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Zelman v. Simmons-Harris: Authorizing School Vouchers, Education's Winning Lottery Ticket

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Note

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I. INTRODUCTION

One-fourth of all American children do not graduate from high school. Of the students who do graduate from high school, thousands cannot make inferences or draw conclusions from what they have read. While research indicates that students at public schools are reading at higher levels today than they were twenty years ago, public school students are still reading at far lower levels than those at private schools. Thus, it is understandable that both legislators and some parents have given up on the public school system. Likewise, it is understandable that many urban parents have cried out for vouchers.

* J.D. expected May 2004. I would like to thank my family and friends for their love, support, and encouragement. In particular, I would like to thank my father, Richard Fonté, and Isaac Colunga, who directed me to helpful sources for this article.


4. See Nicole Stelle Garnett & Richard W. Garnett, School Choice, the First Amendment, and Social Justice, 4 TEX. REV. L. & POL. 301, 308-09 (2000) (stating that many politicians and low-income parents are looking to school choice programs, instead of the public school system, to create educational equality); Holland & Soifer, supra note 1, at 371 (noting that not only conservatives have given up on the public school system and embraced vouchers, but also liberals are “embracing vouchers with growing ardor”); Joseph Byrd, Comment, Permissive School Vouchers in Ohio: Magic Pill or Placebo? An Analysis of the Federal Ohio Application of the
Public schools in Cleveland, Ohio, are no exception to the generally failing condition of the public school system throughout the nation. In fact, after examining Cleveland’s public schools, a United States District Court declared an educational “crisis of magnitude.” With only ten percent of its ninth graders passing basic proficiency tests and less than one-third of its students successfully graduating from high school, the Cleveland school district miserably failed to meet any of the state performance standards. In an attempt to remedy these problems, the court placed the entire school district under state control; subsequently, the Ohio legislature enacted its Pilot Project Scholarship Program. This program provided Cleveland families with the winning


5. See Garnett & Garnett, supra note 4, at 308–09 (“An increasing number of policymakers, education experts, politicians, and, perhaps most important, low-income parents believe that real school choice [programs, such as vouchers, are] the best hope for increasing educational opportunity and equality for all”). Vouchers are written documents redeemable for a specified amount of money to cover the tuition costs of a private school. See BLACK’S LAW DICTIONARY 1571–72 (7th ed. 1999) (defining a voucher as “[a] written or printed authorization to disburse money”); Tyler Neal, Note, Mitchell v. Helms: Giving the Cleveland School Voucher Program a Fighting Chance, 29 PEPP. L. REV. 343, 351 (2002) (defining voucher as a “piece of paper redeemable for a designated sum of money, if, and only if, it is used to pay the cost of schooling [a] child at an approved school”).

6. See Clint Bolick, Solving the Education Crisis Through Parental Choice, 21 STAN. L. & POL’Y REV. 245, 245 (2000) (stating that students in Cleveland’s public school system “have a 1 in 14 chance of graduating on time from high school at senior-level proficiency, and an equivalent 1 in 14 chance each year of being a victim of a crime in their schools”).

7. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2463 (2002) (quoting Reed v. Rhodes, No. 1:73 CV 1300 (N.D. Ohio Mar. 3, 1995)). The United States District Court for the Northern District of Ohio made this statement in a school desegregation case after examining Cleveland’s public schools. See Reed v. Rhodes, 869 F. Supp. 1265, 1268 (N.D. Ohio 1994). The plaintiffs in Reed v. Rhodes were a class of African-American public school students and their parents. Id. at 1268. They brought suit against the Board of Education of the Cleveland City School District, its members, and its Superintendent, as well as the Ohio State Board of Education, its members, and its Superintendent. Id. at 1269.

8. Zelman, 122 S. Ct. at 2460. The state board of education created a statewide testing program, “designed to ensure that students who receive a high school diploma demonstrate at least high school levels of achievement in reading, writing, mathematics, science, and social studies.” OHIO REV. CODE ANN. § 3301.0710 (West 1999 & Supp. 2002). The board administered tests to all students at the end of the third grade, fifth grade, seventh grade, eighth grade, and tenth grade. Id. The Cleveland school district failed to meet any of the minimal achievement standards set by these tests. Zelman, 122 S. Ct. at 2463. “A school district or building shall be declared to be in a state of academic emergency if it does not meet more than five of the applicable state performance indicators.” OHIO REV. CODE ANN. § 3302.03(B)(5) (West 1999 & Supp. 2002).

lottery ticket of education: the voucher. With vouchers, Cleveland parents could send their children to any participating public or private school located within the school district’s boundaries, regardless of the school’s cost or religious affiliation. Not surprisingly, Cleveland parents jumped at the chance to choose where their children would attend school.

However, not long after the voucher program began, litigation arose. In Zelman v. Simmons-Harris, the United States Supreme Court addressed the issue of whether Cleveland’s voucher program violated the Establishment Clause of the First Amendment. In a 5-4 decision, the majority held that, although the program provided public funds to religiously affiliated schools, the voucher program did not offend the Establishment Clause because (1) the program was “neutral” with respect to the religious status of the beneficiaries and service providers, and (2) aid reached religious schools solely as the result of “true private choice.” Thus, the Court upheld the program and permitted the poor urban children of Cleveland to enjoy the benefits of private education, as do millions of wealthy children across the nation.

Before examining Zelman v. Simmons-Harris, Part II of this Note will outline the historical origin of the Establishment Clause and its early relationship to the American education system. Part II will then discuss both what has been termed the Supreme Court’s “empty

10. See Holland & Soifer, supra note 1, at 338 (stating that school choice enables disadvantaged children to improve their scholastic achievement); Garnett & Garnett, supra note 4, at 310 (“School choice [such as a voucher program] is essential to achieving equality of opportunity for American children, rich or poor.”).

11. Zelman, 122 S. Ct. at 2463. However, participating private schools were subject to some state regulations. Id. These regulations prohibited private schools from discriminating on the basis of race or religion and from “advocat[ing] or foster[ing] unlawful behavior or teach[ing] hatred of any person or group on the basis of race, ethnicity, national origin, or religion.” Id. (citing OHIO REV. CODE ANN. § 3313.976(A)(6) (West 1999)). Moreover, private schools were required to meet the same statewide educational standards as public schools. Id.

12. Id. at 2464 (noting that over 3700 students participated in the voucher portion of the Pilot Project Scholarship Program).

13. Id. at 2465 (noting that, in 1996, Ohio taxpayers first brought suit in state court, challenging the program on both state and federal grounds); see also infra Part III.B.1–3 (discussing the litigation in the Ohio State Supreme Court, the United States District Court for the Northern District of Ohio, and the Sixth Circuit Court of Appeals, which addressed Cleveland’s voucher program).


15. Id. at 2465.

16. Id. at 2473.

17. See id.

18. See infra Part II.A–D (discussing the impetus of the Establishment Clause, the early entanglement of church and state, and the state anti-religion constitution clauses).
promise" of educational choice and how school choice programs can be used to fulfill the Supreme Court's promise. Part II will conclude by discussing the modern pillars of Establishment Clause jurisprudence. Part III will explore the United States Supreme Court's decision in Zelman, where the Court ultimately held that Cleveland's voucher program did not violate the Establishment Clause. Part IV will then analyze the Supreme Court's holding and argue that the Court correctly analyzed the facts of the case, applied Establishment Clause jurisprudence, and held that Committee for Public Education and Religious Liberty v. Nyquist was not controlling law. Part IV will also examine the dissents' contentions and Justice Thomas's invitation to reconsider the application of the Establishment Clause against the states. Finally, Part V will discuss the impact of the Court's decision on voucher programs and note that voucher programs must still withstand state constitutional challenges.

II. BACKGROUND

This Part will begin with a discussion of the origin of the Establishment Clause. Next, this Part will address whether church and state were ever truly "separate" in the United States, focusing on the American school system. This Part will then examine the anti-religious establishment amendments found in most state constitutions. This Part will also discuss the Supreme Court's empty promise of

19. See infra Part II.E (examining the Supreme Court's decision in Pierce v. Society of Sisters, 268 U.S. 510 (1925), where the Court affirmed the fundamental right of parents to educate their children as they choose).
20. See infra Part II.F (discussing vouchers and other school choice programs).
21. See infra Part II.G (tracing the development of the two modern pillars of Establishment Clause jurisprudence: neutrality and true private choice).
22. See infra Part III.A (discussing the facts of Zelman); infra Part III.B (discussing the lower court's Zelman decisions); infra Part III.C (discussing the Supreme Court's Zelman decision).
23. See infra Part IV.A-C (analyzing the majority opinion in Zelman).
24. See infra Part IV.D (examining the dissenting opinions of Justice Stevens, Justice Souter, and Justice Breyer).
25. See infra Part IV.E (examining Justice Thomas's concurring opinion).
26. See infra Part V (predicting that voucher programs will expand and improve the education system of America and noting that the state anti-religion clauses are a significant legal obstacle for voucher programs).
27. See infra Part II.A-B (discussing the Framers' motivation for including the Establishment Clause in the Bill of Rights).
28. See infra Part II.C (noting that church and state were entangled in early America).
29. See infra Part II.D (examining state anti-religion amendments, known as the Blaine Amendments).
educational choice in *Pierce v. Society of Sisters* and how school choice programs, such as vouchers, can provide all Americans with the educational choice discussed in *Pierce*. Finally, this Part will outline modern Establishment Clause jurisprudence.

A. The Origin of the Establishment Clause

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." An establishment of religion generally denotes a "legal union of government and [one] religion." This definition alone, however, does not reveal the legal implications of the Establishment Clause. Thus, to understand its legal implications, an examination of the origin of the Establishment Clause is also necessary.

Many of the first colonists came to America to flee religious persecution and to set up their own religious communities. The main purposes of their immigration to America were to establish communities where their religion could flourish and to receive government support instead of persecution. Therefore, at the time of the American

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30. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535–36 (1925); *see also infra* Part II.E (discussing when the Court affirmed the fundamental right of parents to educate their children as they choose, by permitting private schools to exist alongside of state public schools).
31. *See infra* Part II.F (discussing vouchers and other school choice programs).
32. *See infra* Part II.G (tracing the development of the two modern pillars of Establishment Clause jurisprudence: neutrality and true private choice).
33. U.S. CONST. amend. I.
35. *See Levy*, *supra* note 34, at 5; Neal, *supra* note 5, at 361; *see also* M. E. BRADFORD, ORIGINAL INTENTIONS ON THE MAKING AND RATIFICATION OF THE UNITED STATES CONSTITUTION 95 (1993) ("[A] religious establishment was, in Anglo-American parlance, sensu stricto, an institution able (with the assistance of government) to promulgate a creed or dogma, to require official assent to that doctrine, to collect rates or some other tax in support of that religion, and to require, at least from time to time, attendance at worship."); cf. T. JEREMY GUNN, A STANDARD FOR REPAIR: THE ESTABLISHMENT CLAUSE, EQUALITY, AND NATURAL RIGHTS 71 (1992) (noting that the term “establish” appears in the Constitution seven times and in every instance the term implies “creating, instituting, rendering permanent, or setting up”).
36. LEVY, *supra* note 34, at xxii ("With little guidance from the constitution text, we may better understand the establishment clause if we understand the American experience with establishments of religion at the time of the ratification of the Bill of Rights in 1791.").
38. SHEFFER, *supra* note 37, at xvii; Neal, *supra* note 5, at 360. Moreover, many of the original charters from England required the establishment of a state religion. SHEFFER, *supra* note 37, at xvii.
Revolution, most of the colonial governments maintained an "establishment of religion" by supporting one particular religion financially while prohibiting or discriminating against all others.39

Yet, the American Revolution and its quest for secured, unalienable rights triggered a movement for the disestablishment of religion.40 Hence, many state constitutions adopted establishment clauses and clauses guaranteeing the free exercise of religion prior to the creation of the United States Constitution.41 This anti-establishment movement did not result in a federal establishment clause within the main text of the Constitution.42 In fact, the only reference to religion in the

39. See BRADFORD, supra note 35, at 95; LEVY, supra note 34, at 1; Mark W. Cordes, Politics, Religion, and the First Amendment, 50 DEPAUL L. REV. 111, 132 (2000); Neal, supra note 5, at 361. In fact, establishments of religion existed in the southern colonies of Virginia, Maryland, North Carolina, South Carolina, and Georgia. LEVY, supra note 34, at 5. The Church of England was the state religion in each of these colonies. Id. The northern colonies of New York, Massachusetts, Connecticut, and New Hampshire did not have traditional establishments of one religion, but the largest religious group generally controlled the religious power within the colony. Id. at 11. The four colonies of Rhode Island, Delaware, Pennsylvania, and New Jersey did not have any form of an establishment of religion. Id.

