An analysis of First Amendment jurisprudence and school voucher programs after Zelman v Simmons -Harris (2002)

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AN ANALYSIS OF FIRST AMENDMENT JURISPRUDENCE
AND SCHOOL VOUCHER PROGRAMS AFTER
ZELMAN V. SIMMONS-HARRIS (2002)

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ABSTRACT


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In a letter to the Danbury Baptist Association, Thomas Jefferson stated the need for a “wall of separation between Church & State.” The Establishment Clause of the First Amendment maintained that metaphoric wall of separation; however, the magnitude of separation has varied over the course of time. The Supreme Court’s holding in Zelman v. Simmons-Harris (2002) ushers in a new era of Establishment Clause interpretation.

In Zelman, the Cleveland Scholarship and Tutoring Program faced an Establishment Clause challenge. An analysis of the Cleveland program illustrated that in the 1999-2000 school year, 82% of the participating private schools were religious in nature, and that none of the adjacent public schools offered to participate in the program. Therefore, 96% of the students participating in the voucher program were enrolled in religiously affiliated schools.

The issues before the Court in Zelman consisted of an Establishment Clause challenge, and an examination of the choice and neutrality concepts. The Court
examined past legal precedent to decide if the Cleveland program violated the Establishment Clause by providing state imprimatur of religious indoctrination. On June 27, 2002, the Court held that the Cleveland program did not violate the Establishment Clause.

This purpose of this study was to analyze how the U.S. Supreme Court resolved the key issues in the Zelman v. Simmons-Harris (2002) case. The study also examined the areas of the decision that remained unanswered or vague. Furthermore, it examined the implications this holding portends for public education; this study also evaluated the Cleveland program as well as addressed the need for future policy issues in public education.

The following research questions were addressed in order to accomplish these analyses:

1. What were the major arguments that influenced the United States Supreme Court’s decision in the Zelman case?
2. What areas of this decision remain unclear?
3. What issues have emerged from this decision?
4. What outstanding legal issues remain regarding voucher programs?
5. What implications does this decision have for public education?

Because this study constituted legal research, the writing style contained in this dissertation was a combination of APA and the Harvard Blue Book.
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CHAPTER I

INTRODUCTION

Voucher programs developed in an effort to address the perceived crisis in American public schools. Voucher advocates held that a voucher system would provide parents with a choice of where to send their children to school. Nobel Laureate Milton Friedman is credited with the development of the educational voucher. In *Capitalism and Freedom* (1962), Friedman contended that a system of vouchers would promote a competitive arena for the education system; accordingly, this competition for students would improve the program of each school participating in the voucher program.

Friedman's theory was based on free market economic principles. The voucher concept that Friedman advocated originated in economic theory and his staunch belief in free market enterprise. It did not take into consideration the political issues that may evolve; moreover, it did not examine specific constitutional roadblocks that could be encountered by educational voucher programs.

Initially the voucher concept received little attention. However, in the 1970s, the former U.S. Department of Health, Education, and Welfare set-up a voucher experiment. "There were no volunteers among school districts until a failing district in serious financial trouble in Alum Rock, California, came forward" (Witte, pg.34, 2000). The government initially turned down the school district; however, after a series of negotiations, they developed a program that allowed students to transfer among public

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schools. Private schools were not included in this program. After several years, the program was discontinued completely (Witte, 2000).

The concept of vouchers received little to no attention for the next decade. However, in 1980, the concept of educational vouchers was revived with the election of Ronald Reagan. "Reagan officials saw choice and competition as key mechanisms for improving American schools, and they actively pursued legislation promoting the use of vouchers (and tax credits for private schooling)" (Moe, pg. 25, 2001). The voucher proposals were modest in scope and defeated in Congress.

Then, in 1983, A Nation at Risk was published. This report was produced by a panel of experts and became one of the most influential studies of American education ever conducted. The panel determined that American schools were not preparing students to compete in a global marketplace. Furthermore, they addressed "the rising tide of mediocrity" in American public schools. The American public school system was viewed as an operating system in a crisis state. Therefore, the school system and the reforms became political lightning rods.

Policymakers were alarmed and a large number of reform efforts moved forward. "Graduation requirements were increased, teacher certification was strengthened, more emphasis was placed on student testing, teacher pay was increased, and more money was spent overall" (Moe, pg. 25, 2001). Other experts argued that the real problem was the system itself. They said that there needed to be major improvements in the nature of fundamental innovations. Voucher programs were believed by many to be among the innovative programs of this nature. Conversely, there were others who believed that vouchers would inflict a great deal of harm on American public schools.
The arguments against educational vouchers include the idea that they would drain children and resources from the public sector. Therefore, voucher programs would make it more difficult for schools to improve their performance. They believed that given the choice the most motivated parents would take their children out of failing schools and move elsewhere. These were the very parents who were likely to demand improvements in their schools and participate in school affairs (Moe, 2001).

The voucher advocates answer to this theory was that the draining off of resources was good incentive to improve. Furthermore, they said that it is misleading to say that schools were being denied resources needed for improvement because they were only losing resources for students they did not have to educate. Therefore, they would only have to provide services for a certain number of students. This would provide them with some room to implement reforms.

Other arguments against vouchers stated that vouchers would create inequities. These opponents believed that it was the white, higher socioeconomic, highly motivated parents who were likely to put choice into effect. Furthermore, their contention was that vouchers benefited private schools more than the children they served. The well-established private schools would able to select the best applicants, while, “less reputable schools [would be] forced to accept the remainder” of the private school applicants (Howell & Peterson, p. 19, 2002). Moreover, the opponents argued that a new system would develop; this would be a tiered system that allowed privileged children to escape into the private sector; whereas, minority and economically disadvantaged children would remain in the public schools (Howell & Peterson, 2002).
Educational voucher advocates address this argument stating that "under a market-driven system, good schools will thrive and poor schools will go out of business as their disgruntled clients vote with their feet and pocketbooks" (Bracey, pg. 151, 2002). Therefore, if vouchers were available to the general public, schools would be forced to compete for the students. Their programs would be forced to address the needs of the students in attendance.

Voucher opponents stated that vouchers would promote racial segregation. They stated that vouchers would threaten democratic control. This view was based on the premise that:

The public school system is supposed to be about expressing the collective values of a democratic citizenship, common schooling for all classes and races, and equal opportunity for all – and these objectives can only be realized through top-down control of the schools by democratic government. Vouchers would break the hold of democracy and its values, producing a system that exalts the individual over the community and promotes balkanization and self-interest (Moe, pg. 28, 2001).

According to Gerald Bracey, a voucher opponent, voucher advocates feel that the current system is already segregated. "Vouchers will increase the diversity of schools. Since there is no single best system, increasing the instructional options will give students a better chance to match a school to their preferred mode of learning" (pg. 151, 2002).

Advocates state that a voucher program would allow the parents of minority students to find other schools that address their child's specific needs and thereby promote integration.
Voucher opponents further argued that vouchers would violate the Establishment Clause. Their argument is that religion should be kept out of the schools – specifically, K-12 public education. Moreover, they contend that absolutely no government funds should support church affiliated schools. The placement government funds into the coffers of religious institutions would violate the Establishment Clause of the U.S. Constitution (Godwin & Kemerer, 2002).

Voucher advocates believe that “parents should be able to use their vouchers at religiously affiliated schools, such as Catholic schools, if that is what they want for their children. Their preferences deserve to be respected” (Moe, pg. 30, 2001). The courts will decide the constitutionality of this issue. Voucher advocates argue that there is no violation of the Establishment Clause in voucher programs if parents have the direct choice to decide which school gets the voucher.

Voucher programs developed as one remedy for an ailing public school system. However, the voucher concepts presented a drastic change from the way things were previously handled. Voucher advocates believed that the nation’s schools were in a crisis state and required drastic measures. Voucher opponents also believed that the nation’s schools needed assistance. However, they believed that what was required was additional political and financial assistance to the existing system.

Universal free public education is one of the many promises our society gives each generation. The United States has a system of public education that ensures all children have access to education. They are entitled to this education regardless of race, creed, or socioeconomic status. Once in school, children are not to be inculcated in the

---

1 "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof..."
tenets of a specific religion. The inculcation of children with religious precepts in a government public school would be a violation of the Establishment Clause. Therein lays the problem with vouchers.

A vast majority of this country’s private schools are pervasively sectarian. These schools are the K-12 schools where vouchers would be used. Proponents of vouchers claim that vouchers are "neutral" because the parents have a "choice" where to send their children. Therefore, the government is not advocating any religious dogma; rather, they are providing a choice for parents. The concepts of neutrality and choice evolved during the progression of substantial jurisprudence. However:

[T]here are strong arguments that the use of taxpayer monies to fund sectarian schools and subsidize religious education violates the fundamental principles of religious liberty and the separation of church and state that are the cornerstone of our Constitution (Mincberg & Schaeffer, pg. 395, 2000).

In Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973), the Court struck down a New York state law that provided tuition reimbursement for parents who sent their children to private schools. The Court held that there was no constitutional difference between direct aid to private schools, most of which were parochial, and aid to parents for tuition to a parochial institution. Moreover, according to Mincberg & Schaeffer (2000):

The Court recognized that because children already have the right to a free public education, government subsidization of private education through vouchers creates an ‘incentive’ to send their children to private schools. Because public
schools are free, vouchers immediately skew the ‘choice’ toward private schools (pgs. 395-396).

The Nyquist holding set a significant legal precedent; prior to this case, according to Justice O’Connor, “Our cases...provide[d] no precedent for the use of public funds to finance religious activities.”2 Thus, with the precedent set in Nyquist, a significant constitutional barricade existed for many years.

Nevertheless, while the national debate stirred, many school districts were suffering and needed assistance immediately. In Milwaukee, Wisconsin during the period “from 1970 to 1990, the percentage of Milwaukee households with incomes below the poverty line increased from 11.4 percent to 22.2 percent (U.S. Bureau of the Census, 1990, SEWPRC)” (Witte, pg. 37, 2000). The city of Milwaukee had undergone a transformation that many of the Rust Belt cities had undergone. The once industrial-based high paying union jobs gave rise to newer industrial plants that hired younger workers for lower wages. The history of public education in Milwaukee underwent even more dramatic changes (Witte, 2000).

The changes in the Milwaukee Public Schools (MPS) were directly linked to the demographic and economic shifts in the general population. The percentage of minority children enrolled in MPS rose from 28% in 1970 to over 80% in 1997. Of the students in the MPS, 15% qualified for free or reduced lunch in 1970; in 1997, 68.8% of students were eligible for free or reduced lunch. Moreover, the number of special education students rose from 9.8% in 1983 to 14% in 1997. Test scores declined and dropout rates increased. The Milwaukee Public School system was in a state of decline (Witte, 2000).

Local politicians attempted to assuage the situation. In an effort to deal with the changing needs of the Milwaukee school children, Representative Annette Williams, a black democrat, attempted to carve out an “all-black school district in the heart of Milwaukee” (Witte, pg. 43, 2000). This effort failed; the proposal was defeated.

Governor Tommy Thompson introduced the first voucher bill in 1988. Representative Williams did not support this bill. “The governor’s bill, 1987 Assembly Bill 816, was to be added to the 1988-89 state budget, which is the dominant political and policy document in Wisconsin” (Witte, pg. 43, 2000). The original bill proposed that all private schools (sectarian and nonsectarian) could participate in the voucher program. It allowed existing private school students to participate in the program; moreover, it would have applied to all of Milwaukee County. There was no limit to the number of students who could participate; it did not require any type of random selection process. Finally, it did not require any evaluative procedures to monitor the program; this bill failed (Howell & Peterson, 2002).

Governor Thompson modified the bill in 1989 in the form of Senate Bill 31. This bill excluded religious private schools. Other politicians produced a number of modifications that reduced the scope of the bill and added a number of restraints. The number of students allowed to participate was initially 1000; moreover, students already attending private school at that time were excluded from participating (Witte, 2000).

In 1990 the Milwaukee Choice Program made its debut. Low-income students were the participants. If the students were current students at private parochial schools, they were not allowed to participate. Disabled students could not participate. In order for a school to be part of the program, the school had to be nonsectarian. The schools
must be located in the city of Milwaukee. The limit of choice students per school was 49%. The number of students allowed to participate in the voucher program was capped at 1000. The selection of students was random. There were set standards for participating schools. Research reports were required from participating schools. The maximum amount of the voucher was $2,446.00, which participating families could not supplement with their own resources (Witte, 2000).

The Milwaukee Choice Program expanded in 1993 to raise the limits of choice students per school to 65%. The number of students participating in the program increased to 1500. Furthermore, the voucher amount increased to $2,985.00. Then, in 1995 a significant change in the program occurred – sectarian schools were allowed to participate in the program. The number of choice students per school was lifted to allow 100% of the students to be choice students. The number of students participating in program was increased to 15,000. The research reports that were originally required were stopped. Moreover, the amount of the voucher increased to $4,600.00 (Witte, 2000). The per pupil expenditure for the 1995-1996 school year was $7495.00.

However, the road for the Milwaukee Choice program was not without its pitfalls. From the beginning, there were legal challenges. The original law in 1990 that provided publicly supported scholarships for poor children in Milwaukee sustained two legal challenges. "One suit was brought in state court claiming that the bill was a private law and that it violated a Wisconsin constitutional provision requiring the creation of a uniform system of schools" (Viteritti, pg. 413, 1998). The Wisconsin Supreme Court held that "the program, when enacted, was not a private or local bill and that it served a

3 Wisconsin Statute § 119.23
4 This figure was obtained from the Wisconsin Department of Public Instruction.
sufficient public purpose” (David v. Grover, 166 Wis. 2d 501, 480 N.W. 2d 460 [1992]). The Court held that it was a limited experiment designed to assist economically disadvantaged children.

The court battles increased when sectarian schools were included in the Milwaukee Choice program. “Believing that the case was destined for the U.S. Supreme Court, in an unprecedented action both parties agreed to send the case immediately to the Wisconsin Supreme Court. Given the impending importance of the case, and to build media attention, both sides went to national organizations to bolster their legal teams” (Witte, pg. 179, 2000). Governor Thompson brought in Ken Starr. Attorneys from the Landmark Legal Foundation supported Starr. The voucher opponents brought in national counsel from the ACLU, Americans United for Separation of Church and State, and People for the American Way Action Fund (Witte, 2000).

The Wisconsin Supreme Court remanded the case back to the county court level. The governor attempted to have the county judge, Paul Higginbotham, removed. The charge against Judge Higginbotham asserted that he was biased against choice. The attempt failed. “Judge Higginbotham ruled the expansion unconstitutional in January 1997, and restored the 1993 legislation during appeals” (Witte, pg. 178, 2000). In Jackson v. Benson, 213 Wis 2d 1, 570 N.W. 2d 407 (Ct. App. 1997) the appeals court, in a two-to-one decision, affirmed an order of the Circuit Court for Dane County.

The majority of the court of appeals concluded that “the Milwaukee Parental Choice Program as amended by 1995 Wis. Act 27, §§ 4002-4009 (amended MPCP), was invalid under Article I, § 18 of the Wisconsin Constitution because it directed money from the state treasury for the benefit of religious seminaries” (Jackson, 1997). In his
dissent, Judge Roggensack concluded that the amended MPCP did not violate the state constitution or the federal constitution. The State appealed from the court of appeals. Both sides prepared to appeal all the way to the U.S. Supreme Court. According to Witte (2000):

The appeals court, however, limited its decision to violation of the Wisconsin constitution and did not address First Amendment concerns. If that were to remain the basis for the reversal of the decision by the Wisconsin Supreme Court, it would have been much harder to get the U.S. Supreme Court to review the case, and thus provide the definitive test voucher supporters see (pg. 179).

Nonetheless, the Wisconsin Supreme Court, in a four-to-one decision upholding the program went beyond the state constitution. The Court held that the choice program did not violate the “Establishment Clause because it had a secular purpose, it will not have the primary effect of advancing religion and it will not lead to excessive entanglement between the state and participating sectarian private schools” (Jackson v. Benson). This left grounds for appeals. According to Witte, “[this] must have been a deliberate action on the part of the court majority. The dissenting opinions were very brief and limited to Wisconsin constitutional issues” (pg. 179, 2000).

While political foes debated one another in the state of Wisconsin and elsewhere, the U.S. Supreme Court let the Wisconsin court-ruling stand and denied the Petition for Certiorari. Thereby, leaving in place a voucher program that allowed state funds to go to religious institutions. The clarity, or explicit answers, desired from the U.S. Supreme Court on the voucher issue would have to be found elsewhere.

^ Jackson v. Benson, Wisconsin Supreme Court, 97-0270, June 10, 1998

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
During the evolution of the Milwaukee Parental Choice Program, another school district in another state was in crisis and trying to develop programs that would alleviate the severe problems that they were experiencing. In 1995, the Cleveland City School District was placed under state control. A state auditor found that the Cleveland City School District was in the midst, "of a crisis that is perhaps unprecedented in the history of American education" (Zelman, 2002). A voucher program was developed to address the existing crisis; it was entitled the Cleveland Scholarship and Tutoring Program (CSTP). The Ohio General Assembly appropriated funds that would provide an estimated 1500 scholarships for Cleveland City School District students. The scholarships were worth as much as $2,250 (Greene, Howell, & Peterson).

The recipients of the scholarships were to be selected by a lottery. Each scholarship covered up to 90% of a school's tuition. The recipient's family, or another private source, would pay the balance of the tuition (Greene et al). Students had the option of applying to public schools or private schools. Moreover, the private schools in CSTP could be either secular or non-secular in nature. The legislation allowed as many as 50% of all scholarships to be used by private school students. This number was eventually reduced to 25% by the Ohio Department of Education. 29% of the students in the first round of applicants were from private school students. In January 1996 CSTP awarded 375 scholarships to the private school applicants. The remaining scholarships were granted to students in public school (Green et al).

The Ohio Department of Education gave preference to poor families when granting the scholarships. The students from these families received larger scholarships:

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7 Of 6,244 applications received in the fall of 1995, 1,780 came from private school students.

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Students from families whose incomes were below 200 percent of the poverty line received 90 percent of their schools' tuition, up to $2,250, whereas students coming from families whose incomes were at or above 200 percent of the poverty line were eligible to receive $1,875 or 75 percent of their schools' tuition, which ever was less (Greene et al, pg. 359, 1998).

Furthermore, low-income students were more likely to be selected. The first lottery held was limited to poor students only. However, many of the scholarship recipients did not accept their scholarships. This was because some of them never verified their income, or the CSTP office could not reach them, or they were found to be ineligible.

The number of scholarship applicants was less than expected; therefore, it became possible to increase the number of scholarship recipients to 2000. In an effort to accommodate a higher number of available scholarships, the Ohio Department of Education relaxed some of the rules for admittance into the program. Therefore, any family whose income fell below 200 percent of the poverty line was now eligible.

However, at the time of the second lottery, CSTP was in the midst of a court challenge and no one really knew if the program would survive the challenge; thus, the number of applicants decreased. The result of this, according to CTPS, was that they offered scholarships to all of the lower income applicants they were able to locate (Greene et al, 1998).

The Cleveland Scholarship and Tutoring Program suffered several set backs in its early days. Some of these problems consisted of: the ability to locate the applicants; the number of applicants, and lawsuits. In Simmons-Harris v. Goff, 711 N.E. 2d 203, 216 (Ohio 1999), Doris Simmons-Harris and other interest parties brought suit against the
program. On May 27, 1999, the Ohio Supreme Court issued a judgment in favor of the plaintiffs. Judge Pfeifer wrote for the Court. The Court held that the “School Voucher Program generally does not violate the Establishment Clause of the First Amendment to the United States Constitution or the Establishment Clause of Section 7, Article I of the Ohio Constitution... We also conclude that the current School Voucher Program does violate the one-subject rule” (Simmons-Harris, 1999). That one-subject rule held that one piece of legislation cannot address multiple subjects. The Court concluded that the program violated this rule because the state legislature attached the voucher bill onto a general budget bill.

On June 29, 1999, the Ohio legislature re-enacted the voucher program (CSTP) as an individual piece of legislation. On July 20, 1999, in Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 836 (N.D. Ohio 1999), Doris Simmons-Harris and others brought suit against the Department of Education in federal court. The lawsuit stated that the program violated the Establishment Clause of the First Amendment. On July 27, 1999, Senel Taylor led a group of parents to intervene to defend the constitutionality of the program. On August 2, 1999, the Hanna Perkins School, along with several sectarian schools, also attempted to intervene and defend the constitutionality of the program.

On August 13, 1999, the district court held a preliminary injunction hearing in both cases, and on August 24, 1999, granted plaintiffs the injunctive relief sought. Also on August 24, 1999, the state and the two intervening defendants appealed that decision to the United States Court of Appeals for the Sixth Circuit. In the same order, the district court consolidated the two cases, and found that the Ohio Supreme Court’s decision in

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8 Senel Taylor, et al. v. Doris Simmons-Harris, et al. No. 00-1779
9 Hanna Perkins School is associated with Case Western Reserve University in Cleveland, Ohio.
Simmons v. Goff, 711 N.E. 2d 203 (Ohio 1999), did not preclude federal consideration of the constitutional challenge to the voucher program because the Ohio court's decision rested on a state ground which independently supported its resolution of the case.

On August 27, 1999, the district court granted in part the defendant's motion for a stay of the preliminary injunction. The court's limited stay allowed the children already enrolled in the voucher program to continue in it. However, the ruling stopped any new children from participating in the program. Therefore, the state appealed the partial granting of the preliminary injunction. On November 5, 1999, in Simmons-Harris v. Zelman, 120 S. Ct. 443 (1999), the U.S. Supreme Court granted by a vote of five-to-four a stay of the preliminary injunction pending the resolution of the entire appeal in the Sixth Circuit. After that, the Sixth Circuit entered an order on November 15, 1999, concluding that that United States Supreme Court's decision granting the state's motion for a stay rendered moot the defendant's pending motions for a stay in the Sixth Circuit. The case proceeded in the district court on an expedited basis.


10 Hanna Perkins School, et al. v. Doris Simmons-Harris, et al. No. 00-1777

The Court premised their holding with the notation that “at the outset, we note that Defendants’ argument concerning other options available to Cleveland parents such as the Community Schools is at best irrelevant. Analyzing the scholarship program choices as compared to choices or schools outside the program is asking this Court to examine the entire context of Ohio education. Such a question is not before this Court” (Simmons-Harris, 2000). The Court emphasized that the plaintiffs only challenged the school voucher program; therefore, the Court would limit their analysis to the school voucher program.

The Court wrote that the Nyquist decision provided them with governance in this case. As in Nyquist, the Court held that Ohio program did not contain any effective means of guaranteeing that the state aid derived from public funds would be used exclusively for secular and neutral purposes. Moreover, “the program clearly has the impermissible effect of promoting sectarian schools” (Simmons-Harris, 2000).

In citing Mitchell, the Court held that to approve this program would approve the actual diversion of government aid to religious institutions in endorsement of religious education, something in tension with the precedents of the Supreme Court (530 at 2556). The Court concluded that “unlike Mitchell, Agostini, Witters and Mueller, the Ohio scholarship program is designed in a manner calculated to attract religious institutions and chooses the beneficiaries of aid by non-neutral criteria” (Simmons-Harris, 2000).

Judge Ryan concurred in part and dissented in part. In his dissent, he questioned the majority’s use of Nyquist as a case that “is directly on point.” Ryan stated that the
Court’s refusal to conduct any meaningful analysis of the Supreme Court’s Establishment Clause decisions handed down since Nyquist suggest that the majority has “simply signed onto the familiar anti-voucher mantra that voucher programs are no more than a scheme to funnel public funds into religious schools” (Simmons-Harris, 2000). Moreover, he wrote, “a reading of the Supreme Court’s Establishment Clause cases decided since 1973 makes it unmistakably clear that the voucher program passes constitutional muster” (Simmons-Harris, 2000).

On May 23, 2001, a petition for a Writ of Certiorari was filed. Friends of the Court (amicus curiae) briefs began to be submitted following the petition. And on September 25, 2001, unlike the Wisconsin voucher case, the U.S. Supreme Court granted the petition for the writ of certiorari. The Cleveland voucher case would be argued before the U.S. Supreme Court on February 20, 2002.

Research Problem

The intent of this study was to analyze how the U.S. Supreme Court addressed and resolved the key issues in the Sixth Circuit’s holding in Simmon-Harris v. Zelman, Nos. 00-3055/3060/3063 (2000). The issues before the Court consisted of an Establishment Clause challenge, the concept of true, private choice, and the concept of neutrality. The Court examined how the Sixth Circuit utilized established precedent with regard to the Cleveland Scholarship and Tutoring Program.

An analysis of the Cleveland Scholarship and Tutoring Program showed that in the 1999-2000 school year, 82% of the participating private schools were religious in nature, and that none of the surrounding public schools offered to participate in the
program. Therefore, "96% of the students participating in the voucher program were enrolled in religiously affiliated schools" (Zelman, 2002). If the Supreme Court decided that the Sixth Circuit's analysis was correct and the Cleveland program was in violation of the Establishment Clause, it would force the Cleveland City School District to eliminate the program and allow 75,000 children to remain in a catastrophically failing school system. However, the Sixth Circuit did note:

The courts do not make educational policy; we do not sit in omnipotent judgment as to the efficacy of one scheme or program versus another. The design or specifics of a program intended to remedy the problem of failing schools and to rectify educational inequality must be reserved to the states and the school boards within them (Simmons-Harris, 2000).

Additionally, the Court had to decide if the Sixth Circuit appropriately evaluated the Cleveland program and whether it met the criteria of neutrality and true private choice that the Court had previously addressed concerning governmental aid that is ultimately channeled to religious institutions. If the Court held that the Cleveland program met the criteria established by past legal precedent, the Cleveland program may meet the constitutional challenge. Thereby, allowing the Cleveland City School District to keep the program in place.

Research Questions

This study analyzed how the United State Supreme Court addressed and resolved key issues in the Sixth Circuit's holding in Simmon-Harris v. Zelman, Nos. 00-3055/3060/3063 (2000) by an extensive examination of Zelman v. Simmons-Harris, No.
Moreover, this study attempted to develop answers to the following questions:

1. What were the major arguments that influenced the United States Supreme Court's decision in the Zelman case?
2. What areas of this decision remain unclear?
3. What issues have emerged from this decision?
4. What outstanding legal issues remain regarding voucher programs?
5. What implications does this decision have for public education?

Method of the Study

"Legal research does not occur in a factual vacuum: the purpose of researching the law is to ascertain the legal consequences of a specific set of actual or potential facts. It is always the facts of any given situation that suggest – indeed, dictate – the issues of the law that need to be researched" (Wren & Wren, pg. 29, 1986). In this study traditional methods of legal research will be employed in order to identify relevant Supreme Court cases applicable to this study. Therefore, relevant case history, constitutional amendments, federal acts, state statutes, rules, and regulations will be identified. Analyses of relevant decisions will be performed; specific case analysis will be executed. This will be completed by an internal and external evaluation. "An internal evaluation involves reading the particular legal authority you have found and determining whether, on its own terms, it applies to the fact situation in your research problem" (Wren & Wren, pg. 79, 1986). Once an internal evaluation has been completed, an external

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11 See Witters v. Washington Department of Services for the Blind, 474 U.S. 481

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evaluation will be conducted. An external evaluation "requires you to determine the current status (i.e. validity) of the authority" (Wren & Wren, pg. 89, 1986).

This researcher attended the oral argument before the United States Supreme Court; this will provided a personal perspective on the proceedings that may be lost on a general reading of the transcripts. Also, legal participants in the Zelman v. Simmons-Harris case may be interviewed so that the spirit of the case history may be better understood. The synthesis of all this information will provide the framework for an analysis of the implications that Establishment Clause cases and the Zelman holding have for the American public school system.

Definition of Terms\textsuperscript{12}

The following definitions of terms are provided for the purpose of this study:

**Amicus curiae**: A person who is not a party to a lawsuit but who petitions the court to file a brief in the action because that person has a strong interest in the subject matter.

**Appeal**: An application to a higher court to amend a lower court's ruling.

**Appellant**: One who takes an appeal to a higher court. The appellant may have been the plaintiff or defendant in the lower court proceeding.

**Appellee**: The party in an action against whom an appeal has been sought. Sometimes also called the respondent.

**Case Law**: The aggregate of reported cases that form a body of jurisprudence within a given jurisdiction.

\textsuperscript{12} The legal definitions in this study were drawn from *Black's Law Dictionary*, Garner, B. et al. (7th ed.). St. Paul: West Publishing Co.
**Certiorari**: An original writ or action whereby a cause is removed from an inferior to a superior court for trial. The record of proceedings is then transmitted to the superior court. The term is most commonly used when requesting the U.S. Supreme Court to hear a case from a lower court.

**Common Law**: The body of law derived from judicial decisions and opinions, rather than from statutes or constitutions.

**Concurring opinion**: An opinion written by a judge expressing agreement with the majority’s holding. However, the concurring judge may disagree with the majority’s reasoning or discuss additional points of law.

**Constitution**: The supreme fundamental law of a nation or state. Provisions are included to establish and organize the government and to distribute, limit, and prescribe the manner of the exercise of sovereign powers. In addition, basic principles and rights of the citizenry are enumerated.

**Dissenting opinion**: An opinion written by a judge in disagreement with the rationale and/or decision of the majority of judges hearing the case.

**En Banc**: Of or referring to a session in which the full membership of the court participates.

**Enjoin**: An individual or institution is required by a court of equity to cease or abstain from a particular action.

**Establishment Clause**: The constitutional provision (U.S. Constitution, Amendment I) prohibiting the government from creating a church or favoring a particular religion. “Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof…” (United States Constitution).
Federal Court: A court having federal jurisdiction.

First Amendment: The constitutional amendment, ratified with the Bill of Rights in 1791, guaranteeing the freedoms of speech, religion, press, assembly, and petition. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the Government for a redress of grievances” (United States Constitution).

Free Exercise Clause: The constitutional provision (United States Constitution, Amendment I) from interfering in people's religious practices or forms of worship. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”(United States Constitution).

Fundamental Rights: In constitutional law, a right that triggers strict scrutiny of a law to determine whether the law violates the Due Process Clause or the Equal Protection Clause.

Holding: A court's determination of a matter of law pivotal to its decision; a principle drawn from a decision.

Injunction: A court order commanding or preventing an action. To get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted.

Imprimatur: A general grant of approval; commendatory license or sanction.
Mandate: An order from an appellate court directing a lower court to take a specified action. A judicial command directed to an officer of the court to enforce a court order.

Neutral: A person or country taking no side in a dispute. A nonpartisan arbitrator typically selected by two other arbitrators – one of whom has been selected by each side in the dispute.

Neutral Principles: Constitutional Law. Rules grounded in law, as opposed to rules based on personal interests or beliefs.

Parochial School: A school supported by a church parish.

Petitioner: A party who presents a petition to a court or other official body, esp. when seeking relief on appeal. Cf. respondent.

Plaintiff: The party who brings a civil suit in a court of law.

Private: Relating or belonging to an individual, as opposed to the public or the government.

Public Forum: In constitutional law, public property where people traditionally gather to express ideas and exchange views.

Remand: To send (a case or a claim) back to the court or tribunal from which it came for some further action.

Respondent: 1. The party against whom an appeal is taken; appellee. 2. The party against whom a motion or petition is filed Cf. petitioner.

Sectarian: Of or relating to a particular religious sect.

Secular: Worldly, as distinguished from spiritual.
Stay: 1. The postponement or halting of a proceeding, judgment, or the like. 2. An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding.

Summary Judgment: A judgment granted on a claim about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law. This procedural device allows the speedy disposition of a controversy without the need for a trial.

Supreme Court of the United States: The court of last resort in the federal system, whose members are appointed by the President and approved by the Senate. The Court was established in 1789 by Article III of the U.S. Constitution, which vests the Court with the “judicial power of the United States.”

Voucher: A written or printed authorization to disburse money.

Writ: A court’s written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act.

Significance of the Study

In 1962, in Engle v. Vitale, 370 U.S. 421, Justice Hugo Black wrote, “A union of government and religion tends to destroy government and degrade religion.” Since that time, there have been numerous attempts to formally amend the Constitution and to bring religion back into the classrooms of the public school system. Voucher programs essentially do allow religion in the classrooms in that sectarian schools participate in voucher programs. The constitutionality of voucher programs, if upheld, reflects a new
era in education reform. In *Zelman v. Simmons-Harris* (2002), the constitutional roadblocks once considered permanent potentially may be revised. This potential constitutional revision is significant in what it portends for the future of voucher programs, educational policy efforts, and public school reform efforts.

