Changing American Schools: The Intersection of Choice and the Constitution

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I. introduction

President George W. Bush's "No Child Left Behind" education plan, as it was originally submitted to the House of Representatives in March 2001, included a proposal to create a limited program for school choice via vouchers that students attending consistently low-performing schools could use as tuition at better-performing public or private schools.1 By the time the bill reached the House floor, however, those portions proposing school choice that included private schools had been removed by committee.2 Two attempts to resurrect the choice proposal with the inclusion of private schools by amendment to the No Child Left Behind Act of 2001 were subsequently rejected by the House.3

While this particular attempt to legislate choice into the school system is noteworthy for its intended national scope, school choice is not a new concept.4 In the last three decades of the twentieth century, several states wrestled with such methods as voucher programs, also called "scholarship" programs, and tax credits or deductions as mechanisms for implementing choice-based reforms.5 Pervasive support for improving the system of educating American children finds its stimulus in the recognition of certain weaknesses, such as the lagging performance of American students as compared to certain foreign counterparts6 and the dual detriments of high attrition and low graduation rates.7

The impetus for a system of choice stems primarily from the basic market theory that choice breeds competition and that competition breeds improvement in the quality of services offered. At its core, this supply-versus-demand argument8 suggests that parents will choose better schools (i.e., higher-performing schools) if that option is available to them. Consequently, lower-performing schools will be forced to either improve educational quality or close their doors. Despite the seeming simplicity of this theory, the implementation of voucher programs has generated a notable amount of litigation, mostly due to the inclusion of private schools, particularly religiously-affiliated private schools, in the matrix of schools available to choice students. Opponents challenge the constitutionality of voucher programs on the basis that they violate the Establishment Clause because they permit use of governmental education dollars to pay for tuition at private, often sectarian, schools.9 Supporters contend, and the United States Supreme Court recently agreed,10 that the intervention of private choice between the state and religious institutions removes any unconstitutional taint.

An interpretation of the Establishment Clause that permits the use of vouchers in programs that include sectarian institutions may be a logical extension of the Court's Establishment Clause jurisprudence. However, the basis for expansion-that private choice alleviates the unconstitutional concerns-is inadequate support for a decision that redesigns the constitutional boundaries of the modern educational landscape. This expansive interpretation is also at odds with other precedent that restricts the intervention of religion in a public educational setting.11 It is at least inconsistent, and arguably illogical, that although it is impermissible to bring religion into taxpayer-funded public schools, it is now permissible to send taxpayer funds to sectarian institutions because the private choice of a parent to so direct those funds has intervened.

Part II of this Note briefly overviews the general characteristics of a voucher program. Part III reviews the evolution of post-1971 Establishment Clause jurisprudence as it applies to schools. Part IV examines the particular implementation characteristics and the procedural progression of litigation concerning Ohio's "Pilot Project Scholarship Program," the constitutional legitimacy of which was recently upheld by the United States Supreme Court.12 Part V discusses the application of case law precedent to the Ohio Scholarship Program.

II. GENERAL CHARACTERISTICS OF A VOUCHER PROGRAM

The current education system divides education into two dimensions: (1) private financing and provision, and (2) public financing and provision.13 A voucher system adds a third possible dimension of public financing and private provision to the basic scheme.14 At its most basic level, a voucher system entails the following: (1) government payment of education dollars to a student's parent; (2) parental choice as to which participating school they desire their student to attend; and (3) the physical act of voucher redemption, at which point the parent endorses the voucher to the chosen school.15 The following subsections-describing the general methods of determining participant eligibility, voucher funding, and admission considerations-add layers to this basic scheme of government-sponsored choice, describing the general methods of determining participant eligibility, voucher funding, and admissions considerations.

A. Eligibility

Choice programs determine eligibility by different criteria, relating to both the school and the student. Some programs propose to limit eligibility to only public schools, while other programs propose to include both public and nonprofit private schools. A nationwide analysis of the availability of public school choice (not limited to voucher programs) indicates that thirty-six states plus the District of Columbia have at least limited school choice:16

The availability of some voucher programs has been restricted to students falling within certain definable classes, delineated in some instances by the quality of the school attended prior to voucher assistance or the economic status of the student's family. For example, Florida's publicly funded private school choice program, "Opportunity Scholarships," allows "any child who has attended a failing school for two years out of any four year period to attend a higher performing public school or a private or religious school of choice."17 In contrast, the Milwaukee "Parental Choice Program" offers a student whose family income is at or below 175% of the poverty level the choice to attend either a private or religious school.18

B. Funding

The most significant aspect of an educational voucher program is that the government continues to provide payment for education, but the student's family directs the education dollars to the chosen school. This function relegates the government's role to that of a "public education bank of sorts,"19 as opposed to the traditional method under which the government directs the child to the geographically appropriate school and disburses the funds to the school accordingly.20

Just as school and student eligibility varies among the programs, so too does the value of the vouchers created.21 A report produced by the Center for the Study of Public Policy presents two models to answer the general question of how much of the cost of education the voucher should pay.22 The first model, called the Egalitarian Approach, proposes that each and every child should receive a voucher of equal value, calculated by using the average per-pupil expenditure.23 For example, for the 1999-2000 school year the estimated average national per-pupil expenditure was $6911.24 Consequently, the Egalitarian Approach would distribute a voucher worth $6911 to each eligible child. Breadth is fundamental to the Egalitarian Approach-regardless of the amount, all vouchers are valued equally.

Whereas the Egalitarian Approach offers breadth, the Regulated Compensatory Model-the second model proposed by the Office of Economic Opportunity-accentuates depth.25 The Regulated Compensatory Model requires that each child receive a voucher in an amount approximately equivalent to the cost of education in the public schools in his area.26 The underlying logic of the Regulated Compensatory Model is that areas where the cost per pupil is lower will not require vouchers in the same amount as areas where the cost per pupil is higher; if it costs more to educate a child in an urban school than it does to educate the same child in a suburban or rural school before the implementation of a voucher system, then it will still cost more to educate that child in an urban school post-implementation.

C. Admissions

Aside from the determination of student eligibility discussed briefly in Part II.A, the manner in which admissions decisions among eligible students are made is important because a voucher system can affect social, racial, and gender stratification within schools. Failing to prohibit discriminatory admission policies could undermine a program's reformatory purpose by permitting resegregation of schools and the creation of larger gaps in achievement between the rich and the poor, as well as between those who are better situated to navigate through the educational system and those who are not.27

1. Selection Guidelines

To counter these potential problems, some guidelines for the selection of students have been advanced. For example, the Office of Educational Research and Improvement ("OERI") provides a list of key factors that should be considered in the makeup of a school population, including racial balance, instructional capacity, space availability, neighborhood school priority, preferences for siblings, replication efforts, and gender balance considerations.28 This same OERI report also states that no student should be denied admission to a voucher program based on gender, race, or disability characteristics.29

2. Selection Methodology

Two basic methods of selection are cited in voucher literature: first-come, first-served and the lottery.30 The first-come, first-served model rewards parents who take the time to use the system to the fullest extent possible and offers an incentive for parents to be involved in the pursuit of their children's education.31 While increased parental involvement is a laudable objective, first-come, first-served has the very real potential to operate against families experiencing economic-related time constraints-ironically, the same families whose children are most often defined as those who are particularly in need of better educational opportunities.32 A single, working parent in an impoverished inner-city area may not be able to respond as quickly as others to the demands of a first-come, first-served model. The lottery method, however, is not subject to this problem. In a lottery, each student has the same probability of being chosen, and schools using this approach are not

able to control for any particular student characteristics perceived as desirable or undesirable.33 With a lottery, there is neither penalty nor reward for economic status, race, or ethnicity, as could result de facto from the first-come, first-served model.