40. LEVY, supra note 34, at 27. The Declaration of Independence provides that "it is the Right of the People to alter or to abolish" any government that destroys "certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Thus, the colonists reasoned that the establishment of one state religion and the prohibition of other religions were contrary to the purposes of the Revolution. See LEVY, supra note 34, at 27.

41. LEVY, supra note 34, at 27 (noting that many state constitutions contained clauses that expressly prohibited the State from funding a particular religion); Cordes, supra note 39, at 131-32 (stating that many states enacted clauses, after the revolution, to eliminate "compelled financial support and compelled worship"); Neal, supra note 5, at 362 ("Many State Constitutions contained specific anti-establishment provisions."). The most famous of these state religious clauses is the Virginia Bill of Establishing Religious Freedom, promoted zealously by James Madison and Thomas Jefferson. Neal, supra note 5, at 362. Madison, however, first wrote the Memorial and Remonstrance Against Religious Assessments in opposition of a proposed tax assessment to support Virginia's established religion. Cordes, supra note 39, at 130. Madison contended that government support of religion endangered "liberty of conscience" and the free exercise of religion. Id. This memorial gave rise to the Virginia Bill of Establishing Religious Freedom, the free exercise of religion clause written by Thomas Jefferson. Id. The bill stated

"[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested or burdened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities."


42. See SHEFFER, supra note 37, at xix (noting that the main text of the Constitution refers to religion only in Article VI, Clause 3). The Articles of Confederation also does not include a disestablishment of religion clause; indeed, The Articles of Confederation protected no individual liberties except the "privileges and immunities of free citizens in the several States." ARTICLES OF CONFEDERATION art. 4, para. 1 (1781).
Constitution’s main text is the prohibition against religious qualification tests for those seeking federal public office. During the Constitutional Convention, George Mason requested that a Bill of Rights preface the Constitution, but the other Constitutional Framers rejected the inclusion of Mason’s proposal because they deemed it unnecessary. The Framers reasoned that a Bill of Rights was unnecessary because the federal government possessed only enumerated powers and, thus, could not exercise powers that it did not have to restrict the civil liberties provided for in the proposed Bill of Rights.

Nevertheless, to secure ratification of the Constitution, James Madison promised to seek an amendment to the Constitution, including a Bill of Rights. Consequently, in 1789, the First Congress

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43. SHEFFER, supra note 37, at xix. Article VI, Clause 3 of the Constitution states that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” U.S. CONST. art. VI, cl. 3. In contrast, The Declaration of Independence makes numerous references to religion or God, such as “the separate and equal station to which the Laws of Nature and of Nature’s God entitle them,” “[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights,” and “with a firm reliance on the Protection of divine Providence.” THE DECLARATION OF INDEPENDENCE para. 1, 2, 32 (U.S. 1776) (emphasis added).

44. George Mason was one of the seven constitutional delegates from Virginia. See CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787, at 3, 18 (1986). Mason, however, refused to execute the Constitution, stating that the federal government had too much power and would result in “a monarchy or a tyrannical aristocracy.” Id. at 250–51. He had written Virginia’s Bill of Rights in 1776. Id. at 244. Thus, to appease George Mason, James Madison promised to seek an amendment to the Constitution to protect civil liberties. LEVY, supra note 34, at 84.

45. See BOWEN, supra note 44, at 244. The Constitutional Framers were the fifty-five state delegates who attended the Federal Convention of 1787 and created the United States Constitution. See id. at 3. The most notable Constitutional Framers were George Washington, James Madison, Alexander Hamilton, Benjamin Franklin, John Rutledge, John Dickinson, George Wythe, and George Mason. Id. Not present at the convention, however, were John Adams and Thomas Jefferson, both of whom were arranging treaties and seeking loans internationally. Id. at 11.

46. LEVY, supra note 34, at 82. Elbridge Gerry of Massachusetts first moved for preparation of the Bill of Rights; George Mason seconded his motion. BOWEN, supra note 44, at 244.

47. LEVY, supra note 34, at 82. Thus, Hamilton exclaimed: “For why declare that things shall not be done which there is no power to do?” Id. (quoting THE FEDERALIST No. 84 at 579–80 (Alexander Hamilton) (James E. Cook ed., 1961)).

48. James Madison was one of the most influential Constitution Framers. See JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 7 (5th ed. 1996). Madison proposed separating governmental power between the federal and state government to prevent tyranny. Id. Also, Madison co-authored a series of persuasive articles now known as The Federalist Papers to secure the ratification of the Constitution. Id. The Federalist Papers urged the states to support the creation of a centralized federal government and to ratify the Constitution. Id.

49. LEVY, supra note 34, at 84 (“Opponents of ratification feared most of all that the centralizing tendencies of a consolidated national government would extinguish the rights of
of the United States passed the Establishment Clause of the First Amendment, and the necessary number of states ratified the First Amendment and the other amendments constituting the Bill of Rights in 1791. The general purposes of the Establishment Clause were to prevent the government from gaining excessive power, to prevent the government from requiring religious uniformity, and to prevent religious strife.

The First Congress sought to prevent the government from gaining excessive power through the Establishment Clause. English rule had left a general fear of tyrannical leadership within all of the American colonists; the Framers, therefore, sought to avoid excessive government power by precluding the national government from acquiring additional power through religious institutions. Because religious institutions

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50. LEVY, supra note 34, at 104. On September 25, 1789, Congress passed the Bill of Rights, including the Establishment Clause, when two-thirds of the Senate voted in favor it. Id. Because Vermont already had become part of the union, eleven states then needed to ratify the Establishment Clause and the remainder of the Bill of Rights. Id. at 106. Within six month, nine states approved the Bill of Rights. Id. There is no record of the ratification debates in these states. Id. at 111. Only Virginia, Massachusetts, Connecticut, and Georgia delayed their ratification. Id. at 106. On December 15, 1791, Virginia ratified the Bill of Rights, making it part of the Constitution. Id. at 111. The ratification debate in Virginia specifically addressed the First Amendment. Id. at 107. Eight state senators attacked the amendment as inadequate because it did “not prohibit the rights of conscience from being violated or infringed: and although it goes to restrain Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount, for the support of religion.” Id. at 107. Some contend that this statement proves that the Constitutional Framers, and the population as a whole, did not believe that the Establishment Clause prohibited the government from directing aid to religious institutions on a non-preferential basis. Id. at 108. Others, however, argue that this statement was merely political rhetoric of anti-federalists who wanted Virginia to defeat the Bill of Rights, thereby forcing Congress to readdress the amendments and, hopefully, to pass amendments that would enhance state power. Id. at 109.

51. See infra notes 54–57 and accompanying text (proposing that because the Framers sought to avoid excessive governmental power, they enacted the Establishment Clause to preclude the government from acquiring additional power through religious institutions).

52. See infra notes 58–62 and accompanying text (suggesting that the Framers created the Establishment Clause out of the belief that religious diversity constituted an essential component of democracy).

53. See infra notes 63–68 and accompanying text (contending that the Framers created the Establishment Clause in order to prevent the emergence of religious crusades in the United States).


55. See BARRON, supra note 48, at 1 (noting the colonists’ fear of tyranny). In fact, the Declaration of Independence essentially indicted the King for his tyrannical acts. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Declaration of Independence states:
can greatly influence one's formulation of values and opinions, the Framers concluded that tyranny would result if the national government took control over religion.\textsuperscript{56} Thus, to prevent the government from gaining expansive control, the Framers enacted the Establishment Clause.\textsuperscript{57}

The Framers also designed the Establishment Clause to prevent "government induced homogeneity" in religious beliefs.\textsuperscript{58} Realizing that all government actions have the tendency to encourage certain conduct, while discouraging other conduct, the Framers sought to avoid the suppression of religion by excluding the government from religious matters all together.\textsuperscript{59} Suppression of religion was intolerable because the Framers believed that religious diversity was an essential component of democracy.\textsuperscript{60} In fact, James Madison reasoned that a stable democracy could not exist in America without maintaining religious diversity because religious groups constituted significant political factions, and such factions lessened the threat of majority oppression.\textsuperscript{61}

The History of the present King of Great Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid World.

He has refused his Assent to Laws, the most wholesome and necessary for the public Good.

.......

He has dissolved Representative Houses repeatedly, for opposing with manly Firmness his Invasions on the Rights of the People.

.......

He has kept among us, in Times of Peace, Standing Armies, without the consent of our Legisatures.

.......

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

\textit{Id.} paras. 2–20. This list is not exhaustive; the Declaration enumerates over numerous tyrannical acts of the King and Parliament of Great Britain. \textit{See id.} paras. 3–30.


57. \textit{Id.} at 848.


59. \textit{Id.}


61. \textit{Id.} To secure the ratification of the Constitution, James Madison and others authored a series of persuasive articles now known as \textit{The Federalist Papers}. \textit{BARRON, supra} note 48, at 3. \textit{The Federalist Papers} urged the States to support the creation of a centralized federal government and to ratify the Constitution. \textit{Id.} In the \textit{Federalist No. 52}, James Madison explained that "[i]n a free government the security of civil rights must be the same as that for religious rights."
Therefore, the Establishment Clause was necessary to ensure the pluralist society envisioned by the Framers.\textsuperscript{62} 

Finally, the Framers sought to prevent religious strife by enacting the Establishment Clause.\textsuperscript{63} The Framers remembered that many of the original colonists immigrated to America to escape religious discrimination and conflict.\textsuperscript{64} Moreover, the religious persecution of the European crusades remained in their minds.\textsuperscript{65} Experience had demonstrated that when government allies itself with one particular religion, individuals with contrary beliefs are likely to face hatred and persecution.\textsuperscript{66} Social stability simply had no vitality without religious tolerance.\textsuperscript{67} Therefore, the Framers drafted the Establishment Clause to prevent religious crusades from emerging in the United States.\textsuperscript{68}

\subsection*{B. Incorporation of the Establishment Clause}

The Framers intended the Establishment Clause to limit the actions of only the federal government.\textsuperscript{69} Thus, on its face, the text of the

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\item[{62}.] Viteritti, \textit{Blaine's Wake, supra} note 60, at 700. Pluralism is a philosophical doctrine that posits that society benefits from the total participation of minority groups within the dominant society when the minority groups maintain their cultural differences. \textit{Random House Webster's College Dictionary} 1040 (Robert B. Costello et al. eds., 4th ed. 1996).
\item[{63}.] Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2502 (2002) (Breyer, J., dissenting) ("[T]he Establishment Clause reflect[s] the Framers' vision of an American nation free of the religious strife that had long plagued the nations of Europe."); \textit{Bradford, supra} note 35, at 96–97 (noting that the Constitutional Framers hoped to prevent religious conflict through the Establishment Clause).
\item[{64}.] Davidson, \textit{supra} note 37, at 452.
\item[{66}.] Zelman, 122 S. Ct. at 2503 (Breyer, J., dissenting) (citing Engel v. Vitale, 370 U.S. 421, 429 (1962)).
\item[{67}.] \textit{Id.} at 2502 (Breyer, J., dissenting) (The Establishment Clause embodies an “understanding, reached in the 17th century after decades of religious war, that liberty and social stability demand religious tolerance.”).
\item[{68}.] \textit{Id.} (Breyer, J., dissenting).
\item[{69}.] LEVY, \textit{supra} note 34, at 147; Donald L. Beschle, \textit{Does the Establishment Clause Matter? Non-Establishment Principles in the United States and Canada}, 4 U. PA. J. CONST. L. 451, 453 (2002); \textit{see also infra} notes 501–19 and accompanying text (discussing Justice Thomas's contentions in \textit{Zelman} that the courts should not apply the Establishment Clause to the states); \textit{cf.} James McClellan, \textit{Hand's Writing on the Wall of Separation: The Significance of Jaffree in Future Cases on Religious Establishment}, in \textit{How Does the Constitution Protect Religious Freedom?} 43, 45 (Robert A. Goldwin & Art Kaufman eds., 1987) (contending that
Establishment Clause prohibits only Congress from establishing a religion. In addition, the wording of a draft of the Establishment Clause, which provided that "nor shall any national religion be established," is evidence of the Framers' intention to limit the actions of the Federal Government alone. Moreover, James Madison proposed another amendment to limit the actions of state governments regarding

the Framers designed the Bill of Rights to prevent the federal government from "encroaching upon the jurisdiction of the states").

70. U.S. CONST. amend. I ("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 peaceably to assemble, and to petition the Government for a redress of grievances.").