Furthermore, the *Zelman* decision has the potential to energize future educational reform efforts; it also has the potential to dismantle the few existing voucher programs. Educators, legislators, and affect the future of public education. The *Zelman* case has the potential to refocus the national spotlight away from federal Establishment Clause issues and place the spotlight on issues of state constitutional language and issues of choice. Therefore, the importance of state constitutional language takes on tremendous significance.

This study will provide essential information for educators, legislators, and policy makers in the area of school reform and possible voucher development. Moreover, and analysis of the *Zelman* decision may also inform public school administrators of new developments in education law regarding Establishment Clause jurisprudence.

Limitations on the Study

Every study is somewhat limited in scope. This study will be limited by the amount of relevant case history, as well as relevant historical documentation and information available and the accessibility of that information to the researcher. Moreover, the accuracy of the sources and the researcher's interpretation of that data will limit the nature of the study.
Summary

In this chapter, the voucher program concept was examined historically and politically. Voucher advocates' arguments were presented and examined. Moreover, voucher opponents' arguments were also presented and examined. Existing voucher programs in Milwaukee and Cleveland were scrutinized. Legal issues related to the voucher concept were discussed. The research problem and research questions of the study were presented. The method of this study was introduced and a definition of terms was presented, as well as the significance of the study and the limitations of the study.
CHAPTER II

REVIEW OF LITERATURE

In Milton Friedman’s Capitalism and Freedom, he advocated a system of vouchers in which parents would be provided with a sum of money and allowed to send their children to a school of their choice. Friedman stated that the contemporary “argument for nationalizing schools” was that it would be impossible to develop a “common core of values deemed requisite for social stability” (Friedman, pg. 90, 1962). Friedman’s theory was that government run schools were not accomplishing this goal of a “common core of value;” rather, these schools were furthering a sense of isolation among varying social echelons and ethnicities in the country.

He believed that America had lived too long with a small town mentality; he stated that in theory public education appeared to be metaphysically in an age when there was “the small town which had but one school for the poor and rich residents alike” (Friedman, pg. 92, 1962). Under these circumstances, the idea of providing everyone with an equal playing field would apply. However, in its present state the rich could afford to send their children to expensive private schools and the poor were trapped with a public school system that may or may not address their needs (Friedman, 1962).

He supposed that there was another way in which the government could assist those who needed assistance. His overall vision was to minimize the government’s
involvement; moreover, his theory espoused a sense of greater control over an individual’s own life:

Governments could require a minimum level of schooling financed by giving parents vouchers redeemable for a specified sum per child per year if spent on ‘approved’ educational services. Parents would then be free to spend this sum and any additional sum they themselves provided on purchasing educational services from an ‘approved’ institution of their own choice. (Friedman, pg. 89, 1962)

Friedman believed that this would open the education market and improve schools with a free market sense of competition. He stated that if “present public expenditures on schooling were available to parents regardless of where they send their children, a wide variety of schools would spring up to meet the demand” (Friedman, pg. 91, 1962).

In fact, as recently as 1995, Friedman continued to advocate the system of voucher for America's schools. He stated, "The quality of schooling is far worse today than it was in 1955" (Friedman, 1995). He attributed the decline of the public school system to the deterioration of major urban centers and the increased centralization of public schools. Friedman stated that, "the only way to make a major improvement in our educational system is through privatization to the point at which a substantial fraction of all educational services is rendered to individuals by private enterprises" (Friedman, "Public Schools," 1995).

Friedman is a staunch advocate of a free market system. Therefore, he believes that if the education system was turned over to private agencies, they would develop new and better ways of educating the youth of this country. According to Friedman:
We know from the experience of every other industry how imaginative competitive free enterprise can be, what new products and services can be introduced, how driven it is to satisfy the customers — that is what we need in education. We know how the telephone industry has been revolutionized by opening it to competition; how UPS, Federal Express and many other private enterprises have transformed package and message delivery ...(Friedman, "Public Schools," 1995).

One argument that has been espoused by voucher opponents is that it would create a stringent social stratification. The argument is that the poor would be given no opportunity for upward mobility while the rich would be able to go wherever they chose. Nevertheless, according to Friedman, this is a fallacy. Friedman states that, "under present arrangements particular schools tend to be peopled by children with similar backgrounds thanks to the stratification of residential areas" (Friedman, Cato Institute, 1995). In addition, Friedman contends that parents are not prohibited from sending their children to private school; however, only a limited few do so. Therefore, the standard public school system produced further social stratification. Friedman's assertion is that "the widening of the range of choice under a private system would operate to reduce both kinds of stratification" (Friedman, Cato Institute, 1995).

Friedman’s theory of free market enterprise was an ideal far ahead of his time. His vision was intelligent and thoughtful; nonetheless, he did not reflect on the conflict with the First Amendment of the United States Constitution that a voucher system could entail. In his text, Capitalism and Freedom, he does mention sectarian schools and the fact that many parents may opt to send their children to these schools. However, he does
not mention the potential for First Amendment, Establishment Clause litigation that could, and did, arise. The historical development of First Amendment issues such as Establishment Clause issues deserves specific attention because this history plays a role in certain education reform efforts -- particularly voucher programs that include sectarian schools.

First Amendment Historical Perspectives

The First Amendment establishes that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."¹ These comprised decrees are known as the Establishment Clause and the Free Exercise Clause. The Establishment Clause separates government and religion in an effort to maintain civility between believers and non-believers, as well as maintain civility between religious factions in the United States.

The evolution of the American Constitution was a result of centuries of enduring religious contention. There is a belief that the founders of the first American colonies came to the New World for religious freedom. However, the earliest permanent settlers were members of the Anglican Church², which was the established church in England at the time. They came to the New World to explore its economic potential. When they created a government for the Virginia colony, they established the Anglican Church. It was to be the only church in the colony. The colony provided clergy with public money for salaries and support; furthermore, there were laws against blasphemy and criticism of the Anglican Church (Flowers, 1994).

¹ United States Constitution, Amendment I
² Anglican Church is also known as the Church of England
Nonetheless, in England, a group of people existed who did not conform to Anglicanism. They wanted to separate from the national church. They believed that Anglicanism was too closely aligned with Roman Catholicism. They were the Puritans. The Puritans landed in Plymouth, Massachusetts in 1620. They attempted to create the ideal church and state, “a commonwealth based on the Bible, ‘a due form of Government both civil and ecclesiastical’” (Flowers, 1994 p. 10). The Puritans and Anglicans developed similar religious laws respecting different religions. The Puritans expanded their territory to include Connecticut and New Hampshire.

Conversely, Rhode Island founder, Roger Williams, was a vigorous advocate for religious freedom. He was concerned with the purity of the church and the spiritual welfare of those within it. He believed that the church should be firmly separated from the state in order to maintain its spiritual purity. The founder of Pennsylvania was a Quaker, William Penn. The Quakers believed that there was an *Inner Light* inside each person that represented God. As such, each person’s experience with God was extraordinarily unique and direct. The imposition of governmental conformity in religious ideals denigrated this unique and individual relationship with God (Flowers, 1994).

Therefore, the Founding Framers’ approach to the development of the Constitution included not only the history of centuries of religious strife in Europe, but the diversity of the religious beliefs among the colonies as well. Accordingly, when the states ratified the Constitution, except for the “religious test”, there was no mention of religion (Levy, 1986).

3 United States Constitution, Article VI, Clause 3, “No religious test shall ever be required as a qualification to any office or public trust under the United States”.
At the first session of the First Congress, James Madison proposed a series of amendments to the Constitution for house approval. His discussed many things during that session; however, he did not discuss the proposal relating to an establishment of religion (Levy, 1986). Madison was notably ambiguous regarding the issue of defining his original verbiage, which read, “nor shall any national religion be established” (Levy, 1986, p. 75). The reference to a “national” religion was ultimately changed and the word “national” removed. Scholars continue to debate the Framers original intent because there are no documents that reference the exact dialogue; rather, there exists a series of writings that were edited and re-edited. In fact, “our only account of the debate, in the Annals of Congress, is probably more in the nature of a condensed and paraphrased version than it is a verbatim report”(Levy, 1986, p. 77)  

Nonetheless, James Madison did advocate the separation of church and state through other writings. In addition, Thomas Jefferson and Roger Williams attempted to influence the separation of church and state as well. Jefferson and Madison set a tone for religious freedom in their discourse. Jefferson’s Bill for Establishing Religious Freedom and Madison’s Memorial and Remonstrance against Religious Assessments were two of the most important documents written on religious freedom. Roger Williams’ pamphlet The Bloudy Tenent of Persecution for Cause of Conscience took the position that the State had no jurisdiction over the minds of men, religious or otherwise (Nasseri, 1999). The philosophy of John Locke influenced Jefferson and Madison. Locke supported the idea of separation; in Locke’s view, “the care of souls cannot belong to the civil magistrate because his power consists only in outward force, but true and saving religion

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4 The debate is referred to as “irrelevant, apathetic, and unclear”.

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consists in the inward persuasion of the mind, without which nothing can be acceptable to God" (Locke, 1685).

Several delegates at the Constitutional Convention, including James Madison, made an unsuccessful effort to advance the matter of education. Education was not mentioned in the Constitution; therefore, it fell to the legal control of the individual states. The public concluded that the education of the children was essential to the well being of the state and a stable society.

However, the colonial period of American educational history is inculcated by religious purpose. In Notes on the State of Virginia, Thomas Jefferson argues for the establishment of a system of public schools. Eugene F. Provenzo, Jr. states that:

Religious freedom was inseparably connected to his general program of public education. [Jefferson believed] that rational men needed education in order to arrive at religious truths, just as much as to achieve political wisdom; that basic education could be better obtained from state-sponsored schools than from state sponsored churches; and finally, that the cause of religious truth could best be served by having all churches present their doctrines in a private rather than state context. (1990, p. 93)

The issue of religion in public education was also at the core of Horace Mann's philosophy. Mann regarded education in terms of preparation for life; moreover, he believed in the need for teaching morals. Nonetheless, he did not advocate that public schools teach one religious creed. In his Final Report to the Massachusetts State Board of Education (1848) Mann wrote:
If a man is taxed to support a school where religious doctrines are inculcated which he believes to be false, and which he believes that God condemns, then he is excluded from the school by divine law, at the same time and he is compelled to support it by the human law. This is a double wrong. (Quoted in Religious Fundamentalism and American Education, 1990, p. 92)

The philosophy of Horace Mann was quite consistent with the thoughts of another theorist, Alexis De Tocqueville. Alexis De Tocqueville’s observations of American Society and culture correspond to Horace Mann’s own ideals. De Tocqueville stated:

In New England, every citizen receives the elementary notions of human knowledge; he is taught, moreover, the doctrines and the evidences of his religion, the history of his country, and the leading features of its Constitution. In the states of Connecticut and Massachusetts, it is extremely rare to find a man imperfectly acquainted with all these things, and a person wholly ignorant of them is a sort of phenomenon. (1835, p. 315)

De Tocqueville concurred with Mann’s concept of morality as well. De Tocqueville did not believe that a republic could exist without morals; furthermore, he stated, “I do not believe that a people can have morals when it has no religion” (1835, p. 290).

Conversely, Mann was not opposed to using Bible readings in the classroom; however, he resisted any notion that the schools used sectarian textbooks (Kniker, 1997).

Education in contemporary American Society attempts to follow the mandates drawn from the Establishment Clause. Nonetheless, this is not an easy task. The Framers’ original intent is continually debated. This is because the overall language is ambiguous in nature. Nonetheless, American citizens show great interest in religious
issues. Even De Tocqueville noted many years ago, “by and large, they seem to be a religious people.” (1835, p. xv)

Nearly two centuries later, this same observation may be made. One scientific study of American public opinion appears to support that Americans have been consistently religious at least since the 1920’s.\(^5\) In fact, according to the same study, over ninety percent of Americans believe in God. Nonetheless, while there is a very strong and pervasive religious component to American life, Americans are “most zealous in guarding their public institutions against explicit religious influences” (Carter, 1994, p. 4).

Thus, the wall between church and state appears to be an ever-changing entity. Parents want their children to learn about religion; conversely, they want to protect their children from beliefs opposed to their own. State voucher programs do place state monies into the coffers of religious institutions. The Founding Fathers’ original intent in regard to church and state matters may never truly be clarified. Nonetheless, an examination of relevant jurisprudence may provide evidence that whatever the shape of the original \textit{wall} between church and state was, it is now an entity in flux. This is evident in the jurisprudence surrounding voucher cases.

\textbf{Relevant Judicial Precedent for Determining the Constitutionality of Educational Voucher Programs}

In an effort to provide clarity and establish a notable pattern in the Court’s holdings on school funding and religion, a case history involving religion and schools

will be examined. These cases cited by courts in resolving voucher cases are briefed and presented here.

**Everson v. Board of Education of Ewing TP, 330 U.S. 1 (1947),** was decided in a five-to-four vote. Justice Black delivered the opinion of the Court. This case addressed Constitutional law, specifically, an Establishment Clause challenge. The facts of the case were that a local New Jersey school board authorized reimbursement to parents of school age children for bus transportation on public buses to and from parochial schools. The question in this case was whether or not that violated the Establishment Clause of the United States Constitution. The Court’s answer was no. The Court found that the public purpose involved was intended to facilitate the opportunity of children to get a secular education free from risks of traffic and other hazards. The Court stated that “subsidies and loans to individuals such as farmers and homeowners and to privately owned transportation systems and other businesses had been ‘commonplace practices’ in United States history” ([Everson, 1947](#)). Justice Black concluded with, “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here” ([Everson, 1947](#)).

**Engel v. Vitale, 370 U.S. 421 (1962),** Justice Black delivered the opinion of the Court. This case addressed Constitutional law, specifically, an Establishment Clause challenge. The facts of the case were that in New Hyde Park, New York, the students were directed to recite a Regent’s prayer in the presence of a teacher at the start of each school day. The Regent’s prayer stated, “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and
our Country” (LaMorte, 2002, p. 30). The question in this case was whether or not the daily prayer in public schools violated the Establishment Clause of the United States Constitution. The Court’s answer was yes. Justice Black wrote that:

The constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is not part of the business of government to compose official prayers for any group of American people, to recite as a part of a religious program carried on by government (Engel, 1962).

The requisite recitation of the Regent’s prayer was found to violate the Establishment Clause of the First Amendment.

Board of Education v. Allen, 392 U.S. 236 (1968), Justice White delivered the opinion of the Court. This case addressed Constitutional law, specifically, an Establishment Clause challenge. The facts of the case were that a New York state law required local school boards to lend textbooks to all children residing in the district who were enrolled in seventh through twelfth grade in either secular or non-secular schools. The question in this case was whether this furnishing of textbooks to non-secular schools violated the Establishment Clause. The Court’s answer was no. Justice White wrote that, "Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by parochial schools to teach religion” (Allen, 1968). In this case, the Court held that “furnishing of text books was similar to the furnishing of transportation and thus was not aid to a religion but rather an assistance in the accomplishment of the legitimate state objective of secular education of all children” (Reutter, 1982, p. 23).
Lemon v. Kurtzman, 403 U.S. 602 (1971), Justice Burger delivered the opinion of the Court. This case addressed Constitutional law, specifically, an Establishment Clause challenge. The facts of the case were that the Rhode Island legislature provided a 15 percent salary supplement to be paid to teachers dealing with secular subjects in nonpublic schools. Additionally, a Pennsylvania statute provided financial support to nonpublic schools by reimbursing the system for expenses such as teachers’ salaries, textbooks, and instructional materials in specified secular subjects (LaMorte, 2002). The question before the Court dealt with whether these statutes violated the Establishment Clause. The Court’s answer was yes. Justice Burger wrote that the overall impact of the legislation was an excessive “entanglement between government and religion” (Lemon, 1971).

In an effort to clarify further Establishment Clause challenges, the Court developed what is known as the “Lemon Test.”

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243 (1968); [403 U.S. 602, 613] finally, the statute must not foster an ‘excessive government entanglement with religion.’

Walz, supra, at 674 (Lemon, 1971).

The “Lemon Test” has been used as a benchmark in Establishment Clause jurisprudence for the last thirty years. However, it is not without its critics; the Supreme Court justices have differing opinions as to its validity.⁶

⁶ A review of voucher decisions reflects that lower federal courts are not entirely comfortable using the Lemon test because of the noted disagreement on the part of the Supreme Court justices regarding it (LaMorte, 2002).
Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973), was decided in a six-to-three vote. Justice Powell delivered the opinion of the Court. This case addressed Constitutional law, specifically, an Establishment Clause challenge. The facts in this case were that a New York law provided for the maintenance and repair of private school facilities, tuition reimbursement for parents of private school students, and tax relief for those individuals who did not qualify for tuition reimbursement (Nyquist, 1973). The question before the Court was whether these policies violated the Establishment Clause. The Court’s answer was yes. The Court held that the law had the purpose of advancing religion; therefore, it violated the Establishment Clause. It was found that the program made no attempt to ensure that state funds were not being used for religious purposes. Accordingly, the tuition reimbursements could be seen as a reward for parents sending their children to private schools (LaMorte, 2002). Justice Powell wrote, “we have found that the challenged sections have the impermissible effect of advancing religion” (Nyquist, 1973).

Mueller v. Allen, 463 U.S. 388 (1983), was decided in a five-to-four vote. Justice Rehnquist delivered the opinion of the Court. This case addressed Constitutional law, specifically, an Establishment Clause challenge. The facts of this case were that the state of Minnesota permitted taxpayers to claim a deduction from their gross income on their state income tax returns for the expenses acquired in “tuition, textbooks, and transportation” (Mueller, 1983). This tax deduction was available to all parents whose children attended school – private or public. The question before the Court was whether this violated the Establishment Clause. The Court’s answer was no. The Court held that the tax deduction was available to all parents with children in school and was “simply
part of the state’s tax law permitting deductions for a number of things” (LaMorte, 2002, p. 85). Justice Rehnquist wrote, “The historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from neutrally available tax benefit at issue in this case” (Mueller, 1983).

*Lynch v. Donnelly*, 465 U.S. 668 (1984), was decided in a five-to-four vote. Justice Burger delivered the opinion of the Court. This case addressed Constitutional law, specifically, an Establishment Clause challenge. The facts of this case involved the city of Pawtucket, Rhode Island and their annually erected a Christmas display in a park owned by a nonprofit organization. The park was located in the heart of the city’s shopping district. “The display included a Santa Claus house, a Christmas tree, a banner that read ‘Seasons Greetings,’ and a nativity scene” *(Lynch, 1984)*. The question before the Court was whether this display violated the Establishment Clause. The Court’s answer was no. In this case the Court analyzed the historical perspective of the display; as well as, the neutrality of the placement of the display. Using the “Lemon Test,” Justice Burger wrote:

It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries, would so “taint” the city’s exhibit as to render it violative of the Establishment Clause *(Lynch, 1984)*.

*Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), was decided in a nine-to-zero vote. Justice Marshall delivered the opinion of the

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7 The “crèche” or nativity scene

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Court. This case addressed Constitutional law, specifically, an Establishment Clause challenge. In this case, the Court exhibited a "spirit of accommodation" (Vacca & Hudgins, 2001, p. 108). The facts of this case around Perry Witters. Witters attended a private Christian college. He was pursuing a degree to become a pastor; and he was suffering from a progressive eye disease. He applied to the Washington Commission for the Blind for vocational rehabilitation, an assistance program. The Washington Commission for the Blind denied his application on the ground that it was prohibited by the State Constitution. He appealed the decision; the Commission's decision was upheld during the administrative appeal. The Washington Supreme Court affirmed this decision (Vacca & Hudgins, 2001).

The question before the Court was whether the assistance violated the Establishment Clause. The Court's answer was no. Justice Marshall wrote, "extension of aid under the Washington vocational rehabilitation program to finance petitioner's training at a Christian college would not advance religion in a manner inconsistent with the Establishment Clause" (Witters, 1986). Utilizing the "Lemon Test," the Court deduced that the facts of the case did not support the view that the state aid in this situation sponsored religion (Vacca & Hudgins, 2001). The Court referred back to the neutrality concept discussed in Mueller.

Westside Community Board of Education v. Mergens, 496 U.S. 226 (1990), was decided in an eight-to-one vote. Justice O'Connor delivered the opinion of the Court. This case addressed Constitutional law, specifically, an Establishment Clause challenge. The facts of this case were that a group of students asked permission to start an extracurricular religious club scheduled to meet during non-instructional time. The
school board denied permission on the grounds that it would violate the Establishment Clause. The students sued claiming that the school board had violated the Equal Access Act. The question before the Court was whether the school board's decision violated the Equal Access Act. The Court's answer was yes. The United States Supreme Court held that the school board's actions did violate the Equal Access Act because the school allowed other extracurricular groups to meet during non-instructional time. The Court reasoned that high school students could effectively understand that the school was not endorsing religion (Mergens, 1990).

Lee v. Weisman, 505 U.S. 577 (1992), was decided in a five-to-four vote. Justice Kennedy delivered the opinion of the Court. This case addressed Constitutional law, specifically, an Establishment Clause challenge. The facts of this case were that principals of local public schools were allowed to invite clergy members to give invocations at middle school and high school graduation ceremonies. Mr. Weisman, the father of Deborah Weisman—student, objected to this practice. He sought a permanent injunction barring Lee and other petitioners from following this practice. The District Court enjoined the petitioners from continuing the practice. The Court of Appeals affirmed this decision (Lee, 1992).

The question before the Court was whether this practice violated the Establishment Clause. The Court's answer was yes. The Court held that prayer delivered by a rabbi, at the behest of school officials, at a middle school graduation violated the Establishment Clause. Justice Kennedy wrote that "at a minimum, the Constitution

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8 Equal Access Act of 1984—P.L. 98-377; Sec. 802. (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.
guarantees that government may not coerce anyone to support or participate in religion or its exercise" (Lee, 1992).

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993), was decided in a five-to-four vote. Justice Rehnquist delivered the opinion of the Court. This case addressed Constitutional law, specifically, an Establishment Clause challenge. The facts of this case revolved around James Zobrest. Zobrest was a deaf student who had attended public schools from first grade through eighth grade. During this time a sign-language interpreter was provided for him by the school district. When Zobrest entered the ninth grade his parents enrolled him in a parochial school. The school district was asked to supply Zobrest with an interpreter; the request was denied. The case was referred to the County Attorney. The County Attorney construed that the provision of the interpreter would, indeed, be a violation of the Establishment Clause (Kops, 1998).

The question before the Court was whether assigning Zobrest an interpreter during his attendance in parochial school violated the Establishment Clause. The Court’s answer was no. Justice Rehnquist wrote “Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole;” again, the Court focuses on the issue of neutrality discussed in Mueller⁹ and Witters¹⁰ (Zobrest, 1995). Furthermore, the Court went on to say:

The IDEA creates a neutral government program dispensing aid not to schools, but to individual handicapped children. If a handicapped child chooses to enroll in a sectarian school, we hold that the Establishment Clause does not prevent the


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school district from furnishing him with a sign-language interpreter there in order to facilitate his education (Zobrest, 1993).

**Rosenberger v. University of Virginia**, 515 U.S. 819 (1995), was decided in a five-to-four vote. Justice Kennedy delivered the opinion of the Court. This case addressed Constitutional law, specifically, an Establishment Clause challenge. The facts of this case involved an incident at the University of Virginia. The University of Virginia authorized payments for printing student publications through its Student Activity Fund. The payments were made to outside contractors. Nonetheless, the university withheld authorization for the payments to the outside contractors for the publication produced by Wide Awake Productions. The students challenged the university’s denial; they alleged that the authorization was withheld solely because the newspaper represented a Christian perspective. The question before the Court was whether this practice of the school violated the students’ First Amendment rights.

The Court held that the university’s actions had effectively suppressed student speech. Furthermore, the Court held that the funding program must be neutrally applied to religious and non-religious organizations. Justice Kennedy wrote:

The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University’s course of action. The viewpoint discrimination inherent in the University’s regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive
bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires (Rosenberger, 1995).

Agostini et al. v. Felton et al., 521 U.S. 203 (1997), was decided in a five-to-four vote. Justice O'Connor delivered the opinion of the Court. This case addressed Constitutional law, specifically, an Establishment Clause challenge. The facts of this case involved a New York City Title I program that sent public school teachers into parochial schools to provide remedial education to disadvantaged children. The Court was asked to examine whether using federal education funds to pay public school teachers for teaching remedial education in parochial schools violates the Establishment Clause. The Court’s answer was no. The decision overruled both Aguilar v. Felton, 473 U.S. 402 (1985) and Grand Rapids School District v. Ball, 473 U.S. 373 (1985). These decisions had not allowed this practice to take place. Nonetheless, in Agostini, the Court abandoned the assumption that public school teachers within parochial schools constituted a figurative union between government and religion (LaMorte, 2002). Justice O’Connor wrote, “What has changed since we decided Ball and Aguilar is our understanding of the criteria used to assess whether aid to religion has an impermissible effect” (Agostini, 1997). The Court relied on the distinction that the program distributed funds to specific, eligible students as opposed to school wide availability.

The concept of neutrality was utilized again in Mitchell et al. v. Helms et al., 530 U.S. 793 (2000) which was decided in a six-to-three vote. Justice Thomas delivered the opinion of the Court. This case addressed Constitutional law, specifically, an Establishment Clause challenge. In this case, a federal program loaned computers, software, and library books to religious schools. Justice Thomas wrote “that the aid was
allocated on the basis of neutral, secular criteria that neither favored nor disfavored religion, and was made available to both religious and secular beneficiaries on a nondiscriminatory basis” (Mitchell, 2000). The Mitchell decision overruled previous holdings in Meek v. Pittenger and Wolman v. Walter that had barred the provision of various instructional material and instrumentation to religious schools (LaMorte, 2002).

Voucher Cases
Wisconsin

In Jackson v. Benson, 578 N.W. 2d 602 (1998), the amended Milwaukee Parental Choice Program (MPCP)\(^\text{11}\) was reviewed before the Wisconsin Supreme Court. In this case, the court was asked to review a decision of the court of appeals:

The court of appeals, in a 2-1 decision, affirmed an order of the Circuit Court for Dane County, Paul B. Higginbotham, Judge, granting the Respondents’ motion for summary judgment. The majority of the court of appeals concluded that the Milwaukee Parental Choice Program, Wis. Stat. § 4002-4009 (amended MPCP), was invalid under Article I, § 18 of the Wisconsin Constitution because it directs payments of money from the state treasury for the benefit of religious seminaries (Jackson v. Benson, 578 N.W. 2d 602 [1998]).

In the court of appeals decision, the majority of the court declined to address whether or not the amended MCPC violated the Establishment Clause of the First Amendment or any provisions of the Wisconsin Constitution. Judge Roggensack, who dissented, found that the amended program did not violate either constitution.

\(^{11}\) The MPCP was amended twice because of litigation; once in 1993 and lastly in 1995. The changes in the program are discussed in Chapter One.
Judge Steinmetz wrote for the majority and addressed the respondents' five issues in their review. The court stated that the first issue they needed to address was whether or not the amended program violated the Establishment Clause of the Wisconsin Constitution. They went on to state that "neither the circuit court nor the court of appeals reached this issue" (Jackson, 1998). Their finding was that the amended program, in fact, did not violate the Establishment Clause. They reasoned that the program had a secular purpose and did not have the primary effect of advancing religion. The court held that the amended MCPC would not lead to excessive entanglement between the State and participating sectarian private schools (Jackson, 1998).

Furthermore, Steinmetz discussed the difficulty of attempting to bring some clarification to an issue that is filled with ambiguity. First Amendment issues are decided on precedent. However, even then the direction provided by the precedent may not have been altogether clear. The court stated:

When assessing any First Amendment challenge to a state statute, we are bound by the results and interpretations given that amendment by the decisions of the United States Supreme Court... 'Ours is not to reason why; ours is but to review and apply.' State ex Rel. Warren v. Nusbaum. (Nusbaum I), 55 Wis. 2d 316, 322, 198 N.W. 2d 650 (1972). Our limited role is not aided by the Supreme Court's candid admission that in applying the Establishment Clause, it has 'sacrifice[d] clarity and predictability for flexibility.' Committee for Pub. Educ. And Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) (Jackson v. Benson, 578 N.W. 2d 602 [1998]).
The U.S. Supreme Court has recognized that Establishment Clause issues bring about difficult areas of interpretation. Nonetheless, decisions must be made.

The Wisconsin Supreme Court applied the Lemon test to the MPCP. The court held that the program had a secular purpose; moreover, the court of appeals recognized that the purpose of the program was to provide “low-income parents with an opportunity to have their children educated outside of the embattled Milwaukee Public School system. The propriety of providing educational opportunities for children of poor families in the state goes without question” (Jackson, 1998).

The second prong of the Lemon test was to assess if the program had the primary effect of advancing religion. This portion of the Lemon test becomes more nebulous; rather than looking at purpose, the assessment must predict the effect. However the court stated that before the analysis for this portion started it needed to be clarified that it does not mean that the “Establishment Clause is violated every time money previously in the possession of a state is conveyed to a religious institution” (Jackson, 1998).

The court addressed judicial precedent of neutrality and examined how it affected Establishment Clause issues. The neutrality concept was addressed previously in Zobrest, Mueller, Witters, Rosenberger, Agostini. Using the neutrality precedent, the Wisconsin court examined the Milwaukee program. They found that the program did not violate the second prong of the Lemon test. The court stated, “eligibility for benefits under the amended MPCP is determined by ‘neutral, secular criteria that

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12 The Lemon Test: 1. does the issue have a secular purpose; 2. does the issue have a principal or primary effect advance or inhibit religion; and 3. does it create excessive entanglement between government and religion (Lemon v. Kurtzman, 403 U.S. 602).
neither favor nor disfavor religion,' and aid 'is made available to both religious and secular beneficiaries on a nondiscriminatory basis’” (Jackson, 1998). Moreover, after further scrutiny, the court found that the program in Milwaukee did not violate the third prong of the Lemon test either.

Next the court examined the State Establishment Clause issues. The court of appeals held that the amended MPCP violated article I, § 18 of the Wisconsin Constitution wherein lays the benefits clause and the compelled support clause. The benefits clause provides, “nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.” The Wisconsin Supreme Court focused on the language of this clause. Their finding was that the court of appeals focused on the “religious seminaries” item; conversely, they believed that the more important language was “for the benefit of.” They believed that “for the benefit of” should not be read as “requiring that some shadow of incidental benefit to a church-related institution brings a state grant or contract to purchase within the prohibition of the section” (Jackson, 1998).

Furthermore, the court found that the language of the clause was under the auspices of the “primary effect test.” Applying the primary effect test developed by the U.S. Supreme Court, the Wisconsin court concluded that the primary effect of the amended MPCP is not the advancement of religion. The “primary effect test” focuses on the neutrality and indirection of state aid; the Wisconsin Supreme Court held that this test provided “the appropriate line of demarcation for considering the constitutionality of neutral educational assistance programs such as the amended MPCP” (Jackson, 1998).
The third issue presented to the court in this case was whether the amended MPCP was a private or local bill. The Wisconsin Constitution states that, "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title."\(^{18}\) This provision was designed to address the form of legislation, not the substance. In \(\text{Davis, 166 Wis. 2d at 519}\), the court developed a two part analysis to assess whether or not a bill violated article IV, § 18. In their analysis of the bill's evolvement they found that it did not violate article IV, § 18. The bill was not "smuggled or log-rolled through the legislature;" furthermore, it was debated in an open-forum with many people participating.

The court used the Brookfield test to ascertain whether the amended MPCP is private or local legislation. There are five elements to the Brookfield test:

1. The classification employed by the legislature must be based on substantial distinction which makes one class really different from another.

2. The classification adopted must be germane to the purpose of the law.

3. The classification must not be based on existing circumstances only. Instead, the classification must be subject to being open, such that other cities could join the class.

4. When a law applies to a class, it must apply equally to all members of the class.

\(^{18}\) Wisconsin Constitution, Article IV, § 18
5. The characteristics of each class should be so far different from those of the other classes so as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.\textsuperscript{19}

The court held that the original program had met the requirements of the Brookfield test. They also held that the amended program satisfied all five elements of the Brookfield test.

The respondents attempted to argue that the amended program did not meet the criteria of the second prong of the Brookfield test. The original program was listed as "experimental;" therefore, after being amended the respondents held that the program was no longer experimental and thus did not meet the criteria. However, this court held that the program had "retained its experimental character" (Jackson, 1998). The amended MPCP maintains is experimental character; thus, it meets the criteria of the Brookfield test.

The fourth issue presented in this case was whether the amended MPCP violated the uniformity provision of the Wisconsin Constitution, Article X, § 3. "The court of appeals did not reach this issue, and the circuit court concluded that the amended program [did] not violate the uniformity clause" (Jackson, 1998). This court held that the amended MPCP upheld in Davis\textsuperscript{20} did not deprive any student of the opportunity to attend a public school with a "uniform character of education." Therefore, the amended MPCP did not violate the uniformity provision of the Wisconsin Constitution.