III. CASE LAW: ESTABLISHMENT CLAUSE JURISPRUDENCE

The constitutional debate over school vouchers arises from the Establishment Clause of the First Amendment: "Congress shall make no law respecting an establishment of religion."34 Supreme Court case law over the last quarter of the twentieth century has set forth criteria for determining whether a governmental aid program passes muster under an Establishment Clause challenge.35 The issue raised by voucher program cases is whether the laws enacting such programs are laws respecting an establishment of religion such that the programs are unconstitutional under the First Amendment. The question often hinges on whether religious schools are included in the consortium of schools from which students can choose. The following examines the analysis the Supreme Court has applied in Establishment Clause cases, specifically the role that choice has played in the Court's constitutionality determinations.

A. Lemon v. Kurtzman36

In its 1971 Lemon v. Kurtzman decision, the Supreme Court first outlined the contours of a test for determining the constitutionality of aid to church-related schools.37 The test included three prongs, accumulated from previous decisions, indicating that a statute does not violate the Establishment Clause if it meets the following conditions: (1) it has a secular legislative purpose; (2) its principle or primary effect neither advances nor inhibits religion; and (3) it does not foster excessive entanglement of government and religion.38

The Lemon test has subsequently been used in numerous cases to determine constitutionality under the Establishment Clause. Notably, much of the post-Lemon litigation has centered on analysis under the "effects prong," as the Court has exhibited its disinclination to ascribe an unconstitutional legislative purpose by employing a liberal test, which looks primarily to the face of the statute for a plausible secular purpose.39

B. Committee for Public Education & Religious Liberty v. Nyquist40

Lemon was soon applied in Committee for Public Education & Religious Liberty v. Nyquist to a tuition grant program which provided, inter alia, partial tuition reimbursements to low-income parents whose children attended private elementary or secondary schools.41 The Court's examination of legislative history indicated that one of the legislature's motivations was to provide financial support to the state's private schools in order to prevent a "massive increase in public school enrollment and costs."42 The Court held that the statute in Nyquist failed to satisfy the second prong of the Lemon test-that the primary effect of the statute must neither advance nor inhibit religion.43 The Court made two key points in support of its holding. First, the Court declared that direct aid is invalid, regardless of its form, when there is no effective means for assuring that public funds will be used only for "secular, neutral, and nonideological purposes."44 Second, the Court reasoned that, without such an effort to separate educational functions according to their secular and sectarian natures so that government aid would support only the secular purposes, the effect of the statute was to impermissibly provide financial assistance to religious schools.45 In its analysis, the Court explained that passing the aid through the hands of parents in the form of a reimbursement does not repair an Establishment Clause violation.46

One last point of considerable importance is found within a footnote to Nyquist's majority opinion, where the Court asserted that for its then-present decision it "need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."47 The importance of this judicial caveat is realized both by the subsequent case law as discussed in this Part and in its implications for the Cleveland Scholarship Program.48

C. Mueller v. Allen49

In 1983, the Court again used its Lemon criteria in Mueller v. Allen to appraise the constitutionality of a Minnesota statute that allowed state taxpayers to deduct expenses from their state income tax for certain "tuition, textbooks, and transportation" costs incurred by parents of elementary and secondary school children.50 The Court held that breadth of

availability is an "important index of secular effect" and that, therefore, the deduction did not have the primary effect of advancing the sectarian aims of nonpublic schools; it was available to all parents, regardless of the public-nonpublic or sectarian-nonsectarian nature of the schools their children attended.51 The Mueller Court claimed that sectarian institutions received an attenuated financial benefit only when the parents directed their portion of the aid to those schools-rather than as a direct result of state involvement.52 This claim indicated the significance of the role of individual decisions made by parents. The emphasis on private choice would come to play a crucial role in future Establishment Clause cases.

The Mueller Court ultimately refused to adopt a rule whereby the constitutionality of a statute would be determined by statistical analysis of how many parents took advantage of the tax deductions each year.53 This holding-that government aid does not establish religion simply because beneficiaries choose to obtain services from more religious than nonreligious institutions-is in direct contradiction to the Court's reasoning in Nyquist that by providing parents with a reimbursement for a portion of the tuition incurred at a sectarian institution (which they choose freely), the statute has the impermissible effect of providing financial support for nonpublic, sectarian institutions.54

D. Witters v. Washington55

In Witters v. Washington, the Court upheld the provision of state vocational rehabilitation assistance to a blind recipient as free from an Establishment Clause violation, despite the recipient's use of the aid at a sectarian college in pursuit of an education as a "pastor, missionary, or youth director."56 The Court determined that the rehabilitation assistance program was not biased toward religion and did not create a financial inducement for beneficiaries to choose sectarian institutions because such institutions received funds only as a result of the "genuinely independent and private choices" of the beneficiaries.57 Private choice thus made it inappropriate to attribute sectarian receipt of aid to state sponsorship, subsidization, or endorsement of religion.58

E. Zobrest v. Catalina Foothills School District59

In 1993, in Zobrest v. Catalina Foothills School District, the Court sustained a grant of state assistance to provide a sign language interpreter who accompanied a deaf child in classes at a private, sectarian high school.60 The Court again employed the theory that "programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."61 With this statement, the Court again emphasized the significance of private parental choice to direct aid for use in a sectarian school, designating the child as the primary beneficiary whereby the school receives only an incidental, if any, benefit from the child's enrollment.62

F. Agostini v. Felton63

Lemon's three-prong test underwent a makeover in Agostini v. Felton, a case involving a New York City program under which public school teachers taught remedial classes in private schools.64 Agostini recast the entanglement question as one factor in the analysis of a statute's effect, transforming the three-prong test into a two-prong test.65 The reformulated Lemon test provides that a statute does not violate the Establishment Clause when it has a secular legislative purpose and its principle or primary effect neither advances nor inhibits religion.66 Furthermore, the Agostini Court clearly set out the three current, fundamental criteria used to evaluate whether government aid has the impermissible effect of advancing religion. The Court stated that a statute does not advance religion if "[i]t does not result in government indoctrination[,] define its recipients by reference to religion[,] or create an excessive entanglement" of government and religion.67

The Agostini Court also noted particular changes in the evolution of Establishment Clause jurisprudence. For instance, the development of case law had eradicated the presumption that a symbolic link was established between government and religion just by the presence of public employees in sectarian schools.68 Moreover, case law had departed from the directive that deemed all government aid invalid when it directly bolsters the "educational function of religious schools."69

In applying the reformulated "effects" prong to the program at issue in Agostini, the Court relied on familiar rationales. Revisiting the importance of neutrality, the Agostini Court determined that, because the aid was allocated neutrally, the New York City program created no financial incentive for beneficiaries to alter their religious beliefs.70 The Court observed that where distribution of aid is based on "neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis . . . the aid is less likely to have the effect of advancing religion."71 The availability of services to all children meeting the eligibility requirements under the New York City program satisfied the neutrality principle.72

Another familiar rationale used by the Agostini Court to uphold New York's program was the notion that aid is permissible when it follows the students at whatever school they choose to attend, otherwise characterized as the intervention of private choice between church and state.73 In other words, aid provided in a sectarian environment, as with the sign-language interpreter in Zobrest,74 is not interpreted as an advancement of religion by government where it is only by a genuinely independent parental choice that the child receives the governmental benefit in a sectarian institution.