71. U.S. CONST. amend. I (emphasis added); see also LEVY, supra note 34, at 95 (noting the original wording of the Establishment Clause); McClellan, supra note 69, at 47 (pointing to the original wording of the Establishment Clause); Edwin Meese & John Eastman, The Federalism Side of School Vouchers (discussing the original wording of the Establishment Clause), at http://www.claremont.org/writings/precepts/20020703eastman_meese.html (last modified July 3, 2002). No information exists concerning why the select committee of the House of Representatives deleted the word "national" in the First Amendment. LEVY, supra note 34, at 96. However, the House notes, found in the Annals of Congress, do provide the debate that followed the select committee's proposal. Id. The account states in part:

Mr. Sylvester had some doubts of the propriety of the mode of expression used in [the first draft of the Establishment Clause]. He apprehended that it was liable to a construction different from what had been made by the committee. He feared it might be thought to have a tendency to abolish religion altogether.

Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.

Mr. Huntington said that he feared, with the gentleman first up on this subject, that the words might be taken in such latitude as to be extremely harmful to the cause of religion.

Mr. Madison thought, if the word national was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.

Mr. Gerry did not like the term national, proposed by the gentleman from Virginia. It had been insisted upon [at the Constitutional Convention] by those who were called antifederalists, that this form of Government consolidated the Union; the honorable gentleman's motion shows that he considers it in the same light. Those who were called antifederalists at that time complained that they had injustice done them by the title, because they were in favor of a Federal Government, and the others were in favor of a national one.

Mr. Madison withdrew his motion, but observed that the words "no national religion shall be established by law," did not imply that the Government was a national one.

I ANNALS OF CONG. 757–59 (Joseph Gales & W.W. Seaton eds., 1834–1856), quoted in LEVY, supra note 34, at 96–99. Accordingly, partly due to Elbridge Gerry's fears concerning federalism and state rights, the Framers did not re-insert the word "national." See DONALD L. DRAKEMAN, CHURCH-STATE CONSTITUTIONAL ISSUES: MAKING SENSE OF THE ESTABLISHMENT CLAUSE 68 (1991) (stating that Gerry had noted that the word "national" had "achieved some notoriety in the Federalist-Antifederalist debates")..
religion, which was not enacted.\textsuperscript{72} The mere fact that Congress considered and rejected an amendment limiting state government actions with respect to religion demonstrates that the Framers did not intend for the Establishment Clause to apply to the states.\textsuperscript{73} In addition, in 1875, Congress again considered and rejected an amendment that would have restricted state governmental actions regarding religion, demonstrating that the Congressmen of the nineteenth century did not believe that the Establishment Clause applied to the states.\textsuperscript{74}

Nevertheless, the Due Process Clause of the Fourteenth Amendment and the doctrine of incorporation provided the means necessary to apply the Establishment Clause to the states.\textsuperscript{75} The doctrine of incorporation posits that because the Fourteenth Amendment prohibits state governments from “depriv[ing] any person of life, liberty, or property, without due process of law,”\textsuperscript{76} it, in effect, prevents state governments...

\textsuperscript{72} LEVY, supra note 34, at 105; see also Kenneth J. Brown, Comment, Establishing A Buffer Zone: The Proper Balance Between the First Amendment Religion Clauses in the Context of Neutral Zoning Regulations, 149 U. Pa. L. Rev. 1507, 1528 (2001) (noting that because James Madison was a strong proponent of state rights vis-à-vis the federal government, many have interpreted the Establishment Clause as a limitation on the federal government alone). The proposed amendment provided that “[n]o State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury.” LEVY, supra note 34, at 105. The notes from the House debates provide:

Mr. Madison conceived this to be the most valuable amendment in the whole list. If there were any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments. He thought that if they provided against the one, it was as necessary to provide against the other, and was satisfied that it would be equally grateful to the people.

I ANNALS OF CONG. 731 (Joseph Gales & W.W. Seaton eds., 1834-56), reprinted in A SECOND FEDERALIST: CONGRESS CREATES A GOVERNMENT 276 (Charles S. Hyneman & George W. Carey eds., 1967). The House passed the amendment, but the amendment did not receive the necessary votes in the Senate. LEVY, supra note 34, at 105. Levy states that “[h]ad the Senate passed it, a constitutional basis would have existed for interpreting the rights of conscience as being contradictory to establishment of religion. Such an interpretation had to wait until long after the Fourteenth Amendment imposed restrictions on the States.” Id.

\textsuperscript{73} LEVY, supra note 34, at 147.

\textsuperscript{74} Id. at 148; BRADFORD, supra note 35, at 99; see also infra Part II.D (discussing the state anti-religion clauses that resulted after the attempt to amend the United States Constitution). This proposed amendment is commonly known as the “Blaine Amendment,” in recognition of its promoter James G. Blaine of Maine. LEVY, supra note 34, at 147. Although the Blaine Amendment did not pass in Congress, Blaine’s attempt to amend the Constitution did encourage many states to amend their state constitutions to include anti-religion clauses. See Viteritti, Blaine’s Wake, supra note 60, at 671.

\textsuperscript{75} LEVY, supra note 34, at 148.

\textsuperscript{76} U.S. CONST. amend. XIV, § 1 (emphasis added). The Fourteenth Amendment provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of
from depriving individuals of the liberties found in the Bill of Rights. 77 Therefore, although the Constitutional Framers did not necessarily intend for the Establishment Clause to restrict state governments, the Establishment Clause, through the Fourteenth Amendment, now restricts state governments through the doctrine of incorporation. 78

The Supreme Court, in 1925, originally incorporated the First Amendment into the Fourteenth Amendment’s protection of liberties in *Gitlow v. New York.* 79 In *Gitlow,* a case dealing with free speech issues, the Court stated that the First Amendment protections were incorporated into the Fourteenth Amendment and, therefore, applied to the states. 80 The Court did not specifically apply the Establishment Clause to the states until 1947 in *Everson v. Board of Education.* 82 Since 1947, the Court has consistently imposed the limitations of the Establishment Clause on state governments. 83

C. The Lack of True Separation of Church and State

The Establishment Clause expressly prohibits Congress from establishing a national religion. 84 This disestablishment of religion is
not, however, synonymous with the separation of church and state, for the government may interact with religious institutions and even provide public funds to religious institutions without establishing a national religion.\textsuperscript{85} Moreover, the phrase "separation of church and state" does not originate from the text of the Constitution; it originates from Thomas Jefferson's letter to the Danbury Baptist Association.\textsuperscript{86} In this letter, Jefferson stated that "the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence... [the First Amendment] which declared that [Congress] should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State."\textsuperscript{87} Jefferson's "wall of separation" has created the popular belief that the Establishment Clause created a rigid wall of separation between church and state.\textsuperscript{88} Many commentators, however, point to America's early history as evidence that the Establishment Clause does not prohibit the government and religious institutions from interacting.\textsuperscript{89}
For instance, commentators point to the Northwest Territory Ordinance of 1787, which expressly encouraged the intermingling of church and state and was enacted by the same Congressional members who enacted the Establishment Clause. Other examples of public support for religious activity in early America include a day dedicated to prayer and thanksgiving, a tax levied to pay for ministers’ salaries, and required religious tests for state public officials. Moreover, because clergymen administered early American schools, religion crept into the education of American school children. This religious instruction was Protestant in nature because early America was predominantly Protestant. Children recited Protestant prayers and sang Protestant hymns at school. Also, the school curriculum at that time included reading from the King James version of the Bible.

In the early nineteenth century, state governments began funding and administering schools; nevertheless, total separation of church and state did not emerge suddenly. In fact, moral training became the mission of these early public schools. Horace Mann, the leader of the public school movement, termed his newly created schools “common

90. ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT art. III (U.S. 1787). This ordinance created the temporary government of the United States territory northwest of the Ohio River. Commentators point to the ordinance because it stated that “[r]eligion, morality, and knowledge; being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” Id.

91. Davidson, supra note 37, at 453 (contending that the Northwest Ordinance demonstrates that the Framers did not intend for the Establishment Clause to create a rigid wall of separation); Neal, supra note 5, at 364 (pointing to the Northwest Ordinance to prove that the strict separationist approach is erroneous).

92. Viteritti, Blaine’s Wake, supra note 60, at 663 n.27 (noting that on the same day that the House of Representatives passed the First Amendment, it also adopted a resolution that requested the President to create the national holiday of Thanksgiving).

93. Id. at 663. In fact, Alexis de Tocqueville, in Democracy in America, noted that “Allmost all education [was] entrusted to the clergy.” Id. at 663 (quoting Alexis de Tocqueville I DEMOCRACY IN AMERICA 320 n.4 (Phillips Bradley ed., Random House 1945) (1839)).

94. See Viteritti, Blaine’s Wake, supra note 60, at 666 (noting that Protestantism was the mainstream religion of the nation).


96. Zelman, 122 S. Ct. at 2503 (Breyer, J., dissenting); Viteritti, Blaine’s Wake, supra note 60, at 666.

97. See McConnell, Crossroads, supra note 58, at 121 (noting that instructors taught Protestant prayers in the publicly funded schools of the nineteenth century). W

98. William J. Bennett, Children and Our Country 72 (1988) (“[The public schools] were to be controlled by local lay boards. And—this is important—they were to be charged with the mission of moral and civic training, training that found its roots in a ground of shared values.”).
The purpose of these common schools was not simply to teach reading and math to American school children; the purpose was to create a youth with common values, morals, and loyalties. Mann saw the public school system as a necessity to unify the diverse citizens of America and instill a shared set of American ideals in the entire population. Thus, common school proponents considered public education a critical element of the democracy experiment.

Patriotism and national pride, however, were not the only subjects taught at common schools; common schools also forced Protestant prayers and beliefs upon the school children. At times, common schools even indoctrinated school children with anti-Catholic and anti-Jewish bigotry. Although Mann called for the "entire exclusion of religious teaching" publicly, some scholars contend that Mann's true intention was to force his Protestant beliefs on the immigrant and largely Catholic population that had recently exploded in size.

99. CHARLES LESLIE GLENN, JR., THE MYTH OF THE COMMON SCHOOL 4-5 (1988) (noting, however, that Horace Mann did not truly invent the common school agenda, for the philosophers of the French Enlightenment first recognized the importance of creating a shared national identity); James A. Peyser, School Choice: When, Not If, 35 B.C. L. REV. 619, 623 (1994). Horace Mann was the secretary of education for Massachusetts. Viteritti, Blaine's Wake, supra note 60, at 666. He is responsible for both creating the first public school system of the nation in Massachusetts and promoting the "common school" concept. Id.

100. GLENN, supra note 99, at 4.

101. Zelman, 122 S. Ct. at 2483 (Thomas, J., concurring); BENNETT, supra note 98, at 72; Peyser, supra note 99, at 623.

102. Garnett & Garnett, supra note 4, at 357.

103. McConnell, Crossroads, supra note 58, at 121. "Mann's schools required daily reading from the King James version of the Bible. . . . The recital of [Protestant] prayers and the singing of hymns were also regular school activities." Viteritti, Blaine's Wake, supra note 60, at 666-67.

104. McConnell, Crossroads, supra note 58, at 121. For example, common school children taunted the Jewish children in their schools, calling them "Christ killers" and "dirty Jews." LEVY, supra note 34, at 231.

105. Viteritti, Blaine's Wake, supra note 60, at 662, 668. As scholar Dennis Doyle notes, every school has two curriculums: one visible and one invisible. Dennis P. Doyle, The Excellence Movement, Academic Standards, A Core Curriculum and Choice: How Do They Connect?, in THE POLITICS OF EXCELLENCE AND CHOICE IN EDUCATION 15-16 (William Lowe Bowd & Charles Taylor Kerchner eds., 1988). The visible curriculum of books and homework can, of course, greatly influence the ideas of children; however, it is the invisible curriculum of beliefs and morals, which are purposefully taught to children, that is most powerful and influential. Id. Thus, regardless of Mann's public rejection of church and state interaction and of the actual physical books used in the common schools, the invisible curriculum of acculturation prevailed. Id. Furthermore, Mann did not always publicly reject interaction between church and state because in his 1848 final report to the Board of Education he stated that "[o]ur system earnestly inculcates all Christian morals; it finds its morals on the basis of religion; it welcomes the religion of the Bible." VITERITTI, CHOOSING EQUALITY, supra note 85, at 149.

Hence, Professor Viteritti states that "[t]he entire concept of a free, universal secular education was in fact an institutional hypocrisy perpetrated by the political establishment." Similarly, others described the common school as an agent of socialization and a "device of class domination," with the State and Protestant Church thoroughly intertwined.

Catholic Americans, however, did not quietly accept the Protestant bias of the public school system. Instead, during the late nineteenth century, Catholics formed political alliances with other religious minorities and launched an aggressive attack against the Protestant majority. Through these alliances, Catholics filed and won lawsuits to remove the Protestant emphasis in public schools in several states. Moreover, Catholics began their own school system, sometimes with the help of public funds from state governments. Therefore, by the end of the nineteenth century, religion not only had taken a prominent role within publicly funded schools, but also had claimed its own schools through the Catholic school system. Accordingly, the nation had not truly erected a wall of separation between church and state.