Additionally, the court held that sectarian private schools participating in the MPCP did not compromise "district schools" for the purposes of the uniformity clause.

\textsuperscript{19} Brookfield, 144 Wis. 2d at 907-09.
\textsuperscript{20} Davis, 166 Wis. 2d at 539
In essence, the state of Wisconsin was meeting its obligation to provide students with a uniform character of education. On the other hand, the “experimental” program, MPCP, was in no way denying students access to their education; rather, it was providing them with another means of obtaining a basic education.

The fifth issue that the court examined was whether or not the MPCP violated Wisconsin’s public purpose doctrine. “The court of appeals did not reach this issue, and the circuit court concluded that it does” (Jackson, 1998). The public purpose doctrine essentially states that public funds may only be expended on public purposes. Furthermore, it states that an expenditure of public funds on anything other than a public purpose would violate the Wisconsin Constitution. The court held that, in this case, the amended MPCP contained sufficient controls to attain its public purpose. Moreover, the amended MPCP fulfilled a valid public purpose and did not violate the public purpose doctrine.

The National Association for the Advancement of Colored People (NAACP) raised a challenge; they alleged that the amended MPCP violated article I, § 1 of the Wisconsin Constitution and the equal protection clause of the Fourteenth Amendment. This issue was not addressed by the circuit court or the court of appeals. This court held that the NAACP’s facial equal protection claim failed as a matter of law. In fact, the court stated that “none of the facts presented by the NAACP support a claim that the State enacted the amended MPCP with an intent or purpose to discriminate based on race” (Jackson, 1998).

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21 State ex rel. Warren v. Nusbaum, 59 Wis. 2d 391, 414, 208 N.W.2d 780 (1973)
22 This guarantees “a right to be free from invidious discrimination in statutory classifications and other governmental activity...The central purpose of the Equal Protection Clause is to prevent ‘official conduct discriminating on the basis of race.’”
In conclusion, the court held that the amended MPCP did not violate the Establishment Clause of the First Amendment; the Wisconsin Constitution Article I, § 18; Article IV, § 18; Article X, § 3; or the public purpose doctrine. The U.S. Supreme Court was petitioned for a Writ of Certiorari; however, this was denied. According to John F. Witte (2000):

The U.S. Supreme Court is unlikely to review a case in which it decides that a state constitution provides greater protection of rights than current interpretations of the U.S. Constitution provide. In the case of vouchers to religious schools, whichever way the state court decides, the U.S. Supreme Court must decide whose rights are being extended and restricted by the law (pg. 177).

Therefore, the U.S. Supreme Court likely decided that the guidance provided by the Wisconsin Supreme Court's interpretation of the state's constitution provided a clear enough protection of rights. Thus, the petition for the Writ of Certiorari was denied.

Ohio

During the evolution of the Milwaukee Parental Choice Program another voucher program arose. In this case the State of Ohio established the Pilot Project Scholarship Program. It was designed to give “educational choices to families in any Ohio school district that is under state control pursuant to a federal-court order” (Zelman, Superintendent of Public Instruction of Ohio, et al. v. Simmons-Harris et al., No. 00-1751 (2002). The only school district under state control at that time was the Cleveland City School District.

The Cleveland City School District serves more than 75,000 students. “In 1995 a state judge had declared the local school board unfit to govern the schools and handed
direct control to the state" (Howell & Peterson, 2002, p.31). The majority of Cleveland's children were from low-income and minority families. The scholarship program developed for Cleveland was entitled The Cleveland Scholarship and Tutoring Program (CSTP). CSTP had strong bipartisan political support. Prominent Republican David Brennan originally lobbied the Governor for a voucher program; moreover, Fannie Lewis, a black Democratic city council member, also endorsed this program (Howell & Peterson, 2002).

The requirements for the voucher program had important limitations. Only children entering kindergarten through third grade were eligible. The voucher could be applied to secular or non-secular schools. The maximum voucher amount was $2,250; however, by the year 2000 the amount increased to $2,500 per voucher (Howell & Peterson, 2002). Vouchers would then pay 90% of the tuition for low-income families. Accordingly, for families that did not meet the criteria of "low-income" the state would pay up to 75% of the school's tuition to a maximum of $1875.00. The voucher was made out to the parents of the students and the parents would then sign the voucher over to the school of their choice. The maximum amount provided from the voucher, however, "was little more than a third of the per-pupil cost of Cleveland public schools, which in 1997 was $6,507" (Greene, Howell, & Peterson, 1998, p. 359).

In July 1996, CSTP's constitutionality was challenged by teachers' organizations, as well as several other organizations. A decision was reached in the case in August 1996 when, just before the school year was to start, the lower court ruled in favor of CSTP (Greene et al., 1998). During the summer of 1999, new legal challenges threatened CSTP. On August 24, 1999, the district court granted plaintiffs injunctive
relief. In the same order, the district court consolidated the Cleveland voucher cases. The court held that the Ohio Supreme Court’s decision in Simmons-Harris v. Goff, 711 N.E. 2d 203 (Ohio, 1999), did not prevent federal consideration of the Establishment Clause challenge to the CSTP. The reasoning behind this was that the “Ohio’s court’s decision rested on a stage ground which independently supported its resolution of the case. Thereafter, on August 27, 1999, the district court granted in part Defendants’ motion for a stay of the preliminary injunction” (Simmons-Harris v. Zelman, 234 F.3d 945 [Sixth Circuit 2000]).

On August 24, 1999, which was the same day that the district court granted the plaintiffs’ motion for a preliminary injunction, the State, and two defendants appealed that decision. After the district court’s August 27th ruling, all defendants filed revised briefs with the Appellate Court for the Northern District of Ohio. They were specifically addressing the issue of students who were new to the voucher program. However, while those appeals were pending, the State filed a motion for a stay with the United States Supreme Court. The Court granted the motion by a vote of 5-4 (pending the appellate court’s disposition of the entire appeal).

On October 15, 1999, all parties involved agreed that the “handbooks, mission statements, and brochures of the schools participating in the Cleveland scholarship program are ‘authentic, speak for themselves, have been made available to the parents of the scholarship students and are not false or misleading’” (Simmons-Harris, 2000). On November 1, 1999, both sides filed motions for summary judgment. On November 29, 1999, the district court denied Taylor’s motion to have this question certified to the Ohio Supreme Court, “Does Ohio law give preclusive effect to the resolution of the
Establishment Clause claim in *Simmons-Harris v. Goff*, 711 N.E. 2d 203 (Ohio 1999)?” The district court also found the voucher program to be in violation of the Establishment Clause. The court enjoined the defendants from running the program and denied the defendants motion for a summary judgment. The court postponed its summary judgment order with the plaintiff’s consent pending a review by the United States Court of Appeals for the Sixth Circuit (*Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 836 (N.D. Ohio 1999)).

In *Simmons-Harris v. Zelman*, 234 F.3d 945 (Sixth Circuit 2000), in a two-one decision, the Court recognized the significance and importance that the issue of school vouchers had in the public education sector; however, they stated that they:

> [did] not have the luxury of responding to advents in educational policy with academic discourse on practical solutions to the problem of failing schools; nor may we entertain a discussion on what might be legally acceptable in a hypothetical school district. We may only apply the controlling law to the case and statute before us (*Simmons-Harris*, 2000).

Judge Clay delivered the opinion of the Court and wrote that they did not make educational policy; it was not up to them to sit in judgment over one program or another. However, what they could do was examine such a program and determine whether or not the program violated the United States Constitution.

First, the court reviewed the district court’s grant of summary judgment *de novo.* They stated that summary judgment was proper when the material at hand showed that there was a “genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law (Fed. R. Civ. P. 56 (c) quoted in *Simmons-Harris*, 2000).
The court held that there was no genuine issue of material fact; therefore, the summary judgment was denied.


The court reaffirmed the substance of the Lemon test in Agostini v. Felton, 521 U.S. 203 (1997). In this case the court noted the particular importance of the Lemon test concerning issues involving school aid. However, the court illustrated that the Lemon test was not a rigid three-part analysis; rather, it was flexible in its approach to analyzing school issues. "Agostini found 'three primary criteria' used by the Court in evaluating whether government aid has the effect of advancing religion: whether the statute or programs in question 'result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement'" (Simmons-Harris, 2000).

\textsuperscript{23} The Lemon Test: 1. does the issue have a secular purpose; 2. does the issue have a principal or primary effect advance or inhibit religion; and 3. does it create excessive entanglement between government and religion (Lemon v. Kurtzman, 403 U.S. 602).
The court stated that of the cases that adhered to Lemon the one that was most persuasive and most related to this case was Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). In this case, a New York State statute established a tuition grant program that provided tuition reimbursement to low-income parents. The U.S. Supreme Court held that the tuition program in Nyquist violated the Establishment Clause. The Court of Appeals went on to discuss the cases that utilized Nyquist in their arguments: Mitchell v. Helms, 120 S. Ct. 2530 (2000); Agostini v. Felton, 521 U.S. 203 (1997); Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983). In Mitchell, Justice Thomas:

[N]oted that the nexus between neutrality and private choice was the prominent, even the chief factor, in upholding government aid in Agostini, Zobrest, Witters, and Mueller, and found that there is a close relationship between private choice and the question of whether a program creates a financial incentive to undertake religious schooling (quoted in Simmons-Harris, 2000).

The Court of Appeals held that, "[d]espite the language of the [Ohio] statute, there is no evidence that the tuition vouchers serve as a neutral form of state assistance which would excuse the direct funding of religious institutions by the state, despite the state's language" (Simmons-Harris, 2000). Therefore, the court concluded that the CSTP was designed in a manner that attracted religious institutions and was not neutral in nature. The court also stated that the voucher program essentially endorsed religion and was in violation of the Establishment Clause of the First Amendment. They affirmed the district court's order and granted summary judgment to the plaintiffs.
Zelman et al. v. Simmons-Harris et al. (2002)

Petition for a Writ of Certiorari and Response

On May 23, 2001, the state petitioners filed for a Writ of Certiorari with the United States Supreme Court. The question addressed by the petitioners was whether the Establishment Clause prohibited Ohio's program from authorizing parents to use the scholarships at any private school, whether religious or not. The petitioners were Dr. Susan Tave Zelman, Superintendent of Public Instruction for the State of Ohio, the State of Ohio, and Saundra Berry, Director of the Cleveland Scholarship and Tutoring Program. The Respondents were Doris Simmons-Harris, Marla Franklin, Reverend Steven Behr, Sue Gatton, Mary Murphy, Reverend Michael DeBose, Glenn Altschuld, and Deidre Peterson.

Intervening defendants in the proceedings were Senel Taylor, Johnnietta McGrady, Christine Suma, Arkela Winston, Amy Hudock, Amber Lee Angelo, on their own behalf and that of their children. Also, additional intervening defendants are the Hanna Perkins School, Ivy Chambers, Carol Lambert, Our Lady of Peace School, Westpark Lutheran School Association, Inc., Lutheran Memorial Association of Cleveland, and Deloris Jones.

The petitioners argued that this case presented a fundamental constitutional issue of profound importance to educational policy. Furthermore, their contention was that the holding of the Wisconsin Supreme Court in Jackson v. Benson, and the holding of the Sixth Circuit in regard to the Cleveland program have cast a sense of general confusion over the area of school choice. Therefore, they argued the Court needed to grant the Writ of Certiorari in order to provide needed clarification "over the proper meaning of this

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The respondents did not take issue with the petitioners' fundamental proposition that this case presented a question of weighty significance in the area of educational policy. However, in general, they believed the issue had been resolved with the holding of the Sixth Circuit. The respondents stated that the subject "may warrant review by this Court at some point" (Opp. Brief at 2). Nevertheless, their contention was that it was unnecessary for the Court to review this case at this time.

The petitioners argued that the Wisconsin Supreme Court's analysis in *Jackson v. Benson* was more accurate than the Sixth Circuit's constitutional analysis. The Wisconsin Court rejected an argument that the voucher program was invalid because 89 out of 122 participating schools were religious in nature. In doing so, the Court held that a proper analysis focused not on how the money was spent; rather, it focused on the "nature of the benefit received by the recipient" (citing *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 843 [1995]). Additionally, the Wisconsin Court took guidance from *Mueller v. Allen* 463 U.S. 388 (1983) and found that the percentage of participating religious schools were irrelevant to the constitutional inquiry.

Conversely, the Sixth Circuit relied on *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) for their rational. The petitioners argued that *Nyquist* was not on point. However, the respondents argued that the *Nyquist* decision was an appropriate method of analysis. The respondent's contended that the program in Cleveland was analogous to the program in New York. They maintained that the
financial structure of the Cleveland program was such that participating parents were compelled to select religious schools for their children because of the low tuition charged by the parochial institutions. The program left the parents with little other choice; therefore, the program was not truly a program of choice. Moreover, the respondents stated that the numbers in the Cleveland program were entirely relevant -- 82 percent of the participating schools were parochial schools and 96 percent of the participating students attended parochial schools (Opp. Brief for Writ of Certiorari, at 6). Therefore, they argued, the Sixth Circuit's holding was appropriate.

The petitioners' contention was that the Court's Establishment Clause jurisprudence had evolved since the Nyquist decision. Moreover, they argued that the Cleveland program was a program of true choice and that "this Court's governing Establishment Clause precedents [are] emphasis on private choice" (Petition for Writ of Certiorari, at 14, Zelman). They acknowledged that no lower court had the authority to overrule precedent established by the Court. Therefore, in addition to the previous arguments, the Court should hear this case in order to, "confront paralyzing judicial confusion, rooted ultimately in Nyquist, over the question of how recent Establishment Clause jurisprudence applies to neutral, indirect programs of non-religious aid that benefit religious schools solely as a result of independent choice" (Petition for Writ of Certiorari, at 15, Zelman).

Brief of the State Petitioners

In the state petitioners' brief to the U.S. Supreme Court, the question presented was, "Whether the Establishment Clause prohibits Ohio's program from authorizing..."
parents to use scholarships at any private school, whether religious or not". The certiorari petition for the state petitioners stated that the Cleveland Scholarship and Tutoring Program passed constitutional scrutiny under the U.S. Supreme Court's Establishment Clause jurisprudence. The program was tailored to meet the needs of the Cleveland parents and students. The petitioners pointed out that the program had twice before been passed by the Ohio’s General Assembly.

Furthermore, the program was crafted with "careful attention to Establishment Clause requirements...Where a State offers individualized benefits through a neutral regime of private choice, this Court has uniformly upheld such programs against Establishment Clause assaults." According to the petitioners, one of the most significant aspects of this program is that there are no financial incentives to select religious schools for children. Instead, the program provides the same amount of scholarship money regardless of educational setting. Therefore, Cleveland parents are not enticed by government subsidies that favor religion. The parents are able to choose freely where to send their children to school.

The Cleveland Scholarship and Tutoring Program also satisfy the Court's neutrality guidelines. The program meets these guidelines in two aspects. The first aspect is that the family must reside in a school district that is or has been under federal court order requiring state supervision; this was the case with the Cleveland City School District. The program’s second aspect was personal income. The applicants income must be a certain percentage below the poverty line. Therefore, the program was designed to assist the poorest families in the Cleveland City School District. “This

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25 Brief of State Petitioners for Writ of Certiorari at i, Zelman et al. v. Simmons-Harris et al., (Nos. 00-1751, 00-1777, 00-1779).
26 Id at 15
carefully calibrated neutrality is a far cry from situations where lawmakers engage in covert religious gerrymandering of program eligibility.\textsuperscript{27}

The elements of neutrality and private choice in the Cleveland program satisfy the test established more recently in \textit{Agostini v. Felton}, 521 U.S. 203 (1997); that is the direct aid to religious schools. According to the petitioners, the respondents in this case: have never challenged the secular purpose of this program, nor have they alleged excessive entanglement between government and religious institutions. The sole questions under an \textit{Agostini} analysis are therefore whether the Ohio law results in governmental indoctrination and whether it defines recipients by reference to religion.\textsuperscript{28}

The Cleveland program satisfies both requirements. The distribution of the scholarship money is based entirely upon the choices of parents. Moreover, the program selects the applicants without any reference to religion.

Nonetheless, the Sixth Circuit Court invalidated the Cleveland program for several reasons. One, the program contained a large number of parochial schools. Two, according to the petitioners, the program operated with the “novel theory that underfunding religious activity can constitute unconstitutional favoring of religion. And, three, the U. S. Supreme Court’s decision in \textit{Nyquist}. The first two reasons were not the primary foci in the court’s opinion; moreover, they are excluded by this Court’s decisions. In particular the findings in \textit{Mueller v. Allen}, 463 U.S. 388 (1983) directly oppose the first two reasons for invalidating the Cleveland program. However, in the end the Sixth Circuit majority relied on \textit{Nyquist}.

\textsuperscript{27} id at 16
\textsuperscript{28} id at 16
The critical distinction of Nyquist that the majority of the Sixth Circuit failed to note was the program in Nyquist's provided assistance to some at-risk students. In the Cleveland program, the assistance is provided solely to at-risk students. Furthermore, the Sixth Circuit failed to heed the warning provided in Nyquist that expressed reservation of judgment on cases like the Cleveland program posing constitutional challenges to generally available scholarship programs. According to the petitioners, Nyquist continues to promote constitutional confusions; this is illustrated by the Nyquist driven decision to terminate the Cleveland program (Petition for Writ of Certiorari at 16, Zelman).

The primary argument in the petitioners' brief addresses reasons why it is important for the Court to take the case. The first is that they state that Ohio's program passes constitutional examination because it is neutral and the program affords true private choice to the participatory parents in Cleveland. While the Court once employed the three-pronged Lemon test to examine these issues, it now has developed an alternative prong. This alternative prong folds the entanglement prong into the primary effect prong and examines whether the aid results in governmental indoctrination; defines recipients by religion; and creates excessive entanglement (Mitchell v. Helms, 530 U.S. 793, 808 (2000) (plurality opinion); at 845 (O'Connor, J., concurring); Agostini, 521 U.S. at 234 (Petition for Writ of Certiorari at 20, Zelman).

Recently, Justice O'Connor, joined by Justice Breyer, observed:

In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students
who, in turn, decide to use the aid at the same religious schools (Mitchell, 530
U.S. at 843 (O'Connor, J. concurring).

The Ohio program is not the kind that offers direct aid to private schools; rather, it
distributes aid to parents. The parents, in turn, redirect the aid to participating schools by
means of their own decision-making. Accordingly, the program does not pose the
particular danger of governmental endorsement of religion (Petition for Writ of
Certiorari, at 21, Zelman).

The Ohio program is one of true private choice. It meets the requirements set
forth in Everson, Mueller, Witters, and Zobrest. In Everson v. Board of Education of
Ewing, 330 U.S. 1 (1947) the reimbursement to parents for their children’s bus
transportation was upheld; therefore, whether your child went to private or public school
(secular or non-secular), if you paid for bus transportation, you were reimbursed. The
Court held that the funds were merely assisting parents in getting their children to school
(regardless of their religion) safely and expeditiously.

In Mueller v. Allen, 463 U.S. 401, the Court upheld a program of tax deductions
for education expenditures. These deductions were upheld even though 96% of those
deductions went to parents whose children attended parochial schools. The Court
approved the program because the law channeled whatever assistance may provide to
parochial schools through individual parents (Mueller at 399). The parents chose to send
their children to parochial schools. The tax exemptions were merely part of the state’s
system available to anyone who chose to participate.

In Witters v. Washington Department of Services for the Blind, 474 U.S. 481
(1986), and Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993), the Court
confirmed the importance of individual choice. In Witters, the Court held that any money that went to a parochial institution for tuition did so as a result of personal choice on the part of the student to attend that school. In Zobrest, the Court “upheld a challenged program of government-paid sign-language interpreters that dispensed aid not to schools, but to individual hearing-impaired children” (Zobrest, 509 U.S. at 13). The program’s hallmark trait of true private choice was the critical issue in that case.

Furthermore, the petitioners argue that there was never any evidence that suggested that any Cleveland parent who wanted to attend a non-religious, private scholarship school has ever failed to find it. In Simmons-Harris, Judge Ryan emphasized in dissent:

[T]here is no evidence that any of the several nonreligious, private schools participating in the program have ever rejected a single voucher applicant for any reason, nor is there any evidence that any Cleveland public school parent has ever declined to enroll his or her child in a nonreligious, private school because there was a differential cost that was prohibitive (Simmons-Harris v. Zelman, 234 F.3d at 971).

The Cleveland program provides for private and parental decision-making; thereby, ensuring that the decisions are freely made and without any sense of coercion. The petitioners argue that program participation is legally not distinguishable from the use of federal scholarships at religiously affiliated colleges under the G.I. Bill and similar adult educational programs.

Nonetheless, the Sixth Circuit found these elements insufficient. The court concluded that since the majority of scholarship students were attending religious schools
that the program had the effect of promoting sectarian education. The petitioners found
this argument to be misguided. Moreover, the petitioners espoused that while students
may attend public school free of charge, parents of scholarship students — including those
from low-income families — must pay at least ten percent of the cost of the tuition
(Petition for Writ of Certiorari, at 27 Zelman).

The state provides significantly less funding to Scholarship Program schools than
to other options available to the predominantly low-income parents who participate in the
program. Therefore, according to the petitioners, the state has not created a spending
incentive for Cleveland parents to choose a religious private school rather than a non-
religious community school; rather, the parents have chosen of their own volition where
to send their children to school (Petition for Writ of Certiorari at 27, Zelman).

In addition to the element of true private choice, the Cleveland scholarship and
Tutoring Program satisfies the Court’s established criteria for neutrality. In Mueller, the
Court held that a program must neutrally provide state assistance to a broad spectrum of
citizens (Mueller, 463 U.S. at 398-99). Furthermore, in Everson, the Court held that the
Constitution does not prevent a state from extending the benefit of its laws to all citizens
without regard to religious affiliation. Moreover, the First Amendment requires that the
state be neutral in its relations with groups of religious believers and non-believers. It
does not require the state to be either’s adversary (Everson, 330 U.S. at 17). Similarly, in
Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236, 243 (1968)
the Court placed critical reliance on the neutral availability of the public benefit. In this
case, the Court stated that the state needed to make the benefits of the program available
to all children in the area on an equal basis. The Cleveland Program does just this. One
factor determines the family’s eligibility — whether or not they reside in the school district that is or has been under federal court order requiring supervision.

The Cleveland City School District is currently the only Ohio school district to be under such a federal court order. There also happens to be a large number of parochial schools in this district. The religious schools were present in this area before any federal mandates were incurred. Therefore, this is not a case where lawmakers intentionally created a program in a geographic area that gave rise to a type of “explicit religious gerrymandering” that violates the Establishment Clause of the First Amendment Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 729 (1994) (Kennedy, J. concurring).

Furthermore, the petitioners stated that the Sixth Circuit’s approach to this case, if upheld, would call into question a host of other state and federal programs that may ultimately be viewed as violating the Establishment Clause. “The simple fact is that funding of the Program, like all state funding decisions in Ohio, rests ultimately with the Ohio legislature” (Petition for Writ of Certiorari at 40, Zelman).

Finally, the petitioners argue that the Sixth Circuit misread the Nyquist decision. They state that the case in Nyquist involved an attempt to rescue religious schools from severe fiscal problems. In the Ohio program the attempted rescue is aimed at the children of the Cleveland City School District. “Ohio’s program unlike Nyquist’s, is thus precisely what it purports to be — a comprehensive regime of choice for students in dire need, Nothing in Nyquist requires the invalidation of such programs” (Petition for Writ of Certiorari at 44, Zelman). Furthermore, according to the petitioners, the officials in Ohio created this program with the Court’s jurisprudence in mind. The Ohio Supreme
Court approved the Ohio program for the people of Ohio. The petitioners believe that the program is not in violation of the Establishment Clause and that Nyquist should not be applied to invalidate the program.

But if [they] are mistaken, and if state supreme court judges in both Ohio and Wisconsin are likewise in error...then the problem lies with Nyquist itself. Because it continues to sow seeds of confusion, and since it stands in tension with the Court's more recent decisions on which state officers have relied and continue to rely, Nyquist should not be permitted to stand in the way of Ohio's program (Petition for Writ of Certiorari at 47-48, Zelman).

Brief for the Respondents

On June 21, 2001, the respondents' filed their brief. The questions posed by the respondents were:

1. Whether the moneys the Voucher Program provides to participating sectarian private schools are "properly attributable to the State" Witters v. Dept. of Serv. For the Blind, 474 U.S. 481, 489 (1986), as a form of "an impermissible 'direct [State] subsidy'" to the schools, id. at 487, or are "a permissible [parental] transfer" to the schools similar to [a] hypothetical salary donation by a government employee from a government paycheck to a religious institution?

2. Whether the Voucher Program has "the [impermissible] effect of advancing religion by creating a financial incentive to undertake religious indoctrination," Agostini v. Felton, 521 U.S. 203, 231 (1997)?

The respondents argued that the Court of Appeals was correct; the Ohio Voucher Program aid to sectarian private schools providing a religious education is properly attributable to the State, and the Program does violate the Establishment Clause. “Aid to a religious institution unrestricted in its potential uses, if properly attributable to the State, is clearly prohibited under the Establishment Clause” (Witters v. Washington Department of Services for the Blind, 474 U.S. 481, 498 [1986]).

The brief states that the Ohio Voucher Program authorizes the state to issue tuition voucher checks to parents of selected Cleveland children who are admitted to private schools and registered to participate in the voucher program. The overwhelming majority of these schools are sectarian private schools. According to the brief, the Establishment Clause “absolutely prohibit[s] government financed ... indoctrination into the beliefs of a particular religious faith” Grand Rapids School District v. Ball, 473 U.S. 373, 385 (1985). Quoted in respondents brief, see Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O’Connor, J. concurring) (“[O]ur decisions ‘provide no precedent for the use of public funds to finance religious activities.’”) (quoting Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 847 (1995) (O’Connor, J. concurring)).

The respondents state that it is undeniable that the Ohio Voucher Program finances religious education that is attributable to the state. Again, in Witters, the Court had held that if the financing is attributable to the state it stands in direct violation of the Establishment Clause of the First Amendment. Furthermore, the Court held in Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973),
that a New York statute that authorized direct payments to nonpublic schools (all of these schools were Roman Catholic schools) in low-income areas was in violation of the Establishment Clause. The Court stated:

No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions ... Absent appropriate restrictions on expenditures for [religious] purposes, it simply cannot be denied that this [program] has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools (Nyquist, 413 U.S. at 774).

Moreover, according to the respondents, the Court held that a state may not “pay for what is actually a religious education, even though ... it makes its aid available to secular and religious institution alike” (Roemer v. Maryland Public Works Board, 426 U.S. 736, 747 (1976) (plurality opinion)). The respondents’ brief provided additional validation for this argument regarding the issue of neutrality with the inclusion of Justice O’Connor’s concurrence in Mitchell v. Helms, 530 U.S. at 840, “we have never held that a government-aid program passes constitutional muster solely because of the neutral criteria it employs as a basis for distributing aid.”

The brief argued against the true private choice contention of the petitioners. The argument held that the Ohio Voucher Program did not provide the parents of Cleveland schoolchildren with true private choice. In Witters, the Court held that, ‘a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do
so even knowing that the employee so intends to dispose of his salary” (474 U.S. at 486-87). In a case such as this, individuals are able to spend their money any way they chose. However, in the case of the Ohio Voucher Program, parents are issued a monetary voucher that must be spent on their children’s education at specified participatory schools.

Furthermore, the brief argued that the choice was limited at best; choice was limited to the scope of schools participating in the program. This limited choice was exemplified by the fact most of the participating schools were parochial schools. According to the brief, “82% of which (representing an even higher percentage of the available student places) are sectarian private schools providing a religious education” (Respondents Brief). The brief also argues that the choice is limited in nature because:

The Program caps the tuition that participating private schools may charge voucher students from low-income families at $2,500 and pays only 90% of that capped tuition – unquestionably discouraging the participation of secular private schools, which generally have greater tuition needs than sectarian private schools (Respondents Brief).

The brief stated that the voucher program created a financial incentive for voucher program parents to choose a sectarian private school that provides a religious education. The brief stated that in Nyquist, the Court held that while the New York tuition grant program left parents free to spend their grants on a secular education, the program’s criteria was so constrained that it created “an incentive [for] parents to send their children to sectarian schools” (413 U.S. at 786). Furthermore, in Sloan, the Court found that even though the Pennsylvania tuition grant program did not tell parents how they must spend
the amount received, the tuition grant benefit could be viewed "as an incentive to parents to send their children to sectarian schools" (413 U.S. at 832).

The brief also contends that the voucher program in Ohio is designed in the same manner as the programs in Nyquist and Sloan — the Court struck down both of those programs. Furthermore, the respondents' brief states that the program in Ohio is "far removed from the program upheld in Witters. Moreover, "the criteria [of the Ohio Voucher Program] themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination" (Agostini, 521 U.S. at 231). Thus, the program in Ohio violates the Establishment Clause.

The brief argues that the voucher program creates a public perception that the state is endorsing religious practices and beliefs. The respondents contend that the government payment program that feeds into the coffers of religious organizations violates the Establishment Clause because "government moneys are in fact financing religious education and indoctrination" (Respondents' Brief).

Furthermore, the respondents advocate that the petitioners’ argument fails on its merit because the Ohio program does create the public perception that the government is endorsing religious practices and beliefs. Their evidence in this argument, they believe, lays in the fact that over 80% of the schools that receive money from the voucher program in Ohio are sectarian private schools. These schools provide their students with a religious education. Therefore, according to the respondents, the public cannot help but perceive that the State is endorsing and, in fact, advancing religious beliefs and practices.

Finally, the respondents argue that the conclusion, that the Ohio Voucher Program violates the Establishment Clause, derives further persuasive force from the doctrine of
stare decisis. The Court has always held that in order to depart from precedent there must
be special justification. In this case, there is no special justification for departing from
Nyquist and Sloan as precedents of the Court. Conversely, in Witters, the Court “fully
embraces Nyquist and Sloan, and treats them as setting out the proper legal principles for
assessing Establishment Clause challenges to this type of government program”
(Respondents’ Brief). Therefore, the respondents argue that there has been no precedent
changing events post Nyquist/Sloan; as such, the petitioners do not have a relevant
argument.

Amicus Curiae Briefs

From May 23, 2001, through December 14, 2001, a total of 50 amicus curiae
briefs were filed with the United States Supreme Court. On September 25, 2001, the
petition for the Writ of Certiorari was granted. The date set for oral argument was
February 20, 2002.

The amicus curiae briefs in support of the petitioners contained similar arguments.
In particular, the briefs argued that the Cleveland Scholarship and Tutoring Program did
not violate the Establishment Clause of the First Amendment. Furthermore, many briefs
discussed the issues of choice and neutrality.

In the amicus curiae brief presented by Claremont Institute Center for
Constitutional Jurisprudence on behalf of the petitioners, they argue that the Circuit Court
had misapplied the U.S. Supreme Court’s “repeated holding that religious neutrality is a
vital factor in determining whether a government program establishes religion.”29

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29 Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence in Support of
Petitions for Writ of Certiorari. Zelman v. Simmons-Harris, Nos. 00-1751, 00-1777, and 00-1779, (2001).

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According to the Claremont Institute’s brief, the Court of Appeals also held that the Cleveland Scholarship and Tutoring Program was not neutral. Judge Ryan dissented and said that this conclusion lacked, “a scintilla of evidence” (Zelman, 234 F.3d, at 970).

The court said that the religious schools were more inexpensive to run than other schools. Therefore, they could accommodate the children in an easier manner; as such, the program becomes “unequal.” According to the Claremont brief, “The Sixth Circuit’s definition of neutrality borders on the Orwellian, and it is contrary to this Court’s repeated holding that religious organizations should not be treated less favorably than non-religious organizations in the provision of governmental aid.”

Several amicus curiae briefs also discussed Justice O’Connor’s opinion in Mitchell v. Helms, 530 U.S. 793 (2000). In Mitchell, Justice O’Connor noted that neutrality is not the sole consideration in an Establishment Clause case; in this instance, the briefs espouse that the court interpreted her holding appropriately. However, Justice O’Connor went further with her discussion; she stated that:

Distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools… supports a school’s religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school [in which case] “no reasonable observer is likely to draw from the facts … inference that the State itself is endorsing a religious practice or belief.” Rather, endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid (Mitchell, 530 U.S., at 842-843 [quoting Witters, 474 U.S. at 493(O’Connor, J., concurring in judgment)]).