However, the Agostini majority declared that, while Establishment Clause law had changed significantly since 1985, the Court was not overruling earlier precedent.75 Rather, the Court declared, '"if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'"76 The importance of this admonition to the courts of appeals is examined in the context of Nyquist's Establishment Clause precedent as applied to the Cleveland Scholarship Program.77

G. Mitchell v. Helms78

In Mitchell v. Helms, the Court again employed the Lemon test, as it was modified in Agostini, to examine whether a Louisiana law providing governmental aid in the tangible form of materials and equipment to both public and private, including many sectarian,

schools-under which the amount of aid depended upon a school's population-was in violation of the Establishment Clause.79 The Court ultimately answered this question in the negative.80

Mitchell's plurality opinion provided the most sweeping revelations.81 In analyzing whether the Louisiana program supported religious indoctrination by the government, the Court again invoked the principles of neutrality and private choice.82 It reaffirmed the theory that offering aid to a vast group of citizens, regardless of religion, is one indication of neutrality under which governmental aid may be upheld.83 The Court similarly reaffirmed the role of genuinely independent, private choices of individual parents as a method of promoting neutrality.84

The Court also used the inquiry regarding financial incentives to undertake religious indoctrination in its examination of whether the Louisiana program defined its recipients by reference to religion.85 The Court reiterated that no such intolerable financial incentive is present where the aid is allocated based on neutral, secular criteria and is available to all beneficiaries on a nondiscriminatory basis.86

Finally, the Mitchell Court also held that the Establishment Clause does not require the exclusion of "pervasively sectarian" schools from government aid programs that are otherwise constitutionally sound.87

IV. OHIO'S PILOT PROJECT SCHOLARSHIP PROGRAM

A. Cleveland's Educational Crisis

The problems with education in the Cleveland City School District have been borne out in consistently dispiriting education statistics. Statistics for the 1999-2000 school year indicated that thirty-five school districts were categorized as being in a state of "academic emergency," which means that each district met only eight or fewer of Ohio's twenty-seven performance standards.88 In the Cleveland City School District, the academic emergency was evidenced in statistical reports signifying the percentages of fourth-graders

who received promotion to fifth grade, sixth-graders who received promotion to seventh grade, and the number of students who graduated from high school for the school years 1996-97 to 1999-2000:

While the graduation rates are alarmingly low, the utterly precipitous decline in promotion rates for fourth- and sixth-graders between the school years 1998-1999 to 1999-2000 is even more appalling. Given the grim graduation rates over all the years covered in the table, it may well be that terminating the wholesale social promotion of students through elementary grades is warranted; however, there can be no doubt that such a termination will soon produce an enormous backlog of students in Cleveland's elementary schools. These difficult circumstances forced the Ohio legislature and the courts to get involved.

B. Cleveland's Voucher Program

In March 1995, following a finding of mismanagement by the local school board, the United States District Court for the Northern District of Ohio ordered that the Cleveland City School District be placed directly under the supervision and management of the State Superintendent of Public Instruction.93 Despite experiments in other states,94 the theory of vouchers as a mechanism for institutionalizing choice in public education was a hypothesis waiting for a sympathetic opening-an opening exactly like the desperate environment of the Cleveland schools. The Ohio legislature subsequently enacted the "Pilot Project Scholarship Program."95 Following a litany of litigation that threatened its viability,96 the Program was reenacted in 1999 to bring the statute into compliance with state law,97 this time under the name "Pilot Project Scholarship and Tutorial Assistance Program" ("Scholarship Program").98

C. Program Characteristics

The new version of the statute makes the Scholarship Program available for implementation in any district that is or ever has been under federal court order requiring the state superintendent's supervision and management.99 The Scholarship Program provides scholarships (essentially vouchers) to children residing within the designated school districts, to be applied at alternative schools-private schools or public schools in an adjacent school district100-chosen by the student's family, for students in kindergarten through

eighth grade.101 Preference is given to children from low-income families, defined as families whose income is below 200% of the poverty line.102 A tuition cap of $2500 per student per year is required of participating private schools.103 Under this tuition cap, families falling below 200% of the poverty line will receive a scholarship worth 90% of the cost of tuition, up to a maximum of $2250; families at or above the 200% poverty line will receive a scholarship for 75% of the cost of tuition, up to a maximum of $1865.104 These funds originate from the tax revenue coffers, but they do not represent a zero-sum reallocation of money for public schools from which students transfer-Cleveland's public schools have the opportunity to keep up to 55% of the per-pupil state aid amount, even when Scholarship Program parents receive the full voucher amount.105 One policy implication of this financial arrangement is that, for the failing public schools, a decreased student population coupled with increased per-pupil expenditure funds (taking into account the 55% that remains when a Scholarship Program recipient leaves the public school) should benefit the students remaining in the public schools, notwithstanding the benefit received by those eligible for the Program.

In addition to the preference given to students from low-income families, the statutes also address the possibility that more applications are submitted from the entire population of students than spots are available.106 In this situation, the priorities for admission of students provide that, in selecting new students for admission, children from low-income families are second only to siblings of students who were enrolled in that particular private school during the preceding year.107 Following the admission of siblings, the statute requires that the school must admit children from low-income families to kindergarten, first, second, and third grades, until the number of such students in each grade equals the number that constituted 20% of the total number of students enrolled in the school during the preceding year in such grade.108 When there are more applications from low-income families than there are available spaces, admission choices are to be made by lottery among all low-income family applicants.109

In practice, this system of priorities means that a participating school that had a total of 100 students enrolled in kindergarten during the 2001-2002 school year must admit twenty new kindergarten students from low-income family applicants for the 2002-2003 school year before admitting students from families at or above 200% of the poverty line.

However, this hypothetical participating school may not be required to admit all twenty new kindergarten students; rather, it may admit fewer so long as (1) all of those selected are from the low-income family applicant pool, and (2) the school enrolls ten students per class or a minimum sum of twenty-five students in all offered classes.110

Finally, the Ohio legislature also enacted an anti-discrimination provision in its codification of the requirements for registration of participating schools.111 In order for a participating private school to be eligible to receive one of the scholarship payments, it must be registered with the State Superintendent of Public Instruction.112 To qualify for registration, the school is prohibited from discriminating on the basis of race, religion, or ethnic background.113 The school must also agree not to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion."114 Litigation has focused on the implementation of the Program in the Cleveland City School District.115

D. Procedural Posture Pre-Supreme Court

Litigation regarding the Ohio Scholarship Program originated when a group of Ohio taxpayers filed suit against the state of Ohio and the state superintendent, challenging the Program's constitutionality.116 The trial court granted summary judgment to the state defendants, finding that the Program did not violate the Constitution.117 The taxpayer-plaintiffs then requested and received review by the Court of Appeals of Ohio, which reversed the trial court, finding the Scholarship Program unconstitutional under the Establishment Clause.118