107. Viteritti, Blaine’s Wake, supra note 60, at 666.
108. See, e.g., Glenn, supra note 99, at 5.
109. See Jeffries & Ryan, supra note 106, at 304 (noting that Catholics filed multiple lawsuits to remove the Protestant emphasis in the public schools). But see Glenn, supra note 99, at 179–206 (noting that before the Catholics began their protest, Orthodox Protestants voiced their opposition to the common schools because Horace Mann generalized the Protestant religion in the common schools by eliminating many of the tenets of orthodox Christianity).
111. Heytens, supra note 110, at 136. For instance, the Ohio Supreme Court upheld the removal of the King James Bible from public schools in Cincinnati. Bd. of Educ. v. Minor, 23 Ohio St. 211, 253 (1872); see also Heytens, supra note 110, at 136 n.118 (noting the Minor decision). Also, Catholics successfully rid the Chicago, New York City, Buffalo, and Rochester public schools of the King James Bible. Jeffries & Ryan, supra note 106, at 304. Yet, courts often held that requiring school children to read from the King James Bible was not a violation of religious freedom because “Protestantism had been so entrenched within the mainstream of American culture that it was difficult for many to understand the concerns of religious minorities.” Viteritti, Blaine’s Wake, supra note 60, at 668. For example, in Donahue v. Richards, the Maine Supreme Court upheld the school board’s required readings of the King James Bible. Donahue v. Richards, 38 Me. 376, 379 (1854).
114. See McConnell, Crossroads, supra note 58, at 121 (noting that early American schools, funded by state governments, required children to say religious prayers and sing hymnals).
D. The Protestant Backlash: The Blaine Amendments

To curb Catholic political gains in the education system, the Protestant majority made a push for the state and its public schools to separate from the Church.\(^1\) In fact, in his 1875 State of the Union address, President Ulysses S. Grant called for a constitutional amendment to officially prohibit public funds from reaching religious institutions.\(^1\) Congressman James G. Blaine\(^1\) of Maine took Grant’s challenge, sponsoring an amendment that would have forbidden any state from establishing a religion and from raising money in support of religious institutions.\(^1\)

Blaine’s amendment fell short of the necessary votes; his attempt to amend the United States Constitution, however, did propel an anti-Catholic movement within the states.\(^1\) Approximately thirty states then amended their constitutions to include the restrictive language of

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\(^1\) See Jeffries & Ryan, supra note 106, at 303–04 (stressing that the Protestants sought to regain their dominance through many means, including constitutional amendments and statutory changes).

\(^1\) Heytens, supra note 110, at 131–32 & 132 n.77 (citing Grant’s State of the Union Address, 4 CONG. REC. 174–75 (1875)). Interestingly, legal precedent at that time did not indicate that public aid to religious institutions was unconstitutional. Viteritti, Blaine’s Wake, supra note 60, at 671.

\(^1\) Congressman Blaine was one of the most influential members of the Republican Party in the House. Heytens, supra note 110, at 132. He had served as Speaker of the House until the Democrats recaptured the House in 1874. Id. He then planned on running for president in the 1876 election. Id. However, he lost the Republican Party nomination to Rutherford B. Hayes. HarpWeek, The Presidential Elections from 1860-1884, The Presidential Elections: 1876, Overview, at http://www.elections.harpweek.com/overview/overview-1876-1.htm (last visited Mar. 4, 2003). In 1876, Hayes became the President of the United States. BARRON, supra note 48, at xxxix.

\(^1\) Heytens, supra note 110, at 131–32; Eric W. Treene, The Grand Finale is Just Beginning: School Choice and the Coming Battle Over the Blaine Amendments, 7, available at http://www.ij.org/publications (last visited Feb. 13, 2003); see also Viteritti, Blaine’s Wake, supra note 60, at 671 n.64 (quoting Blaine’s proposal). Blaine’s proposal 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 devoted be divided between religious sects and denominations.

Id.

\(^1\) Viteritti, Blaine’s Wake, supra note 60, at 671; Heytens, supra note 110, at 133–34. The House passed the Blaine Amendment with 180 members voting for the Amendment, 7 voting against, and 98 abstaining from the vote. Heytens, supra note 110, at 133. The Senate then debated the Amendment. Id. Ultimately, the Amendment failed in the Senate with only 28 Senators voting in favor of it, 16 voting against it, and 27 abstaining from the vote. Id. Senators voted almost entirely along party lines, with all but one Republican Senator casting his ballot for the Amendment and all of the voting Democrat Senators opposing it. Id. at 133–34.
These state amendments are evidence of the Protestant majority's refusal to permit Catholicism to flourish in America and of the governments' anti-Catholic sentiments. Consequently, because many state constitutions expressly prohibit state

120. Jeffries & Ryan, supra note 106, at 305; Heytens, supra note 110, at 134. This number is an approximation because some dispute exists over which constitutional provisions constitute Blaine Amendments. Heytens, supra note 110, at 123 n.32. The following provisions are recognized as Blaine Amendments: ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. II, § 12; CAL. CONST. art. IX, § 8; COLO. CONST. art. V, § 34; DEL. CONST. art. X, § 3; FLA. CONST. art. I, § 3; GA. CONST. art. I, § 2; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 5; ILL. CONST. art. X, § 3; ID. CONST. art. I, § 6; KY. CONST. § 189; MASS. CONST. art. XVIII; Mich. CONST. art. VIII, § 2; Minn. CONST. art. I, § 16, art. XII, § 2; MO. CONST. art. X, § 6; MONT. CONST. art. X, § 6; NEB. CONST. art. VII, § 11; N.H. CONST. pt. II, art. 83; N.M. CONST. art. XII, § 3; N.Y. CONST. art. XI, § 3; N.D. CONST. art. VIII, § 5; OKLA. CONST. art. II, § 5; OR. CONST. art. I, § 5; PA. CONST. art. III, § 29; S.C. CONST. art. XI, § 4; S.D. CONST. art. VI, § 3; TEX. CONST. art. I, § 7; UTAH CONST. art. I, § 4, art. X, § 9; WASH. CONST. art. I, § 11; WIS. CONST. art. I, § 18; Wyo. CONST. art. I, § 19. Id. The text of each Blaine Amendment varies, but the amendments typically prohibit the government from extracting public funds from their treasuries to support religious institutions. Id. For instance, the following is the text of Florida's Blaine Amendment:

There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

FLA. CONST. art. I, § 3. The text of the Blaine Amendment of Wisconsin states:

The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

WIS. CONST. art. I, § 18. Another variation is the Blaine Amendment of New York, which states:

Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.

N.Y. CONST. art. XI, § 3. Finally, the following is the text of the Illinois Blaine Amendment:

Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.

ILL. CONST. art. X, § 3.

121. Jeffries & Ryan, supra note 106, at 303–05.
public funds from reaching religious institutions, today these institutions not only must withstand United States constitutional challenges when seeking public aid but also state constitutional challenges.\textsuperscript{122}

\textbf{E. Pierce v. Society of Sisters: The "Empty Promise" of a Parent's Right to Choose Education}

As America's Catholic and Jewish populations increased during the twentieth century, Protestant religious dominance subsided.\textsuperscript{123} As a result of the immigrant influx, America lost its identification as a Protestant nation, and Protestants largely accepted America's new religious pluralism.\textsuperscript{124} Indeed, religious pluralism received support in \textit{Pierce v. Society of Sisters}, where the Supreme Court unanimously held that American parents could send their children to Catholic schools instead of Protestant-dominated public schools.\textsuperscript{125} The Supreme Court explained that state governments could not mandate attendance at public schools because parents have a liberty interest "to direct the upbringing and education" of their children.\textsuperscript{126} In essence, \textit{Pierce} affirmed the fundamental right of parents to educate their children as they choose by permitting private schools to exist alongside state public schools.\textsuperscript{127}

\begin{itemize}
\item 122. \textit{See infra} Part V.D (discussing the limitations that the Blaine Amendments place on the Supreme Court's ruling in \textit{Zelman v. Simmons-Harris}).
\item 123. Jeffries & Ryan, supra note 106, at 305. Protestants remained the most numerous religious sect in America and continued to control American politics; however, "the Protestant era in American life had come to its end." \textit{Id.} (quoting Robert T. Handy, \textit{A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES} 58, 213 (1971)). By the twentieth century, the Protestant majority had learned to accept the fact that Americans came in three forms: Protestant, Catholic, and Jew. \textit{Id.}
\item 124. \textit{Id.} at 305-06.
\item 125. \textit{Pierce v. Soc'y of Sisters}, 268 U.S. 510, 535-36 (1925). This case came in front of the Court prior to the incorporation of the First Amendment. Viteritti, \textit{Blaine's Wake}, supra note 60, at 677 n.98. The Supreme Court decided the case on due process and liberty principles of the Fourteenth Amendment. \textit{Id.}
\item 126. \textit{Pierce}, 268 U.S. at 534–35. The Court also noted that private schools have a "business and property" interest that the Constitution protects. \textit{Id.} at 535–36.
\item 127. VITERITTI, CHOOSING EQUALITY, supra note 85, at 130; SHEFFER, supra note 37, at 38; Frank J. Kemerer, \textit{The Constitutionality of School Vouchers}, 101 EDUC. L. REP. 17, 19–20 (1995) [hereinafter Kemerer, \textit{Constitutionality of School Vouchers}]; Viteritti, \textit{Blaine's Wake}, supra note 60, at 677–78; Davidson, supra note 37, at 444–45; see also Meyer v. Nebraska, 262 U.S. 390 (1923) (affirming parents' right to choose the education of their children by permitting children to learn in non-English languages if their parents so desire). The Supreme Court in \textit{Pierce} explained that [the fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations].
\end{itemize}
The case, however, did not address the issue of government funding of religious schools. Nevertheless, Pierce did validate the existence of religious schools.

Some commentators contend that the Pierce decision can be read as containing an implied promise that parents may choose to send their children to religious schools. Yet, these commentators note that this implied promise is an empty promise, for most parents cannot afford the fees of private school. Therefore, although the Court in Pierce broke the states’ monopoly on education, the decision did not truly provide American parents with the right to choose the education of their children. In fact, because the Court provided parents with the constitutional right to send their children to religious schools without providing parents with the financial means, the Court in Pierce effectively encouraged parents to place their children in public schools. As one commentator explained, the “selective funding” permitted by Pierce “exerts powerful—and highly questionable— financial pressure on dissenting parents to conform their educational choices to the majority’s values by enrolling children in public schools.

Pierce, 268 U.S. at 535. More recently, in Roe v. Wade, the Court described parents’ right to educate their children according to their own preferences as fundamental, stating that the fundamental right of privacy “has some extension to activities relating to . . . child rearing and education.” Roe v. Wade, 410 U.S. 113, 152–53 (1973).

128. See Pierce, 268 U.S. at 536; Viteritti, Blaine’s Wake, supra note 60, at 677–78; Davidson, supra note 37, at 445.

129. See Pierce, 268 U.S. at 534–35; Viteritti, Blaine’s Wake, supra note 60, at 677–78; Davidson, supra note 37, at 445.

130. VITERITI, CHOOSING EQUALITY, supra note 85, at 130; Viteritti, Blaine’s Wake, supra note 60, 677–78.

131. VITERITI, CHOOSING EQUALITY, supra note 85, at 130; Viteritti, Blaine’s Wake, supra note 60, 677–78 (“But the promise of choice implied by the two rulings [of Pierce and Meyer] would prove to be somewhat empty.”); see also Nat’l Ctr. for Educ. Statistics, Findings from the Condition of Education 1997: Public and Private Schools: How Do They Differ? (1997) (“Because most private schools charge tuition, only parents with the personal financial resources or financial aid to afford the tuition truly have the option of selecting a private school. Thus, the rate of private school attendance in 1993 increased with family income.”), at http://www.nces.ed.gov/pubsearch/pubsinfo.asp?pubid=97983 (last visited Feb. 13, 2003) [hereinafter Findings].

132. VITERITI, CHOOSING EQUALITY, supra note 85, at 130; Viteritti, Blaine’s Wake, supra note 60, 677–78.

133. Stephen G. Gilles, On Educating Children: A Parentalist Manifesto, 63 U. CHI. L. REV. 937, 942 (1996); Viteritti, Blaine’s Wake, supra note 60, at 677–78; cf. Davidson, supra note 37, at 448 (“[S]ome commentators argue that from an economic perspective, because many parents or guardians cannot bear the cost of private schooling or cannot spare the time to home school due to both spouses working, the public school system in the United States has a practical monopoly on elementary and secondary education.”).
to avoid the heavy financial burden of private school tuition.”

In fact, some argue that government funding of both private and public schools may be constitutionally required in order to achieve the promise of Pierce.