According to Claremont, the Court of Appeals failed to apply the proper neutrality analysis, and therefore misapplied the U.S. Supreme Court's binding precedent. The brief from the American Center for Law and Justice, Incorporated agreed with this same failed application.

According to the amicus curiae brief in support of the petitioners by the Pacific Legal Foundation and others, the distribution of a general government benefit in a neutral fashion does not violate the Establishment Clause. This brief argued that "when a government offers a neutral service that is not designed to help religion, the evil sought to be avoided by the Establishment Clause, the establishment of a national church, is simply not implicated."\(^\text{31}\) According to the Pacific Legal Foundation, the First Amendment forbids government from favoring religion; however, it does not mandate that government discriminate against it.

Their argument states that the Court "left doctrines of neutrality and private decision making fully in tact, shining like a beacon to guide lower court decisions" (Agostini v. Felton, 521 U.S. 203, 1997). In this case, according to the Pacific Legal Foundation brief, the Court emphasized that government programs that provided public aid to disadvantaged schoolchildren on a neutral basis do not have the effect of advancing religion. Furthermore, the Court has held that the Establishment Clause is not violated when public aid eventually flows to religious schools as a result of private choice (Mueller v. Allen, 463 U.S. at 399).

The American Education Reform Council supported the petitioners. They argued that the Cleveland Scholarship did not violate the Establishment Clause. In their brief,

\(^{31}\) Brief of Amicus Curiae Pacific Legal Foundation, Zelman v. Simmons-Harris, Nos. 00-1751, 00-1777, and 00-1791, (2001).
they stated that the purposes of the Cleveland Scholarship Program were secular in nature. The first secular issue was to improve the educational opportunity for students who were trapped in poorly performing assigned public schools; the second secular issue was to spur on improvement of the school district through an increasingly competitive student market.\(^{32}\)

The American Education Reform Council argued that under this Court's modern Establishment Clause jurisprudence, "a state program passes constitutional muster if it (a) has a secular purpose; (b) is neutral with respect to religion on its face and applied; and (c) is so designed that any benefits that ultimately reach sectarian institutions do so through the mechanism of genuine individual private choice."\(^{33}\)

In the case of the Cleveland Scholarship and Tutoring Program, the students were trapped in a failing school district. The program was devised as a means of providing the students with an improved education experience. All schools in the Cleveland area were allowed to participate in the program. The fact is that a predominant number of schools that opted to participate were sectarian schools. Nonetheless, parents did have the choice of sending their students to the private sectarian schools with a tuition voucher or selecting a tutoring program – again, this would be paid for with a voucher.

According to briefs for the petitioners, the program was developed to assist children; it was not developed to advance religion. Moreover, the parents of students in the Cleveland City School District did have a choice of educational arenas to select for their children. Many of the parents did choose parochial schools. Nonetheless, it was the

\(^{32}\) Brief of Amicus Curiae, American Education Reform Council, *Zelman v. Simmons-Harris*, nos. 00-1751, 00-1777, and 00-1791, (2001).

\(^{33}\) *Id.* 18
parents who did the choosing. Thus, briefs for the petitioners argue that the program was neutral and the individuals participating in it did have a choice.

However, in a brief of amici curiae in support of the respondents, the argument changes significantly. In their argument they state that they agree that there was a profound educational crisis in Cleveland's public schools. Second, they agree that the children of Cleveland deserve something better than what they have endured thus far. However, they disagree that funding religious education is a remedy for this crisis. Furthermore, they state that "the State is responsible to the crisis in Cleveland's public schools, and the State's overwhelming religious voucher program in response to that crisis is unconstitutional" (id. at 4).

Furthermore, this brief purports that the State failed to produce an adequate system of public schools; that is not compliant with the mandates of the Ohio Constitution. Moreover, it is their contention that "the voucher program coerces enrollment in religious schools as the price of obtaining a safe and effective education," thus it is in violation of the Free Exercise and Establishment Clauses (id. at 7). It is also their estimation that voucher families do not freely and independently choose religious education for their children. They contend that, "voucher families are vulnerable, lacking financial resources to access, on their own, alternatives to the failed public schools, and yet particularly susceptible to the harms inflicted by those schools" (id. at 8).

34 Participants in this brief included: Ohio School Boards Association, Ohio Association of School Business Officials, Buckeye Association of School Administrators, Ohio Coalition for Equity and Adequacy of School Funding, Coalition of Rural and Appalachian Schools, and Ohio Association of Secondary School Administrators.
In the brief of amici curiae from the American Jewish Committee, et al., the argument presented states that the “Ohio Vouchers Program violates the central tenet of the Establishment Clause by pouring government funds directly into the coffers of religious schools, while providing no restriction on their use” (id. at 6). Accordingly, this brief states that the program in Ohio is “indistinguishable” from the program struck down in Nyquist. They contend that, “[t]he Sixth Circuit’s holding in this case is entirely consistent with this Court’s decisions regarding public assistance to religious schools” (id. at 6).

In the Nyquist decision, the overwhelming majority of the participating schooling was “religion-oriented” and the aid was technically provided to the parents. Furthermore, there was no attempt to direct expenditures of the money, as in the Ohio program; thus, the Nyquist Court held that, “In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid” (413 U.S. at 780, 783). Therefore, the program was found to be unconstitutional. And more importantly, according to their argument, the Sixth Circuit was correct in their assessment of the Ohio Voucher Program. It was “indistinguishable” from the New York program in Nyquist; therefore, it was unconstitutional as well.

Another argument in this brief addressed the concept of neutrality. Their contention was that to the extent that the Ohio Voucher Program was facially neutral, it permits both sectarian and nonsectarian, public and private schools to participate, it is

neutral "only in the most formal sense" (id. at 16). The Ohio program, they argue, is very much swayed toward religion. This is "because it constrains the choices of voucher recipients to such a degree that government subsidization of religious indoctrination will inevitably result" (id at 16).

One of the reasons for this is because of the funding imbalance that exists. Ohio requires all school districts to rely on local tax contributions that are derived from local property and income taxes. These make up the bulk of their financing for the academic year. This results in wide disparities among districts. Therefore, the state of Ohio contributes to each district’s budget to assuage to varying budget levels. However, it is seldom enough and the brief goes on to state:

It is a foregone conclusion, therefore, that no Cleveland suburban public school – or any Ohio public school adjacent to the Cleveland district – will ever participate in the Ohio Vouchers Program, because the amount of funding provided by the Program on a per pupil basis will never equal the amount of funding, on a per pupil basis, generated for local students by local taxes (id. at 19).

Therefore, their argument holds that parochial schools are the only type of school that will be financially able to participate in the program.

Finally, the United States submitted an amicus curiae brief. In this instance, the basis of this application was that the court of appeals’ decision conflicted with a decision of the Ohio Supreme Court that upheld the same pilot program under the Establishment Clause, as well as with a decision of the Wisconsin Supreme Court that, again, upheld a similar program. The brief stated that it was in the United States’ best interest to grant a
Writ of Certiorari and resolve this conflict. Accordingly, policymakers would know, without delay, whether these types of programs were constitutionally permissible.

Oral Argument

The United States Supreme Court granted the Writ of Certiorari. The oral argument was heard on February 20, 2002. Original transcripts were recorded verbatim; however, the transcripts did not identify which justices posed which questions. This researcher was presented during the oral argument and in the following account of the oral argument the justices are associated with their questions when it could be established. Ms. Judith L. French, Assistant Attorney General for the State of Ohio, David J. Young, Esquire, and Theodore B. Olson, Solicitor General spoke on behalf of the petitioners. Robert H. Chanin, Esquire, and Marvin E. Frankel, Esquire, spoke on behalf of the respondents.

Judith French, on behalf of the petitioners, was the first to present the petitioners’ argument to the Court. Ms. French explained the background of the voucher program, as well as the fact that there was validation of such voucher programs to be found in the Court’s teachings. Specifically, she mentioned Mueller, Witters, Zobrest, Agostini, and Mitchell. Ms. French argued that the Ohio program was constitutional “because it offers a neutral program that offers true private choice to parents.” She stated that there were two criteria that determined where the benefits go in this program. First,

participants must live in a school district that is or has been taken over by the State.

Second, the participants must meet the income criteria.

She was asked by one of the justices if she believed these criteria guaranteed that the program to be constitutional. She stated that the criteria did not assure its constitutionality; however, they were necessary conditions in the constitutionality of the program. She also explained that the program offered neutrality and true private choice. Furthermore, the program required that each school not discriminate based on race, religion, or ethnic origin.

The concept of neutrality was divided into three categories. First, the schools must be nondiscriminatory in nature. Second, is the choice to participate in the program. There is a cap on the number of students who are in the program, as well as a limit on the number who can continue. The third category was the benefit itself – the money to attend school. One justice inquired as to the number of students actually participating in the program. The estimate was less than 10 percent.

The concept of choice was addressed by the justices and by Ms. French. One justice pointed out that there was a dramatic difference between a choice of university program in Witters and what a student in this program might choose. The suburban schools have opted not to participate in the program. Some private secular schools say the tuition vouchers are not enough; therefore, the students do not have the choice of attending those schools. The justice asked if it was true that the percentage of students selecting religious schools was around 99%. Ms. French stated that the number fluctuated during the course of the program; however, it was true at that time. The justice asked why the lower court did not take into account varying community schools. Ms.
French answered that she would have liked them to take those into account very much; however, the court below did not do that.

The community schools such as magnet schools or charter schools were all part of the program. The funding of these schools did not require a voucher because they were part of the public school system. Therefore, they received the usual per pupil funding. The justices inquired if any secular private schools were part of the program. Ms. French answered that, in fact, two schools had joined the program.

Ms. French was asked if the Court would have to overrule Nyquist to support her position. Ms. French explained that the New York program in Nyquist had a class of beneficiaries; those beneficiaries were the students already in private schools. The program offered them a benefit. Conversely, in Ohio the problem was very different. The Cleveland City School District was in disrepair; Nyquist reserved judgment (specifically in footnote 38) to develop programs such as scholarship programs — regardless whether the eventual recipient was sectarian or nonsectarian in nature (Record at 15).

The justices expressed concern at the amount of money that appeared to be going into the coffers of religious institution. One justice referred to it as a “sticking point” (Record at 16). Nonetheless, Ms. French pointed out that where the money went was a result of the choices the parents were making in these situations. Furthermore, Ms. French was asked to name the “closest of our cases … to the Ohio program?” (Record at 17). Her answer was Witters. She stated that in Witters the person making the choice regarding where the money went was a student; nonetheless, he was an adult. Moreover, in Ohio adults are also making the decision on where to send the money.
Moreover, Ms. French argued that the Court addressed the issue of limited choices in *Mueller*, in *Witters*, and in *Zobrest*. The lesson learned is that "percentages that change from year to year is simply not relevant" (Record at 18). Therefore, what is relevant is a solidly designed program. Furthermore, Ms. French clarified a difference between the Ohio program and *Nyquist*. She stated that *Nyquist* was specifically designed to aid private schools; also, there was not a non-discrimination clause present. In the Ohio program there is a non-discrimination clause present; and, the program is designed to provide aid to the children of Cleveland, Ohio.

Mr. Young also addressed the differences between *Nyquist* and the Ohio program. The difference Mr. Young noted was that in the *Nyquist* program the public assistance amounted to tuition grants for parents of children in non-public schools only. The Court questioned whether or not the same thing was happening in the Cleveland program. Mr. Young assured the Court that, in fact, there was a distinct difference. The Cleveland program allotted vouchers for tutorial assistance for people in public schools, magnet schools, and community schools.

The Court expressed fear that the Ohio program was placing exceedingly large amounts of money into the coffers of parochial schools. Therefore, the question was posed to counsel, "Wouldn’t you then say, in the United States of America, like France or like England, the Government of the United States endorses a religious education for young children by putting money up, massive amounts?" (Record at 22). Mr. Young responded by saying that there was no governmental endorsement of religion in this program. He stated that the actual per pupil finding cost for the State averaged
approximately $8,000; however, the vouchers for the private schools were restricted to $2,250.

Mr. Young stated that the examination of the funding aspect favored the public school rather than the private sector. Furthermore, he said, “this program was adopted because of one of the most serious educational, public school crises in the United States” (Record at 23). The government was not endorsing religion in this case; it was attempting to provide low-income families whose children were trapped in a failing system to exercise an alternate choice. Furthermore, he argued that not a dollar flowed into a religiously sponsored school without the independent private choice of the parent.

Following Mr. Young, Theodore B. Olson spoke on behalf of the petitioners. Mr. Olson stressed the importance of the history and context of the Cleveland program. He also stated that these things were essential, “as this Court has taught repeatedly, the background history and the context informs the decision which this Court has endorsed with respect to what the effects or endorsement test would be” (Record at 28). Therefore, he argued this brought back the original conundrum: is the government endorsing religion in the context of what is going on?

Mr. Olson stressed the neutrality and choice aspects of the program in his argument. He discussed the different types of schools the children could go to; moreover, he discussed the ability to choose that the vouchers provided for parents. Furthermore, he also emphasized that the concept of neutrality in that parents do not have to participate in the program. Justice O’Connor addressed the range of options available to parents. She asked, “I want to ask how the courts faced with this challenge have to view the case. Must they view it as having the whole range of options available, public school, magnet,
community, and religious schools?” (Record at 32). Mr. Olson answered in the affirmative. He stated that the lower court made a legal error in failing to acknowledge these aspects of the program.

Justice O’Connor questioned why “there was no attempt in the program to make sure that the money that ends up in the parochial schools is not used for religious training, or teaching. There have been other Federal programs, for example, where there have been such limitations on usage. There’s none of that here” (Record at 33). Mr. Olson acknowledged that she was correct in that point; however, there was a significant difference between direct aid programs and programs that involve, “private, genuinely independent, purely private choice programs where the choices are being made by individual parents, and being made by individual parents motivated by the best education for their children” (Record at 33).

The Court questioned the neutrality of the program in regards to the high number of students who were choosing religious schools. One Justice inquired, “why shouldn’t we stress as one of those facts the bottom line of 96 percent of the kids taking tuition aid, or taking it in parochial schools?” (Record at 36). Mr. Olson stated that the same issue had arisen in Mueller; in that case, the Court held that the percentage was not of constitutional significance.

Robert H. Chanin argued on behalf of the respondents. Mr. Chanin stated that in the Cleveland voucher program there were millions of dollars flowing in an unrestricted manner. These funds were flowing into the coffers of sectarian private schools. The money was used to “provide an educational program in which the sectarian and secular
are interwoven, it is a given that, if those funds are properly attributable to the State, the program violates the Establishment Clause” (Record at 37).

The Court inquired of Mr. Chanin whether it was necessary to look at all of the varying options the Cleveland program had as well as the context in which it operated. Mr. Chanin responded that it was only necessary to look “at the voucher program as a freestanding program” (Record at 37). The Court argued that if the program was not examined in its entirety it would be analogous to wearing blinders. Mr. Chanin’s argument was that examining the program as a freestanding entity would provide clarity rather than confusion.

Mr. Chanin stated that, “if you take a program which is designed to give parents the option to go out of public schools and educate their children in a private school, and then you say to 99 out of 100 of those parents, if you choose that option, you must send your child to get a religious education” (Record at 41). The Court responded that numerically this case mimicked Mueller; Mr. Chanin stated that he did not believe that this case was controlled by Mueller.

The major argument presented by Mr. Chanin was that if public money is reasonably attributed to the State and is used to pay for a religious education, it violates the Establishment Clause. Mr. Chanin stated, "the only way in which it’s not attributable to the State is if it doesn’t go there by virtue of a State action or a State decision, but the circuit is broken, and the circuit is broken because in between … is an independent party with decision making to divert it away" (Record at 45). Nonetheless, Mr. Chanin’s contention was that the parents’ choice where to send the money was only ritualistic in
nature. Furthermore, he stated that the Court had established the required criteria in *Witters*.

The Court had previously examined the constitutionality of programs in *Witters*; furthermore, it stated why the programs were constitutional. According to Mr. Chanin, a program established its constitutionality "because the aid recipients have generally independent and private choice" (Record at 47). Furthermore, in *Witters*, there was a plethora of program opportunities from which to choose. Only a small fraction of that program money went to sectarian schools. The Court held issue with Mr. Chanin's argument regarding the number of schools or programs involved. Furthermore, the Court had already established in *Mueller* that in terms of numbers or percentages, these issues held no constitutional value.

The next person arguing on behalf of the respondents was Judge Marvin E. Frankel. Judge Frankel pointed out that the public school financing in Ohio was held to be unconstitutional by the Ohio Supreme Court. In 1997, the Ohio system of financing its public schools had been determined to be unconstitutional and under ongoing repair. One means of repair was the voucher program. Judge Frankel stated that he agreed with Mr. Chanin and found the voucher program to be unconstitutional.

Moreover, he contended that financing needed to be restructured and increased. Justice Scalia argued that studies reflected that money was not the needed commodity for school improvement. Furthermore, Justice Scalia argued that other studies found that parochial schools spent less per child and did a much better job. Nonetheless, Judge Frankel argued this point with Justice Scalia and maintained that the voucher program was unconstitutional; it violated the Establishment Clause. Judge Frankel cited the
DeRolph case\textsuperscript{42}, however, he stated that Mr. Chanin had covered all other constitutional issues sufficiently in his argument.

In conclusion, Ms. French made four final points. First, that the Ohio Supreme Court upheld the constitutionality of the voucher program. Furthermore, they approved of it as a measure for solving the educational crisis in Cleveland. Second, she stated that the respondents had either ignored or chosen not to accept the last 20 years of the Court’s jurisprudence. “Each of the legal principles they have raised here today and in their briefs have been expressly rejected by the Court” (Record at 69). Third, the State of Ohio has attempted to create opportunities for students and schools. Fourth, the program attempted to target the most needy population “who would not otherwise have choice. It is for this reason that we ask the Court to overturn the decision of the Sixth Circuit and uphold this program” (Record at 71).

Summary

In this chapter, significant court decisions associated with Establishment Clause jurisprudence were reviewed and analyzed. The courts have been dealing with Establishment Clause issues in schools since 1947. Both the body of jurisprudence and the public school system has evolved greatly during this course of time. The current lexicon in this arena has two tremendously important terms: choice and neutrality. There are a number of cases that deal with these issues in particular. These include Agostini, Mitchell, Mueller, Witters, and Zobrest.

The U.S. Supreme Court granted certiorari to the Zelman case. The issue in this case was the constitutionality of the Cleveland Scholarship and Tutoring Program. This

\textsuperscript{42} DeRolph et al. v. State of Ohio et al., 78 Ohio St.3d 193 (1997)
program was a voucher program that provided educational vouchers to the most needy students. It provided parents with the ability to choose which schools they wanted their children to attend. The advocates for the program stated that the program provided a neutral selection of educational programs and that parents were provided the opportunity for true private choice. The opponents of the program stated that the argument about neutrality and choice was merely a type of smoke-and-mirrors argument. They argued that the program violated the Establishment Clause of the First Amendment.
CHAPTER III

METHODOLOGY

A Qualitative Legal Research Design

The purpose of this study was to analyze and assess the impact of the U.S. Supreme Court's decision in Zelman, Superintendent of Public Instruction of Ohio, et al. v. Simmons-Harris et al., 122 S. Ct. 2460 (2002); this is a case surrounding the voucher program in Cleveland, Ohio. The intention of this study is to provide educators, legislators, and policy makers with accurate legal information surrounding voucher programs and the implications involved with the implementation of such programs. Furthermore, the success of specific existing voucher programs will be examined following the Zelman decision.

A qualitative research design obliges the researcher to work inductively and generate theories that assist in the understanding of their data. In qualitative research, the researcher frequently collects data from different sources within a setting for the specific purpose of triangulating information. In other words, the data streams together to produce a confluence of information that will require interpretation (Locke et al., 2000). In this case, the data will be derived from sources such as decided legal cases, journals, law reviews, and books. Furthermore, specific legal issues and court cases will be examined for patterns and relevance.
Legal research is designed to “ascertain the legal consequences of a specific set of actual or potential facts” (Wren & Wren, pg. 29, 1986). The facts of a specific situation control the issues of law that need to be researched. There are critical steps that must precede research in law books. The steps include gathering facts, analyzing facts, identifying the legal issues raised by those facts; and, arranging the legal issues in a logical order for research (Wren & Wren, 1986).

Gathering facts in legal research involves uncovering facts that may not present themselves in an obvious manner. This can be derived through discussion with witnesses, participants, or any people that are involved in a particular case. There may be physical evidence that is significant in a particular case. Frequently, crucial information may found in books, periodicals, and reports. There are infinite opportunities to use facts drawn from written sources. As facts are gathered in legal research, the researcher must continually assess the facts and ask questions about each fact that was unearthed. A standard approach involves asking who, what, when, why, and how (Wren & Wren, 1986).

Once the facts are assembled, they must be analyzed to determine the legal issues to be researched. This analysis involves several steps. Legal researcher will examine the parties involved in the case. They will also examine and assess places where the facts evolved and effects involved in the case. The basis of the case or the primary issue of the case must be analyzed. A defense to the action or issue at hand must be developed. Finally, the relief sought in the action must be established (Wren & Wren, 1986).

Analyzing the facts of a given research problem by using varying descriptors will suggest the legal issues requiring research. The descriptors involved are used to identify
parties or persons involved in the case, as well as objects and things involved. The descriptors used will allow the legal researcher to categorize essential information and develop a research agenda. A preliminary fact analysis and issue identification will provide needed direction for the study. The more carefully thought out a problem is before commencing research, the more prolific the research is likely to be (Wren & Wren, 1986).

Once the preliminary evaluation of the facts and issues is established, the legal researcher needs determine if the facts can be arranged in a logical order. This “will increase the efficiency and effectiveness of [the] research” (Wren & Wren, pg. 37, 1986). Moreover, the issues need to be analyzed to see how they relate to one another. In performing this type of analysis, the legal researcher needs to pay particular attention to “whether any of the issues could dispose of the problem fairly mechanically, at a threshold level” (Wren & Wren, pg. 37, 1986). When the researcher finds a dispositive threshold issue it should top the issues list.

Once these preliminary steps have been undertaken the researcher is ready to proceed to legal research. The researcher must initially distinguish between primary sources and secondary sources. Primary sources consist of the law itself, which is found in constitutions, statutes, court decisions, and administrative regulations and decisions. Secondary sources are essentially everything else. These include “writings or commentaries about the law found in primary sources. Secondary authorities include such publications as legal treatises and law review articles” (Wren & Wren, pg. 41, 1986).
Primary sources need to be distinguished between mandatory authorities and persuasive authorities. Mandatory authorities are statutes or decisions of the highest court of a given jurisdiction that must be followed by all courts within that jurisdiction. Persuasive authorities offer guidance; these decisions or mandates are not mandatory. The Wisconsin Supreme Court may be regarded as persuasive by the Ohio Supreme Court when considering issues relating to school voucher programs. A legal research's primary goal is to locate mandatory primary authorities that bear on their specific legal problem (Wren & Wren, 1986).

Once the legal researcher locates a case, statute, administrative regulation, or constitutional provision, the researcher must evaluate its usefulness. This analysis involves two steps, which are an internal evaluation and an external evaluation. An internal evaluation involves reading the particular legal authorities necessary and determining whether the issues apply to the "fact situation in your research problem" (Wren & Wren, pg. 79, 1986). This process involves two elements. The first is an analysis of the facts of the authority to determine how they relate to the facts of the research problem. The second element is to determine if the authority's intended legal significance and impact is relative to the research problem.

"The need for an internal evaluation of judicial decisions is tied to the doctrine of stare decisis. This court-created doctrine says, essentially, that when a court has applied a rule of law to a set of facts, that legal rule will apply whenever the same set of facts is again presented to the court" (Wren & Wren, pg. 80, 1986). Therefore, the more similarities a researcher finds between their legal problem and those of an established case, the more likely the established case' outcome will be reflected in the present one.
being researched. A researcher should look for as many analogies between cases as possible (Wren & Wren, 1986).

If the internal evaluation finds that a legal authority applies to the research problem an external evaluation will need to be conducted. “The external evaluation focuses on how subsequent court decisions have interpreted and applied to [the researcher's] principal cases” (Wren & Wren, pg. 89, 1986). The external evaluation will provide the researcher with the opportunity to discover if the decided case has been overruled or limited by subsequent court decisions.

The legal research will involved in this study will be analyses of the Zelman briefs, petitions, amicus curiae briefs, oral arguments, and all relevant court cases that are deemed to be relative to this research. Relevant jurisprudence was arranged in the brief format to assist in making the case analysis more efficient and orderly. Briefing a case involves placing relevant case information in a general order (Wren & Wren, 1986).

Additionally, this researcher attended the oral arguments of the Zelman case before the United States Supreme Court; this provided an invaluable perspective to the case. This researcher had the opportunity to observe an extensive legal debate in the highest Court in the land; more importantly, the spirit of each argument was noted. The arguments were vivid; the questioning from the justices was intense and demanding. Additionally, attending the proceeding allowed this researcher to observe attorneys who argued well and those who did not.

The experience of attending the oral argument allowed this researcher to understand the priorities certain justices placed on established case history. Moreover, the oral arguments placed light on whether the justices’ points of view were siding with
liberal or conservative agendas. After all, voucher programs are associated with political entities; that discernment was corroborated by attending the oral arguments. Therefore, the researcher will utilize the transcripts of the oral argument before the United States Supreme Court to derive the significance of the argument and the argument's impact on the Court.

It was the intent of this researcher to communicate with the attorneys who were involved in the Cleveland Scholarship and Tutoring Program. Solicitor General Theodore Olson refused to discuss the case; Judith French declined because she is now the chief legal counsel for the Governor of Ohio. Marvin Frankel passed away two weeks after the oral argument; and Robert Chanin graciously consented to phone contact. He was very deliberate in his denunciation of the final Zelman holding. He articulated his view of the majority’s rational; and stated his support of Justice Souter’s dissenting opinion. He also stated that he supported Justices Breyer and Stevens opinions.

The voucher program in Cleveland was assessed. The assessment of the voucher program included the number of participants from year to year; the overall academic success of the participants; parental satisfaction, and any changes implemented in the program because of the Zelman case. The significance of this information is that voucher programs may be an impetus of education reform through political activism. At the time of this study, the republicans control the U.S. House of Representatives, the U.S. Senate, and the Executive Branch of the U.S. Government. Therefore, an evaluation of the success or failure of voucher programs may prove noteworthy and timely.
CHAPTER IV

FINDINGS OF THE STUDY

This chapter answers the research questions posed in Chapter I. Moreover, this chapter presents the United States Supreme Court’s decision in Zelman, Superintendent of Public Instruction of Ohio, et al. v. Simmons-Harris et al., No. 00-1751 (2002) and discusses the relevant issues that developed resultant of Zelman. Additionally, this chapter analyzes the impact of the Zelman decision on public education.

The Zelman Decision

Chief Justice Rehnqust and the Majority

In a deeply divided vote of five-to-four, the Court upheld the Cleveland program. Chief Justice Rehnquist delivered the opinion of the Court. He gave a detailed background of the pilot program created in Ohio. 75,000 schoolchildren were in the Cleveland City School district. The majority of those children were from low-income and minority families. “For more than a generation, however, Cleveland’s public schools have been among the worst performing schools in the Nation” (Zelman, 2002).

The school district had failed to meet any of the 18 state standards for minimal acceptable performance. Only one out of ten ninth graders could pass a proficiency examination. More than two-thirds of the high school students either dropped out or failed before graduation. Of the remaining number who actually reached high school,
one of every four of those students failed to graduate. In 1995, a Federal District Court placed the school district under state control.

The State of Ohio enacted several initiatives, one was its Pilot Project Scholarship Program. The program provided financial assistance to families in any Ohio school district that is or was under a federal court order that required supervision and operational management. The Cleveland City School District was the only Ohio school district that fell into this category.

The program provided two kinds of assistance to parents of children in the Cleveland City School District. "First, the program provides tuition aid for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parents choosing. Second, the program provides tutorial aid for students who choose to remain enrolled in public school" (Zelman, at 4, 2002). Any private school could participate in the program and accept program students as long as the school was located in the district and met statewide educational standards. The private schools could be secular or sectarian in nature. However, "participating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion" (Ohio Rev. Code Ann. §3313.976).

Any public school located in the school district adjacent to the Cleveland City School District could participate in the program. They were eligible to receive a $2,250 tuition grant for each program student they accepted in addition to the full amount of per-

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1 See Reed v. Rhodes, No. 1:73 CV 1300 (ND Ohio, Mar. 3, 1995)
pupil state funding attributable to each student. (Ohio Rev. Code Ann. §3313.977, 3317.03).

The tuition aid was distributed to parents according to their financial need. Families with incomes below 200% of the poverty line were given priority and were eligible to receive 90% of private school tuition up to $2,250. (§3313.978). For the parents whose income was 200% below the poverty line, the participating private schools could not charge a co-payment of more than $250. All other families would receive 75% of the tuition costs up to $1,875, with no co-payment ceiling (§3313.976, 3313.978). However, these families could only participate if the number of scholarships exceeded the number of low-income children who chose to participate. The number of available scholarships were determined annually by the Ohio Superintendent for Public Instruction (§3313.978 (A)-(B), 3313.979). The parents who received the tuition aid had complete control as to where the money was spent. If the parents selected a private, secular or sectarian, the checks were made payable to the parents who then endorsed the checks to the selected school (§3313.979).

The tutorial aid section of the program allowed parents to arrange for registered tutors to provide assistance to their children and then submit the bills for those services to the state for payment (§3313.976 (D), 3313.979 (C)). Students from low-income families receive 90% of the amount charged for this tutorial assistance up to $360. All other students receive 75% of that amount. The number of tutorial assistant grants offered to students in the district must equal the number of tuition aid scholarship provided to students enrolled at participating private or public schools (§3313.975 (A)).
Students in the Cleveland City School District also had the option of attending community schools or magnet schools. Community schools are funded under state law but are run by their own school boards, not by local school districts. They hire their own teachers and determine their own curriculum. These schools can have no religious affiliation; and they are required to accept students by lottery. For each student enrolled in a community school, the school receives $4,518 (§3314.01 (B), 3314.04).

Magnet schools are public schools operated by a local school board that emphasize a particular subject area, teaching methodology, or service to students.

As of 1999, parents in Cleveland were able to choose from among 23 magnet schools, which together enrolled more than 13,000 students in kindergarten through eighth grade. These schools provide specialized teaching methods, such as Montessori, or a particularized curriculum focus, such as foreign language, computers, or the arts (Zelman, 2002).

In 1996, a group of Ohio taxpayers challenged the Ohio program in state court on state and federal grounds. The Ohio Supreme Court rejected the respondents’ federal challenge, but held that the program violated certain procedural requirements of the Ohio Constitution. The state legislature resolved those issues. Thus, the Ohio program continued as described.

In July of 1999, the respondents sought to enjoin the Ohio program on the ground that it violated the Establishment Clause of the United States Constitution. In August 1999, the District Court issued a preliminary injunction barring further implementation of the program. The U.S. Supreme Court stayed that injunction pending a review by the Court of Appeals. In December 1999, the District Court granted summary judgment for Simmons-Harris v. Goff, 86 Ohio St. 3d1, 8-9, 711 N.E. 2d 203, 211 (1999).
the respondents. In December 2000, a Court of Appeals affirmed the judgment of the District Court. The Court of Appeals held that the Ohio program had the *primary effect* of advancing religion and was therefore in violation of the Establishment Clause. The Court of Appeals stayed its mandate pending disposition in the U.S. Supreme Court. The U.S. Supreme Court granted certiorari and reversed the Court of Appeals.


Rehnquist stated that the Court’s jurisprudence with regard to the issue of direct aid programs may have changed over the last twenty years; however, he went on to state, the Court’s jurisprudence in regard to true private choice had remained “consistent and unbroken” (Zelman, 2002). “Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges” (Zelman, 2002). The three cases cited were *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dept. of*
In Mueller, the Court rejected an Establishment Clause challenge to a Minnesota program that authorized tax deductions for certain education expenses; specifically, tuition, textbooks, and transportation. This included private school tuition costs; in this program over 95% of the beneficiaries were parents of children in religious schools.\(^3\) The tax deductions were available to all parents. Thus, the Court concluded, was not subject to a challenge under the Establishment Clause. The Court emphasized that “the principle of private choice, noting that public funds were made available to religious schools ‘only as a result of numerous, private choices of individual parents of school-age children’” (Zelman, 2002).

Moreover, the Court held the percentage of beneficiaries that utilized religious schools was essentially irrelevant. “We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law” (Mueller at 401). The program was found to be one of true private choice. The Court concluded that there was “no imprimatur of state approval” of a particular religion, or of religion at all.