In May 1999, the parties nearly missed another reversal of fortune when the Ohio Supreme Court held the Scholarship Program constitutional as to the Establishment Clause of the U.S. Constitution, but tempered that holding by finding a violation of a separate state rule regarding the form of permissible statutory enactments.119 In what was to become the most notable part of its opinion, despite being dicta, the Ohio Supreme Court declared that the Establishment Clause doctrine set forth in Nyquist was not applicable to

the determination of the Scholarship Program's constitutionality.120 The court subsequently provided that its order was stayed through the end of the fiscal year to avoid disruptions to the students already participating in the Program.121

Following the declaration as to particular violations of the Ohio Constitution, the Ohio legislature proceeded in June 1999 to reenact the Scholarship Program before commencement of the next school year,122 thus bringing the Program into compliance with the state constitutional requirements set forth by the Ohio Supreme Court. In response to the reenactment, the taxpayers again filed suit, this time in the United States District Court, seeking and receiving an injunction enjoining the state from continuing administration of the Program pending the district court's decision on the merits of the case.123 Three days later the district court stayed the injunction in part, providing that no new students would be allowed to enroll in the Program, but permitting students enrolled in the last academic year to continue in the Program for one semester or until final decision on permanent injunctive relief could be made, whichever occurred sooner.124

In the interim between the district court's staying order and its hearing on permanent injunctive relief, the Supreme Court issued an order staying the district court's preliminary injunction pending the Sixth Circuit's final disposition of the appeal.125

In December 1999, the district court granted summary judgment to the taxpayer-plaintiffs and permanently enjoined the state from administering the voucher Program126 after determining that Nyquist controlled the issue.127 However, the district court again stayed its order, pending review by the Sixth Circuit.128

In December 2000, the Sixth Circuit affirmed the district court, finding that an analysis of the Scholarship Program as per Nyquist rendered the Program unconstitutional under the Establishment Clause.129 The court denied a petition for rehearing en banc,130 but stayed the injunction of the Scholarship Program pending dismissal of the appeal by the United States Supreme Court.131 The Scholarship Program and the participating students were in educational limbo, waiting for the Supreme Court to "clarify the proper application of its precedents" regarding Establishment Clause jurisprudence.132

V. ESCAPING AN ESTABLISHMENT CLAUSE VIOLATION: JURISPRUDENCE AND THE SCHOLARSHIP PROGRAM

As discussed in the previous Part, the lower courts wrestled with Establishment Clause precedent, holding at some levels that the Scholarship Program did not violate the Constitution and holding the Program in violation at other levels.133 Accepting as secular the legislative purpose of the Program to provide improved educational opportunities for children in the failing Cleveland schools,134 the issue was always whether the Program had the effect of advancing or inhibiting religion.

A. Ohio Supreme Court

The state courts and lower federal courts sharply disagreed in their analyses of the Program under Lemon's effect prong. In upholding the constitutionality of the Scholarship Program, the Ohio Supreme Court found that it did not violate the governmental indoctrination prong of the Lemon test, because it provided benefits without respect to religion, avoided a "symbolic link" between government and religion, did not involve a government actor in a religious activity or a religious setting, and did not encourage attendance at sectarian institutions.135 The court also found that on its face, the Program's statute did not define recipients with reference to religion.136 In its analysis, as per Agostini, of whether the statute had the effect of advancing religion by creating a financial incentive to undertake religious indoctrination, the court ultimately held that the result that most beneficiaries chose to use their aid to attend private, sectarian institutions was not a circumstance worthy of rendering the entire Program unconstitutional because the aid was allocated in a neutral, nondiscriminatory manner.137 As would be the case in other courts as the litigation progressed, the Ohio Supreme Court placed significant emphasis on the intervention of private choice.138 The court reasoned that, because government money only reaches sectarian schools when individual parents direct it to those schools, the Program did not violate the Establishment Clause.139 Having thus determined that the Program did not have the primary effect of advancing religion and summarily dismissed Nyquist as "undermined by subsequent case law,"140 the court held that no constitutional challenge remained.141

B. Court of Appeals for the Sixth Circuit

The Court of Appeals for the Sixth Circuit also acknowledged the modified formulation of the Lemon test as the general criteria to apply in Establishment Clause cases involving aid to sectarian institutions.142 Unlike the Ohio Supreme Court, however, the Sixth Circuit found Nyquist to be the most persuasive case on point143 and called particular attention to Agostini's admonition that courts of appeals are to follow Supreme Court precedent where it directly applies and leave it to the Supreme Court to overrule itself.144 Working within the confines of Nyquist, the Sixth Circuit then marked factual similarities between the Nyquist program and the Scholarship Program, finding the latter a "tuition grant program for low-income parents whose children attend private school parallel to the tuition reimbursement program found impermissible in Nyquist."145 Other factual similarities noted by the court included that both programs provided payment of government funds to parents, that the great majority of benefiting schools were sectarian, and that neither program provided an effective means for ensuring that public aid would be used only for "'secular, neutral, and nonideological purposes.'"146

In applying Supreme Court precedent to the Scholarship Program, the court made several further conclusions. Despite finding the statute facially neutral, the court concluded that the Program was not neutral because it discouraged participation by nonreligious schools,147 thereby statutorily limiting the options available to Program participants and consequently precluding the existence of genuinely independent choice.148 Moreover, the court reasoned that the lack of participation by public schools in adjacent districts rendered the public-private choice illusory and determined that adjacent public schools suffered financial disincentives to participation.149 The court concluded that, because no spaces were therefore available under the Program for students to attend public schools instead of private schools, the "program clearly ha[d] the impermissible effect of promoting sectarian schools."150 Ultimately, the Sixth Circuit held that the Scholarship Program directly contravened the Supreme Court mandates of neutrality, freedom from incentives to undertake religious instruction over secular instruction, and private choice regarding application of aid to either sectarian or nonsectarian institutions.151

C. United States Supreme Court

The federal and state court decisions indicated that the Scholarship Program's constitutionality would hinge upon whether Nyquist was applicable or whether subsequent case law had sufficiently modified the impermissible effects test to such a degree that the Program would survive an Establishment Clause review. The Program opponents centered their argument to the Supreme Court on their assertion that upholding the Program would require the Court to overrule its Nyquist opinion.152 In contrast, supporters argued that Nyquist could be distinguished because the program therein involved aid to benefit private schools, whereas the Scholarship Program involved aid to benefit impoverished students.153 The supporters also argued that the Program satisfies the modern tests of Establishment Clause jurisprudence,154 in particular the Court's "two pivotal considerations" for "adjudicating challenges to government aid programs under which individual students are intended beneficiaries," because the Program involves true private choice and is neutrally designed and administered.155 In arguing for the Program's use of choice, the supporters hit upon what would be the linchpin in the Court's holding.