F. School Choice: Vouchers

The Supreme Court has never reconciled Pierce’s apparent implied promise that parents may choose to send their children to religious schools with the public school system’s monopoly on free education. Consequently, parents are frequently forced to forfeit free education if they choose to send their children to private schools or are forced to accept the dilapidated condition of the public school system. This choice usually permits only affluent children to avoid the public school system, while locking America’s urban poor into the failing public school system.

Thus, for the purposes of this Note, the first question to consider is whether the public school system is truly failing. Research indicates that, in fact, the public school system is teaching its students inadequately and that educational reform is therefore essential. For

134. Gilles, supra note 133, at 942. Gilles explains that “government may not do indirectly what it is forbidden to do directly.” Id. at 1008. He cites commentator Cass Sunstein and states that “when the government engages in selective funding it is attaching ‘strings’ to the exercise of constitutional rights, and although this may sometimes be permissible, ‘the pressure imposed by the strings . . . is constitutionally troublesome.’” Id.

135. See Robert F. Drinan, The Constitutionality of Public Aid to Parochial Schools, in THE WALL BETWEEN CHURCH AND STATE 56 (Dallin H. Oaks ed., 1963) (“A plausible argument can be made for the proposition that the Pierce decision elevated the private school to the status of a publicly recognized institution which cannot logically and fairly be granted state accreditation and denied state subsidization.”). See generally Michael W. McConnell, The Selective Funding Problem: Abortions and Religious Schools, 104 HARV. L. REV. 989 (1991) (comparing the constitutional right affirmed in Pierce to the constitutional right to abortion recognized in Roe v. Wade, 410 U.S. 113, 159 (1973), and considering whether, to avoid unconstitutional discriminatory funding, both abortion and private religious schools must be funded).

136. Drinan, supra note 135, at 55 (“The fundamental issue in the controversy over public funds for private schools, including parochial schools, therefore arises out of the fact that private schools are public schools for the purpose of compulsory attendance laws [due to Pierce], but have not been designated as public schools capable of being beneficiaries of public funds.”); Gilles, supra note 133, at 937.

137. Gilles, supra note 133, at 988.

138. Id. at 989; Michael J. Frank, The Evolving Establishment Clause Jurisprudence and School Vouchers, 51 DEPAUL L. REV. 997, 999 (2002); Holland & Soifer, supra note 1, at 337; see also Findings, supra note 131 (suggesting that only parents with personal wealth or access to financial aid have the option to send their children to private schools because of the cost of private school tuition). The average tuition of a private elementary school in 1993 was $2138, and the average cost of a private secondary school was $4578. Findings, supra note 131.

139. See Bolick, supra note 6, at 245 (discussing the poor performance of public school students in areas where voucher programs are in place); Holland & Soifer, supra note 1, at 337
instance, average Scholastic Aptitude Test ("SAT") scores have fallen approximately seventy-five points in the last thirty years.\footnote{140} Cleveland public school students have a one-in-fourteen chance of graduating from high school with senior-level proficiency.\footnote{141} Moreover, half of all minorities in American public schools do not graduate from high school.\footnote{142} Therefore, few commentators contend that the public school system is a success.\footnote{143}

These statistics have triggered the school choice movement.\footnote{144} All school choice programs aim to return control to parents and enable them...
to make some decisions concerning where their children will attend school. The following are the six main types of school choice programs: intra-district public choice, inter-district public choice, charter schools, magnet schools, privately funded voucher programs, and publicly funded voucher programs.

The first four school choice programs operate within the public school system. Intra-district public choice programs permit parents to send their children to any traditional public school within their school district. Inter-district public choice programs allow parents to transfer their children to a traditional public school in a different school district. Charter schools, also known as community schools, are not traditional public schools; they are self-managed public schools that do not answer to local school district boards and therefore have less bureaucracy than traditional public schools. Consequently, charter schools have less bureaucracy than traditional public schools and can be more responsive to the needs of their students. Charter school programs permit parents to choose from one of the self-managed public schools.

the quality of the public school system had deteriorated due to the government's increased control over the school districts and the bureaucratization of the public school system as a whole. Friedman proposed empowering parents by providing them with tuition vouchers that they could use to send their children to private schools for little or no cost. Today, the quality of education within the public school system has dramatically decreased since Friedman made his proposal. Therefore, it is not surprising that a large support basis for school choice has finally emerged. See Jerry Ellig & Kenneth Kelly, Competition and Quality in Deregulated Industries: Lessons for the Education Debate, 6 Tex. Rev. L. & Pol. 335, 340 (2002) (noting the various school choice programs that provide parents with control over where their children will attend school); Jerry Ellig & Michael Heise, The Political Economy of School Choice, 111 Yale L.J. 2043, 2073–78 (2002).

Magnet schools, which are operated by local school districts, are public schools that emphasize a specific curriculum or teaching style. Magnet school programs, therefore, enable parents to send their children to schools with a special emphasis that may spark interest in their children. Research indicates that many of these public school choice programs have improved the scholastic achievement of their students; some contend, however, that the students’ scholastic achievement levels will not improve dramatically without the inclusion of private schools in a school choice program.

The only school choice programs that enable parents to send their children to private schools are voucher programs. Such programs enable children to attend private schools at little or no cost. There are two types of voucher programs: privately funded programs and publicly funded programs. Privately funded voucher programs are funded by private donations. Because privately funded voucher

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157. See Ellig & Kelly, supra note 145, at 340 (noting that independent school boards usually run charter schools); Peyser, supra note 99, at 621 (stating that charter schools are independently managed); see also Garnett & Garnett, supra note 4, at 349-50 (discussing the details of the highly successful charter school program in New York City’s Harlem neighborhood).

158. See Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2464–65 (2002) (noting that magnet schools emphasize a particular teaching style, subject area, or service to the student); Ryan & Heise, supra note 148, at 2070 (noting that oftentimes the purposes of magnet schools are to “foster racial integration and typically to use racial balance criteria in selecting students”).

159. See Zelman, 122 S. Ct. at 2464–65 (noting that magnet schools emphasize a particular teaching style, subject area, or service to the student); Ryan & Heise, supra note 148, at 2070. Magnet schools do restrict admissions, however, and typically use race as a factor for enrollment. Id. Use of race-based criteria to determine admission into magnet schools is both politically and legally controversial. Id. “Politically, magnet schools are controversial because they cost more to operate and restrict admissions, taking away resources from other pubic schools while simultaneously limiting the opportunities of resident students to attend the schools in order to assure racial balance.” Id. at 2070 n.129. Legally, magnet schools are controversial because race criteria may be subject to constitutional challenge. Id. For more information on the constitutionality of race criteria, see Note, The Constitutionality of Race-Conscious Admissions Programs in Public Elementary and Secondary Schools, 112 HARV. L. REV. 940 (1999).

160. See, e.g., Garnett & Garnett, supra note 4, at 349. For example, the charter school program in New York City’s Harlem neighborhood has been described as the “the Miracle in East Harlem” because of its success. Id. Prior to implementation of the charter school program, less than sixteen percent of Harlem public school students could read at their grade level. Id. After Harlem created its charter school program, sixty-three percent of Harlem school students could read at their grade level. Id.

161. See id. at 349 (noting that charter schools and public-school-only choice programs exclude private religious schools); supra note 5 (defining the term “voucher”).

162. See Peyser, supra note 99, at 621.

163. See Bodenmer, supra note 2, at 289–90.

164. See Ellig & Kelly, supra note 145, at 340; Peyser, supra note 99, at 620.

165. See Bodenmer, supra note 2, at 289–90. Privately funded voucher programs are scholarship programs organized by both not-for-profit organizations and individuals and are funded by the donations of private individuals and corporations. Ellig & Kelly, supra note 145,
programs receive no government assistance, they circumvent Establishment Clause issues.\textsuperscript{166} Privately funded vouchers are not without problems, however, because their total existence depends on the generosity of private benefactors.\textsuperscript{167} Publicly funded voucher programs, on the other hand, operate independently from private charity.\textsuperscript{168} Publicly funded vouchers receive all funding from the government.\textsuperscript{169} As of November 2002, three publicly funded voucher programs existed: one in Milwaukee, Wisconsin;\textsuperscript{170} one in Cleveland, Ohio;\textsuperscript{171} and one statewide in Florida.\textsuperscript{172} Because these voucher

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{166}] See Bodenmer, supra note 2, at 290.
\item[\textsuperscript{167}] See id.
\item[\textsuperscript{168}] See id. at 292 (noting that publicly funded voucher programs receive direct government support).
\item[\textsuperscript{169}] Id.
\item[\textsuperscript{170}] See Laura Athens, \textit{Is the Wall Between Church and State Crumbling?}, 81 MICh. B.J. 18, 22 (Sept. 2002) (noting that a voucher program exists in Milwaukee, Wisconsin). Milwaukee’s program began in 1990. Ellig & Kelly, supra note 145, at 376. The program limited voucher recipients to low-income families. \textit{Id.}\ The program initially limited the number of participants to one percent of Milwaukee’s total public school system enrollment. \textit{Id.}\ Today, however, the program permits fifteen percent of the students in Milwaukee to participate in the program. \textit{Id.}\ Also, the program initially excluded religious schools. \textit{Id.}\ at 377. Today, the program allows both religious and non-religious public schools to participate in the program. \textit{Id.}\ Milwaukee’s parental choice program, in part, provides:

\begin{itemize}
\item[(2)(a)] Subject to par. (b), any pupil in grades kindergarten to 12 who resides within the city may attend, at no charge, any private school located in the city if all of the following apply:
\begin{enumerate}
\item The pupil is a member of a family that has a total family income that does not exceed an amount equal to 1.75 times the poverty level determined in accordance with criteria established by the director of the federal office of management and budget . . . .
\item No more than 15% of the school district’s membership may attend private schools under this section. If in any school year there are more spaces available in the participating private schools than the maximum number of pupils allowed to participate, the department shall prorate the number of spaces available at each participating private school.
\end{enumerate}
\end{itemize}
\item[\textsuperscript{171}] See Athens, supra note 170, at 22 (noting that a voucher program exists in Cleveland, Ohio); \textit{see also infra} Part III.A (discussing the facts of \textit{Zelman}). \textit{See infra} notes 277–82 and accompanying text for a detailed description of Cleveland’s Pilot Project Scholarship Program, which provides, in part:

\begin{itemize}
\item[(A)] The superintendent of public instruction shall establish a pilot project scholarship program and shall include in such program any school districts that are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent. The program shall provide for a number of students residing in any such district to receive scholarships to attend alternative
\end{itemize}
\end{itemize}
\end{footnotesize}
programs require the government to provide financial assistance to religious institutions, some contend that such vouchers violate the Establishment Clause.\footnote{173} Therefore, to determine if the implied promise of school choice made in \textit{Pierce v. Society of Sisters} is to be

\begin{quote}
\textbf{Ohio Rev. Code Ann.} § 3313.975(A) (West 1999 & Supp. 2002). Also, the Pilot Project Scholarship Program provides preference to low-income families:

\begin{enumerate}
\item Each registered private school shall admit students to kindergarten and first, second, and third grades in accordance with the following priorities:
\item Students who were enrolled in the school during the preceding year;
\item Siblings of students enrolled in the school during the preceding year, at the discretion of the school;
\item Children from low-income families attending school or residing in the school district in which the school is located until the number of such students in each grade equals the number that constituted twenty per cent of the total number of students enrolled in the school during the preceding year in such grade. Admission of such twenty per cent shall be by lot from among all low-income family applicants who apply prior to the fifteenth day of February prior to admission.
\item All other applicants residing anywhere, provided that all remaining available spaces shall be filled from among such applicants by lot.
\end{enumerate}

\textit{Id.} § 3313.977(A).

\footnote{172. \textit{See} Athens, \textit{supra} note 170, at 22 (noting that a voucher program exists in Florida). Florida began its statewide program in 1998. Ellig \& Kelly, \textit{supra} note 145, at 384. The program first provides that the quality of all Florida public schools be tested in the areas of writing, reading, and math. \textit{Id.} at 383–84. If a public school receives two "F" grades based on the statewide testing, then its students receive vouchers to attend any private school or better-performing public school. \textit{Id.} at 384. The Florida Opportunity Scholarship provides in part:

(1) Findings and intent.—The purpose of this section is to provide enhanced opportunity for students in this state to gain the knowledge and skills necessary for postsecondary education, a technical education, or the world of work. The Legislature recognizes that the voters of the State of Florida, in the November 1998 general election, amended s. 1, Art. IX of the Florida Constitution so as to make education a paramount duty of the state. The Legislature finds that the State Constitution requires the state to provide the opportunity to obtain a high-quality education. The Legislature further finds that a student should not be compelled, against the wishes of the student’s parent or guardian, to remain in a school found by the state to be failing for 2 years in a 4-year period. The Legislature shall make available opportunity scholarships in order to give parents and guardians the opportunity for their children to attend a public school that is performing satisfactorily or to attend an eligible private school when the parent or guardian chooses to apply the equivalent of the public education funds generated by his or her child to the cost of tuition in the eligible private school as provided in paragraph (6)(a). Eligibility of a private school shall include the control and accountability requirements that, coupled with the exercise of parental choice, are reasonably necessary to secure the educational public purpose, as delineated in subsection (4).