The Court used identical reasoning in Witters. In this case the Court rejected an Establishment Clause challenge to a scholarship program that provided tuition to a student studying to become a pastor at a religious institution. Rehnquist stated that the Court held the aid was directed to a religious institution only as a result of “genuinely independent and private choices of aid recipients” (Witters at 487). The holding rested on the fact that the aid recipients were able to make their own private choices about

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\(^3\) See Mueller at 406
where the aid would be directed. The program aid was made available to recipients “without regard to sectarian-nonsectarian, or public-nonpublic nature of the institution benefited” (Witters at 487).

Lastly, Rehnquist stated the Court applied the holdings of Mueller and Witters to Zobrest. In this case, an Establishment Clause challenge was raised against a federal program that permitted sign-language interpreters to assist deaf children enrolled in parochial schools. Rehnquist wrote that the Court examined the program and found that it distributed benefits “neutrally to any child qualifying as ‘disabled.’ Its ‘primary beneficiaries,’ we said, were ‘disabled children, not sectarian schools’” (Zobrest at 12). The primary focus of the Court in this case, according to Rehnquist, was on neutrality and the principle of private choice. It did not consider the number of beneficiaries attending religious schools.

Rehnquist wrote that Mueller, Witters, and Zobrest made clear that when a government program is “neutral with respect to religion, 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 own genuine and independent private choice, the program is not readily subject to a challenge under the Establishment Clause” (Zelman, 2002). Furthermore, Rehnquist held that any perceived advancement of a religious message, or perceived endorsement of religion was attributable to the recipient of the aid – the individual. The government’s role concluded with the disbursement of the benefits.

Rehnquist stated that the Ohio program was a program of true private choice. The program was consistent with the programs in Mueller, Witters, and Zobrest; therefore, the Ohio program was constitutional. He held that the Ohio program was “part of a general
and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district" (Zelman, 2002). It provided educational assistance directly to a broad class of individuals without reference to religion. The program was available to any parent of a school-age child who resided in the Cleveland City School District.

Furthermore, the program allowed the participation of all schools within the district. Adjacent public schools also could participate; moreover, they had a financial incentive to participate. According to Rehnquist, the program benefits were available to participating families on neutral terms, without reference to religion. The only preference in the program was a preference for low-income families; these families received greater assistance and were given priority in admission at participating schools. Thus, the majority held that the Ohio program was a neutral program that was one of true private choice; moreover, it was consistent with Mueller, Witters, and Zobrest.

The respondents in this case argued that the program created a perception that "the State is endorsing religious practices and beliefs" (Brief for Respondents Simmons-Harris et al. 37-38). Rehnquist countered that the Court had previously established that when state aid reached religious schools exclusively as a result of private individual choices that "no reasonable observer would think a neutral program of private choice ... carries with it the imprimatur of government endorsement" (Zelman, 2002). Furthermore, he stated that anyone reasonably familiar with the history of the implementation of the Ohio program would understand that the program was one part of a broader undertaking to help poor children in a failing school district rather than view it as a state endorsement of religion.
The Court held that the Establishment Clause question in the Ohio program was "whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating all options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school" (Zelman, 2002). Therefore, the answer that Rehnquist offered to this question was an unequivocal no, the state of Ohio is not coercing parents into sending their children to religious schools.

Rehnquist wrote that Justice Souter argued that because of the high numbers of religious private schools participating in the program, the program must be discouraging the participation of nonreligious private schools. Rehnquist addressed this issue by stating that the "preponderance of religiously affiliated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities" (Zelman, 2002). Rehnquist stated that the Ohio program had actually done a very good job of capturing a cross-section of private schools, both religious and nonreligious.

According to the Court, Justice Souter also asserted that the Court should attach constitutional significance to the high number of scholarship recipients who attend religious schools. However, this argument was negated in Mueller; the Court held that the fact that 96% of parents taking deductions for tuition expenses paid tuition to religious schools was irrelevant.

Another argument of the respondents stated that the Court should examine the Committee for Public Ed. & Religious Liberty v. Nyquist 413 U.S. 756 (1973) decision to decide the Zelman case. Rehnquist disagreed with this comparison for two reasons. First, the Nyquist case involved a New York program that gave tax benefits "exclusively

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4 According to Zelman, 96% of aid recipients enrolled in religious schools.
to private schools and the parents of private school enrollees” (Nyquist at 783). In that case, the Court held that the program provided distinctive financial support for private sectarian schools. Moreover, it provided a financial incentive for parents to send their children to private sectarian schools. The program also prohibited the participation of public schools or parents of public school children. Rehnquist asserted that the Ohio program did not share any of these features.

The second reason that Rehnquist disagreed with the Nyquist comparison was that in Nyquist the Court specifically reserved judgment regarding “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 benefited” (Nyquist at 783, n. 38). That, according to Rehnquist, was the case before the Court in the Zelman case. He held that it had been answered by the holdings in Mueller, Witters, and Zobrest. These decisions addressed neutral educational assistance programs that offered aid directly to a broad class of individual recipients defined without regard to religion (Zelman, 2002). Rehnquist contended that the Nyquist decision did not govern these types of programs.

In summation, the Court held that the Ohio program was completely neutral with respect to religion. It provided benefits directly to a broad class of citizens. The program permitted individuals to make a true private choice between various options that included public or private schools, sectarian and nonsectarian schools. “In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause” (Zelman, 2002).
O’Connor’s Concurrence

Justice O’Connor joined in the majority opinion; however, she wrote separately for two reasons. She asserted that she did not believe the Court’s decision in this case marked any kind of departure from their previous holdings. Moreover, she believed that given the emphasis the Court placed on true private choice, an inquiry must include all the reasonable educational alternatives to religious schools that were available to parents in the Ohio program. “To do otherwise is to ignore how the educational system in Cleveland actually functions” (Zelman, 2002).

O’Connor wrote that this case differs from past indirect aid cases because a significant portion of the funds reached religious schools. Furthermore, there were no restrictions on these funds and the way in which they were spent at those religious schools. The respondents argued that a constitutional violation occurs because 96% of the money from the voucher program was directed toward religious schools. Concurring with Rehnquist, she stated that this is essentially irrelevant. The rationale behind this, O’Connor contended, was that when additional and relevant factors were taken into consideration the percentage of 96% becomes reduced significantly (Zelman, 2002).

O’Connor noted that when the students’ option of attending community schools is taken into consideration, the percentage of students enrolled in religious schools is 62.1%. Moreover, the inclusion of students attending magnet schools into this mélange decreases the number to 16.5 percent. Nevertheless, O’Connor wrote, these numbers still present an incomplete picture of the Cleveland program. This program provides “voucher applicants from low-income families with up to $2,250 in tuition assistance and

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5 See The Racial, Economic, and Religious Context of Parental Choice in Cleveland, by J. Greene. This reports that 2,087 students were enrolled in community schools and 16,184 students were enrolled in magnet schools in 1999.

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provides the remaining applicants with up to $1,875 in tuition assistance. In contrast, the State provides community schools $4,518 per pupil and magnet schools, on average, $7,097 per pupil" (Zelman, 2002).

O'Connor asserted that the state spent roughly 8.2 million dollars of public funds on vouchers for religious schools; nonetheless, it spent over one million more dollars on students in community schools than it did on students in religious schools. She contended that “although $8.2 million is no small sum, it pales in comparison to the amount of funds that federal and local governments already provide religious institutions. Religious organizations may qualify for exemptions from the federal corporate income tax” (Zelman, 2002). According to O'Connor, these tax policies were validated and upheld by Mueller v. Allen 463 U.S. 388 (1983) and Walz v. Tax Commission of City of New York 397 U.S. 664 (1970). She detailed state tax benefits provided to religious organizations in Colorado, Maryland, Minnesota, Wisconsin, and Louisiana.

Furthermore, O'Connor stated that federally, “it is reported that over 60 percent of household charitable contributions go to religious charities. Even the relatively minor exemptions lower federal tax receipts by substantial amounts. The parsonage exemption, for example, lowers revenues by around $500 million” (Zelman, 2002).

It is O’Connor’s line of reasoning that these tax exemptions have the similar effect as cash grants. Moreover, she wrote that the federal government allows federal dollars to flow into the coffers of religious institutions in variety of ways. Federal dollars reach religious organizations through programs such as the Pell Grant program, and the G.I. Bill of Rights; they also reach religious organizations through public health programs

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6 Mueller upheld a Minnesota tax deduction for educational expenses; and Walz upheld an exemption for religious organizations from New York property tax.
such as Medicare and Medicaid. There are also child care programs such as the Child Care and Development Block Grant Program which finances child care for low-income parents. These programs contribute vast amounts of federal money to religious based institutions. “Against this background, the support that the Cleveland voucher program provides religious institutions is neither substantial nor atypical of existing government programs” (Zelman, 2002).

According to O'Connor, the decision in this case does not signal a major departure from the Court’s prior Establishment Clause jurisprudence. She wrote that a central tenant in the Court’s analysis of Establishment Clause cases has been the Lemon test. In Agostini v. Felton 521 U.S. 203 (1997), the Court “folded the entanglement inquiry into the primary effect inquiry. This made sense because both inquiries rely on the same evidence...and the degree of entanglement has implications for whether a statute advances or inhibits religion” (Zelman, 2002).

O’Connor reasoned that the Zelman case presented essentially the same test that was set forth in School District of Abington Township v. Schempp 374 U.S. 203 (1963) and McGowan v. Maryland 366 U.S. 420 (1961). The test focused on how to apply the primary effects prong in indirect aid cases. More specifically, “it clarifies the basic inquiry when trying to determine whether a program that distributes aid to beneficiaries, rather than directly to service providers, has the primary effect of advancing or inhibiting religion” (Zelman, 2002).

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7 Lemon v. Kurtzman 403 U.S. 602 (1971) established a three-pronged test in order for a statute to pass constitutional muster: 1) It must have a secular legislative purpose; 2) The principal or primary effect was one that neither advanced nor inhibited religion; and 3) it must not foster an excessive government entanglement with religion.

8 School District of Abington Township v. Schempp 374 U.S. 203 (1963) held that the reading of bible verses over the Pennsylvania’s school’s broadcast system violated the Establishment Clause. McGowan v. Maryland 366 U.S. 420 (1961) held that a Maryland statute that prohibited the selling of goods on Sunday in Anne Arundel County did not violate the Establishment Clause.
In these cases, the courts are instructed to consider two factors. The first factor is whether the program administers aid neutrally; the administration must be “without differentiation based on the religious status of the beneficiaries or providers of the services” (Zelman, 2002). The second factor, the more important factor according to O’Connor, is “whether the beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid” (Zelman, 2002). If the answer to either inquiry is no, then O’Connor asserts, it should be struck down under the Establishment Clause.

Justice O’Connor asserted that Justice Souter stated this line of inquiry was a departure from the Court’s holding in Everson. She argued that the opposite was true. “Justice Black’s opinion for the Court held that the ‘First Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary’” (Everson quoted in Zelman, 2002). The Establishment Clause requires that state aid going into religious coffers do so only through the direction of the beneficiaries of that aid. Therefore, according to O’Connor, “such a refinement of the Lemon test surely does not betray Everson” (Zelman, 2002).

Justice O’Connor wrote that in her opinion the Cleveland voucher program is neutral between religious schools and nonreligious schools. However, O’Connor stated that Justice Souter disagrees with the majority’s view of neutrality. “But Justice Souter’s notion of neutrality is inconsistent with that in our case law. As we put it in Agostini, government aid must be ‘made available to both religious and secular beneficiaries on a nondiscriminatory basis’” (Zelman, 2002). Furthermore, O’Connor contends that

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9 Everson v. Board of Education of Township of Ewing 303 U.S. 1 (1947) held that reimbursing parents for the costs of public transportation to religious school did not violate the Establishment Clause; in fact, all parents received the reimbursement regardless of school destination – religious or nonreligious.
nonreligious schools have provided Cleveland parents with a reasonable alternative to religious schools in the voucher program.

Secular schools in this program are not required to be superior to religious schools; conversely, they need to be adequate substitutes for religious schools in the eyes of the consumer – the parents. O’Connor stressed that the program records indicate that secular schools were able to compete effectively with religious schools. “The best evidence of this is that many parents with vouchers selected nonreligious private schools over religious alternatives and an even larger number of parents send their children to community schools rather than seeking vouchers at all” (Zelman, 2002).

Again referring to Justice Souter, O’Connor stated that his theory that the tuition cap involved in the Cleveland program encouraged low-income students to attend religious schools is mistaken. More significantly for O’Connor are the findings that:

Cleveland parents who use vouchers to send their children to religious private schools do so as a result of true private choice. The Court rejects, correctly, the notion that the high percentage of voucher recipients who enroll in religious private schools necessarily demonstrates that parents do not actually have the option to send their children to nonreligious schools (Zelman, 2002).

Moreover, O’Connor avowed that these facts bear out that the Cleveland program does not provide financial incentives to obtain a sectarian education. She further stated that the Cleveland program provides a legitimate choice between religious and nonreligious schools.

Additionally, O’Connor faulted the Court of Appeals for their decision. Her assertion is that the Court of Appeals did not examine all of the aspects of the program:
The Court of Appeals chose not to look at community schools, let alone magnet schools, when evaluating the Cleveland voucher program. That decision was incorrect. Focusing in these cases only on the program challenged by respondents ignores how the educational system in Cleveland actually functions (Zelman, 2002).

O'Connor contended that all of the educational options available to parents whose children were eligible for educational vouchers needed to be examined in order to effectively evaluate the program.

Finally, Justice O'Connor addressed Justice Souter’s argument directly. According to O'Connor, Souter found fault with the Cleveland program because, according to Souter, “of the 10 community schools operating in Cleveland during the 1999-2000 school year, 4 were unavailable to students with vouchers and 4 others reported poor test scores” (Zelman, 2002). Nonetheless, O'Connor argued that this analysis unreasonably limits the choices available to Cleveland parents. The reasons these schools were unavailable to certain voucher students were that the school did not offer primary school classes; or they were targeted toward students with disciplinary or academic problems; therefore, it was a matter of not having the necessary programs rather than not permitting the students to attend.

Souter, according to O'Connor, also noted that several of the community schools reported lower test scores than public schools during the year after the District Court’s grant of summary judgment to the respondents. O’Connor’s contention was that this evaluation underestimated the value of the schools. These particular community schools
accepted the poorest and most educationally disadvantaged children. Moreover, the schools had among the highest rate of parental satisfaction of all voucher schools. These schools also provided a safe and disciplined environment; therefore, O’Connor wrote that to merely consider academic performance as a singular indicator of success negates the importance of other measures that parents may view as essential to an effective educational environment.

O’Connor maintained that Justice Souter relied on restricted data to draw expansive conclusions. Moreover, according to O’Connor:

One year of poor test scores at four community schools targeted at the most challenged students from the inner city says little about the value of those schools…Justice Souter’s use of statistics confirms the Court’s wisdom in refusing to consider them when assessing the Cleveland program’s constitutionality. (Zelman, 2002).

The objective of the Court’s Establishment Clause jurisprudence, asserted O’Connor, is the determination of whether or not parents of voucher school children were freely able to direct the state educational aid to either religious or nonreligious schools. In order to achieve that objective, the Court must evaluate all reasonable educational options that the Ohio program provides for the Cleveland school system. O’Connor contended that “the Cleveland voucher program affords parents of eligible children genuine nonreligious options and is consistent with the Establishment Clause” (Zelman, 2002).

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Thomas’ Concurrence

Justice Thomas wrote that many urban public schools deny a quality education to minority youths. Furthermore, he asserted that a quality education has the potential to make people free – to uplift them. Therefore, if that education is not available to a certain group of people they become oppressed; moreover, they are “forced into a system that continually fails them. These cases present an example of such failures” (Zelman, 2002). The Cleveland City School District was experiencing a severe educational crisis when the Ohio program was enacted. According to Thomas:

The dissents and respondents wish to invoke the Establishment Clause of the First Amendment, as incorporated through the Fourteenth, to constrain a State’s neutral efforts to provide greater educational opportunity for underprivileged minority students. Today’s decision properly upholds the program as constitutional, and I join it in full (Zelman, 2002).

Thomas argued that the Court has often considered varying educational efforts and whether they conflict with constitutional limitations or not. The Cleveland Scholarship and Tutoring Program does not conflict with those constitutional limitations.

Thomas asserted that the Court has recently decided several federal aid programs that include religious schools. He cited Mitchell v. Helms 530 U.S. 793 (2000) and Agostini v. Felton 521 U.S. 203 (1997) as examples. The determination of the constitutionality of these programs was based on whether the program had a secular purpose and whether it had the primary effect of advancing or inhibiting religion.

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12 Mitchell held that a federal program that loaned computers, software, and library books to religious schools was constitutional. Agostini held that using federal education funds under Chapter I to pay public school teachers who taught programs aimed at helping low-income and educationally deprived students in religious schools was also constitutional.
Thomas stated that the Ohio program “easily passes muster under our stringent test” (Zelman, 2002). Nonetheless, Thomas questioned whether this test should be applied to the States.

Thomas’ contention was that the Establishment Clause places no limit on the states with regard to religion. Moreover, “[t]he Establishment Clause originally protected States, and by extension their citizens, from the imposition of an established religion by the Federal Government” (Zelman, 2002). Thomas questioned whether the states should be constrained under the Fourteenth Amendment.

In Thomas’ argument he stated that the Fourteenth Amendment “restructured the relationship between individuals and the States and ensured that States would not deprive citizens of liberty without due process of law” (Zelman, 2002). Therefore, when rights are incorporated against the States through the Fourteenth Amendment they should enhance individual liberty. They should not hinder individual liberty. Thomas asserted that the States should have greater latitude in matters of religion than the Federal Government.

He stated, “The wisdom of allowing States greater latitude in dealing with matters of religion and education can be easily appreciated in this context.” (Zelman, 2002). The respondents, in Thomas’ opinion, advocate using the Fourteenth Amendment to restrict a state’s ability to develop new and innovative methods of education. Thomas argued that without education individuals can not exercise their civic, political, and personal freedoms that are conferred on them by the Fourteenth Amendment. Therefore, the state of Ohio attempted to develop an educational reform that could address the crisis at hand. Their program allows the voluntary participation of religious and non religious private
schools. Thereby, offering parents whose children were trapped in a failing system a choice of venues where their children could receive an appropriate educated.

The Ohio program, according to Thomas, does not force an individual to submit to any religious indoctrination. It gives parents a choice: private religious schools, private nonreligious schools, public schools, tutoring programs, community schools, and magnet schools. Thomas also contends that if the Court disallowed the inclusion of religious schools it would significantly decrease the parents' selection of educational venues. Moreover, Thomas stated, “Religious schools, like other private schools, achieve far better educational results than their public counterparts” (Zelman, 2002). Thus, the inclusion of religious schools in the Ohio program provides evidence that the program is attempting to improve the education provided for Cleveland's children. Thomas also wrote that the state of Ohio has the constitutional right to experiment with programs to promote educational opportunity.

Thomas asserted that one of the purposes of public education was to “promote democracy and a more egalitarian culture, failing urban public schools disproportionately affect minority children most in need of educational opportunity” (Zelman, 2002). Therefore, the promise of public education has failed poor inner-city minority students according to Thomas. As such, minority and low-income parents have become staunch advocates of choice programs.¹³

Thomas argued that the opponents of the program “raise formalistic concerns about the Establishment Clause but ignore the core purposes of the Fourteenth Amendment” (Zelman, 2002). He stated that there is a romanticized view of public education that comes from voucher opponents and the like. However, urban families

simply desire the best possible education for their children – an education that will be necessary for them if they are to succeed. “The failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives” (Zelman, 2002).

Thomas further stated that ten states have enacted forms of publicly funded private choice programs as a means of addressing the education provided to underprivileged children. He argued that “society’s other solution to these educational failures is often to provide racial preferences in higher education. Such preferences, however, run afoul of the Fourteenth Amendment’s prohibition against distinctions based on race” (Zelman, 2002). According to Thomas, school choice programs that involve religious schools are constitutional. They only become viewed as unconstitutional when opponents of school choice “twist the Fourteenth Amendment against itself by expansively incorporating the Establishment Clause” (Zelman, 2002). Opponents of school choice, Thomas stated, convert the Fourteenth Amendment from a guarantee of opportunity to an obstacle that “distorts our constitutional values and diserves those in the greatest need” (Zelman, 2002). It is Thomas’ contention that the Fourteenth Amendment should advance individual liberty; any suppression of those liberties goes against the very temperament of the Fourteenth Amendment.

Justice Souter and the Dissent

Justice Souter wrote the dissenting opinion for the minority in which Justices Ginsburg, Breyer, and Stevens joined. Justice Breyer and Justice Stevens wrote additional dissenting opinions to emphasize particular issues. According to Souter, the
Court's majority held that the Ohio program did not violate the Establishment Clause of
the United States constitution; the Court reached this decision by taking into
consideration the condition of the Cleveland City School district in its holding. The
vouchers created in this state of educational crisis were intended to provide needed relief
to a faltering school district. However, according to Souter:

Constitutional limitations are placed on government to preserve constitutional
values in hard cases, like these. ‘Constitutional lines have to be drawn, and on
one side of every one of them is an otherwise sympathetic case that provokes
impatience with the Constitution and with the line. But constitutional lines are the
price of constitutional government’ (Zelman, 2002).14

Souter contended that the applicability of the Establishment Clause to public
funding of aid to religious schools was an issue that was settled in Everson v. Board of
Education of Ewing, 330 U.S. 1 (1947). In Everson the Court stated that, "No tax in any
amount, large or small, can be levied to support any religious activities or institutions,
whatever they may be called, or whatever form they may adopt to teach or practice
religion" (Everson at 16). Souter stated that the Court has never “repudiated this
statement, let alone, in so many words, overruled Everson” (Zelman, 2002).

Nonetheless, according to Souter, the majority created a paradox by leaving
Everson on the books while simultaneously approving the Ohio Pilot Project Scholarship
Program. Souter wrote that the only way the Court could arrive at this conclusions was
to ignore the precedent established in Everson in an effort to base their findings in
traditional law. Furthermore, Souter argued, the Court also ignored the “meaning of
neutrality and private choice" in an effort to arrive at their decision (Zelman, 2002). In

an effort to validate these assertions, Souter lays out a historical perspective of Establishment Clause jurisprudence.

He categorized this history initially into three groups. The first group is from 1947 to 1968; the second group consists of the 15 years following 1968; finally, the third group was from 1983 until the present time. However, the Zelman holding, according to Souter, introduced a fourth group.

In the time period of 1947 to 1968 the Court’s basic principle was that aid to religious schools was not tolerated. Following 1968, for the next 15 years the Court “termed its efforts as attempts to draw a line against aid that would be divertible to support the religious, as distinct from the secular, activity of an institutional beneficiary” (Zelman, 2002). In 1983, according to Souter, the Court began to lessen its concern with aid being diverted and focused its attention on aid that would be unlikely to provide substantial benefits to religious schools. The aid was offered “evenhandedly without regard to a recipient’s religious character, and when channeled to a religious institution only by the genuinely free choice of some private individual” (Zelman, 2002).

Souter wrote that these three stages have now been succeeded by a fourth stage. In this fourth stage, “the substantial character of government aid is held to have no constitutional significance, and the espoused criteria of neutrality in offering aid, and private choice in directing it, are shown to be nothing but examples of verbal formalism” (Zelman, 2002).

In 1947, Everson v. Board of Ed. of Ewing provided the Court with an opportunity to develop a modern Establishment Clause doctrine. In this case, a taxpayer challenged a state provision of funds raised by taxes to pay for the public bus fares of
religious school children. The program was designed to provide reimbursement to parents of children attending both public and private nonprofit schools. According to Souter, although the Court was split in its decision, it agreed on the basic doctrinal principal established in this case. Furthermore, Souter pointed out, that no member of the Court denied the tension between the New Jersey program and the aims of the Establishment Clause. However, the majority upheld the program under the auspices of the Free Exercise Clause.

It also contended that any benefit the program bestowed on religious education was an indirect means and not as significant as the benefits the program provided to children (e.g. traffic safety). Moreover, the principal the Court applied in this case was that the program was essentially providing a general governmental service. The dissenting opinion found “the benefit to religion too pronounced to survive the general principle of no establishment, no aid, and they described it as running counter to every objective served by the establishment ban...it exposed religious liberty to the threat of dependence on state money” (Everson at 54 n. 47 quoted in Zelman, 2002).

In Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236 (1968), the Court upheld a New York law that authorized local school boards to lend textbooks in secular subjects to children attending religious schools. The Court held that the benefit was actually going to the parents and children attending the schools and not the schools themselves. Justice Black led the dissent and stated that “Textbooks, even

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15 "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion" Everson v. Board of Education of Ewing, 330 U.S. 1 (1947).
16 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." United States Constitution, Article I
17 Similar programs had been struck down in six states and upheld in eight states.
when ‘secular’ realistically will in some way inevitably tend to propagate the religious views of the favored sect” (Allen at 252).

Justice Douglas, who joined in the Allen dissent, raised other objections. He wrote that religious schools would request textbooks that aligned themselves with the religious dictates of that particular religion. Public boards of education would have the final approval of the lending of those texts. However, Justice Douglas noted, “If the board of education supinely submits by approving and supplying the sectarian or sectarian-oriented textbooks, the struggle to keep church and state separate has been lost. If the board resists, then the battle line between church and state will be drawn’ (Allen at 256, Douglas, J. dissenting quoted in Zelman, 2002).

Souter argued that in Allen the Court recognized that religious schools pursue two goals: religious instruction and secular education. If aid from public coffers could be restricted to secular education, accordingly, the aid may be permissible under the Establishment Clause. However, in the events that followed this decision there were educational functions that became severely entwined. The specific elements of the programs that the aid benefited became more difficult to distinguish. Therefore, in Lemon v. Kurtzman, 403 U.S. 602 (1971) the Court developed a three-pronged test that would determine the entanglement between church and state.\footnote{The Lemon Test: 1) It must have a secular legislative purpose; 2) The principal or primary effect was one that neither advanced nor inhibited religion; and 3) it must not foster an excessive government entanglement with religion.}

Souter stated was that the Court’s post Allen decisions focused on whether the aid was being diverted for religious purposes and if substantial monitoring was required to prevent any diversion to religious purposes. The Court also attempted to be practical; if
the aid recipients were “not so ‘pervasively sectarian’ that their secular and religious functions were inextricable intertwined, the Court generally upheld aid earmarked for secular use” (Zelman, 2002). Souter cited the following cases as evidence of this jurisprudence: Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

Nonetheless, as a rule, the nondivertibility issue was strictly enforced; this was evidenced in a comparison of Levitt v. Committee for Public Education & Religious Liberty, 413 U.S. 472 (1973) with Wolman v. Walter, 433 U.S. 229 (1977). In Levitt the Court struck down a state program that reimbursed private schools’ administrative costs for teacher-prepared tests in required secular subjects. However, in Wolman, the Court upheld a similar program that used standardized tests.

Souter stated that Court also rejected “stratagems invented to dodge [the Establishment Clause]” (Zelman, 2002). In Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), the Court struck down a New York program of tuition grants for poor parents and tax deductions for more affluent parents whose children attended private school. In Nyquist, the aid was distributed to the parents; however, the Court held that this was only one factor that they considered in their decision. Furthermore, the Nyquist Court held that “aid to parents through tax deductions was no different from forbidden direct aid to religious schools for religious uses” (Zelman, 2002).

Souter asserted that all criteria requiring judicial assessment of risks of divertibility portends an invitation for argument. However, according to Souter, the past objects of the judicial arguments have “always been a realistic assessment of facts aimed
at respecting the principle of no aid" (Zelman, 2002). It was Souter's contention that the
Court began to drift away from this reality based argument in Mueller v. Allen, 463 U.S.
388 (1983). Souter referred to this as an era when the Court "started down the road from
realism to formalism" (Zelman, 2002).

Souter argued that the aid in Mueller was essentially the same aid that was present
in Nyquist. The aid in both cases was "substantively difficult to distinguish from aid
directly to religious schools" (Zelman, 2002). However, the Court held that the
Minnesota tax deductions in Mueller were neutral in availability for sectarian and secular
educational expenses; furthermore, citizens had a private choice to take them or not.
Souter stated that the Court relied on the same two principles in Witters v. Washington
Department of Services for Blind, 474 U.S. 481 (1986). The Witters decision allowed a
student to study at a religious college. The aid involved in this case was viewed as aid
that would provide no large benefit to a religious institution.

Souter faulted the majority for veering away from what he views as the
established criteria for judging the concept of divertibility of direct aid. He stated that in:
which was overruled in part by Agostini v. Felton, 521 U.S. 203 (1997), [the
Court] clarified that the notions of evenhandedness neutrality and private choice
in Mueller did not apply to cases involving direct aid to religious schools, which
were still subject to the divertibility test" (Zelman, 2002).

However, according to Souter, the aid in Ball was identical to the aid in Agostini. In this
case public employees taught remedial secular classes in sectarian schools. Nevertheless,
in Agostini the Court rejected its precedence of thirty years past in regard to the concept
of divertibility and found that the aid supplemented existing educational services. The aid did not supplant the existing services; therefore unlike Ball, the Court viewed the aid as something that went directly to the student regardless of where they chose to attend school.

Souter reported that in the 12 years between Ball and Agostini, the Court decided three cases that emphasized the concepts of neutrality and private choice over the “substance of aid to religious uses” (Zelman, 2002). However, Souter pointed out, that the aid was always isolated and insubstantial. The cases in point were Witters, which has already been discussed, Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993), and Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995).

In Zobrest, the case involved one student’s choice to use funds from a general public program at a secular school. The funds were used to pay for a sign-language interpreter. Reminiscent of Witters, the Court held that it was the child who was the beneficiary, not the religious school. The Court found that if the religious school benefited at all, it was incidental at best. In Rosenberger, wrote Souter, “like Zobrest and Witters, involved an individual and an insubstantial use of neutrally available public funds for a religious purpose (to print an evangelical magazine)” (Zelman, 2002).

Souter argued that the Court held that the aid in Agostini was substantial; however, the majority chose to view it as aid that was a “bare ‘supplement’” (Zelman, 2002). Accordingly, taking these cases into consideration, the Court held in Mitchell v.
Helms, 530 U.S. 793 (2000) that the systemic aid\(^\text{19}\) involved in this case was aid that totaled a mere portion of the secular schools' budgets. Souter passionately stated:

> The plurality in that case did not feel so uncomfortable about jettisoning substance entirely in favor of form, finding it sufficient that the aid was neutral and that there was virtual private choice, since any aid 'first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere' \(\text{Id.}\), at 816. But that was only the plurality view (Zelman, 2002).

Souter argued that the substantiality of aid was rejected by the Court as irrelevant in light of the past decisions and especially because of the Zelman decision. He further stated that "Today's cases are notable for their stark illustration of the inadequacy of the majority's chosen form analysis" (Zelman, 2002).

Souter followed this part of his dissent with an analysis of the concepts of neutrality and private choice. He led into this discussion by stating that it had taken fifty years since Everson to reach the present Court's standards of neutrality and private choice; nonetheless, "the facts show that, in the majority's hands, even these criteria cannot convincingly legitimize the Ohio scheme" (Zelman, 2002).

Souter stated that as recently as two terms ago, the majority of the Court viewed the concept of neutrality and "that neutrality conceived of as evenhandedness toward aid recipients had never been treated as alone sufficient to satisfy the Establishment Clause" (Mitchell, 530 U.S. at 838-839, O'Connor, J., concurring in judgment).\(^\text{20}\) Nonetheless, according to Souter, the concept of neutrality had some formal limited purpose. He

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\(^{19}\) Systemic aid is Souter's term.

\(^{20}\) Souter, J., dissenting
stated that the Court in this case has rendered that conceptualization of neutrality as something that is impossible to understand.

Souter asserted that the current Court defines the neutrality concept as an evenhandedness in setting eligibility between potential sectarian and secular recipients of money. He argued that in order to apply the neutrality test, "it makes sense to focus on a category of aid that may be directed to religious as well as secular schools, and ask whether the scheme favors a religious direction" (Zelman, 2002). In the Cleveland program, according to Souter, the question must be asked about whether the voucher provisions were written in a way that benefits religious schools. Souter contended that the Court did not do this; rather they looked at every available educational opportunity involved in the Cleveland program. Souter stated that the Court found solace in the fact that all schools in the area and surrounding areas were allowed to participate in the program. Moreover, the Court noted that the better part of the state's educational expenditure was spent on public schools.