The Supreme Court, in a five-four decision, held that the Program does not offend the Establishment Clause.156 Much as the Ohio Supreme Court had done, the Court dismissed the applicability of Nyquist, noting that the program at issue there was designed to benefit financially-troubled, private, sectarian schools.157 Comparatively, the Court recited the dismal state of public education in Cleveland and focused on the students and parents as the beneficiaries of the state aid.158 The Court also referred to the window it had left open for itself in Nyquist, whereby it reserved judgment at that time for some future case involving aid provided without regard to the nature of the institution benefited.159 The Court stopped short of overruling Nyquist, however, leaving the courts of appeals still bound by the Agostini directive that had previously inhibited its determination of the Program's constitutionality.160

Acknowledging once again the legitimate secular purpose behind the Program and thereby discarding the first prong of the Lemon test as satisfied, the Court contemplated whether the Program had the "forbidden 'effect' of advancing or inhibiting religion."161 The Court focused extensively on the role of true private choice as it intervenes between the governmental provision of and sectarian institution's receipt of educational funds.162 Of great importance to this analysis were the Program characteristics of the provision of

aid to a broad class of neutrally defined beneficiaries, the nonexistence of a financial incentive to choose sectarian institutions, and the inclusion of all district schools as eligible participants regardless of the sectarian/nonsectarian nature.163 The Court held that these characteristics operated to provide beneficiaries with "genuine choice" among a variety of opportunities.164 Not only did the Court find that there was no financial incentive to choose religious schools, but it also argued that the Program actually produced "financial disincentives," both for the participation of religious schools and the private direction of aid to religious schools.165

Also crucial to the determination of the Program's constitutionality was the Court's distinction between where the scholarships may be redeemed and where the scholarships are actually applied. According to the Court, the proper focus is the empowerment of participants to use the aid freely, not the overwhelming preference for religious institutions that the statistical reports demonstrated.166

While the majority assumed the propriety of the Program because of the availability of "true private choice," the dissent argued against the transition from the realist perspective in the Nyquist era-which recognized the legal importance of what state aid "bought when it reached the end point of its disbursement"-and the Court's formalist expansionism, under which constitutionality is determined by the public/private character of the hands through which the aid passes and the myriad institutions to which the aid may be directed.167

The thrust of the dissent's argument was that, neutral characteristics of the Scholarship Program notwithstanding, the Court stretched outside the bounds of even early formalistic Establishment Clause jurisprudence, which found "isolated and insubstantial" aid programs consistent with the Constitution.168 In the current decision, the dissent contended, the Court stepped far beyond the realm of providing a sign language interpreter for a deaf student,169 approving instead the application of "substantial amounts of tax money" to "systematically underwrit[e] religious practice and indoctrination."170 In discussing how "[s]chool voucher programs differ . . . in both kind and degree from aid programs upheld in the past," the dissent observed that the programs "differ in kind because they direct financing to a core function of the church: the teaching of religious truths to young chil-

dren. . . . [They] also differ in degree [in that the] majority's analysis . . . appears to permit a considerable shift of taxpayer dollars from public secular schools to private religious schools."171 Taking into consideration the Program's tuition cap172 and the fact that recipients may receive a scholarship worth up to ninety percent of tuition,173 it is a difficult to make the argument that the state is not engaged in the provision of religious education-though this must be the circumvention intended by the majority's focus on the intervention of private choice.

The dissent also addressed entanglement issues not taken up with any real sincerity in the previous Scholarship Program litigation. Specifically, the dissent engaged in discussion of the implication of the Program's anti-discrimination provision.174 Under this criterion, participating schools are prohibited from discriminating in admissions on the basis of religion, as well as from teaching "hatred of any person or group on the basis of . . . religion."175 Though the notion of discrimination on the basis of religion would be a naturally repugnant proposition in most aspects of modern American life, the opposite is true within the parameters of a particular religious faith-otherwise, the distinctions dividing one belief from another are lost in the attempt to incorporate the nuances of all beliefs. Furthermore, while the prohibition against the teaching of hatred on the basis of religion is a hot topic in the context of the war on terrorism, from a practical application standpoint outside of that context, the dissent posits that the prohibition "could be understood . . . to prohibit religions from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others, if they want government money for their schools."176 Moreover, "every major religion currently espouses social positions that provoke intense opposition."177

The dissent, unfortunately, failed to address the majority's argument that not only is there no financial incentive to choose religious institutions, but, in fact, there are financial disincentives to do so.178 This argument is at best disingenuous, especially given the importance the majority places on the availability of choice. Although it is true that Program participants must pay a portion of the school's tuition,179 the participants still receive state money that they may utilize to attend institutions previously beyond their grasp. Characterizing the difference in dollars available as a disincentive is an attempt to disguise the fact that public money is nevertheless used for sectarian purposes. Because the

amount of tuition is capped at $2500,180 the maximum amount that a family must contribute (at the seventy-five percent rate for families at or above 200% of the poverty line181) is $635. This reduced amount, as compared to families carrying the entire tuition burden, may still be a disincentive for some would-be participants. However, the Program's assistance works to reduce the financial disincentives to such a significant degree that any true disincentive is practically extinguished-in truth, that is the aim of the Program, so that choice is available to all families.

Whatever the arguments against the application of public aid into the private, sectarian realm, private choice has intervened between state and religion, freeing the Scholarship Program participants from their indeterminate state.

VI. CONCLUSION

In the educational voucher context, emphasis on choice that includes private, sectarian institutions overlooks the reality that, despite the extra hands through which public funds pass, the state is nevertheless financing religious education. As noted by Justice Souter in his dissent in the Cleveland case, "Constitutional limitations are placed on government to preserve constitutional values in hard cases, like [the Scholarship Program case]."182 Undoubtedly, the Cleveland City School District presents an incredibly sympathetic situation when it offers up the futures of disadvantaged, inner-city youths confronted with the grim prospects beset them by a failing education system. It seems that even the Supreme Court has been caught up in the impassioned equivalent of the end justifying the means for the affected students.

Even sans a favorable decision for the Scholarship Program, the particular bent of the Supreme Court's decision would likely have been a win for vouchers. An explanation of unconstitutional provisions likely would have served mostly to aid proponents in restructuring offensive portions of the Program, as demonstrated by the state's resilience in reenacting the Program when it was determined previously that certain portions violated constitutional mandate.183 Decades of experimentation with school choice as a mechanism for educational reform demonstrate the movement's longevity and fortitude. However, even conceding that the time for true exploration of voucher programs has arrived, where

is the Establishment Clause line now? If vouchers to be used at private, secular institutions are permissible in the framework of failing public schools, what precludes their permissibility in general? If limitations do exist, just how dire must the straits be before a Scholarship Program is acceptable? If true private choice is the criterion, and the secular purpose is to benefit all school children, then the Supreme Court's decision may be even more sweeping for education than it appears in the "history and context" underlying the Cleveland Program.184

Ultimately, the Court's decision is supported by the development of Establishment Clause jurisprudence. School choice likely will also prove to be as large an innovative force as predicted by its presenting scholars. How effective a cure choice may be for crises in educational systems across the entire country remains to be seen. Redefining the boundaries between secular and sectarian educational standards and regulations certainly lies ahead as two constitutionally opposed forces-government and religion-make way for one another, or rather encounter the entanglements predicted by Justice Souter.185 In the end, what is curiously inconsistent-perhaps comforting to some families-is that, in an era where indicia of religion are still being systematically purged from public schools so that students are not involuntarily exposed to governmental indoctrination,186 choice has intervened to permit families to elect that the state pay for that very sort of religious indoctrination.