\footnote{173. \textit{See} Bodemner, \textit{supra} note 2, at 292.}}
fulfilled, an analysis of modern Establishment Clause jurisprudence is necessary.\textsuperscript{174}

\textbf{G. Modern Establishment Clause Jurisprudence}

Many scholars and commentators criticize the Supreme Court for its inconsistent interpretations of the Establishment Clause.\textsuperscript{175} Critics point to the Supreme Court's haphazard and unsystematic use of the \textit{Lemon} test, the three-part test that emerged from \textit{Lemon v. Kurtzman}\textsuperscript{176} in 1971 to determine if government programs contravene the Establishment Clause.\textsuperscript{177} Yet, some commentators suggest that while the Court's interpretation of the Establishment Clause and the \textit{Lemon} test has varied over the years,\textsuperscript{178} the Court has consistently stressed the importance of religious neutrality.\textsuperscript{179} Moreover, commentators point out that, since 1983, the Supreme Court has consistently applied the principle of private, independent choice when interpreting the \textit{Lemon} test.\textsuperscript{180} Therefore, some commentators argue that, despite the apparent

\begin{itemize}
  \item \textsuperscript{174} See Viteritti, \textit{Blaine's Wake}, supra note 60, at 678 (noting that Pierce's implied promise of choice—the implied promise that parents may send their children to religious schools if they so desire—is empty, for most cannot afford the fees of private school).
  \item \textsuperscript{175} Cordes, supra note 39, at 143 ("[M]ost commentators agree in their lament over the Court's often incomprehensible and inconsistently applied set of principles."); Hamilton, supra note 54, at 824–25 ("The Supreme Court's doctrine in the Establishment Clause arena has been treated to more internal and external criticism for its lack of consistency, perhaps, than any other constitutional doctrine."); McConnell, \textit{Defense of Educational Choice}, supra note 56, at 852 (noting that the Supreme Court's cases involving aid to religious schools are commonly criticized for their inconsistencies).
  \item \textsuperscript{176} \textit{Lemon v. Kurtzman}, 403 U.S. 602 (1971).
  \item \textsuperscript{177} See Garnett & Garnett, supra note 4, at 318 ("The \textit{Lemon} test has been applied haphazardly, to put it kindly, by the Supreme Court ever since the case was decided."). In \textit{Lemon v. Kurtzman}, the Supreme Court established a three-step test to determine whether a government program violates the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" \textit{Lemon}, 403 U.S. at 612–13. Many of the Supreme Court Justices themselves have criticized the test and called for its overruling, yet the test remains. ERWIN CHEMERINSKY, \textit{CONSTITUTIONAL LAW} 1279 (2001). Indeed, Justice Scalia described the test as "a ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring).
  \item \textsuperscript{178} Frank, supra note 138, at 1038 ("The United States Supreme Court's understanding of the Establishment Clause has obviously meandered over the years.").
  \item \textsuperscript{179} Steffen N. Johnson, \textit{A Civil Libertarian Case for the Constitutionality of School Choice}, 10 GEO. MASON U. CIV. RTS. L.J. 1, 15 (1999–2000) (noting the Supreme Court's consistent application of the neutrality-to-aid principle to education cases following \textit{Everson v. Board of Education}, with only a few exceptions).
  \item \textsuperscript{180} See, e.g., Kemerer, \textit{Constitutionality of School Vouchers}, supra note 127, at 21 (noting that the recent aid-to-education cases have followed the reasoning of \textit{Mueller v. Allen}, 463 U.S. 388 (1983), and applied the principle of private, independent choice); McConnell, \textit{Defense of
inconsistent use of the lemon test, the basic pillars of Establishment Clause jurisprudence have been, and continue to be, neutrality and private, independent choice. Today, a government program does not violate the Establishment Clause if the program is neutral with respect to religion and if public funding reaches religious institutions solely as the result of the private choices by individuals.

1. Neutrality

Neutrality, and modern Establishment Clause jurisprudence as a whole, has its roots in the 1947 Supreme Court case of Everson v. Board of Education. In Everson, the Court upheld a state school-choice program must endure.” Garnett & Garnett, supra note 4, at 318.

181. See McConnell, Defense of Educational Choice, supra note 56, at 852 (“In fact, with the exception of a few aberrant decisions in the 1970’s and early 1980’s, several of which have been overruled, the Supreme Court has consistently upheld aid to students attending nonpublic schools, provided 1) that the aid is neutral among educational choices, and 2) that any religious use is the product of private independent choice.”); cf. James G. Dwyer, School Vouchers: Inviting the Public into the Religious Square, 42 WM. & MARY L. REV. 963, 981 (2001) (“[T]he neutrality position has come to dominate judicial application of the Establishment Clause.”); Davidson, supra note 37, at 483 (“A survey of relevant case law has shown that in order to pass constitutional muster under Establishment Clause jurisprudence, such a program should include provisions adhering to the overarching principles of: (1) secular purpose; (2) neutrality; and (3) private choice.”). See generally STEVEN D. SMITH, FOREDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 77-97 (1995) (discussing the pillar of neutrality). But see Jeffries & Ryan, supra note 106, at 280 (contending that no true principles of law govern the Establishment Clause and that the entire body of Establishment Clause jurisprudence is a product of politics).

182. McConnell, Defense of Educational Choice, supra note 56, at 852 (“In fact, with the exception of a few aberrant decisions in the 1970’s and 1980’s, several of which have been overruled, the Supreme Court has consistently upheld aid to students attending nonpublic schools, provided 1) that the aid is neutral among educational choices, and 2) that any religious use is the product of private independent choice.”); cf. Davidson, supra note 37, at 483 (“A survey of relevant case law has shown that in order to pass constitutional muster under Establishment Clause jurisprudence, such a program should include provisions adhering to the overarching principles of: (1) secular purpose; (2) neutrality; and (3) private choice.”).

183. Cordes, supra note 39, at 143; see Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (holding that public aid could reach a religious school because, in part, the government program was neutral with respect to religion). The New Jersey statute at issue in Everson v. Board of Education authorized local school districts to enact rules regarding the transportation of children to school. Everson, 330 U.S. at 3. Pursuant to this authority, Ewing Township in New Jersey began reimbursing all parents the transportation costs of sending their children to school. Id. Ultimately, the Court upheld this program even though one of its results was that “children are helped to get to church schools” and “some of the children might not be sent to the church schools if the parents were compelled to pay their children’s bus fares out of their own pockets.” Id. at 17.
government program that reimbursed parents for their children’s bus fares to school, regardless whether the children attended public schools or religious private schools. In reaching its decision, the Court found that the Establishment Clause did not require the government to be the church’s adversary. Rather, the Establishment Clause merely required the government to be neutral with respect to religion. Consequently, the Court held that the program was constitutional, despite the fact that some parents might not have sent their children to religious schools if the government had not funded the transportation costs. This was the first time that the Court expressly held that government must be neutral toward religion. Yet, in dictum, the Court did state that the Establishment Clause prohibited the government from levying taxes in support of any religious activity. More importantly, the Court, for the first time, made the Establishment Clause fully applicable to the states through incorporation under the Fourteenth Amendment. Nevertheless, some commentators contend that, regardless of the conflicting dicta, Everson was the first case to establish the Court’s emphasis on religious neutrality.

185. Id.
186. Id. at 17.
187. Id. (upholding the government program although the publicly funded bus fares may enable some parents to send their children to religious private schools, even though those parents otherwise would have to forgo religious education because of the cost of transportation).
188. See Michael J. Sandel, Freedom of Conscience or Freedom of Choice?, in RELIGIOUS LIBERTY IN THE SUPREME COURT 487 (Terry Eastland ed., 1993); Douglas Laycock, The Underlying Unity of Separation and Neutrality, 46 EMORY L.J. 43, 53 (1997); see also BARRON, supra note 48, at 1239 (noting that Justice Black expressly mandated neutrality). But see Bradfield v. Roberts, 175 U.S. 291 (1899). In Bradfield v. Roberts, the Court upheld the disbursement of public funds to religious hospitals. Id. at 299–300. The Court did not specifically mention neutrality, but the program was neutral with respect to religion. Id.
189. Everson, 330 U.S. at 16 (“No tax in any amount, large or small, can be levied to support any religious activities or institutions . . . .”)
190. See supra Part II.B (discussing the incorporation of the Establishment Clause). In Everson, the Court did not analyze thoroughly whether the First Amendment applied to the State of New Jersey. Everson, 330 U.S. at 15. Instead, the Court first noted that it had already interpreted the Fourteenth Amendment to apply against “state action abridging religious freedom” and cited cases demonstrating the Fourteenth Amendment’s incorporation of the Free Exercise Clause, such as Cantwell v. Connecticut, 310 U.S. 296 (1940). Everson, 330 U.S. at 15. Then, the Court stated that “[t]here is every reason to give the same application [against the states] . . . to the ‘establishment of religion’ clause.” Id.
191. See Cordes, supra note 39, at 143–44 (contending that Everson established the conflicting constitutional principles of neutrality and strict separation between church and state); Johnson, supra note 179, at 12 (stating that, since Everson, the Court has emphasized neutrality, but noting that even in Everson the Court “took pains” to point out that aid to religious institutions is not always constitutional); Laycock, supra note 188, at 53 (“[T]he essence of both the no-aid [separationist] and the nondiscrimination [neutrality] theories is succinctly laid out in
The Court's emphasis on neutrality continued in *Committee for Public Education and Religious Liberty v. Nyquist*.\(^{192}\) In *Nyquist*, the Court held that a government program was unconstitutional because it expressly prohibited the participation of public schools and, thus, was not religiously neutral.\(^{193}\) The program in *Nyquist* provided tuition reimbursement to and tax relief for parents who send their children to religious schools; the program also provided grants to the religious schools themselves for the purposes of maintaining and improving school buildings.\(^{194}\) Although the Court held that the "grant and tax" program was unconstitutional,\(^{195}\) the Court limited its holding in footnote thirty-eight.\(^{196}\) In the footnote, the Court distinguished the

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\(^{192}\) Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973). The New York program at issue in *Nyquist* provided tuition grants and tax relief for parents who sent their children to religious schools, as well as grants to the religious schools themselves for the purposes of maintaining and improving school buildings. *Id.* at 761–76.

\(^{193}\) *Id.* at 794. The Court held that New York's program violated the Establishment Clause because the program did not merely "indirect[ly] and incidental[ly]" benefit religious schools; the program directly "subsidize[d] and advance[d] the religious mission of sectarian schools." *Id.* at 775, 779–80.

\(^{194}\) *Id.* at 761–76.

\(^{195}\) *Id.* at 794.

\(^{196}\) *Id.* at 782 n.38. Because the Court held a tuition reimbursement program to be unconstitutional in *Nyquist*, voucher opponents incessantly point to the case as precedent. *See*, e.g., Br. for Resp'ts Doris Simmons-Harris, et al. at 7, *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002) (Nos. 00-1751, 00-1777 & 00-1779), available at 2001 WL 1636772; *see also infra* Part IV.C (demonstrating that the majority correctly held that *Nyquist* was not controlling law in *Zelman*). Footnote thirty-eight provides:

Allen and Everson differ from the present litigation in a second important respect. In both cases the class of beneficiaries included all schoolchildren, those in public as well as those in private schools. See also *Tilton v. Richardson*, supra, in which federal aid was made available to all institutions of higher learning, and *Walz v. Tax Comm'n*, supra, in which tax exemptions were accorded to all educational and charitable nonprofit institutions. We do not agree with the suggestion in the dissent of THE CHIEF JUSTICE that tuition grants are an analogous endeavor to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools, 413 U.S., at 801—803, 93 S. Ct., at 2990—2991. The grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools 'totally at state expense.' And in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants
non-neutral Nyquist program from the neutral program of Everson.\textsuperscript{197} Thus, footnote thirty-eight suggests that the Court would have decided Nyquist differently if the program had neutrally provided assistance without regard to the religious status of the beneficiaries.\textsuperscript{198} Accordingly, although the Court held the tuition grants at issue in Nyquist to be unconstitutional, it qualified its holding and implied that neutral tuition grants would not violate the Establishment Clause.\textsuperscript{199}

2. The Lemon Test and Its Early Inconsistent Applications

In Lemon v. Kurtzman, the Supreme Court established a three-step test to determine whether a government program violates the Establishment Clause: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”\textsuperscript{200} After announcing the Lemon test and until establishing the criterion of private, independent choice in 1983, the Supreme Court issued a number of inconsistent opinions flowing from a variety of philosophical principles,
which the Court has since abandoned. The inconsistent constitutional principles concerned the second and third prongs of the Lemon test, for the Court’s examination of the first prong of the Lemon test typically was cursory; it remains so today. Thus, a state’s interest in lowering the cost of education or improving the quality of education usually satisfies the secular purpose prong.