Souter wrote, "The illogic is patent" (Zelman, 2002). He questioned how public schools could participate in the program, and not receive voucher payments, with schools that can receive the voucher payments. Moreover, how could the public expenditure still be spent predominantly on public schools? He questioned the Court's reasoning and stated that they would find neutrality in a voucher program available for private tuition in districts with no secular private schools at all. Thus, neutrality, as the majority used it, is, according to Souter, "literally, verbal and nothing more" (Zelman, 2002). He contends that the Court should judge the voucher program's neutrality in relation to religious use of voucher money.
Souter stated that the Court addressed the issue of choice in much the same manner that they address neutrality. He stated that the majority applied the choice criteria to whether the recipients had a choice of “public schools among secular alternatives to religious schools” (Zelman, 2002). Souter contended the majority misplaced the application of the choice criteria. He believes that the Court needed to ensure that the aid was not systemic or predetermined for religious purposes. Nonetheless, he conceded that recent decisions by the Court “have stripped away any substantive bite, as ‘private choice’” (Zelman, 2002). Presently, the concept of private choice means, according to Souter, that the government delivers the aid to private individuals who deliver the aid to religious schools.

Souter argued that to define the concept of choice as a choice in how or where the recipient spends the money or channels the aid is essentially useless. If the concept choice is available whenever there is an alternative to the religious school, then vouchers will always be constitutional – even in a system in which there are only private schools from which to choose. He further stated that is unlikely that a private religious school will ever draw large enough numbers of students from the public school setting to drain substantial funds; therefore, there may be an inference that the benefit to religious institutions is not a significant intent or an effect of the voucher program (Zelman, 2002).

Souter’s contention is that the genuine choice criteria, if reasonably analyzed, would not stand up to an Establishment Clause challenge. He severely objects to the majority’s argument that simply having several educational choices to choose from makes the concept of private choice constitutional. Moreover, he stated that if the majority wanted the concept of choice to function as an actual criterion – there must be
“a practical capacity to screen something out” (Zelman, 2002).

Souter stated that if the majority did ask the correct question about the vouchers’ direction, they would find that the answer illustrated the vouchers were being directed into the coffers of religious institutions. Souter’s statistical breakdown of the program disclosed that:

[0]f 56 private schools in the district participating in the voucher program (only 53 of which accepted voucher students in 1999-2000), 46 of them are religious; 96.6% of all voucher recipients go to religious schools, only 3.4% to nonreligious ones. Unfortunately for the majority position, there is no explanation for this that suggests the religious direction results simply from free choices by parents (Zelman, 2002).

He further argued that the 96.6% figure would have more merit if all of those were families that chose to educate their children in schools of their own religion. He did not feel that aspect of the program would render the voucher program constitutional. However, it would address the majority’s case for choice. Nevertheless, according to Souter, the families participating in the voucher program, “made it clear they had not chosen the schools because they wished their children to be proselytized in a religion not their own, or in any religion, but because of educational opportunity” (Zelman, 2002).

Furthermore, according to Souter, the Cleveland program only provided a limited choice of educational options; it did not provide the conceptual openness of true private choice the majority tendered. For the reason that students who participated in the voucher program had limited numbers of nonreligious private school seats from which to choose. The cost of tuition at nonreligious private schools was higher than their religious
counterparts. The average tuition in the nonreligious private schools participating was $3,773. Conversely, the average tuition in Catholic schools participating in the program was $1,572.\textsuperscript{21} Therefore, the $2,500 cap on the program’s vouchers made it less attractive for the nonreligious private schools to participate in the program. Accordingly, the nonreligious private schools asserted that they could only accommodate small numbers of voucher students. Souter stated that parents of the voucher students were less likely to be able to satisfy the co-payment for those schools. Therefore, their choice is limited in scope. The voucher amount is too low to create real private choice; and according to Souter, spending additional money on the program would be “even more egregiously unconstitutional” (Zelman, 2002).

Again referencing the figure of 96.6% of voucher money going into the coffers of religious schools, Souter argued this figure denoted the fact that there was not true private choice present in the program. Rather, parents were sending their children to religious schools because that was the only viable option left to them by the Cleveland program. He stated that the children had the option to go to schools in adjacent school districts; however, one of the adjacent districts was also in an academic emergency. Souter called the choice concept allotted to these parents a Hobson’s choice, “and a Hobson’s choice is not a choice, whatever the reason for being Hobsonian” (Zelman, 2002).

Souter ardently stated that the majority misapplied its own law because their reasoning in this case was “profoundly at odds with the Constitution” (Zelman, 2002). He based his contention on two levels. The first level he listed as circumstantial; this was in reference to the substantiality of the aid. The second level was “direct, in the defiance

of every objective supposed to be served by the bar against establishment” (Zelman, 2002).

Souter referred to the scale of aid in this case as unprecedented both in actual numbers and in scope. Moreover, he asserted that the Court addressed each of these concepts in previous cases. The vast quantity of the aid that was delivered to the religious schools was “suspect,” according to Souter, because, “the greater its proportion to a religious school’s existing expenditures...the greater the likelihood that public money was supporting religious as well as secular instruction” (Zelman, 2002). He referred to Meek v. Pittenger, 421 U.S. at 365 (1975) in which the Court held the it was not realistic to believe that when a substantial amount of aid was flowing into a religious school it benefited only the secular purpose. Moreover, he argued that if the aid was minimal in scope the Court had been willing to find the more attenuated aid acceptable (Mueller, 463 U.S. at 400).

Souter objected to the majority’s reliance on Mueller, Agostini, and Mitchell to impugn the relevance of the substantiality of aid flowing into religious school coffers. He stated that in each of those cases involved very insubstantial benefits for sectarian schools. Therefore, he concluded that the logic of using these cases as relevant jurisprudence in this matter is flawed. Furthermore, he argued that the Court previously approved substantial aid when it was directed toward one individual and therefore the benefit to the religious school was deemed incidental.22

Souter argued that, “When neither the design nor the implementation of an aid scheme channels a series of individual students’ subsidies toward religious recipients, the relevant beneficiaries for establishment purposes, the Establishment Clause is unlikely to

22 References to Witters, 474 U.S., at 488; cf. Zobrest, 509 U.S., at 12
be implicated" (Zelman, 2002). However, the Ohio program directed significant amounts of aid toward a sizeable population who, in turn, directed the funds to religious schools. Historically, the program would fail the Establishment Clause analysis, until the present decision.

He declared that, "It is virtually superfluous to point out that every objective underlying the prohibition of religious establishment is betrayed by this scheme, but something has to be said about the enormity of the violation" (Zelman, 2002). Souter addressed two specific objectives: first, respect for freedom of conscience; and second, saving religion from its own corruption.

He stated that Thomas Jefferson described the first objective being evidenced in the concept that no person should “be compelled to ... support any religious worship, place, or ministry whatsoever.” Moreover, he stated that James Madison asserted that any “authority which can force a citizen to contribute three pence ... of his own property for the support of any establishment” violated this objective. According to Souter, the majority’s formalism in the Zelman decision veered far away from the spirit and the meaning of Madison’s and Jefferson’s intent as well as the precedent established in Everson.

With regard to the second objective, Souter again referred to James Madison, who discussed the risk of the corruption of religion in Memorial and Remonstrance. Madison wrote that when religion and government were entwined too closely, “ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a

contrary operation." In the Founding Fathers’ time frame the corruption of religion was evidence by clergy who were arrogant rather than humble; and a laity that appeared to be ignorant and abjectly submissive. In both clergy and laity, additional manifestations of religious corruption were evidenced by “superstition, bigotry, and persecution.” In the 21st century, citing Ball, 473 U.S. at 385 and Lee v. Weisman, 505 U.S. 577, 608 (1992), Souter wrote that religion risks its own corruption by inviting corrosive secularism into religious schools. Religion would be compromised by politics as politicians attempted to remake religion into a shape that met their constituency’s wants and desires at that particular time; rather than remaining true to the established dogma.

According to Souter, the Ohio program realized that risk of religious corruption. Government intruded upon the religious schools by mandating certain requirements in that, “a condition of receiving government money under the program is that participating religious schools may not ‘discriminate on the basis of ... religion’ [Ohio Rev. Code Ann. §3313.976(A)(4) [West Supp. 2002] (Zelman, 2002). Therefore, the religious schools could not provide admission preferences to children who were members of the school’s particular faith.

Furthermore, the hiring practices of participating religious schools were guided by the state’s antidiscrimination restriction. “[B]y its terms, a participating religious school may well be forbidden to choose a member of its own clergy to serve as teacher or principal over a layperson of a different religion claiming equal qualification for the job” (Zelman, 2002). An additional requirement imposed on participating religious schools was that the school “not ... teach hatred of any person or group on the basis of ...”

25 Id. reprinted in Everson, 330 U.S. at 67.
26 Id.
religion" (§3313.976(A)(6) (West Supp. 2002). Thus, the state compels participating religious schools not to teach what may be their own legitimate articles of faith in relation to the sinfulness of ignorance of people outside their faith.

The examples that Souter included were religious treatises from Christianity, Mormonism, Judaism, and Islam. For Christianity, Souter quoted the King James Version of the Bible, “Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness?” (2 Corinthians 6:14). From the Book of Mormon, “And if they will not repent and believe in his name, and be baptized in his name, and endure to the end, they must be damned; for the Lord God, the Holy One of Israel, has spoken it” (2 Nephi 9:24). From Pentateuch (The New Jewish Publication Society Translation) “For one who converts to another faith, [t]he Lord will never forgive him; rather the Lord’s anger and passion rage against that man, till every sanction recorded in this book comes down upon him, and the Lord blots out his name from under heaven” (Deut. 29:18). And finally, from the Koran 334 (N. Dawood translation 4th Rev. Ed. 1974) “As for the unbelievers, whether you forewarn them or not, they will not have faith. Allah has set a seal upon their hearts and ears; their sight is dimmed and a grievous punishment awaits them” (The Cow Ch. 2:1).27

Therefore, if participating schools desire government money, they may be required to suppress their own beliefs. The government intrusion and distortion of religious practices in religious schools may be the impetus of their own religious corruption. Souter warned that “[f]or perspective on this foot-in-the-door of religious regulation, it is well to remember that the money has barely begun to flow” (Zelman,

27 All citations may be found in Footnote 24 of Justice Souter’s dissent.
2002). Moreover, Souter asserted that when government aid increases, reliance on that aid increases as well and the receiving entity begins to lose their independence.

Additionally, Souter wrote that the Establishment Clause and the Free Exercise Clause were designed to prevent the very conflicts that may be inevitable in the Ohio voucher scheme and any like it. He stated that:

Not all taxpaying Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death penalty. Nor will all of America’s Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools, which combines ‘a nationalistic sentiment’ in support of Israel with a ‘deeply religious’ element. Nor will every secular taxpayer be content to support Muslim views on differential treatment of the sexes, or, for that matter, to fund the espousal of a wife’s obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention (Zelman, 2002).

Souter contended that The Free Exercise Clause protected specific religious practices; and the Establishment Clause kept the practices out of government thereby keeping the practices a private matter. However, the voucher scheme will force these issues out in to a public sphere and acceptable moderate religious disagreement may take on a new light.

In summation, Souter reflected that Everson’s original statement remains “the touchstone of sound law, even though the reality is that in the matter of educational aid the Establishment Clause has largely been read away” (Zelman, 2002).²⁸ His hope as he

²⁸ "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion" Everson, 330 U.S. at 16 (1947).
concluded his dissent was that another future Court would reconsider what this Court had done in the *Zelman* decision.

**Stevens’ Dissent**

Stevens initiated his dissent by posing a question, “Is a law that authorizes the use of public funds to pay for the indoctrination of thousands of grammar school children in particular faiths a ‘law respecting an establishment of religion’ within the meaning of the First Amendment?” (*Zelman*, 2002). He asserted that in answering that question, the majority ignored three significant factors.

The first factor was that the educational crisis that was present in the Cleveland City School District when the voucher program was enacted should not be taken into consideration when deciding the issue of constitutionality. Moreover, he contended that the voucher program only provided relief to less than five percent of the students in the Cleveland City School District. According to Stevens, pursuant to an order of the Ohio Supreme Court, the state of Ohio is undergoing major revisions to its public school financing system. The Court should have allowed those reform efforts to take effect “before relying on Cleveland’s educational crisis as a reason for state financed religious education” (*Zelman*, 2002).

The second factor ignored by the majority was that the wide range of choices made available to the students “has no bearing on the question whether the State may pay the tuition for students who wish to reject public education entirely and attend private schools that will provide them with a sectarian education” (*Zelman*, 2002). Stevens asserted that the fact that the majority of voucher recipients chose to attend private religious schools at state expense does support the claim that the Ohio voucher program

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29 *DeRolph v. State*, 93 Ohio St. 3d 309, 754 N.E. 2d 1184 (2001)
is “respecting an establishment of religion.” Moreover, the state of Ohio is required to provide its children with a public education; and yet, the state chose to relegate its duty to private religious schools.

The third factor in this case, according to Stevens, was that the issue of private choice in relation to the issue of constitutionality is essentially irrelevant. The mere availability of private choice does not affect the constitutionality of an issue. The state should not pay for religious education. “Today, however, the Court seems to have decided that the mere fact that a family that cannot afford a private education wants its children educated in a parochial school is a sufficient justification for this use of public funds” (Zelman, 2002).

Stevens stated that the Court’s decision in this case was “profoundly misguided” (Zelman, 2002). He stated that his conclusion was influenced by his understanding of the impact of religious strife on our own ancestors, as well as on the religious strife apparent in the Balkans, Northern Ireland, and the Middle East. Stevens concluded with “Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy” (Zelman, 2002).

Breyer’s Dissent

Breyer stated that he wrote separately to emphasize the risk that voucher programs pose regarding the issue of “religiously based social conflict” (Zelman, 2002). He argued that the Establishment Clause protects the Nation’s social fabric from any type of religious conflict. Nevertheless, Ohio’s voucher program, however well intentioned,
tears at the social fabric of the nation and increases the risk of religious conflict — a conflict that the Framers attempted to prevent.

The Establishment Clause and the Free Exercise Clause of the First Amendment reflect the Framers ideal that America would not have to experience the religious strife that beleaguered Europe for so long. Accordingly, Breyer wrote, the Court's 20th Establishment Clause cases focused on social conflict that was potentially created when the government became involved with religious education. In Engle v. Vitale, 370 U.S. 421 (1962), the Court held that prayer in public school is unconstitutional. The Court recognized that when a government endorses one religion "the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs" (Engle 370 U.S. at 431).

In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Court held that the Establishment Clause forbids state funding of religious schoolteachers. Again, the Court addressed the potential for religious divisiveness that the excessive entanglement of religion and government involved in the program in Lemon could produce. Also, in Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973) the Court struck down a state statute that provided aid for parents whose children attended sectarian schools. The Court stated that the, "assistance of the sort here involved carries grave potential for ... continuing political strife over aid to religion" (quoted in Zelman, 2002).

Breyer argued that though the Court’s 20th century Establishment Clause cases advocated a strong separation of Church and State, it understood that historically an earlier American society had a less obvious separation of Church and State. In fact, many religious practices were permitted in public settings that wrongly discriminated against members of minority religious groups. Nonetheless, they were accepted practices. Breyer wrote that acceptable practices included reading from the King James version of the Bible in public schools during the initialization of the first public school settings. These public schools were Protestant in nature. At that particular time “Catholics constituted less than 2% of American church-affiliated population” (Zelman, 2002).

However, “[b]y 1850, 1.6 million Catholics lived in America, and by 1900 that number rose to 12 million … There were similar percentage increases in the Jewish population” (Zelman, 2002). The schools maintained their practice of having children read from the King James version of the Bible. However, eventually Catholic children began to refuse to read this version of the Bible. Catholic children began to suffer physical abuse or were expelled from school for refusing to read from this version of the Bible. Catholic parents retaliated and demanded that the schools excuse their children from reading the Protestant Bible. Catholics sought relief for their children by asking the government to support private Catholic schools. However, the result was a backlash against Catholicism. There was an attempt to amend the United States Constitution; this failed. However, many state constitutions did amend their constitutions to reflect this anti-Catholic sentiment (Hamburger, P., 2002, quoted in Zelman, 2002).
Against this backdrop, in an effort to suppress religious strife, the 20th century Court concluded that the Establishment Clause required separation; this included separation of religious activities in public schools, as well as government aid to private education. Breyer argued that “With respect to government aid to private education, did not history show that efforts to obtain equivalent funding for the private education of children whose parents did not hold popular religious beliefs only exacerbated religious strife?” (Zelman, 2002). Breyer’s contention was that voucher programs that aid religious schools will act as the accelerant for religious strife in contemporary society.

For example, the Ohio program mandates that no participating school will “advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion” (Ohio Rev. Code Ann §3313.976 (A)(6) [West Supp. 2002]). Moreover, the law requires the state to “revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation” (§3313.976[B]). Breyer questioned how state officials could make that type of assessment without raising the public’s ire. Moreover, this mandate assures that certain religious members of one group will be called in to judge members of another groups’ practices.

Breyer predicted that, “any major funding program for primary religious education will require criteria. And the selection of those criteria, as well as their application, inevitably pose problems that are divisive” (Zelman, 2002). The efforts that it takes to resolve these problematic issues will cause a serious entanglement between church and state. Additionally, deep religious chasms will develop among varying groups as fears of governmental mistreatment evolve.
Breyer admitted that the Establishment Clause permits states to provide various forms of assistance to religious schools. However, school voucher programs, he contended, differ from other types of governmental aid. In school voucher programs, "they direct financing to a core function of the church: teaching of religious truths to young children. For that reason the constitutional demand for ‘separation’ is of particular concern" (Zelman, 2002). Furthermore, the aid programs previously upheld by the Court were quite limited in scope. This voucher program contributed substantial financial aid to religious institutions. "That fact, combined with the use to which these dollars will be put, exacerbates the conflict problem" (Zelman, 2002).

Breyer stated that the parental choice aspect of the program does not resolve the problematic nature therein. Moreover, parental choice does not address the problem of the taxpayer who does not wish to finance religious education. It does not help minority religious members that have too few members to start their own school. It does not satisfy the problems with religious groups whose beliefs prevent them from participating in governmental programs. It does not address the challenging entanglement concept of the program. In conclusion, Breyer accused the majority of turning back the clock and adapting an interpretation of the Establishment Clause that the Court had rejected over fifty years ago in Everson.

What were the Major Arguments that Influenced the United States Supreme Court’s Decision in the Zelman Case?

On June 27, 2002, the Supreme Court of the United Stated rendered its decision in the case of Zelman v. Simmons-Harris (2002). In a five-to-four decision, the Court held
that the Cleveland Tutoring and Scholarship Program did not violate the Establishment
Clause. Chief Justice Rehnquist wrote the opinion for the majority in which Justices
Scalia, O'Connor, Thomas, and Kennedy joined; Justice O'Connor and Justice Thomas
wrote concurring opinions. Justice Souter wrote the dissenting opinion in which Justices
Ginsburg, Breyer, and Stevens joined. Justice Breyer and Justice Stevens wrote
additional dissenting opinions.

The major arguments in the judicial process that influenced the Court's decision
in this case were the concepts of neutrality and private choice. The Court relied on
precedent established in past cases to validate their holding. Furthermore, the Court took
into consideration the state of the Cleveland City School district in reaching their
decision. They held that the state of Ohio enacted the Cleveland program for a valid
secular purpose.

The Court held in the majority opinion written by Chief Justice Rehnquist that the
Cleveland program did not violate the Establishment Clause "[b]ecause the program was
enacted for the valid secular purpose of providing educational assistance to poor children
in a demonstrably failing public school system" (Zelman , 2002). Rehnquist stated that
the Court's previous jurisprudence made clear that a government aid program was not
subject to challenge under the Establishment Clause if the program was neutral with
reference to religion and provides assistance to a "broad class of citizens" who control the
direction of the government aid through their own private choice. In Mueller v. Allen,
463 U.S. 388 (1983) the Court held that as long as private individuals directed funds to
institutions with religious purposes "wholly as a result of their own genuine and
independent, private choice" it did not violate the Establishment Clause.
Because, according to Rehnquist, the “incidental advancement of a religious mission, or perceived endorsement of a religious message, is reasonably attributable to the individual aid recipient not the government” (Zelman, 2002). The government’s role comes to fruition with the disbursement of benefits. Once the benefits have been delivered, the government has completed its job. Therefore, the advancement or endorsement of a particular group or belief falls primary unto the recipient of the funds.

Consistent with the Mueller holding is the concept of neutrality. The Ohio program, Rehnquist holds, is one that consists of a multifaceted approach to providing amelioration for an abysmal public education crisis in the Cleveland City School District. The children of Cleveland were offered varying educational opportunities without reference to religion. The program permitted participation of all the surrounding district schools – whether religious in nature or not; public or private. The only preference in the Ohio program was for low-income families. These families received greater assistance and had a priority status for admission to schools.

Furthermore, in its attempt to provide the children of Cleveland with every possible avenue for a quality education, the Ohio program provided more financial incentive to go to public schools rather than private schools. Families in the Ohio program were required to pay a co-payment if they selected a private school for their children. However, they paid nothing to attend a community, magnet, or traditional public school. Also, the private schools in the program received half of the government assistance that was given to community schools and one-third of the assistance given to magnet schools; adjacent public schools received nearly double the amount of assistance.

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31 Community schools are also known as charter schools. Under the Ohio program a series of charter schools opened to primarily accept the voucher students.
that was given to private schools. According to Rehnquist, “no reasonable observer
would think that such a neutral private choice program carries with it the imprimatur of
government endorsement” (Zelman, 2002).

Rehnquist stated that the Establishment Clause question must be answered by
examining all the options the Ohio program provided the Cleveland schoolchildren. The
program allowed children to remain in public school and receive funded tutorial
assistance. They could obtain a scholarship and choose to attend a private school; they
could obtain a scholarship and attend a religious school. They could enroll in a magnet
program; or they could enroll in a community school. The respondents’ argument that
there was constitutional significance in the percentage of scholarship recipients who were
enrolled in religious schools was “flatly rejected in Mueller” (Zelman, 2002).32
Moreover, according to Rehnquist, “the constitutionality of a neutral educational aid
program simply does not turn on whether and why, in a particular area, at a particular
time, most private schools are religious, or most recipients choose to use aid at a religious
school” (Zelman, 2002).

Therefore, the major arguments that influenced the United States Supreme
Court’s decision in Zelman were neutrality and private choice. Taking these concepts
into consideration, the Court was able to cite relevant jurisprudence that substantiated
their opinion that the Cleveland program did not violate the federal Establishment Clause.
Moreover, in direct opposition to the Sixth Circuit decision, this Court did examine all of
the aspects surrounding the program and its development.

32 96% of the CSTP voucher recipients enrolled in private religious schools.
What Areas of This Decision Remain Unclear?

In his dissent in the Zelman case, Justice Souter argued that the Court’s decision in Zelman had essentially invalidated precedent established in the Everson holding of 1947. Justice O’Connor argued against that idea. Nonetheless, the precedent established in Everson is questionable in the Zelman decision. The concept of choice is questioned by the dissenting opinion. Justice Stevens argued that the choice of attending a sectarian school should not be an option. The majority opinion and the dissenting opinion both note that Establishment Clause jurisprudence has changed over the last twenty years. Nevertheless, the Zelman holding obscures Everson’s role in contemporary Establishment Clause jurisprudence.

In Everson v. Board of Education of Ewing TP, 330 U.S. 1 (1947), a local New Jersey school board authorized reimbursement to parents of school age children for bus transportation on public buses to and from parochial school. The Court found that the public purpose involved was intended to facilitate the opportunity of children to get a secular education free from risks of traffic and other hazards. The Court stated that “subsidies and loans to individuals such as farmers and homeowners and to privately owned transportation systems and other businesses had been ‘commonplace practices’ in United States history” (Reutter, 1982, p. 20). The opinion concluded with, “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here” (Everson Reutter, 1982, p. 21).

In the Zelman decision, Justice Souter stated that Everson had “inaugurated the modern era of establishment doctrine;” it established an Eversonian (italics mine) line
that preserved the basic principle of no aid for religion, yet, allowed for the provision of
general government services (Zelman, 2002). He wrote that no previous Court had ever
overruled Everson; yet he questioned how the Court could “consistently leave Everson on
the books and approve the Ohio vouchers?” (Zelman, 2002). Souter’s contention was
that the majority ignored the Everson tenets in an effort to maintain the argument that it
was relying on established case history to reach the Zelman decision. Souter argued that
while the Court was split in the Everson decision, all the justices concurred with the
statement that, “no tax in any amount … can be levied to support any religious activities
or institutions … whatever form they may adopt to teach … religion” (Everson at 16).

Souter explained that 20 years later in Board of Ed. Central School Dist. No. 1 v.
Allen, 392 U.S. 236 (1968) the line drawn in Everson became less clear. In that case the
Court upheld a New York law authorizing local school boards to lend textbooks in
secular subjects to children attending sectarian schools. The Court relied on basis that the
textbooks provided a benefit to the children and their parents, not the sectarian schools or
the sponsoring religion. The Allen decision afforded the Court with the reality that
sectarian schools have two goals. They provide religious instruction and secular
instruction. Allen held that if state aid could be directed to secular instruction only then it
may pass an Establishment Clause challenge. However, when the two purposes became
exceedingly entwined the Establishment Clause was violated. Therefore, in Lemon v.
Kurtzman, 403 U.S. 602 (1971) the three-pronged Lemon Test was developed.

The Lemon Test examined whether 1) the statute had a secular purpose; 2), its
principal or primary effect neither advanced nor inhibited religion, and 3) the statute must
not foster an ‘excessive government entanglement with religion’ Walz, supra, at 674
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(Lemon, 1971). However, the Court revised its method of inquiry in Agostini v. Felton, 521 U.S. 203, 218, 232-233 (1997). In Agostini, the Court “folded the entanglement inquiry into the primary effect inquiry” (Zelman, 2002). This process allowed the Court to see whether a program that distributes aid to beneficiaries directly has the primary effect of advancing or inhibiting religion.

According to Souter, the Court was suspicious of various strategies designed to evade the Establishment Clause challenge. Therefore, in Committee for Public Ed. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), the Court struck down a New York program for tuition grants and tax deductions for parents who sent their children to religious schools. The Court rejected assurances that the state had statistical guarantees that the program would provide 15% of the total cost of an education at religious schools at the very most. Souter wrote that, “Nyquist thus held that aid to parents through tax deductions was no different from forbidden direct aid to religious schools for religious uses. The focus remained on what the public money bought when it reached the end point of its disbursement” (Zelman, 2002).

However, Souter stated that the Court began to allow the principle of no aid to fade in Mueller v. Allen, 463 U.S. 388 (1983). In Mueller, a Minnesota program authorized tax deductions for certain educational expenses which included tuition costs at private sectarian schools. In Souter’s opinion the aid in Mueller was indistinguishable from the aid in Nyquist. Conversely, Rehnquist argued that in Mueller the Court examined the class of beneficiaries, which included all parents – with children in sectarian or secular private schools. Then, the Court examined the program as a whole and found that it was a program of private choice. Therefore, the funds were made
available to religious schools only as a result of the true private choice of the individuals involved.

Souter argued that the Court's decisions in Establishment Clause cases since Mueller have relied on the concepts of neutrality and choice. However, he wrote, that their definition of neutrality and choice is illogical and convoluted. In his words, "the majority employs the neutrality criterion in a way that renders it impossible to understand" (Zelman, 2002). Souter's contention is that the concept of neutrality that is conceived as evenhandedness toward beneficiaries had never alone been treated as sufficient to satisfy the Establishment Clause.

Accordingly, the concept of choice is misapplied in the Zelman decision. The criterion for deciding whether indirect aid was legitimate was that the private hands it passed through had a true choice of spending it either on sectarian or secular education. However, in the Cleveland program, Souter argued, there were no real alternatives to secular education. The private nonreligious schools were too expensive for most of the participants. And the public schools in the Cleveland City School District were proven to be failing and the participating adjacent school district in East Cleveland was miserable as well. Therefore, the parents in the program had only one alternative for their children—religious schools.

Rehnquist stated that the Cleveland Scholarship and Tutoring Program was a program of choice and neutrality; moreover, the state of Ohio was not coercing parents into sending their children to religious schools. The program in question was consistent with those aid programs in Mueller, Witters, and Zobrest. Rehnquist argued that the program shared the features of neutrality and choice with the aforementioned cases. In
these cases, the only way government aid reached religious institutions was by the
deliberate and true choice of the participating individuals. The perceived governmental
endorsement of religion or a religious message was attributed to the participant, not the
government. The government’s role ended with the disbursement of the aid.

In opposition, Justice Stevens was very clear in his objection to the majority’s
rationale of choice. Stevens stated that the wide range of choices that were available to
the students in Cleveland “within the public school system has no bearing on the question
whether the State may pay tuition for students who wish to reject public education
entirely and attend private schools that will provide them with a sectarian education”
(Zelman, 2002). Stevens’ contended the fact that large numbers of students were
choosing to attend sectarian schools and receive religious indoctrination paid at expense
to the state showed that the law in place was respecting an establishment of religion.
Stevens argued that the participants should not have had the choice of a religious school
at the outset. Addressing the majority’s holding, Stevens wrote, “the Court seems to have
decided that the mere fact that a family that cannot afford a private education wants its
children educated in a parochial school is a sufficient justification for this use of public
funds” (Zelman, 2002).

Justice Breyer wrote that the concept of parent choice does little to address the
Establishment Clause challenge to the program. Moreover, his contention was that the
Ohio program as a whole portends much divisiveness for society. He asserted that the
concept of choice in this program is fallacious; it is fallacious because the parents’ only
real choice appears to be between a failing public school system and religious schools
that may not support the parents own religious convictions. He states the program may

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alienate certain groups whose religious tenets forbid them from participating in government-sponsored programs. In sum, Breyer wrote that the Court had turned back the clock in its interpretation of the Establishment Clause.

Justice Souter asked how the Court could leave Everson on the books and approve the Ohio voucher program. Souter described the Everson holding as inaugurating the modern era of Establishment Clause doctrine. His contention was that for over fifty years it remained constant providing guidance to the Court for Establishment Clause analyses. For more detailed analyses, the Court developed the Lemon Test. This allowed the Court to explore in a more meticulous manner its Establishment Clause exploration. However, in Agostini, the Court refocused its inquiry from the entanglement issue to primary effect issue. As O’Connor noted, “Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be ‘excessive before’ it runs afoul of the Establishment Clause” (Alexander & Alexander, 2001, p. 174). Moreover, O’Connor stated in Agostini that the Court’s Establishment Clause law had changed significantly since the Court’s decision in Aguilar.

Souter argued that the Court’s decision to change its method of inquiry in Agostini served as a departure from Everson; conversely, O’Connor wrote that was not the case at all. She argued that a fair reading of the holding in that case would find no departure from Everson. However, in her conclusion in Agostini she acknowledged that Establishment Clause law had changed significantly from the past. Therefore, as Everson inaugurated the modern era of Establishment Clause doctrine in the 20th century, has
Zelman inaugurated the modern era of Establishment Clause doctrine in the 21st century? With the Court’s focus on neutrality and choice, is the Everson holding still relevant?

The current Supreme Court is deeply divided along philosophical lines. Therefore, the validity of the Everson holding is in doubt. The validity of the Lemon test is in doubt as well. Justice Scalia has openly noted his disdain for it. Other issues that remain unclear are the concepts of neutrality and choice. Justice Souter elaborated on his definition of neutrality and choice in the Zelman decision; his definitions vary greatly from those of Rehnquist and O’Connor. Therefore, the problem arises, whose view will ultimately provide guidance for the Court?

**What Issues have Emerged from This Decision?**

The primary issues to emerge from the Zelman holding are neutrality and choice. Rehnquist asserted in Zelman that the Court’s jurisprudence has remained consistent and unbroken concerning private choice programs. Rehnquist stated that the Court has drawn “a consistent distinction between government programs that provide aid directly to religious schools … and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals” (Zelman, 2002). He referenced Mitchell v. Helms 530 U.S. 793 (2000), Agostini v. Felton 521 U.S. 983 (1999), Rosenberger v. Rector and Visitors of Univ. of Va. 515 U.S. 819 (1995), Mueller v. Allen 463 U.S. 388 (1983); Witters v. Washington Dept. of Services for Blind 474 U.S. 481 (1986); Zobrest v. Catalina Foothills School District 509 U.S. 1 (1993) as established judicial precedent concerning government programs that provide direct aid to religious schools.
Mueller v. Allen, 463 U.S. 388 (1983), was a case in which the state of Minnesota permitted taxpayers to claim a deduction from their gross income on their state income tax returns for the expenses acquired in “tuition, textbooks, and transportation” (Mueller, 1983). This tax deduction was available to all parents whose children attended school – private or public. In a five-to-four decision, the Court held that the tax deduction was available to all parents with children in school and was “simply part of the state’s tax law permitting deductions for a number of things” (LaMorte, 2002, p. 85). Therefore, the twin criteria focused on in this case became neutrality and choice. The deduction was available to all parents; it did not single out what type of parents with children in school to whom it was available. Therefore, it was essentially neutral in nature. Furthermore, it was not something that was forced on any person for any reason. The Court held that it was an opportunity for choice rather than a dictate. Thus, the law was upheld.

In Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986), the Court exhibited a “spirit of accommodation” (Vacca & Hudgins, 2001, p. 108). This case revolved around Perry Witters. Witters attended a private Christian college. He was pursuing a degree to become a pastor. Additionally, he was suffering from a progressive eye disease. He applied to the Washington Commission for the Blind for vocational rehabilitation. The Washington Commission for the Blind denied his application. He appealed the decision; the Commission’s decision was upheld during the administrative appeal. The Washington Supreme Court affirmed this decision (Vacca & Hudgins, 2001).

The United States Supreme Court remanded the case. The Court held that the First Amendment did not preclude a state from extending direct assistance under a state
vocational rehabilitation assistance program to a blind person because the person chose to
study at a Christian college. Utilizing the "Lemon Test," the Court deduced that the facts
of the case did not support the view that the state aid in this situation sponsored religion
(Vacca & Hudgins, 2001). The Court referred back to the neutrality concept discussed in
Mueller.

In Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993), the Court was
asked to decide if providing services for a disabled student in a parochial school violated
the Establishment Clause. In this case, James Zobrest was a deaf student who had
attended public high schools from first grade through eighth grade. During this time a
sign-language interpreter was provided for him by the school district. When Zobrest
entered the ninth grade his parents enrolled him in a parochial school. The school district
was asked to supply Zobrest with an interpreter; the request was denied. The case was
referred to the County Attorney. The County Attorney construed that the provision of the
interpreter would, indeed, be a violation of the Establishment Clause (Kops, 1998).
Eventually, the case was brought before the United States Supreme Court. The Court
held "Nothing in this record suggests that a sign-language interpreter would do more than
accurately interpret whatever material is presented to the class as a whole;" again, the
Court focuses on the issue of neutrality discussed in Mueller and Witters (Zobrest, 1995).
Furthermore, the Court went on to say:

The IDEA creates a neutral government program dispensing aid not to schools,
but to individual handicapped children. If a handicapped child chooses to enroll
in a sectarian school, we hold that the Establishment Clause does not prevent the
school district from furnishing him with a sign-language interpreter there in order
to facilitate his education. The judgment of the Court of Appeals is therefore reversed (Zobrest, 1993).

In *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), the Court addressed the issue of the university’s method of student activity funding. The University of Virginia authorized payments for printing student publications through its Student Activity Fund. The payments were made to outside contractors. Nonetheless, the university withheld authorization for the payments to the outside contractors for the publication produced by Wide Awake Productions. The students challenged the university’s denial; they alleged that the authorization was withheld solely because the newspaper represented a Christian perspective. The Court held that the university’s actions had effectively suppressed student speech. Furthermore, the Court held that the funding program must be neutrally applied to religious and non-religious organizations. Justice Kennedy wrote:

> The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University’s course of action. The viewpoint discrimination inherent in the University’s regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires (*Rosenberger*, 1995).

In *Agostini et al. v. Felton et al.*, 521 U.S. 203 (1997), the Court was asked to examine whether or not using federal education funds to pay public school teachers for
teaching remedial education in parochial schools violates the Establishment Clause. The programs were aimed at helping lower socio-economic, educationally deprived students in a parochial school system. The Court ruled in a five-to-four decision that, in fact, it did not. The decision overruled both Aguilar v. Felton, 473 U.S. 402 (1985) and Grand Rapids School District v. Ball, 473 U.S. 373 (1985). These decisions had not allowed this practice to take place. Nonetheless, in Agostini, the Court abandoned the assumption that public school teachers within parochial schools constituted a figurative union between government and religion (LaMorte, 2002). Justice O'Connor wrote, “What has changed since we decided Ball and Aguilar is our understanding of the criteria used to assess whether aid to religion has an impermissible effect” (Agostini, 1997). The Court relied on the distinction that the program distributed funds to specific, eligible students as opposed to school wide availability.

The concept of neutrality was examined again in Mitchell et al. v. Helms et al., 530 U.S. 793 (2000). In this case a federal program loaned computers, software, and library books to religious schools was upheld in a six-to-three decision (LaMorte, 2002). The Court held “that the aid was allocated on the basis of neutral, secular criteria that neither favored nor disfavored religion, and was made available to both religious and secular beneficiaries on a nondiscriminatory basis” (LaMorte, 2002, p. 84). The Mitchell decision overruled previous holdings in Meek v. Pittenger and Wolman v. Walter that had barred the provision of various instructional material and instrumentation to religious schools (LaMorte, 2002).

In Zelman, Rehnquist asserted that the Court had “never found a program of true private choice to offend the Establishment Clause” (Zelman, 2002). He argued that the
Ohio program was a program of true private choice and that it was consistent with Mueller, Witters, and Zobrest and therefore constitutional. He explained that the Ohio program was neutral in all aspects toward religion. Moreover, the program was multifaceted in nature and designed to provide educational opportunities to underprivileged children in Cleveland trapped in a failing school district.

Rehnquist stated that there were no financial incentives involved in the program to show favorable treatment of religious schools. In fact, he argued, that there were financial disincentives for religious schools because they received only half of the money that government schools received. Moreover, the parents who selected the religious schools had to make a co-payment that their public school counterparts did not make.

O'Connor wrote, "There is little question in my mind that the Cleveland voucher program is neutral as between religious schools and nonreligious school" (Zelman, 2002). She asserted that the Court's prior case law established relevant criteria for neutral programs; the Cleveland program met the criteria that the government aid must be "made available to both religious and secular beneficiaries on a nondiscriminatory basis" (Agostini, 521 U.S. at 231).

She also argued that the Cleveland program is one of true private choice. One criticism aimed at the program by the respondents was the extremely high number of students attending religious schools as opposed to using their vouchers on public school alternative programs. Nonetheless, O'Connor stated, "The Court rejects, correctly, the notion that the high percentage of voucher recipients who enroll in religious private schools necessarily demonstrated that parents do not actually have the option to send
their children to nonreligious schools” (Zelman, 2002). In Mueller, the Court rejected the
very same argument; therefore, the precedent was already established.  

Neutrality and choice were the key issues that allowed the Cleveland Scholarship
and Tutoring Program to stand up under the Establishment Clause challenge. Chief
Justice Rehnquist wrote for the majority and was able to cite 20 years of legal precedence
to validate their findings. What emerged from the Zelman decision was a pattern of case
history that legitimized the concepts of neutrality and choice as a means for successfully
developing programs that pass constitutional scrutiny. Souter argued that the majority’s
definition of neutrality was ambiguous at best; moreover, Stevens argued that including
parochial schools in the choice conceptual framework was unconstitutional. They also
stated that the Zelman decision severely departed from Everson. Rehnquist did not
mention the Everson holding; rather, he relied on Mueller, Witters, and Zobrest to
elucidate the majority’s holding. Therefore, the constitutional bar to pass now involves
the ability of a program to meet the neutrality and private choice criteria.

The issues of neutrality and choice have emerged from the decision as acceptable
standards in the arena of Establishment Clause jurisprudence. The last twenty years have
provided noted jurisprudence in this area. However, the Court is deeply divided in its
approach to defining neutrality and choice; the Court appears to be at a stand-off of sorts
in this arena. There is a strong likelihood that new members will join the Court in a
relatively short time. The new members of the Court are likely to be the ones to decide
which definition becomes the new standard of choice.

33 In Mueller, 96% of parents participating in the program took deductions for tuition expenses paid to
religious schools.
What Outstanding Legal Issues Remain Regarding Voucher Programs?

The Zelman decision has largely answered the basic United States Constitutional Establishment Clause challenge; however, state constitutional restrictions that are currently in place present problems for voucher programs that allow the participation of sectarian schools. The Blaine Amendments found in individual state constitutions will be a substantial hurdle for these programs to overcome. Additionally, the overall success of voucher programs as a relevant method of education reform has yet to be firmly substantiated. Evaluations of the Cleveland program have produced ambiguous results.

Paul E. Peterson, William G. Howell, and Jay P. Greene's evaluation of the CSTP program was co-sponsored by the Taubman Center on State and Local Government, the John F. Kennedy School of Government, and the Center for American Political Studies Department of Government, Harvard University. The study was administered in the summer and fall of 1998. Two groups participated in the study: 1) parents of children in grades one through four who used a voucher to attend private school; and 2) a random sample of all parents in Cleveland with children in public schools in grades 1 though 4 (Peterson, Howell, & Greene, 1998).

Parental satisfaction with the voucher program was very high. Nearly half of the parents in choice schools report being “very satisfied” with the academic program of their child’s school, as compared to less than 30 percent of public-school parents” (Peterson et al., 1998, p. 5). 50% of parents of voucher school children were also “very satisfied” with school discipline compared to 25% of public school parents. The study noted that the most extreme differences in satisfaction was found in teaching moral values; 55% of voucher parents said they were satisfied compared to 30% of public school parents.
There was no difference in satisfaction concerning the location of the school; moreover, the statistical difference concerning parental involvement was minimal (Peterson et al., 1998).

Family background characteristics had minimal effect on parental satisfaction. Family income, mother’s education, mother’s employment status, residential stability, family size, single parent households or not, or frequency of religious service attendance all had an effect on parental satisfaction. Peterson et al. noted one exception to the satisfaction scale, “African Americans tend to be less satisfied than other ethnic groups” (1998, p. 6). The factor that had the largest impact on satisfaction levels was moving from a public school to a private school; this increased the person’s level of satisfaction by 10 points on a 100 point scale, “an effect size of 0.59 standard deviations” (Peterson et al., 1998, p. 6). Of all parents participating in the study, all of the private school parents were more satisfied than the public school parents.

Parents assessed their children’s schools for the study. Only 12% of the voucher parents reported fighting as a problem compared to 27% of public school parents. Racial conflict was reported to be a problem by 5% of voucher parents compared to 10% of public school parents. 3% of voucher parents reported vandalism as a problem compared to 13% of public school parents (Peterson et al., 1998).

Both voucher parents and public school parents scored equally concerning parental involvement. The two groups of parents equally reported that they volunteered at school, joined the PTA, and attended school events. The researchers did note that parents, voucher or public school, who attended church more frequently were much more likely to be involved with school activities. School mobility rates were nearly similar;
92% of voucher parents reported that their child remained in the same school throughout the entire year compared to 96% of public school parents; this number proves to be statistically insignificant. When the parents were asked about plans for the next school year, 79% of voucher parents reported they intended to stay at the same school compared to 77% of public school parents (Peterson et al., 1998).

Standardized test scores were obtained from two schools, the Hope Academy and Hope Ohio City. Students were tested in the fall of 1996, the spring of 1997, the fall of 1997, and the spring of 1998. These schools interested the researchers because they announced that they would accept all students who applied for admission. “Many of the poorest and educationally least advantaged students went to the Hope schools, making an examination of test scores from these schools a hard test case of the program as a whole” (Peterson et al., 1998, p. 9).

Furthermore, the Hope schools were the only participating choice schools that made raw test score data available to the researchers for all students over the four testing sessions. An evaluation of 31 of the Hope third grade students illustrated that the students were not learning as a group in the Cleveland public schools. The data showed that “test score gains were observed in both math and reading between the fall of 1996 and the spring of 1998 for all the student who took tests at these two points in time. The increases are 7 percentile points in reading and 15 percentile points in math” (Peterson et al., 1998, p. 10).

The researchers reported that these gains were maintained the second year; however, they did not continue to rise. Math test scores declined between the summer

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34 The “Hope” schools are charter schools (known in Ohio as community schools) that were developed after the voucher program was in place.
and fall of 1997. Kim Metcalf of Indiana University performed another evaluation of the Hope schools. He observed that the only changes in test scores were in the 1998 school year. The test scores involved showed a statistically significant increase in two of five areas; however, there were no notable changes occurring in 1997 (Reported in Peterson et al., 1998). Peterson's Harvard study reports that Metcalf's Indiana University evaluation only used the data from third grade students; the Harvard study examined data from 1st through 4th grade test scores. The study noted that it is not uncommon for interventions to achieve initial gains that are not increased in subsequent years. According to Peterson,

> It is quite possible that the results at the Hope Schools are not representative of the program as a whole. But given that these schools have been deemed most problematic by choice critics, the gains witnessed there suggest that [the Cleveland Scholarship and Tutoring Program] as a whole probably has helped improve student test scores (Peterson et al., 1998, p. 11).

The voucher recipients expressed their substantial satisfaction with the Cleveland program. The low-income parents participating in this program moved their children out of a failed school district with the hope that the voucher would enable them to place their children in a school that would be successful for them. Concerning the satisfaction component, the parents' goal has been met – they are satisfied. However, statistical analysis of test score data varies between the Harvard study and the Indiana University study. They concur on two things: 1) Parents are satisfied with the voucher program; and 2) some test scores have shown an improvement.

The next outstanding issue confronting voucher programs is located in individual state constitutions. Berg, Brownstein, Chemerinsky, Garvey, Laycock, Lupu, Marshall,
& Tuttle have placed the state constitutional restrictions in three categories. One, restrictions that disallow government funds to be used at any private schools. Two, restrictions that have provisions that prohibit the expenditure of public funds that support or benefit any sectarian school that is controlled by a religious denomination. Most of this language prohibits aid to religious schools; however, it does not prohibit aid to secular schools. The phraseology in these provisions tends to be strong in the forbidding of aid; however, different state courts interpret these restrictions in varying manners. Some states permit vouchers; some forbid them. The third category contains restrictions that forbid the mandated support of religious worship or instruction. Again, this is in reference to religious aid not secular aid (Berg et al., 2002).

If a state developed a voucher program there may be two approaches taken to address the potential state constitutional challenges. The first may be the exclusion of religious schools in such programs. The second may be to challenge state anti-aid provisions that were motivated by 19th century anti-Catholic bias.

In the first approach, the argument will likely be made that the exclusion of religious schools from such a program is a discriminatory practice. It discriminates against religion; thus, it violates the Free Exercise Clause of the United States Constitution, as well as the Free Speech Clause, and the Equal Protection Clause. According to Berg et al. (2002), the groups who oppose these programs:

[W]ill argue that once the government offers benefits for private education, to withhold such benefits for those who choose schools with religious viewpoints –

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including benefits for the secular educational value those schools provide – is to penalize the exercise of constitutional rights” (p. 8).

The arguments that defend the restrictions of the programs may rely on decisions holding that the state need not subsidize the choice of religious education even if it subsidizes alternative secular education. Therefore, the exclusion of religious schools from the program is not unconstitutional because the state is not obligated to fund religious programs (Berg et al., 2002).

The second approach may challenge the state’s anti-aid provisions that are questionable because of their association with the failed Blaine Amendment of the 19th century. According to Berg et al., there are four sitting Supreme Court justices who have opined that the ban on aid to religious schools reflects an anti-Catholic sentiment. In Zelman, Justice Thomas stated that the respondents wished to “invoke the Establishment Clause of the First Amendment, as incorporated through the Fourteenth, to constrain a State’s neutral efforts to provide greater educational opportunity for underprivileged minority students” (Zelman, 2002). However, he argued that they were mistaken in their rationale; his contention was that, “When rights are incorporated against the States through the Fourteenth Amendment they should advance not constrain, individual liberty” (Zelman, 2002).

The arguments likely to be made in defense of restrictions in this scenario may counter that the state restrictions were in place prior to the 19th century anti-Catholic movement, specifically that they pre-date the Blaine Amendment; therefore, they will say that the restrictions are not tainted with negative sentiment. Moreover, “determining the original motive of an enactment is a difficult and problematic inquiry, and that courts
often refuse to accept evidence of bad motive as the basis for invalidating an otherwise constitutional law" (Berg et al., 2002, p. 8). Finally, Berg et al. state that even if the state constitutional restrictions were constructed during a time of anti-Catholic sentiment there is still a legitimate separation of church and state issue with which to contend.

Finally, if voucher programs develop and include religious schools they will need to be able to endure constitutional challenges on both the state and the federal level. Thus, there will be an attempt to regulate the voucher programs. This attempted regulation brings with it several problems. First, “If the state imposed conditions on vouchers that would affect the autonomy of a participating religious school, may the school (or a parent wishing to use a voucher at the school) challenge the condition as constitutionally forbidden?” (Berg et al., 2002, p. 9).

In Zelman, the Cleveland program required that participating schools be forbidden to discriminate because of race, ethnicity or religion; moreover, the participating schools were forbidden to teach or practice unlawful behavior or hatred of any person based on race, ethnicity, or religion. Souter argued that the restriction on the religious schools’ autonomy was a reason to invalidate the program. Nevertheless, “the majority ignored the point, suggesting the possibility that taxpayers challenging voucher programs … will not have standing to assert that such regulations create the danger of ‘excessive entanglement’ between the state and religious schools” (Berg et al., 2002, p. 9).

The second problem exists if a voucher program is created that excludes religious schools. In that case, an argument may be made about the constitutionality of this exclusion. “A challenger will likely argue that this violates the Establishment Clause as
interpreted in Zelman, since one of the prime features in upholding the Cleveland program was its neutrality – that it had the same terms for religious schools as for non-religious schools” (Berg et al., 2002, p. 11).

Voucher programs also have several policy issues to resolve if they are to be successful and effective. The first issue is that most voucher systems in place are on a relatively small scale. Programs in Milwaukee and Cleveland are limited in scope and numbers. Therefore, programs must gradually increase in size if they are to be successful. Howell and Peterson use the analogy of medical research to discuss effective school reform research agendas. They assert:

First medical products are tested on nonhuman subjects. If the results are promising, their effects on small groups of volunteers are carefully examined in what are known as Phase I and Phase II studies. If the results remain encouraging, major randomized field trials (RFTs), Phase III studies are undertaken (Howell & Peterson, 2002, pp. 187-188).

They advocate increasing voucher programs in small increments and researching each step methodically. If the research is not performed appropriately, there is a risk of losing all data or facing the problem of data being worthless. Moreover, if voucher programs expand too fast the participating voucher schools may face all the same difficulties of high poverty inner-city schools.

Another issue that may need to be addressed is the transition rate from public school to voucher program. Howell and Peterson refer to this dilemma as Exit, Voice, and Loyalty (italics mine). Their research suggests that if students leave the public schools too quickly there will be a demoralizing effect on those left behind. However,
this theory leads back to the theory of open market competition. Howell and Peterson contend that although the public schools may face a period of a sense of demoralization, eventually they will begin to reform and become competitive with the other reform efforts. They concede that presently this theory has little to no data (Howell & Peterson, 2002).

Educational vouchers have moved from a relatively little supported endeavor into a concept that is growing more and more appealing to the American public. Nonetheless, people in this country are very loyal to the public school system. If the voucher concept is going to succeed, it will require policies that effect a smooth transition from a program with a small select population to a larger more inclusive population. Programs in Cleveland, Milwaukee, Washington, DC, and New York give rise to the hope that this reform effort could be successful. The federal constitutional issue has been addressed; the state constitutional issues will be addressed; however, the only way a system of educational vouchers will be successful is with a very solid and purposeful policy agenda.

Therefore, the arena shifts from the federal court arena to the political arena. The resolution of the federal Establishment Clause challenge brings the fight for or against vouchers to politicians’ doorsteps. Politicians are going to have to fight for voucher programs or fight against them. In order to do this successfully, the effectiveness of vouchers will need to be established. In an era when funds are so desperately sought after, voucher programs will need to be able to prove that they are an effective remedy for poor schools. Thus far, the one solid item where vouchers excel is parental satisfaction; however, in the long run they will need to show more effectiveness in student achievement.
What Implications Does the Zelman Decision have for Public Education?

Public education may face numerous implications resultant of the Zelman decision. The issue of parental satisfaction may play a more profound role in light of access to potentially more educational choices in place from which parents may choose. There is also the problem of students who are refused vouchers and their morale as they are forced to attend public schools. Another implication of the Zelman decision may be new legislation that revises state financial structures to address various educational choices. Finally, voucher programs may affect the common American culture that is forged within the public school setting.

Public education plays a vital role in a nation that is devoted to equality and freedom. While historians may debate the core motivations behind the American public school system, they agree that the basic point of public education is to "forge commonality, promote civic engagement, and offer economic, political, and social opportunities on an equal basis" (Minow, 2002, p. 64). School choice advocates argue that the public school system in America is failing. It is failing the children who attend it and it is failing the country that supports it. They support new methodologies with which to handle the crisis. Conversely, school choice opponents advocate reforming the present system without bringing in alternative educational opportunities such as voucher programs, charter schools, or school choice in general.

School choice advocates support new avenues of educational opportunities because school reform efforts in the public schools have failed. Martha Minow argues that this may be an overstatement; she states that in many ways, "schools are better than in the past; there are higher graduation and literacy rates than in the past, and more kinds
of students are taught more equitably in American schools today than thirty years ago” (2002, p. 65). However, there are problems in the public school system of this country. The public schools are more racially segregated today than thirty years ago; there are extreme disparities between expenditures and quality of education throughout the system. Poor children in poor school districts have very high dropout rates; and children of color are more likely to labeled learning disabled and be removed from mainstream classes only to waste away in an unproductive environment (Minow, 2002).

The Zelman decision opens the door for school choice advocates to begin implementing their programs. The initial stage will be for state legislatures to enact voucher legislation. Each state will have to address their own Establishment Clause language. “State clauses are more restrictive than the federal Constitution’s Establishment Clause” (Darden, 2002, p.1.).

The effect that voucher programs have on public education will directly relate to the language of the statutes developed. “As a general reference point, the Supreme Court’s permitting aid in Zobrest, Agostini, and Helms has not lead to the demise of public schools” (Russo & Mawdsley, 2003, p. 5). Nonetheless, offering parents a choice may open doors that many states have yet to experience in their educational systems.

Research on voucher programs has not provided relevant information on the direct impact they have on neighboring public school systems. Moreover, the Milwaukee voucher program and the Cleveland voucher program are both relatively small in scope. If newer voucher programs developed in larger more substantial numbers there will need to be more research obtained.
The financial impact of voucher programs on public school systems also relates back to the statutes developed in relation to the size and scope of the program. In the Cleveland City School District, $8.2 million in public funded vouchers were directed toward religious schools. The state also spent $9.4 million dollars on charter schools located in the Cleveland City School District.\(^{36}\) The Cleveland City School District’s total resources were $712 million (Russo & Mawdsley, 2003). Comparatively, the voucher program in Cleveland was quite small. However, the real problem of determining the effects of vouchers on public school systems is that urban school districts “are constantly reforming, experimenting, and reorganizing their schools and systems. The effect is that change is ongoing, and trying to causally distinguish ‘routine’ changes from those specifically tied to the onset of a voucher program will be very difficult” (Yudof, Kirp, Levin, & Moran, 2002, p. 959).

Nevertheless, there are variables that have been measured in metropolitan areas that have choice among public schools. Some researchers noticed the effect that choice programs had on public school performance. Caroline Minter Hoxby discovered that in cities where there is significant choice among public schools, “(1) reading and math scores are higher, (2) per pupil costs are lower, (3) segregation by race, income, and ethnicity is unaffected, (4) parents are more involved in the schools, and (5) the curriculum is more challenging and the environment more disciplined” (Sawhill & Smith, 2000, pp. 275-276).

In a school choice world, a world Zelman has constitutionally opened the initial door for, the key to success will be generating information to the public about school programs. Furthermore, parents’ perceptions of those programs may present the main

\(^{36}\) State expenditures for religious vouchers and charters schools found in Zelman, 2002.
impact on public education. Researchers have noted that “voucher programs are typically oversubscribed, suggesting considerable dissatisfaction with the available public schools and a strong latent demand for more parental choice” (Sawhill & Smith, 2000, p. 274).

Studies have shown strong parental satisfaction with schools participating in voucher programs. “Simply by having applied for a voucher, participants in the voucher programs registered a certain measure of discontent with their local public schools” (Howell & Peterson, 2002, p. 178). If parents are unhappy with local school districts they will be more likely to support programs of choice. Public school districts can no longer assume that the choice between public versus private schools has little effect on them -- not with potential voucher programs that enable parents to select private sectarian or secular schools. Additionally, voucher programs present another problem for public schools. Benveniste, Carnoy, & Rothstein (2003) refer to this problem as “disappointment effects” (p. 41). This occurs when a student is refused a voucher and must remain in public school. Benveniste et al. contend that this new group of students may suffer from lower student achievement and lower morale; therefore, the public schools must address the students and parents needs.

Parental satisfaction can have a profound effect on public school districts. The U.S. Department of Education initiated a parental satisfaction survey in 1999. The survey found that “78 percent of private school parents were ‘very satisfied’ with their schools, compared to 62 percent of parents who ‘chose’ their public school and 48 percent of parents who were assigned a public school” (Howell & Peterson, 2002, p. 179).
Moreover, a study by Howell and Peterson (2002, p. 181) on the Cleveland program illustrated that the parent voucher recipients exhibited more satisfaction with the schools their children attended than their public school counterparts.

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*p < .10; **p < .05; ***p < .01; two-tailed test

Parental satisfaction may spur public school districts to improve their performance as well as their school climate. Hoxby studied the academic performance in Milwaukee’s public schools since the inception of the Milwaukee voucher program. She found that the city’s public schools made “above average gains… particularly high gains in schools in low-income neighborhoods that she said faced the greatest competition from vouchers. Overall … public schools made a strong push to improve achievement in the face of competition from vouchers” (Carnoy, 2002, p. 31).

Another concern for public schools in the era of vouchers is the public school system will lose its best and brightest students to voucher programs. Paul E. Peterson of
Harvard University refutes that assertion; he contends that more families will “likely want to opt out of a school if their child is doing badly than if the child is doing well” (Peterson, 2002, p. 21).

However, Peterson is listed in Gerald W. Bracey’s book *The War Against America’s Public Schools, Privatizing Schools and Commercializing Education* as an enemy of public education. Bracey states that Peterson has described himself and other voucher advocates as, “A small band of Jedi attackers, using their intellectual powers to fight the unified might of Death Star Forces led by Darth Vader whose intellectual capacity has been corrupted by the urge for complete hegemony” (quoted in Bracey, 2002, p. 5). Therefore, the possibility of public schools losing some of their best students to voucher programs has not been substantiated, merely asserted by some and not by others.

Nevertheless, if public schools do lose students to voucher programs, will that affect the funding of public schools? According to Peterson, financial arrangements vary from state to state; however:

> On the average, nationwide, 49 percent of the revenue for public elementary and secondary schools come from state governments, while 44 percent is collected from local sources and the balance is received in grants from the federal government. Most of the revenue school districts get from state governments is distributed on a ‘follow the child’ principle... if a child moves to another district, the state money follows the child (Peterson, 2002, p. 22).

Peterson states that the bulk of the money comes from local revenue; therefore, that money stays in the locale even if the child leaves the area. As such, the design of
voucher programs may be fiscally advantageous to public school systems (Peterson, 2002).

The voucher programs in Cleveland and Florida have similar financial designs. "The state money follows the child, but the local revenue stays behind in local public schools, which means that more money is available per pupil" (Peterson, 2002, p. 22). Peterson advocates a new voucher program that would allow for larger voucher amounts available for larger populations. He argues that if vouchers are larger they may attract new entrepreneurial advocates to education and create a new arena. This new arena would allow a strong sense of competition to develop; not just for public schools, but for private schools as well. The true beneficiaries would be the children who attended the schools, as the schools improved to attract more clientele.

While that certainly is a noble effort, there is another concern for public schools in an era of voucher programs. There is a concern that voucher programs that include religious schools may cause public schools to experience a type of socioreligious balkanization. Justice Breyer noted in his dissent that the Establishment Clause and the Free Exercise Clause of the First Amendment "embody an understanding, reached in the 17th century after decades of religious war, that liberty and social stability demand a religious tolerance that respects that religious views of all citizens" (Zelman, 2002). For this reason, Breyer asserted, the Court's 20th century Establishment Clause cases focused on the social rifts that could occur because government was involved with education.

Henry Levin notes that American public schools were designed with a specific purpose. His contention is that democratic societies need to "reproduce the institutions for a free society in order to ensure these freedoms and the civic behavior that is
consistent with them” (Levin, 2002, p. 161). Children are not born with this knowledge or according behavior. Therefore, democratic societies require that an education system instill an appreciation for knowledge, and the ability to understand the rights of individuals who live and participate in a free society that advocates equality, fairness, and opportunity for all.

In addition to those things, public education needed to incorporate “parental preferences through freedom of choice [that] requires schools that are differentiated to meet the unique desires of families” (Levin, 2002, p. 161). Initially, school systems were created that permitted local input in the implementation of school policies. However, local input was directed by the most powerful political, religious, economic, ethnic, and racial elements in the local population. Schools were not reflecting the true ideal of a free democratic society with equality of opportunity. The Courts addressed many of these issues in the last half of the 20th century—particularly religious and racial issues. The resultant increased uniformity of school practices reduced the input of parental options. School choice issues evolved from this history (Levin, 2002).

Justice Breyer discussed the effects that immigration had on American society from 1850 to 1900. He wrote that as the numbers of non-Protestant immigrants increased, this “increase in numbers, members of non-Protestant religions, particularly Catholics, began to resist the Protestant domination of the public schools” (Zelman, 2002). This resistance led to violence against the non-Protestant protestors. Legislation ensued that forbid money to go to sectarian (read as Catholic) schools (Hamburger, 2002). The Court addressed these issues by evoking the separation of the wall between church and state in an effort to provide equal treatment for all. Breyer argued that, “With
respect to government aid to private education, did not history show that efforts to obtain equivalent funding for the private education of children whose parents did not hold popular religious beliefs only exacerbated religious strife?” (Zelman, 2002).

Justice Stevens asserted in his dissent that he was convinced that the Zelman decision was misguided; he admitted that an influence in this assertion was his understanding of the religious strife that Breyer discussed, as well as the religious conflict noted in the Balkans, Northern Ireland, and the Middle East. Accordingly, voucher programs that permit religious schools to participate may leave the public school sector as the education provider to groups of children unable to attend private school because their parents are incapable of completing the paperwork for whatever reason; or because there is nor school that matches their religious beliefs. Does the public school sector become relegated to that which educates only the poorest, most neglected children, or children whose parents object to religious inculcation, or the educator for children who severely disabled or learning impaired, or for children who have no where else to go? Do vouchers create a divisive climate in a society with a multitude of religious beliefs and economic needs?

Paul E. Peterson argues that is not true. Voucher programs will not sequester learning opportunities for public school students; rather, vouchers are designed to provide more opportunities for all students. Nonetheless, he writes that Breyer and Stevens articulated relevant concerns, particularly since 9/11; however, it is not clear that public schools are the best source for tolerance training. The public school’s historical record for enlightening students is hardly free from imperfections, “One hundred years of public education in the South did little for white tolerance of African-Americans” (Peterson,
Religious schools are not training centers for dissidents; rather, "studies show that students educated in Catholic schools are both more engaged in political and community life and more tolerant of others than public school students" (Peterson, 2002, p. 24). It is Peterson's and other voucher advocates' belief that the voucher system will not have a negative impact on public schools; rather, it will inspire a healthy sense of competition that will address students' needs. Finally, that very competition will benefit the students and the country in the end.

In *All Else Equal*, Benveniste, Carnoy, & Rothstein write that, "Private schools are shaped by the rules of the market. Political interests fashion public schools" (2003, p. 126). They contend that public schools and private schools have many of the same problems. Moreover, they espouse that a competition between public and private school systems will not necessarily create better schools. Their theory is that schools, public or private – secular or sectarian, need to respond to the contiguous community and its specific needs. When the communities' needs are met and a healthy learning environment is established then a better school will be in place (Benveniste et al., 2003). In an altruistic sense this is true; nonetheless, the reality is that public schools and the issue of school choice will be relegated to the political arena for political leverage for various candidates. The political debate will revolve around economic issues; unfortunately, that tends to detract attention from the importance of actual school reform.

Finally, the *Zelman* decision firmly established the wide breach of philosophical beliefs among the Supreme Court Justices. Justices and their decisions do impact public education. Justice Rehnquist has stated that he did not want to retire when there was a sitting democratic president. At this time, that is not the case and there is the possibility
that he may retire. Sandra Day O'Connor has mentioned retiring. There are potentially
two seats that may need to be filled. The United States Senate is nearly divided equally
at this time. Accordingly, the politicization of the confirmation hearings portends to be
problematic for appointments to the Supreme Court; which, in turn, could present a
problem for the future of public education as we know it.