1. See No Child Left Behind Act of 2001, H.R. 1, 107th Cong. [sec] 4311 (2001) ("Introduced in the House") ("The purpose of this part is to determine the effectiveness of school choice in improving the academic achievement of disadvantaged students and the overall quality of public schools and local educational agencies.").

2. H.R. REP. NO. 107-67, [sec] 105 (2001) ("Reported in House").

3. 147 CONG. REC. H2588-90, H2596-98 (daily ed. May 23, 2001) (statements of Rep. Armey).

4. For further support of the contention that choice is not a new concept, see generally JOSEPH P. VlTERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 57 (1999) (recognizing President Ronald Reagan's submis-

sion of voucher bills to Congress in 1983, 1985 and 1986). See also Robert C. Bulman & David L. Kirp, The Shifting Politics of School Choice, in SCHOOL CHOICE AND SOCIAL CONTROVERSY 38-39 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) (noting Reagan administration's educational policies).

5. See NINA SHOKKAII REES, SCHOOL CHOICE 2000: WHAT'S HAPPENING IN THE STATES xxii (2000) (charting recent experiments with (a) voucher programs in Florida, Maine, Ohio, Vermont, and Wisconsin; (b) tax credit or deduction programs in Arizona, Illinois, Iowa; and (c) both tax credit and deduction programs in Minnesota).

6. See Letter from The National Commission on Excellence in Education, A Nation at Risk: The Imperative for Educational Reform (April 1983) (relating through an open letter to the American people that "[international comparisons of student achievement, completed a decade ago, reveal that on 19 academic tests American students were never first or second and, in comparison with other industrialized nations, were last seven times"), available at http://www.ed.gov/pubs/NatAtRisk/risk.html (last visited Jan. 27, 2003).

7. See, e.g., California Department of Education, Policy and Evaluation Division, Student Performance, High School Performance Report (1996-97) (indicating via statistical data that for the 1996-97 school year, in the Los Angeles Unified School District, there were 12,678 students dropping out for 24,646 students graduating), available at http://www.cde.ca.gov/ope/research/hspr/hspr9697/c19.txt (last modified March 30, 2002).

8. See Milton Friedman, Public Schools: Make Them Private, 5 EDUCATION ECONOMICS 341-44 (1997) (advancing benefits of privatization of education provision); see also VlTERITTI, supra note 4, at 53-55 (laying out basic market approach to school choice as first enunciuated by economist Milton Friedman).

9. See discussion infra Parts III, V.

10. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

11. See infra note 186.

12. Id.

13. See Douglas J. Lamdin & Michael Mintrom, School Choice in Theory and Practice: Taking Stock and Looking Ahead, 5 EDUCATION ECONOMICS 211-13 (1997).

14. Id.

15. See MYRON LIEBERMAN, PRIVATIZATION AND EDUCATIONAL CHOICE 7-8 (1989) (defining fundamentals of vouchers); see also SEYMOUR FLIEGEL, MIRACLE IN EAST HARLEM: THE FIGHT FOR CHOICE IN PUBLIC EDUCATION 193 (1993) (tracking movement of public money to individual students, who then choose which school to attend).

16. See REES, supra note 5, at x, xxii (outlining school choice by state and explaining status meanings).

17. REES, supra note 5, at 35.

18. REES, supra note 5, at 181.

19. John E. Chubb & Terry M. Moe, Give Choice a Chance, in LIBERATING SCHOOLS: EDUCATION IN THE INNER CITY 141 (David Boaz ed., 1991).

20. Id.

21. See REES, supra note 5, at 36, 129, 181 (showing voucher values up to (a) $4,000 in Florida; (b) $2,250 in Cleveland, Ohio; and (c) $5,000 in Milwaukee, Wisconsin).

22. CENTER FOR THE STUDY OF PUB. POLICY, The Education Voucher Report, in EDUCATION VOUCHERS: FROM THEORY TO ALUM ROCK 151-221 (James A. Mecklenburger & Richard W. Hostrop eds., 1972).

23. Id. at 178.

24. See NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP'T OF EDUCATION, STATISTICS IN BRIEF: REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 1999-2000, at 2 (2002), available at http://nces.ed.gov/pubs2002/2002367.pdf (last visited Jan. 27, 2003).

25. CENTER FOR THE STUDY OF PUB. POLICY, supra note 22, at 184.

26. CENTER FOR THE STUDY OF PUB. POLICY, supra note 22, at 184.

27. U.S. DEP'T OF EDUCATION, CHOOSING BETTER SCHOOLS: THE FIVE REGIONAL MEETINGS ON CHOICE IN EDUCATION 13 (1990) (recognizing that failure to include nondiscriminatory admissions policies in a voucher program can "increase rather than decrease the gaps in achievement and opportunity between affluent and low-income people").

28. OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT ROUNDTABLE ON PUBLIC SCHOOL CHOICE, U.S. DEP'T OF EDUCATION, GETTING STARTED: HOW CHOICE CAN RENEW YOUR PUBLIC SCHOOLS 19-20 (1992).

29. Id. at 21.

30. See id. at 22-23 (presenting, in addition, a hybrid approach that will not be discussed here); see also Frank R. Kemerer, School Choice Accountability, in SCHOOL CHOICE AND SOCIAL CONTROVERSY 192 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

31. See OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT ROUNDTABLE ON PUBLIC SCHOOL CHOICE, supra note 28, at 22-23.

32. See Betsy Levin, Race and School Choice, in SCHOOL CHOICE AND SOCIAL CONTROVERSY 280 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

33. See OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT ROUNDTABLE ON PUBLIC SCHOOL CHOICE, supra note 28, at 22-23; see also Kemerer, supra note 30, at 194-95.

34. U.S. CONST, amend. I.

35. But see Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) ("Candor compels acknowledgement . . . that [the Court] can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.").

36. 403 U.S. 602 (1971).

37. Id. at 612-13.

38. See id. (gleaning parameters for test from Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968), and Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

39. See Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973) (finding a New York statute satisfactorily buttressed by secular state interests); Mueller v. Allen, 463 U.S. 388, 394 (1983) (noting Court's "reluctance to attribute unconstitutional motives to the States"); see also Lemon, 403 U.S. at 613 (acknowledging that the statutes indicated intent to improve the quality of secular education in all schools).

40. 413 U.S. 756 (1973).

41. Id. at 764-65, 773 (outlining the program under attack and the criteria to be used in evaluating the program).

42. Id. at 765.

43. Id. at 779.

44. Id. at 780 (noting unacceptability of direct aid to sectarian institutions).

45. Nyquist, 413 U.S. at 783.

46. Id. at 781 (categorizing disbursement of aid to parents as only one factor for the Court to consider).

47. Id. at 783 n.38.

48. See discussion infra Part V.

49. 463 U.S. 388 (1983).

50. Id. at 391 n.2 (explicating statute's provisions); see also id. at 393-94 (noting guidance of the Lemon test).

51. Id. at 398 (finding no violation of the primary effects prong of Lemon as the Minnesota statute was distinguishable from that in Nyquist).

52. Id. at 399-400 (reaffirming the importance of the manner in which "state assistance flows to private schools").

53. See id. at 401 (reasoning that such statistical analysis would lack both certainty and principled standards).

54. See Nyquist, 413 U.S. at 783 (elaborating upon the manner of the program's violation of the Establishment Clause).

55. 474 U.S. 481 (1986).