On the other hand, many have blamed the inconsistencies of Establishment Clause jurisprudence on the Lemon test’s third prong, which prohibits the government from excessive entanglement with religion. Some contend that the entanglement prong rendered the Lemon test a “conundrum,” with the second prong preventing the government from granting aid that had the effect or purpose of advancing religion, but the third prong precluding the government from monitoring the use of any aid. Others criticize the Court’s use of the political divisiveness doctrine in conjunction with the entanglement prong. Through the political divisiveness doctrine, the Supreme

201. Viteritti, Blaine’s Wake, supra note 60, at 708-09 (noting that the Supreme Court “issued a wide-ranging set of pronouncements that did not appear to flow from a consistent formulation of philosophical principles” until Mueller v. Allen in 1983).

202. Frank, supra note 138, at 1010 (“The purpose of the aid is frequently one that is particularly important to society, such as health care or education, and the Court has been wise enough not to second-guess the legislature on this point.”); Bodenmier, supra note 2, at 294 (“When applying the secular legislative purpose test to religious aid legislation the Court’s review is generally a cursory one.”); see also Davidson, supra note 37, at 484 (“The secular purpose is most easily satisfied . . . .”). Justice Scalia has criticized the secular purpose prong, contending that it has no historical basis and is illogical because “[t]he number of possible motivations . . . is not binary, or indeed even finite . . . . To look for the sole purpose of even a single legislator is probably to look for something that does not exist.” Edwards v. Aguillard, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting). Yet, scholar Erwin Chemerinsky noted that the Supreme Court has consistently examined the legislative motivation within Equal Protection jurisprudence, despite the difficulties of the inquiry. CHEMERINSKY, supra note 177, at 1280.

203. See Bodenmier, supra note 2, at 295.

204. McConnell, Crossroads, supra note 58, at 141 (noting that many blame the entanglement prong for the “chaotic and inconsistent results” of Establishment Clause jurisprudence).

205. Barron, supra note 48, at 1243; see also Aguilar v. Felton, 473 U.S. 402, 420 (1985) (Rehnquist, J., dissenting) (“In Aguilar v. Felton, the Court takes advantage of the ‘Catch-22’ paradox of its own creation, whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement.”). Not all commentary concerning the entanglement prong is negative; indeed, some argue that the excessive entanglement prong properly served as an “early warning system” for a statute’s impermissible purposes or effects. See, e.g., Kenneth Ripple, The Entanglement Test of the Religious Clauses — A Ten Year Assessment, 27 UCLA L. REV. 1195 (1980).

206. McConnell, Crossroads, supra note 58, at 130 (“[F]or more than a decade the Court embellished the entanglement prong with the notion of ‘political divisiveness.’”); Feldman, supra note 65, at 691-92 (“The connection between divisiveness and entanglement lay in an ‘inevitab[e]’ political conflict between supporters of parochial schools and the opponents of state aid to religious institutions.”).
Court struck down legislation simply because litigation arose concerning the statute, for the litigation demonstrated the statute's political divisiveness. This doctrine armed opponents of state funding of religious institutions with a seemingly unbeatable weapon because their mere opposition could be the basis for the invalidation of the legislation. The Supreme Court, however, has disregarded this doctrine since the mid-1980s, and in 2000, the Court expressly renounced placing constitutional significance on political divisiveness. Finally, many commentators have questioned whether the analysis of the entanglement prong differs from that of the primary effect prong. In 1997, the Supreme Court addressed that question, concluding that the analysis used for the entanglement prong was really an aspect of the constitutional inquiry of the second prong. Therefore, the Court condensed the Lemon test and eliminated the separate analysis of the entanglement prong.

Just as the entanglement prong created inconsistencies in Establishment Clause jurisprudence, the courts have struggled with applying the second prong of the Lemon test. For a period of time when analyzing the second prong of the Lemon test, the Supreme Court invalidated statutes if they disbursed funds to institutions that were "pervasively sectarian." The Supreme Court circularly defined a

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207. McConnell, Crossroads, supra note 58, at 130.
208. Id. In Lemon v. Kurtzman, the Court explained why political divisiveness violated the Establishment Clause, stating that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." Lemon v. Kurtzman, 403 U.S. 602, 622 (1971). Some criticized the Court for establishing this constitutional doctrine without much explanation. See, e.g., Feldman, supra note 65, at 692–93. Regardless of the basis for the doctrine, commentator Michael McConnell contended that the political divisiveness doctrine "blamed the religious side of any controversy for the controversy." McConnell, Crossroads, supra note 58, at 130. McConnell described the doctrine as an "invincible weapon" because the doctrine, in essence, required the Court to invalidate any state funding of religious institutions simply because some individuals opposed the funding. See id.
210. See, e.g., BARRON, supra note 48, at 1252.
212. Id.
213. See Frank, supra note 138, at 1013 ("As in most Establishment Clause cases, the parties grappled over the primary effect of the statute.").
214. Id. at 1017 ("In previous cases, the label [of pervasively sectarian] had been the death knell for government aid programs....") Johnson, supra note 179, at 16 (noting that the Supreme Court invalidated some government programs based on the rationale that the aid would advance the religious goals of pervasively sectarian institutions). The most notable and last cases to strike down government programs based on the pervasively sectarian rationale are Aguilar v. Felton, 473 U.S. 402 (1985), overruled by Agostini, 521 U.S. at 236, and School District of
pervasively sectarian institution as "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."\textsuperscript{215} The Court reasoned that if public funds reached a pervasively sectarian institution, there was a greater chance that the public aid would have the effect of advancing religion.\textsuperscript{216} In recent years, however, the Supreme Court ignored the pervasively sectarian distinction in its analysis until, finally, in \textit{Mitchell v. Helms},\textsuperscript{217} the Court expressly renounced the inquiry.\textsuperscript{218} The Court explained that the pervasively sectarian inquiry was merely a tool to discriminate against Roman Catholic institutions.\textsuperscript{219}

For a period of time when examining the second prong of the \textit{Lemon} test, the Supreme Court also struck down statutes if the government program provided funding directly to a religious institution, rather than to a third party who later conferred the benefit on the religious institution.\textsuperscript{220} The Court reasoned that a prohibition against direct aid was necessary to prevent the "subsidization" of religion.\textsuperscript{221} However, as early as 1986, the Court departed from its prohibition against direct aid.
aid and began to prevent the subsidization of religion by ensuring private, independent choice.\textsuperscript{222} In \textit{Mitchell v. Helms}, the Supreme Court specifically renounced the constitutional relevance of the direct/indirect aid distinction.\textsuperscript{223} The Court explained that labeling a program as direct or indirect was often arbitrary\textsuperscript{224} and an irrelevant formality.\textsuperscript{225} Most importantly, the Court noted that the purpose of the direct/indirect aid distinction could be achieved through application of the principle of private, independent choice.\textsuperscript{226}

3. Private and Independent Choice

In \textit{Mueller v. Allen},\textsuperscript{227} the Court set forth the second pillar of modern Establishment Clause jurisprudence: the requirement of private and independent choice.\textsuperscript{228} The \textit{Mueller} Court upheld a government

\begin{itemize}
  \item \textsuperscript{222} See Agostini, 521 U.S. at 225 (concluding that Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986), eliminated the prohibition on direct aid because the principles of private choice and neutrality could prevent government funds from improperly subsidizing religion); Mitchell, 530 U.S. at 816 (stating that Agostini properly concluded that Witters found the direct/indirect aid distinction irrelevant).
  \item \textsuperscript{223} Mitchell, 530 U.S. at 820 (refusing to recognize a "rule" for all cases that prohibited direct aid to religious institutions). Justice O'Connor, however, in her concurring opinion, did state that the direct/indirect aid distinction has some utility. \textit{Id.} at 837 (O'Connor, J., concurring).
  \item \textsuperscript{224} \textit{Id.} at 818 ("Whether one chooses to label this program 'direct' or 'indirect' is a rather arbitrary choice, one that does not further the constitutional analysis.").
  \item \textsuperscript{225} \textit{Id.} The Court pointed out that the cases relied on by the plaintiffs to further their contention that direct aid to religious institutions violates the Establishment Clause, \textit{Meek v. Pittenger} and \textit{Wolman v. Walter}, actually undermine their contention. \textit{Id.} at 817–18 (citing Meek v. Pittenger, 421 U.S. 349 (1975), and Wolman v. Walter, 433 U.S. 229 (1977)). In \textit{Meek}, the Supreme Court invalidated a government program because religious schools directly received educational materials from the government. \textit{Meek}, 421 U.S. at 362–63. In \textit{Wolman}, the Supreme Court invalidated the exact same government program, although the program loaned the materials to the students, rather than directly to the religious institution. \textit{Wolman}, 433 U.S. at 250. The Court, in \textit{Wolman}, stated that "it would exalt form over substance if this distinction were found to justify a result different from that in \textit{Meek}."). \textit{Id.} at 250. Not surprisingly, in \textit{Mitchell}, the Court stated "[t]hat \textit{Meek} and \textit{Wolman} reached the same result, on programs that were indistinguishable but for the direct/indirect distinction, shows that that distinction played no part in \textit{Meek}."). \textit{Id.} Mitchell, 530 U.S. at 818.
  \item \textsuperscript{226} \textit{Mitchell}, 530 U.S. at 816.
  \item \textsuperscript{227} \textit{Mueller v. Allen}, 463 U.S. 388 (1983). In \textit{Mueller v. Allen}, Minnesota's government program permitted all state taxpayers to take a state income tax deduction for the expenses incurred in providing tuition, textbooks, and transportation for their children attending elementary or secondary school. \textit{Id.} at 391. The plaintiffs argued that, although the government program was facially neutral, the program violated the Establishment Clause because parents of children in religious schools took most of the deductions provided by the program. \textit{Id.} at 400. "They contend that most parents of public school children incur no tuition expenses, see Minn. Stat. § 120.06 (1982), and that other expenses deductible under § 290.09(22) are negligible in value; moreover, they claim that 96% of the children in private schools in 1978-1979 attended religiously-affiliated institutions." \textit{Id.}
  \item \textsuperscript{228} See \textit{id.} at 391–402 (holding that the government tax deduction program was constitutional because of the elements of neutrality and private choice).
program providing a tax deduction to all taxpayers with dependent children in school. In reaching its decision, the Court introduced the principle of private and independent choice, while continuing to stress neutrality. The Court stated that because public funds benefited only religious schools as a result of the private decisions of individual parents, the program was constitutional. The Court explained that the element of independent, private choice eliminates any appearance of state endorsement of religion. Moreover, the Court noted that, in past cases, when public funds reached religious institutions indirectly, the government program was constitutional. Finally, the Court explained that the Constitutional Framers did not intend the Establishment Clause to prevent aid from reaching religious institutions through the private choices of individuals. Accordingly, because aid reached religious schools solely as the result of private choice and the program was religiously neutral, the Court upheld the government program.

229. Id. at 390.
230. Id. at 399.
231. Id. at 401; Hamilton, supra note 54, at 831–32 (discussing the Mueller decision). In reaching its decision, the Court expressly relied on Nyquist's footnote thirty-eight. Mueller, 463 U.S. at 398; see supra notes 194–98 and accompanying text (discussing Nyquist's footnote thirty-eight). The Court emphasized that the Mueller program was neutral with respect to religion, for the tax deduction covered the educational expenses of all children, without considering whether a school was secular or non-secular. Mueller, 463 U.S. at 391; Hamilton, supra note 54, at 831–32 (discussing the Mueller decision). Furthermore, the Court stressed that the program was neutral even though most of the tax deductions benefited parents sending their children to religious private schools. Mueller, 463 U.S. at 401.
233. Id.
234. Id. at 400. The Court stated that it was "noteworthy that all but one of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the state to the schools themselves. The exception, of course, was Nyquist, which, as discussed previously is distinguishable from this case on other grounds." Id. at 399. The Court, in Mueller, did not think that Nyquist was controlling because the program in Nyquist provided funds only to religious schools, whereas the Mueller program was neutral with respect to religion. Id.
235. Id. at 400 ("The historic purposes of the [Establishment 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 the neutrally available tax benefit at issue in this case."); see also supra Part II.A (discussing the origin and purposes of the Establishment Clause).
236. Mueller, 463 U.S. at 400.
4. Recent Application of the Pillars of Neutrality and Private, Independent Choice

Subsequent to *Mueller*, the Court has upheld every program that provides financial assistance to religious schools where the program is neutral with respect to religion, and the funding reaches the religious schools as the result of private and independent choices. For example, in *Witters v. Washington Department of Services for the Blind*, the Court held that state vocational rehabilitation services could financially assist a blind student as he studied to become a minister at a Christian college. The Court upheld the financial assistance because the program was neutral with respect to religion and the aid arrived at a religious institution solely as the result of true private choice.