Summary

In this chapter, the major arguments in the judicial process that influenced the
United States Supreme Court's decision in the Zelman case were analyzed thoroughly.
Chief Justice Rehnquist wrote for the majority and concluded that the Cleveland
Scholarship and Tutoring Program did not violate the Establishment Clause of the United
States Constitution. He based his decision on a body of jurisprudence that was
established by Mueller, Witters, and Zobrest. Furthermore, he held the Ohio program to
be one of true private choice and one that was entirely neutral toward religion.

Justice O'Connor wrote in her concurrence that the Ohio program did not violate
the Establishment Clause and in order to make that assessment one had to examine all the
choices that the program made available to the participants. Justice Thomas concurred as
well. He wrote that when rights are incorporated against the states through the
Fourteenth Amendment they should advance individual liberty; it should not prohibit the
exercise of educational choice.

Justice Souter wrote for the minority in the dissenting opinion. He wrote that for
over fifty years Everson had provided the Court with the means to assess Establishment
Clause issues in a fair and relevant manner; nevertheless, he believed that in the Zelman
holding the Court had overturned *Everson* by ignoring it. Justice Breyer and Justice Stevens wrote dissenting opinions as well. They expressed concerns regarding the issue of social and religious strife. They felt that allowing the government to pay the tuition for private religious schools did endorse religion; that endorsement would eventually create a social rift.

The *Zelman* decision draws detailed attention to *Everson*. If the present Court did, as Justice Souter said, ignore Everson, does the precedent it established remain relevant? Accordingly, the *Zelman* holding appears to have ushered in a new era for Establishment Clause issues. The primary issues that emerged from this decision were neutrality and choice. The concepts of neutrality and true choice appear to be able to stand up to the Establishment Clause challenge.

The outstanding issues that remain regarding voucher programs rest in the state constitutions in the guise of Blaine Amendment language. If states want to create voucher programs, they must contend with the Establishment Clause language that was written into their constitutions long ago.

The implications that the *Zelman* decision holds for public education depends on each state and the way in which they react. The state constitutional language will need to be addressed; however, if parents are very disappointed with the present situation of public schools in their state, they will inflict political pressure on state legislatures to address this situation. Once parents in surrounding states have seen parents in other states receive satisfaction from their new legislation, others will demand the same.

Another implication with which public schools may contend is the issue of school finance. How will vouchers be funded and where will the money come from? Again,
once parents have seen this work in another area, they may expect it to work for them as well. Finally, a striking implication for public schools may be found in the social strife that could develop as a result of voucher programs. The collective uniformity once attributed to public schools may be disappearing.
SUMMARY, RECOMMENDATIONS, AND CONCLUSIONS

Summary of the Zelman Decision

The Zelman decision effectively answered the federal Establishment Clause question. In Zelman, the Court held that as long as a program was facially neutral and a program of true private choice, it did not violate the federal Establishment Clause. The Court determined that the Establishment Clause question in the Zelman case “must be answered by evaluating all options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school” (Zelman, 2002). Moreover, the Court held that any benefit the Ohio program ascribed to religious institutions was a result of participating parents’ choice; it was not attributable to the State.

Precedent established in Mueller, Witters, and Zobrest was used to bear out that when a government aid program is neutral with respect to religion and provides aid to a broad class of citizens who direct that aid to religious schools as a result of their own independent and private choice, the program is not subject to an Establishment Clause challenge. The Court specifically stated that they “never found a program of true private choice to offend the Establishment Clause” (Zelman, 2002).

The Court examined whether the Cleveland program had the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. It found
that the program was neutral in all respects toward religion. Furthermore, the Court found that the Cleveland program was part of a general and multifaceted program developed by the state of Ohio to address the educational needs of children in the Cleveland City School District. The program permitted participation of all schools, sectarian and secular, within the school district. Schools in adjacent districts were also invited to participate. The program benefits were provided to participating families on neutral terms. The criteria for aid included no reference to religion. Moreover, the program itself actually created financial disincentives for religious schools to participate in that state funded public schools received nearly twice as much per-pupil funding as the sectarian schools. The Court's analysis of the program found that it did not provide financial incentives to undertake religious indoctrination.

Finally, the Court examined whether the program conferred a message of state endorsement of religion. However, regarding this issue, the Court held that an objective observer who was familiar with the situation in Cleveland would understand that sectarian school participation was only one aspect of a broader undertaking to provide educational opportunities to children in a failed school district. In the Court’s view, the program was designed to assist children in the Cleveland City School District with educational opportunities— not to provide an endorsement of religion.

In Justice O'Connor's concurrence she stated that the Zelman decision did not mark a dramatic break from past decisions; rather, she stated that the Zelman decision was in conformity with a long line of decisions addressing government programs that impact religious organizations. She argued that the aid involved in the Cleveland
program, while no small sum, when compared to other governmental aid programs that flow into religious institutions the amount became rather insubstantial.

In Justice Thomas’ concurrence he argued that public education had failed urban schoolchildren whose lives were entwined with cyclical poverty, criminality, alienation in a failing public school system Cleveland. Moreover, he asserted that if education was a precursor to freedom, urban schoolchildren in the failing Cleveland City School District were denied that resultant freedom, or “emancipation.” Failure to provide Cleveland schoolchildren with a basic education was tantamount to violating civil rights established in *Brown v. Board of Education* (1954). Thomas wrote, “without education one can hardly exercise the civic, political, and personal freedoms conferred by the Fourteenth Amendment” (Zelman, 2002).

According to Justice Thomas, the Fourteenth Amendment was structured to ensure that citizens would not be deprived due process of law. Furthermore, he contends that “When rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty” (Zelman, 2002). His contention was that the opposition to school vouchers attempted to deny under privileged urban children necessary educational opportunities. Moreover, Thomas stressed that morphing the Fourteenth Amendment from a guarantee of opportunity to an obstacle against school reform “distorts our constitutional values and diserves those in the greatest need” (Zelman, 2002).

1 In Justice Thomas’ concurrence he quotes Frederick Douglass who said, “Education...means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free.” *The Blessings of Liberty and Education: An Address Delivered in Manassas, Virginia, on September 03, 1894*. The Frederick Douglass Papers. J. Blassingame & J. McKivigan (Eds). 1992.
Historical and Legislative Summary

While the Zelman decision did effectively address the federal Establishment Clause challenge, it did not address the Establishment Clause language contained in individual state constitutions. State constitutions tend to have more stringent language regarding Establishment Clause issues. The provisions in state constitutions that specifically place restrictions on aid to religious schools are often referred to as “Blaine Amendments.” There are two potential barriers facing school voucher programs in a post-Zelman climate. One barrier is the Blaine amendment language found in 37 state constitutions. The second barrier is reflected in the state constitutional provisions that maintain no individual shall be compelled to support a ministry without consent. Justice Thomas referred to Blaine amendments in Mitchell v. Helms (2000), he noted that “hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow...this doctrine, born of bigotry, should be buried now.”

The history of the Blaine Amendment is significant in light of the Zelman decision. The Blaine Amendment and proposals mimicking it developed out of an anti-Catholic sentiment that was an established presence in late nineteenth century America. Catholics had immigrated to the United States in large numbers and they began to assemble in large groups in urban areas. The existent Protestantism in the public school curriculum failed addressed their children’s needs and conflicted with their religious beliefs. Therefore, they began to ask for public support for their own school system. This request for funding fueled the existing anti-Catholic sentiment (Viteritti, 1998).

2 See School Choice and State Constitutions, 86 V.A. Law Review 117, 123 n.32 (2000). The conclusion of several law review articles varies on the exact number of state constitutions that contain actual Blaine Amendment language.

3 See Separation of Church and State (2002) by Philip Hamburger. Chapter 8 gives a detailed discussion of this occurrence.
President Ulysses S. Grant spoke before a reunion of the Army of Tennessee on September 30, 1875. Grant’s attempt was to motivate the troops for the upcoming election; in his speech he warned them of the possible danger of a second civil war. His argument was that in order to maintain America’s democratic principles a strict separation between church and state must exist to suppress the growing power of Catholicism:

If we are to have another contest in the near future of our national existence, I predict that the dividing line will not be Mason and Dixon’s, but it will be between patriotism and intelligence on one side, and superstition, ambition and ignorance on the other… Let us … [e]ncourage free schools, and resolve that not one dollar appropriated to them shall be applied to the support of any sectarian school. Resolve that neither the State or nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child in the land the opportunity of a good common school education, unmixed with atheistic, pagan, or sectarian tenets. Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contribution. Keep the Church and State forever separate (quoted in Hamburger, 2002, p. 322).

Grant supported the idea of a specific amendment to the United States Constitution that emphasized a separation of church and state, “particularly, the Catholic Church from the American states” (Hamburger, 2002, p. 322). He argued that the amendment should include compulsory education so that all voters could read and write. He also believed that the amendment should address tax issues. Grant’s contention was that the amendment should “tax ‘all property equally, whether church or corporation,
exempting only the last resting-places of the dead, and possibly, with proper restrictions, church edifices”" (Hamburger, 2002, p. 323). However, the state of New York already taxed church property, with the exception of houses of worship and school houses, most other states did the same; Grant’s tax proposal was more of a political rallying point than a substantial issue requiring legislation.

Grant’s requested federal amendment never became a reality; however, it did serve a purpose. The concept of the amendment was designed to bolster the baser prejudices of the majority against Catholics and promote the nativists’ concepts of American liberty. Therefore, on December 14, 1875, presidential hopeful Congressman James G. Blaine of Maine proposed his version of a separatist constitutional amendment. His proposal was known as the Blaine School Amendment. The Blaine School Amendment stated:

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect: nor shall any money so raised or lands so devoted be divided among religious sects or denominations. (quoted in Witte, 2000, p. 306 from Congressional Record, 44th Congress, First Session, p. 205)

The Blaine School Amendment attempted to “prohibit states from allocating funds to parochial schools” (Viteritti, 1998, p. 420). Furthermore, his amendment was a reactionary attempt to use the public school curriculum as a tool to indoctrinate immigrants with mainstream Protestantism. At that particular time, readings from the
King James version of the Bible were mandatory components of the public school curriculum.

The Blaine School Amendment passed in the House by 180 to 7; however, in the Senate it “fell two votes short of the two-thirds required for a constitutional amendment” (Hamburger, 2002, p. 325). This failed amendment influenced a number of states where Blaine amendment language was incorporated into their state constitutions. “By 1876 fourteen states had enacted laws prohibiting the use of public school funds for religious schools; by 1890 twenty-nine had done the same” (Viteritti, 1998, p. 420).

Accordingly, the Blaine Amendment verbiage causes the language of the United States Constitution and the language of individual state constitutions conflict with one and other at times regarding the issues of schooling and religion. According to Joseph P. Viteritti:

Since 1949 the Washington Supreme Court has handed down a number of decisions in open defiance of federal legal standards – at one time proclaiming: ‘Although the decisions of the United States Supreme Court are entitled to the highest considerations…., we must, in light of the clear provisions of our state constitution and our decisions there-under respectfully disagree’” (1998, p. 421).

However, the Ohio Supreme Court ruled in Simmons-Harris v. Goff that the Blaine Amendment found in Ohio’s Constitution was not violated by the Cleveland Scholarship and Tutoring Program because funds of the state reached religious institutions only by way of private individual choice. The Wisconsin Supreme Court held that its Blaine Amendment was not violated by the Milwaukee school choice plan. In that case, the

\[^{4}\text{§2, Article VI, “no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.”}\]
court examined the phrase “for the benefit of” in exactitude. Therefore, the Milwaukee program benefited the children of Milwaukee rather than a specific religious institution (Treene, 2002).

Arizona’s Supreme Court suggested that Arizona’s Blaine Amendment was so closely aligned with the original Blaine Amendment that it provided enough circumstantial evidence to invalidate it. The court stated that the amendment was a manifestation of religious bigotry. In Chittenden Town School District v. Vermont Department of Education, the Vermont Supreme Court held that a school choice issue would violate the state constitution. Vermont has no Blaine Amendment in its constitution; however, the court “rested its decision on the state’s corollary to the Establishment Clause” (Treene, 2002, p. 10).

According to Eric W. Treene, there are three ways that Blaine Amendments may be removed as obstacles to school choice plans. The courts can interpret them in a narrow fashion as the Ohio and Wisconsin courts did. States can repeal the amendments, “or [find] them to violate the United States Constitution” (Treene, 2002, p. 10). Ohio and Wisconsin used narrow interpretation successfully. Choice advocates could encourage courts to limit their interpretation of individual Blaine Amendments.

Another way to remove Blaine Amendments is for the state to repeal the amendments. “In particular, it allows school choice proponents to highlight the nefarious history behind the Blaine Amendment, and leaves the merits and specifics of school choice programs for another day” (Treene, 2002, p. 12). These campaigns for repeal of the Blaine Amendments would present the argument that legislators should be free to consider school choice programs on their merit, and keep the debate focused on school
reform rather than on issues that were born from an era of hatred and bigotry (Treene, 2002).

The Blaine Amendments may be vulnerable to challenge under the Free Exercise Clause and the Equal Protection Clause. This is due to the discrimination they impose against religious families and because of their chauvinist past. In Church of the Lukumi Babalu Ave, Inc. v. City of Hialeah, 508 U.S. 520 (1993) the Supreme Court held that laws that discriminate on the basis of religion violate the Free Exercise Clause. Blaine Amendments bar aid to religious schools while permitting identical aid to go to secular schools. The origins of the Blaine Amendments in nativist bigotry and a deliberate intention to suppress Catholic schools may make the Equal Protection Clause an appropriate vehicle for challenging them (Treene, 2002).

According to Frank R. Kemerer (2002), specific state constitutional language in regard to publicly funded voucher programs that include sectarian private schools can be placed into three categories: 1- restrictive, 2- permissive, and 3- uncertain. Kemerer placed state constitutions in these categories after an extensive legal analysis of the language of each state constitution. However, he does note that placement in these categories is a reflection of “[his] best judgment after reviewing applicable constitutional provisions and interpretive law” (Kemerer, 2002, p. 3).

The most restrictive constitutional provision would specifically prohibit a publicly funded voucher program that involved any private school. The only state constitution that contains such a provision is Michigan. In the Michigan Constitution:

Article 8, section 2 prohibits the use of public monies by the state or its political subdivisions for the support of denominational or other nonpublic school…[n]}
payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school... (Kremerer, 2002, p. 3).

Section 2 of Article 8 was added to the state constitution in November, 1970. Therefore, voucher programs will not appear in Michigan unless the state constitution is amended.

States that have restrictive constitutional provisions are Florida, Georgia, Montana, New York, and Oklahoma. These states have provisions that prohibit both direct and indirect aid to sectarian private schools. California, Colorado, Delaware, Idaho, Illinois, Minnesota, Missouri, North Dakota, South Dakota, Wyoming have state constitutional provisions that prohibit indirect aid to private sectarian schools. Hawaii and Kansas have constitutional provisions that restrict expenditure of public monies for the support or benefit of any private educational institution (Kremerer, 2002).

The states that have permissive constitutions are Alabama, Arizona, Mississippi, Nebraska, New York, Pennsylvania, South Carolina, Utah, and West Virginia. Kremerer notes that these states have "some combination of weak anti-establishment constitutional provisions, strong free exercise provisions, the presence of a constitutional override provision on restricting appropriations for public education only, or supportive state supreme court precedent suggests a permissive climate for state vouchers" (Kremerer, 2002, p. 11). Furthermore, Maine, Maryland, Rhode Island, and Vermont have state constitutions that have no specific anti-establishment provisions (Kremerer, 2002).

The remaining 19 states fall into the "uncertain" category. There are a variety of reasons that Kremerer places these states in this category. Some of these state
constitutions have provisions that prohibit direct or indirect aid to sectarian private schools; however, aid to nonsectarian private schools is not prohibited. Some states have supreme court precedent that suggests reform efforts may not be turned away. The Colorado Supreme Court “refused to apply two strict anti-establishment constitutional provisions to a state aid plan for students attending public or private colleges except those that are pervasively sectarian” (Kremerer, 2002, p. 7). In this case, the court held that the aid was designed to assist the student, not the institution; moreover, the court noted that a college student is less likely to be religiously indoctrinated than an elementary or secondary student (Kremerer, 2002). And finally, the language of legislation is seldom definitive:

[T]he mere presence of restrictive language in a state constitution is not definitive as to whether a state voucher program would be upheld. State judges often take an independent mind to interpreting state constitutional provisions, and what appears to be restrictive may turn out to be permissive and what appears to be permissive may turn out to be restrictive (2002, p. 7).

Current Voucher Legislation

Regardless of Kremerer’s categorization of state constitutional voucher feasibility, voucher legislation was destined to develop in a post-Zelman era. Americans United for Separation of Church and State produced a web-site with updated voucher legislation on a state by state basis. The following information was obtained from that web-site; each piece of legislation was validated by checking the individual state legislature web site to verify the legislative language of the bill.
In Arkansas, HB 1691 was a bill that proposed a voucher system for parents to use at with private or public schools. The vouchers were capped at $4000.00 per student. HB 1031 is legislation that creates the Ability Scholarships for Students with Disabilities Program. Parents who are dissatisfied with their child’s progress may apply for the scholarships and they can be used to attend a different public school within or adjacent to their current district; or they can be used at a sectarian or nonsectarian private school. The maximum amount of each voucher is the equivalent to the per pupil share of the minimum state and local revenue per average daily membership plus the student’s share of any additional funding received by the district for providing services to students with disabilities.

In Arizona, SB 1141 establishes the “A Plus Literacy Passport Voucher Program.” This program provides a voucher for disabled students and students that fail to achieve a satisfactory score as determined by the state board of education for the student’s grade level on the nationally standardized norm-referenced achievement test. The voucher can be used at any qualified public or private school in the state. The amount of the voucher is not yet determined.

In California, AB 349 is a bill that would enact the California Education Certificate Pilot Program to require the State Department of Education to establish a program within the Compton Unified School District. This program would allow the parents of students to request educational certificates to fund their child’s attendance at participating public or private schools. The bill would establish a schedule to determine the value of the certificate, based on a “face value” of 75% of the revenue limit per unit of average daily attendance, and would set the actual value of the certificate between
60% and 120% of its face value. The bill would require each public school within the Compton Unified School District to become a participating school.

This bill would require the department to report to the legislature on implementation of the pilot program by January 1, 2007. The bill would become inoperative on July 1, 2009 and would be repealed on January 1, 2010, unless a later enacted statute deletes or extends those dates. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claim Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

In Colorado, SB 99 establishes a Colorado education scholarship program to provide scholarships to students in grades 1-12 to attend participating private schools and also includes transportation stipends. A school district will be eligible to participate if a majority of the electors of the school district vote to participate and the district has two or more “low” or “unsatisfactory” rated schools. Each voucher will equal 80% of the school district’s per pupil operating revenues or the actual cost of private tuition, whichever is less.

SB 77 establishes the Colorado Education Scholarship Pilot Program. The state board of education would select three school districts in metropolitan areas as pilot districts. Vouchers would be worth $5,200 or the district’s per pupil spending or the private school’s tuition, whichever is less. HB 1160 establishes the Colorado Opportunity Contract Pilot Program. This program allows a school district to provide assistance to a public school student that receives free or reduced lunch and is attending a school that has received a low or unsatisfactory performance rating and has failed to
improve. The pilot program will offer a maximum of 500 vouchers. Students may use the vouchers to attend public or private schools.

In Connecticut, HB 5741 creates scholarships for special education students to attend private schools. Any parent who feels that their child is not receiving adequate educational assistance may request a voucher. No dollar amount has been set for the voucher at this time.

In Florida, SB 1468 establishes a program to enable students to receive a voucher to attend a private school. This bill provides for the award of a voucher if the constitutional mandate for class size is not met. The voucher granted to an eligible student will be equivalent to 60 percent of the following: the base student allocation in the Florida Education Finance Program multiplied by the appropriate co-factor for the educational program that would have been provided for the student in the district school to which he or she was assigned, multiplied by the district cost differential. In addition, the calculated amount shall include 60 percent of the per-student share of supplemental academic instruction funds, instructional materials funds, technology funds, and other categorical funds as provided for such purposes in the General Appropriations Act, or the amount of the private school's tuition and fees, whichever is less (www.flsenate.gov).

In Hawaii, SB 428 proposes a constitutional amendment to authorize the state to provide scholarships for public elementary and secondary school students with a disability to enroll in and attend private nonsectarian or sectarian schools. The schools must not be “for profit” schools.
In Kansas, SB 211 creates vouchers for children who are eligible for free or reduced cost lunch. The vouchers may be used at public or private schools. The amount of the voucher in 2003-2004 would be 12.5% of the base state aid per pupil.

In Mississippi, HB 372 required the state department of education to establish a school voucher program. Each voucher would not exceed $3,500. HB 935, required the state department of education to establish a school voucher program. The program would provide each student with a $2,250 voucher to be used for tuition and fees at a participating private school. Eligibility for the program required that family income be no more than $30,000 for two parent families; or no more than $20,000 for single parent families. SB 2598 created a program that provided vouchers to students who attended public schools that were judged to be failing two years out of a four year period. HB 372, HB 935, and SB 2598 all died in committee on February 04, 2003.

In Oklahoma, SB 15 created a program that authorized vouchers for children with disabilities to attend participating private schools. The program is similar in design to Florida's McKay voucher program.

In Texas, HB 293 and HB 658 create a pilot voucher program in the state's six largest school districts. The vouchers will be available for low-income parents and educationally disadvantaged youth. A child's voucher is an amount equal to the total average per pupil funding amount in the school district the child would otherwise attend. An eligible child who attends a private school is entitled to 100 percent of the child's voucher, unless the tuition charged by the school is less than the amount of the voucher. In that event, the school district the child would otherwise attend is entitled to the amount
of the voucher remaining after payment of tuition. A child's voucher is payable from the school district to the private school on behalf of the child (www.capitol.state.tx.us).

In Vermont, H 198, establishes a voucher pilot program in each school district in either Rutland County or Chittenden County. The vouchers would be available to students who have an Individualized Education Plan; in order to eligible for the voucher the student must not have met two or more of the goals established in their plan within the timeframe set by the plan.

In Virginia, HJR 572 established a joint subcommittee to study the potential effects of school vouchers and tuition tax incentives on school enrollment. The House tabled this bill on January 28, 2003. HB 1639 allowed parents to transfer their students from overcrowded schools to other institutions. The school board would be required to pay the parent not less than $500 and not more than the annual per child amount set by the school board. The subcommittee voted this bill be "Passed by Indefinitely" on January 14, 2003.

HB 2043 created the Virginia Scholarship and Tutorial Assistance Program to provide state-funded scholarships directly to parents of low-income students in the Commonwealth. The scholarships could be used to pay the costs of tuition of eligible students in kindergarten through 8th grade who attend an accredited public school in an adjacent school district or a participating nonsectarian private school. The scholarships may also be used for purchasing tutorial assistance for students who remain in the local public schools. The subcommittee voted this bill be "Passed by Indefinitely" on January 14, 2003.
Recommendations for Further Study

Chief Justice Rehnquist wrote, “we have never found a program of true private choice to offend the Establishment Clause” (Zelman, 2002). Therefore, the Cleveland Scholarship and Tutoring Program was held not to violate the Establishment Clause of the United States Constitution. The concept of vouchers received new life. However, the condition of the Cleveland City School District remains oblique. It was Milton Friedman’s contention that a system of educational vouchers would promote a competitive market within the education industry; this competitive nature would force public schools to improve to keep up their end of the education market. Therefore, a study of the affect of vouchers on the Cleveland City School District and the Milwaukee Public Schools would provide important information on the influence of vouchers on the neighboring education system.

Furthermore, an examination of the social fabric of the Cleveland area would also provide important information. In his dissenting opinion, Justice Stevens wrote, “Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy” (Zelman, 2002). A sociological study regarding the affect the voucher program had on the Cleveland area may provide insight into how or if schools promote an American culture. In his concurrence with the majority, Justice Thomas wrote that “one of the purposes of public schools was to promote democracy and a more egalitarian culture” (Zelman, 2002). The Cleveland City School District and the Cleveland Scholarship and Tutoring Program have co-existed for nearly eight years now. Theoretically, there should be some relevant sociological and educational data available.
Two of the primary concepts noted in Zelman were neutrality and private choice. An important study would examine new voucher programs that are developing and discover how they are using these concepts in their programs. Moreover, do most of the new voucher programs include sectarian schools? How many new schools are being created around voucher programs? Exactly what type of private schools are participating in voucher programs? If the private schools participating in voucher programs are sectarian, what are the theological origins of those schools? Is there any role for faith-based initiatives in new voucher programs? Also, how does open enrollment affect voucher programs?

In his dissent, Justice Souter asked the question, “How can a Court consistently leave Everson on the books and approve the Ohio vouchers?” (Zelman, 2002). It is recommended that an analysis be conducted on the circumstances surrounding the Everson decision and the circumstances surrounding Zelman decision. Accordingly, an extensive and exhaustive comparative legal analysis should be performed to answer Justice Souter’s perplexing question.

In the Zelman decision, Justice Breyer and Justice Thomas both discuss the application of the Fourteenth Amendment to 20th century American society. Justice Breyer wrote that applying the Establishment Clause through the Fourteenth Amendment allowed the Court to appreciate the religious diversity of America. The concept of separation was required because “an ‘equal opportunity’ approach [to religion] was not workable” (Zelman, 2002). It was not workable because there were too many religions and too many practices to give everyone equal footing. Therefore, drawing clear lines of separation between church and state was the fairest approach.
Justice Thomas wrote, "When rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty" (Zelman, 2002). However, this is a paradoxical statement. Whenever one point is advanced, the counterpoint then becomes repressed, or constrained. This is seen when a woman has the right to choose to carry a child to term; at the same time somebody or some entity losses the right to tell her what to do with her body. It is also seen when the students in the Santa Fe Independent School District can no longer pray over the public address system before a football game because not all students wanted to participate in the traditionally Baptist forum; someone’s rights were upheld and someone lost their perceived right to perform a specific function. Therefore, it is recommended that a legal analysis be completed of the U. S. Supreme Court’s jurisprudence and its application of the Establishment Clause through the Fourteenth Amendment over the last twenty years and its ultimate impact on American society.

It is recommended that research be initiated to analyze the ultimate impact of the Zelman decision on individual state constitutions. A study by Eric W. Treene for the Becket Fund for Religious Liberty suggested three measures that could address Blaine Amendment language. One of the measures was to repeal the individual state constitutions to remove the Blaine Amendment language. A study of individual state constitutions and legislation post-Zelman may shed light on the impact the Zelman decision had on a state-by-state basis.

Additionally, further study is warranted on the success of voucher student achievement. Voucher programs render a great deal of political and emotional debate. It is important to analyze what affect voucher programs have on student achievement. If
students in voucher programs are not performing any better than they did while in attendance in public schools, what is the point in this particular method of education reform? Are voucher programs more valued because of parental satisfaction or student achievement? Further study is also warranted on the social affects of vouchers on student recipients. Do voucher recipients face any type of social stigmatization on private school campuses? If so, what type of isolation exists? How does this affect their learning and achievement?

Conclusions

In chapter I, the voucher program concept was examined historically and politically. Voucher advocates' arguments were presented and examined. Moreover, voucher opponents' arguments were also presented and examined. Existing voucher programs in Milwaukee and Cleveland were scrutinized. Legal issues related to the voucher concept were discussed. The research problem, research questions, and the significance of the study were presented. The method of this study was introduced and a definition of terms was presented.

In chapter II, significant court decisions associated with Establishment Clause jurisprudence were reviewed and analyzed. The courts have been dealing with Establishment Clause issues in schools since 1947. Both the body of jurisprudence and the public school system have evolved greatly during this course of time. The current lexicon in this arena has two important terms: choice and neutrality. There are a number of cases that deal with these issues in particular. These include Agostini, Mitchell, Mueller, Witters, and Zobrest.
The U.S. Supreme Court granted a writ of certiorari to the Zelman case. The issue in this case was the constitutionality of the Cleveland Scholarship and Tutoring Program. This program was a voucher program that provided educational vouchers to the most needy students. It provided parents with the ability to choose which schools they wanted their children to attend. The advocates for the program stated that the program provided a neutral selection of educational programs and that parents were provided the opportunity for true private choice. The opponents of the program stated that the argument about neutrality and choice was merely a type of smoke-and-mirrors argument. They argued that the program violated the Establishment Clause of the First Amendment.

In chapter III, a qualitative research design was explained and the procedures of this legal analysis were outlined. Secondary sources were identified that assisted in the exploration of the general subject matter associated with Establishment Clause litigation and school voucher programs. Resultantly, legal issues and relevant jurisprudence emerged. The cases were arranged in a linear order so that the legal research could be presented in an orderly manner.

An internal evaluation was conducted on all relevant cases to determine the similarity of facts and the relationship of these facts to the research problem. The legal significance and impact of each case was related to the research problem. Secondary sources were used throughout for the purpose of obtaining various legal interpretations.

Case analysis was conducted on the Zelman briefs, petitions, oral arguments, and all relevant cases during the fact analysis stage. The cases were arranged in a brief format to make the case analysis more efficient and to bring to light pertinent issues and to guard against research bias. In addition to the case analyses, I attended the oral
argument and utilized the transcripts of the oral argument before the U.S. Supreme Court to draw analogies regarding legal significance and impact on the Court. A telephone interview was conducted with the chief legal counsel for the National Education Association and written correspondence transpired between key legal scholars and four Supreme Court Justices. All the communication aided this researcher in determining significant issues regarding First Amendment jurisprudence and school voucher programs. Moreover, new voucher legislation from various states was examined and presented in relation to the Zelman decision.

In chapter IV, the major arguments in the judicial process that influenced the United States Supreme Court's decision in the Zelman case were analyzed thoroughly. Chief Justice Rehnquist wrote for the majority and concluded that the Cleveland Scholarship and Tutoring Program did not violate the Establishment Clause of the United States Constitution. He based his decision on a body of jurisprudence that was established by Mueller, Witters, and Zobrest. Furthermore, he held the Ohio program to be one of true private choice and one that was entirely neutral toward religion.

Justice O'Connor wrote in her concurrence that the Ohio program did not violate the Establishment Clause and in order to make that assessment one had to examine all the choices that the program made available to the participants. Justice Thomas concurred as well. He wrote that when rights are incorporated against the states through the Fourteenth Amendment they should advance individual liberty; it should not prohibit the exercise of educational choice.

Justice Souter wrote for the minority in the dissenting opinion. He wrote that for over fifty years Everson had provided the Court with the means to assess Establish
Clause issues in a fair and relevant manner; nevertheless, he believed that in the Zelman holding the Court had overturned Everson by ignoring it. Justice Breyer and Justice Stevens wrote dissenting opinions as well. They expressed concerns regarding the issue of social and religious strife. They felt that allowing the government to pay the tuition for private religious schools did endorse religion; that endorsement would eventually create a social rift.

The Zelman decision draws detailed attention to Everson. If the present Court did, as Justice Souter said, ignore Everson, does the precedent Everson established remain relevant? Accordingly, the Zelman holding appears to have ushered in a new era for Establish Clause issues. The primary issues that emerged from this decision were neutrality and choice. The concepts of neutrality and true choice appear to be able to stand up to the Establishment Clause challenge.

The outstanding issues that remain regarding voucher programs rest in the state constitutions in the guise of Blaine Amendment language. If states want to create voucher programs they are going to have to contend with the Establishment Clause language that was written into their constitutions long ago.

The implications that the Zelman decision holds for public education depends on each state and the way in which they react. The state constitutional language will need to be addressed; however, if parents are very disappointed with the present situation of public schools in their state, they will inflict political pressure on state legislatures to address this situation. Once parents in surrounding states have seen parents in other states receive satisfaction from their new legislation, others will demand the same.
Another implication with which public schools may contend is the issue of school finance. How will vouchers be funded and where will the money come from? Again, once parents have seen this work in another area, they may expect it to work for them as well. Finally, a striking implication for public schools may be found in the social strife that could develop as a result of voucher programs. The collective uniformity once attributed to public schools may be disappearing.

Finally, all research questions were answered in this chapter. A detailed and extensive analysis of the each Justice's opinion was performed. The major arguments that influenced the judicial process in the Zelman case were discussed. Outstanding issues remaining for voucher programs were discussed. The effectiveness of the Cleveland voucher program was analyzed. Moreover, the implications that voucher programs hold for public education was examined.
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Associated Briefs

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Brief for the American Education Reform Council in Support of the Petitioner, Zelman v. Simmons-Harris, Nos. 00-1751, 00-1777, and 00-1779, (2001).


Brief for the Claremont Institute Center for Constitutional Jurisprudence in Support of the Petitioner, Zelman v. Simmons-Harris, Nos. 00-1751, 00-1777, and 00-1779, (2001).

Brief for Ohio School Boards Association, Ohio Association of School Business
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