56. Id. at 482-83.

57. Id. at 487-88 (distinguishing Nyquist and reasserting the intervening role of private choice between state and religion).

58. Id. at 488-89 (spelling out the impact of private choice on attribution to state of improper primary effects).

59. 509 U.S. 1 (1993).

60. Id. at 3.

61. Id. at 8 (acknowledging the principle's heritage in Mueller and Witters).

62. See id. at 10-12 (creating new classification of beneficiary defined by the individual recipient, rather than the institution to which the recipient directs the aid).

63. 521 U.S. 203 (1997).

64. Id. at 208-09 (granting relief from an earlier injunction prohibiting the remedial instruction services because of changes in Establishment Clause jurisprudence during the twelve-year period since the original injunctive order was issued).

65. Id. at 233 (dismissing the characterization of entanglement as either its own prong or a sub-part of the effects analysis as insignificant, but nevertheless recasting it as sub-part of effects prong).

66. Id. at 233-34.

67. Id. at 234.

68. Agostini, 521 U.S. at 223 (addressing the abandonment of this principle as it was previously established in Meek v. Pittenger, 421 U.S. 349 (1975), and Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985)).

69. Id. at 225 (abandoning another premise underlying Ball).

70. Id. at 232.

71. Id. at 231.

72. Id. at 232.

73. Agostini, 521 U.S. at 228-29 (drawing attention to the fact that students receive aid at any school they attend).

74. See supra text accompanying notes 60-62.

75. Agostini, 521 U.S. at 237 (directing lower courts with regard to the proper role of precedent in Establishment Clause jurisprudence).

76. Id. (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1973)).

77. See discussion infra Part V.

78. 530 U.S. 793 (2000).

79. Id. at 801.

80. Id. at 835 (concluding that the Louisiana law is not a law respecting an establishment of religion).

81. Id. at 816 (holding that, although the presence of private choice is easier to see when aid literally passes through individuals' hands, there is no reason to require such a form; indeed, the plurality asserts that Agostini expressly rejected such an absolute line); see also id. at 822 ("The issue is not divertibility of aid but rather whether the aid itself has an impermissible content. Where the aid would be suitable for use in a public school, it is also suitable for use in any private school."); id. at 829 (stating that whether a recipient school is pervasively sectarian, a factor that has been discarded in recent cases, e.g., Witters, is not relevant to the constitutionality of a school-aid program).

Before undertaking analysis of Mitchell, however, it is important to remember the limited extent of support that plurality revelations enjoy in light of Supreme Court doctrine that when no single opinion enjoys the support of a minimum of five justices, "the holding of the Court may be viewed as that taken by those Members who concurred in the judgments on the narrowest grounds." Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (setting contours for discerning precedent in cases in which no clear majority exists). With this in mind, the ensuing Mitchell discussion focuses on the resolution of issues as most narrowly agreed upon in the plurality and Justice O'Connor's concurring opinion.

82. See Mitchell, 530 U.S. at 809-11, 840 (applying indoctrination precedent to Louisiana program and recognizing prominence of these neutrality and private choice precedential principles in Agostini, Zobrest, Witters, and Mueller).

83. Id. at 809, 840 (defying the possibility of attributing indoctrination to government actions when eligibility for aid is extended equally to all).

84. Id. at 810, 841 (explaining that the intervention of private choice prevents a government from (at least easily) creating an establishment of religion).

85. Id. at 813, 846.

86. Id. at 813, 846 (quoting the rule as set forth in Agostini as used in both the plurality opinion and O'Connor's concurring opinion).

87. Mitchell, 530 U.S. at 829 (burying the use of the "pervasively sectarian" doctrine it exemplified the exercise of bigotry).

88. Ohio Dep't of Education, District Results on the 27 Performance Standards (2000), available at http://www.ode.state.oh.us/reportcard/state_report_card/2001StateReportCard.pdf (last visited Jan. 27, 2003).

89. Ohio Dep't of Education, Cleveland City School District Report 1998, available at http://www.ode.state.oh.us/reportcardfiles/1998/DIST/043786.PDF (last visited Jan. 27, 2003).

90. Ohio Dep't of Education, Cleveland City School District Report 1999, available at http://www.ode.state.oh.us/reportcardfiles/1999/DIST/043786.PDF (last visited Jan. 27, 2003).

91. Ohio Dep't of Education, Cleveland City School District Report 2000, available at http://www.ode.state.oh.us/reportcardfiles/2000/DIST/043786.PDF (last visited Jan. 27, 2003).

92. Ohio Dep't of Education, Cleveland City School District Report 2001, available at http://www.ode.state.oh.us/reportcardfiles/2001/DIST/043786.PDF (last visited Jan. 27, 2003).

93. See Reed v. Rhodes, 1995 U.S. Dist. LEXIS 3814, at *7-8 (N.B. Ohio Mar. 3, 1995) (declaring the Superintendent's responsibilities for managing the Cleveland City School District). For a general examination of statistical evidence of the Cleveland City School District's failure, see Ohio Dep't of Education, supra text accompanying note 92, indicating, among other things, the District's disheartening 33.7% graduation rate for the 1999-2000 school year.

94. See supra note 5.

95. 1995 H 117, amended by 1999 H 282 (codified at OHIO REV. CODE ANN. [sec][sec] 3313.974-981 (West 2001)).

96. See discussion infra Parts III.D, IV.

97. See OHIO REV. CODE ANN. [sec] 3313.975 (West 2001) (Note of Decision 1).

98. See Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 836 (N.D. Ohio 1999) (stating that plaintiffs are not challenging the tutorial assistance program in this action). As no constitutional challenges have been raised against the tutorial provisions of the Act, those provisions are not examined in this Note.

99. OHIO REV. CODE ANN. [sec] 3313.975(A) (West 2001).

100. See OHIO REV. CODE ANN. [sec] 3313.974(G) (West 2001).

101. Id. [sec] 3313.975(C)(1) (providing new vouchers to be issued only to students enrolled in kindergarten through third grade, but allowing continuance in program through the eighth grade).

102. Id. [sec] 3313.978(A).

103. Id. [sec][sec] 3313.976(A)(8), 3313.978(C)(1).

104. Id. [sec] 3313.978(A).

105. See REES, supra note 5, at 130 (describing the background of the Cleveland Scholarship Program).

106. OHIO REV. CODE ANN. [sec] 3313.977 (West 2001).

107. Id. [sec] 3313.977(A)(1)(b), (c).

108. Id. [sec] 3313.977(A)(1)(c).

109. Id.

110. Id. [sec] 3313.976(A)(5).

111. OHIO REV. CODE ANN. [sec] 3313.976(A)(4).

112. Id. [sec] 3313.976(A).

113. Id. [sec] 3313.976(A)(4).

114. Id. [sec] 3313.976(A)(6).

115. See Zelman v. Simmons-Harris, 536 U.S. 639, 644-45 (2002) (noting that, at the date of that decision, the Cleveland City School District was the only district in the state that had qualified to implement the Scholarship Program).

116. See Simmons-Harris v. Goff, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583, at *2-3 (Ohio Ct. App. May 1, 1997) (reciting trial court history).

117. See id. at *2.

118. Id. at *10, 16 (holding that the program has the "primary effect of advancing religion in violation of the Establishment Clause" by providing "direct and substantial, non-neutral government aid to sectarian schools").

119. Simmons-Harris v. Goff, 711 N.E.2d 203, 207 (Ohio 1999) (affirming in part and reversing in part the decisions of the Court of Appeals of Ohio).

120. Id. at 208.

121. Id. at 216.

122. See OHIO REV. CODE ANN. [sec][sec] 3313.974-.981 (West 2001) (effecting reenactments on June 29, 1999).

123. See Simmons-Harris v. Zelman, 54 F. Supp. 2d 725, 741-42 (N.D. Ohio 1999).

124. See Siramons-Harris v. Zelman, Nos. 1:99CV1740, 1:99CV1818, 1999 WL 669222, *2 (N.B. Ohio Aug. 27, 1999) (staying injunction and expediting hearing process).

125. Zelman v. Simmons-Harris, 528 U.S. 983 (1999).

126. Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 865 (N.D. Ohio 1999).

127. Id. at 864 (finding the Scholarship Program "factually indistinguishable from the tuition reimbursement program struck down" in Nyquist).

128. Id. at 865 (noting consent of counsel for all plaintiffs to a stay pending Sixth Circuit review).

129. Simmons-Harris v. Zelman, 234 F.3d 945, 963 (2000).

130. Simmons-Harris v. Zelman, Nos. 00-3055, 00-3060, 00-3063, 2001 U.S. App. LEXIS 3344, at *1 (6th Cir. Feb. 28, 2001) (concluding that the issues raised in the petitions "were fully considered" in the original hearing and decision of the case).

131. See Zelman v. Simmons-Harris, 536 U.S. 639, 648 (2002).

132. See Brief for the United States as Amicus Curiae at 10, Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002) (Nos. 00-1751, 00-1777, 00-1779) (urging Supreme Court review of Cleveland Scholarship Program litigation as the Sixth Circuit's decision that the program violates the Establishment Clause of the First Amendment to the Constitution squarely conflicts with (1) the Ohio Supreme Court's finding that the program is constitutionally sound, as well as with (2) similar findings in other states), available at http://www.usdoj.gov/osg/briefs/2000/2pet/5ami/2000-1751.pet.ami.pdf (last visited Jan. 27, 2003).

133. See discussion supra Part IV.D.

134. Simmons-Harris v. Goff, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583, at *4 (Ohio Ct. App. May 1, 1997); Simmons-Harris v. Goff, 711 N.E.2d 203, 208 (Ohio 1999); Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 847 (N.D. Ohio 1999); Simmons-Harris v. Zelman, 234 F.3d 945, 967 (6th Cir. 2000); Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002).

135. Simmons-Harris v. Goff, 711 N.E.2d 203, 208-09 (Ohio 1999).

136. Id. at 209.

137. Id. at 209-10. However, the Ohio Supreme Court did find that the priority scheme's inclusion of a preference for a student whose parents belong to a religious association that supports a sectarian school was in violation of the "reference to religion" prong of the Lemon test. Id. at 210. The court accordingly severed the offending provision from the legislation and, examining the Program in its post-severance state, held that the statute complied with the reference to religion prohibition. Id. at 211.

138. See, e.g., Simmons-Harris, 711 N.E.2d at 209 (emphasizing that any link between government and religion created by the Scholarship Program is an indirect result of independent and private choices made by parents for their children).

139. Id. at 209-10.

140. Id. at 208.

141. Id. at 211. However, the court held that the Program was essentially a rider on a general appropriations bill, thereby violating Ohio's one-subject rule. Id. at 215-16. In this regard, the court reversed the case. Id. at 216 (affirming in part and reversing in part the decision of the Court of Appeals of Ohio).

142. Simmons-Harris v. Zelman, 234 F.3d 945, 951-52 (6th Cir. 2000).

143. Id. at 953.

144. Id. at 954-55.

145. Id. at 958.

146. Id. at 958-59 (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973)).

147. Simmons-Harris, 234 F.3d at 959.

148. Id. at 960 (denying appropriateness of parental choice as a factor breaking the government-church nexus under the Scholarship Program facts).

149. Id. at 959.

150. Id.

151. Id. at 961.

152. Brief for Respondents at *42, Zelman v. Simmons-Harris, 536 U.S. 639, (2002) (Nos. 00-1751, 00-1777, 00-1779).

153. Brief of State Petitioners at *14, Zelman v. Simmons-Harris, 536 U.S. 639, (2002) (Nos. 00-1751, 00-1777, 00-1779).

154. Id. at *15.

155. Id. at *15-17.

156. Zelman v. Simmons-Harris, 536 U.S. 639, 644 (2002).

157. Id. at 661-62.

158. Id. at 644-45.

159. Id; see also supra text accompanying note 47.

160. See supra text accompanying note 76.

161. Zelman, 536 U.S. at 649.

162. Id. at 649-53 (reexamining the role private choice played in breaking the "circuit between government and religion" in Mueller, Witters, and Zobrest).

163. Id. at 653-54.

164. Id. at 662.

165. Id. at 654 (noting that private schools receive less aid than other public school programs and that program participants must pay the part of the religious schools' tuition not covered by the scholarships).

166. Zelman, 536 U.S. at 650.

167. Id. at 693-95 (Souter, J., dissenting).

168. Id. at 694-95 (Souter, J., dissenting).

169. See Zobrest v. Catalina Foothills Sch. Dist, 509 U.S. 1, 3 (1993).

170. Zelman, 536 U.S. at 711 (Souter, J., dissenting).

171. Id. at 727 (Breyer, J., dissenting) (emphasis omitted).

172. OHIO REV. CODE ANN. [sec][sec] 3313.976(A)(8), 3313.978(C)(1) (West 2001).

173. Id. [sec] 3313.978(A).

174. Id. [sec] 3313.976(A)(4).

175. Zelman, 536 U.S. at 712-13 (Souter, J., dissenting).

176. Id. at 713 (Souter, J., dissenting). For examples of articles of faith that may be implicated, see id. at 713 n.24, 716.

177. Id. at 716 (Souter, J., dissenting).

178. Id. at 654.

179. See OHIO REV. CODE ANN. [sec] 3313.978(A), (C)(1) (West 2001) (outlining general parameters of the tuition assistance program).

180. See supra text accompanying note 103.

181. See supra text accompanying note 104.

182. Zelman, 536 U.S. at 686 (Souter, J., dissenting).

183. See supra text accompanying note 122.

184. Zelman, 536 U.S. at 655.

185. See supra text accompanying notes 174-77.

186. See, e.g., Newdow v. United States Cong., 292 F.3d 597, 611-12 (9th Cir. 2002) (holding that Congress violated the Establishment Clause when it inserted the words "under God" into the Pledge of Allegiance and that a school district's policy of teacher-led recitation of the pledge was also a violation), amended and reh'g denied by 321 F.3d 772 (9th Cir. 2003) (amending opinion to remove holding that Congress violated the Establishment Clause, but retaining holding that mandated recitation of the pledge violates the Establishment Clause), as amended, 2002 U.S. App. LEXIS 28040, at *16-27 (9th Cir. Feb. 28, 2003); Fleming v. Jefferson County Sch. Dist., 298 F.3d 918, 921-22, 934 (10th Cir. 2002) (upholding removal of memorial tiles at Columbine High School that were created by students and families and included religious language and symbols such as crosses), cert. denied, 123 S. Ct. 893 (2003).

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