Similarly, in *Zobrest v. Catalina Foothills School District*, the Court found that public funds could be used to pay a sign-language interpreter who worked in a religious school, without violating the Establishment Clause. The Court noted that the program provided

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237. *See Kemerer, Constitutionality of School Vouchers, supra note 127, at 21* (noting that several recent cases have followed the reasoning of *Mueller*).

238. *Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986)*. The Washington State Supreme Court, however, later invalidated the blind student's tuition grant, basing its decision on Washington's Blaine Amendment. *Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1122 (Wash. 1989) (en banc)*. That decision provides evidence that state establishment clauses may be another substantial legal hurdle for voucher proponents. *See Heytens, supra note 110, at 123* (noting that voucher programs must also withstand legal challenges regarding the Blaine Amendments); *Treene, supra note 118, at 2* (noting that voucher programs must also withstand legal challenges regarding the Blaine Amendments). The plaintiff in *Witters* was Larry Witters, a practically blind man who sought to become a Christian minister. *Witters, 474 U.S. at 481*. He applied for financial assistance, through a Washington state program for the disabled, to attend a private Christian college to study to become a minister. *Id.* The State of Washington denied his request for financial aid based on the Establishment Clause. *Id.* However, in a unanimous opinion, the Supreme Court held that Witters could receive public aid to attend a Christian college to become a minister without violating the Establishment Clause. *Id.* at 489.

239. *Witters, 474 U.S. at 488*. Just as in *Mueller*, the *Witters* Court expressly relied on footnote thirty-eight of *Nyquist*, finding that Washington's program was neutral with respect to religion and distinguishing Washington's program from the program in *Nyquist*. *Id.* The Court explained that because the program's benefits were "'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,'" the program was neutral. *Id.* (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782 n.38 (1973)). The Court further explained that "'[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients,... [therefore, the] decision to support religious education is made by the individual, not by the State." *Id.* at 487-88.


241. *Id.* at 10. James Zobrest was a deaf student at a Catholic high school who required the assistance of a sign-language interpreter. *Id.* at 3. The Catalina School District refused to supply Zobrest with an interpreter, contending that doing so would violate the Establishment Clause because the interpreter would be translating both secular and religious subjects for Zobrest. *Id.* at
benefits to any student, regardless of whether he attended a public or private school and regardless of the school's religious affiliation.\textsuperscript{242} Also, the Court noted that the program paid for the interpreter to work at a religious school only because of the private, independent choice exercised by the deaf child's parents.\textsuperscript{243} Therefore, because the program was neutral and involved true private choice, the Court held that the program was constitutional.\textsuperscript{244}

Likewise, in \textit{Agostini v. Felton},\textsuperscript{245} the Court held that public school teachers could travel to religious schools to teach remedial education.\textsuperscript{246} Because the program provided remedial education to all students, on a religion-neutral basis, and aid reached religious private schools only as a result of private and independent choice, the Court held the program to be constitutional.\textsuperscript{247} In reaching its decision, the Court overruled \textit{Aguilar v. Felton}\textsuperscript{248} and its companion case, \textit{School District of Grand

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4. The district court and the Ninth Circuit accepted this argument. \textit{Id.} at 5. The Supreme Court reversed, however, holding that the school district could provide Zobrest with a sign-language interpreter without violating the Establishment Clause because all deaf children can receive assistance from a publicly funded sign-language interpreter and the Zobrests alone caused the interpreter to work in a religious school. \textit{Id.} at 10.

\textsuperscript{242}. \textit{Id.} at 10 (noting that the program distributed "benefits neutrally to any child qualifying as 'disabled'... without regard to the 'sectarian-nonsectarian, or public-nonpublic nature'" of the school).

\textsuperscript{243}. \textit{Id.} The Court stated that because a decision by the Zobrests alone caused the interpreter to work at a Catholic high school, "an interpreter's presence there cannot be attributed to state decisionmaking." \textit{Id.}

\textsuperscript{244}. \textit{Id.} at 13–14. "[G]overnment 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." \textit{Id.} at 8.

\textsuperscript{245}. \textit{Agostini v. Felton}, 521 U.S. 203 (1997).

\textsuperscript{246}. \textit{Id.} at 208–09. In \textit{Agostini}, the government program provided federal aid to public and private schools alike by channeling federal funds through local educational agencies. \textit{Id.} at 209. The purpose of these funds was to assist participating students meet the educational standards of the State of New York. \textit{Id.} Therefore, the local educational agencies used the pubic funds to provide remedial education to students in private schools. \textit{Id.} at 210–11.

\textsuperscript{247}. \textit{Id.} at 226. In reaching its decision, the Court set out three criteria: (1) whether government aid results in indoctrination; (2) whether a program defines recipients by religion; and (3) whether a program creates excessive entanglement of church and state. \textit{Id.} at 234. The Court, however, modified the excessive entanglement portion of the Lemon test, explaining that determining whether the program created excessive entanglement and determining the primary effect of the program really required the same constitutional analysis. \textit{Id.} at 232–33. Moreover, the Court specifically rejected placing constitutional significance on the number of religious students that benefited from the program. \textit{Id.} at 229.

\textsuperscript{248}. \textit{Aguilar v. Felton}, 473 U.S. 402 (1985), overruled by \textit{Agostini}, 521 U.S. at 236. In \textit{Aguilar}, a government program authorized the public school teachers of New York City to instruct students at private schools in remedial subjects. \textit{Id.} at 406. The program had a system to monitor the religious content of the classes taught by the public school teachers. \textit{Id.} at 409.
Rapids v. Ball, cases that relied on abandoned interpretations of the Lemon test. Moreover, the Court eliminated the entanglement portion of the Lemon test.

Most recently, in Mitchell v. Helms, the Court again emphasized the Establishment Clause pillars of neutrality and private, independent choice. In Mitchell, the Court upheld a government program that loaned educational materials, such as computer software and library books, to both non-religious and religious private schools. The Court held that the program was constitutional because it distributed educational materials without regard to the secular or non-secular nature of the school and because aid reached religious schools solely due to

Court held that, because this monitoring system would result in the excessive entanglement of the government and religion, the program was unconstitutional. Id.

249. Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), overruled by Agostini, 521 U.S. at 236. In Ball, a government program authorized public school teachers to teach both remedial and enrichment courses at private schools, which were mostly religiously affiliated. Id. at 375. The government program also permitted public school instructors to teach non-core classes, such as arts and crafts, at private schools after regular school hours. Id. at 376. The Court held that the government program was unconstitutional because it could result in the promotion of religion. Id. at 385. The Court never held that the government program had the “primary effect” of advancing religion. See id. Instead, the Court merely examined the speculative results of the program. Id. Because the Ball Court bypassed the Lemon test and reached its decision on possible secondary results, it is not surprising that the Court overruled Ball in Agostini. See Agostini, 521 U.S. at 235.

250. See Agostini, 521 U.S. at 235. The Court held that the more recent cases of Zobrest and Witters undermined the reasoning the Court previously had relied on in Aguilar and Ball; therefore, the Court overruled Aguilar and Ball in Agostini. Id.; see also supra notes 238–44 and accompanying text (discussing the Witters and Zobrest decisions).

251. Agostini, 521 U.S. at 232–33 (noting that the same factors are used to assess the effect of the program and the degree of entanglement and, thus, that “it is simplest to . . . treat [the entanglement prong] . . . as an aspect of the inquiry into a statute’s effect”); see also supra Part II.G.2 (discussing the Lemon test).


253. Mitchell, 530 U.S. at 801. The amount of aid received by each private school depended upon the number of children attending the school. Id. at 802. Moreover, the government program required that all materials provided to religious schools be “secular, neutral, and nonideological.” Id. (quoting 20 U.S.C. § 7351(a)(1) (1994)).
private choice.\textsuperscript{254} Furthermore, because the Court had not examined whether an institution was "pervasively sectarian" in its recent decisions and the inquiry was rooted in discrimination, the Court renounced this constitutional inquiry.\textsuperscript{255} Similarly, the Court rejected placing constitutional significance on the likelihood that "political divisiveness" could result due to the government program.\textsuperscript{256} Therefore, through \textit{Mitchell}, the Court clarified the proper Establishment Clause inquiry and reaffirmed the two pillars of modern Establishment Clause jurisprudence: neutrality and private, independent choice.\textsuperscript{257}

Accordingly, some commentators argue that the basic pillars of Establishment Clause jurisprudence have been, and continue to be,

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254. & \textit{Id.} at 813. In reaching its decision, the \textit{Mitchell} plurality assessed the three criteria set forth in \textit{Agostini}: whether the government aid resulted in indoctrination; whether the program defined recipients by religion; and whether the program created excessive entanglement of church and state. \textit{Id.} at 808 (citing \textit{Agostini}, 521 U.S. at 234). Guided by the \textit{Agostini} criteria, the Court emphasized the importance of neutrality and private choice because both prevent government indoctrination and relate to whether the program defined recipients by religion. \textit{Id.} at 829–31. The Court held that because the program allocated aid based on the number of students at the school, the amount of aid reached the private schools as the result of private, independent choice. \textit{Id.} at 830. Moreover, the Court held that the program was neutral with respect to religion because both religious and non-religious schools could receive the aid. \textit{Id.} \\
255. & \textit{Id.} at 826–29. In \textit{Zobrest} v. Catalina Foothills School District and in \textit{Rosenberger} v. Rector and Visitors of the University of Virginia, the Court refrained from thoroughly analyzing whether the recipients of the government funding were pervasively sectarian. \textit{See} Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 838 (1995); \textit{Zobrest} v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3–10 (1993). Thus, although the Court expressly rejected the pervasively sectarian criterion in \textit{Mitchell}, the Court had already implicitly rejected the pervasively sectarian criterion. \textit{Frank}, \textit{supra} note 138, at 1032 ("[B]uilding on what was implicit in \textit{Bowen}, \textit{Zobrest} and \textit{Rosenberger}, the plurality finally took the extra step of explicitly renouncing the Court's prior practice of assessing whether an institution is 'pervasively sectarian' [in \textit{Mitchell} v. \textit{Helms}],"). The Court explained that the "pervasively sectarian" criterion was simply a method of discrimination against religious institutions, such as the Roman Catholic Church. \textit{Mitchell}, 530 U.S. at 828; \textit{see also} \textit{supra} Part II.G.2 (discussing the various constitutional principles that emerged from the \textit{Lemon} test, which the Court has since abandoned). \\
256. & \textit{Mitchell}, 530 U.S. at 825–26; \textit{see also} \textit{supra} Part II.G.2 (discussing the various constitutional principles that emerged from the \textit{Lemon} test, which the Court has since abandoned). \\
257. & \textit{Mitchell}, 530 U.S. at 809–14 (clarifying the rule established in \textit{Agostini} that emphasized private choice and neutrality); Garnett, \textit{supra} note 252, at 1290–91 (noting that both the plurality opinion and Justice O'Connor's concurring opinion emphasized neutrality and private choice); Davidson, \textit{supra} note 37, at 481 (noting that Establishment Clause jurisprudence requires government programs to have secular purposes, to be religiously neutral, and to direct aid to religious institutions as the result of private choice); Neal, \textit{supra} note 5, at 394–400 (noting \textit{Mitchell}'s emphasis on neutrality and true private choice and arguing that the Court's analysis in \textit{Mitchell} would lead to the constitutionality of Cleveland's voucher program); \textit{cf.} Dwyer, \textit{supra} note 181, at 981 ("[T]he neutrality position has come to dominate judicial application of the Establishment Clause.").
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neutrality and private, independent choice. These commentators suggest that, while the Court's interpretation of the Establishment Clause and the Lemon test has varied over the years, the Court, from the outset, has stressed consistently the importance of religious neutrality. Moreover, these commentators point out that, since 1983, the Supreme Court has consistently applied the principle of private, independent choice when interpreting the Lemon test. Therefore, these commentators probably would contend that Cleveland's voucher program should be upheld only if the program were neutral with respect to religion, and government funding reached the religious schools as the result of private, independent choice.

258. McConnell, Defense of Educational Choice, supra note 56, at 852 ("In fact, with the exception of a few aberrant decisions in the 1970's and early 1980's, several of which have been overruled, the Supreme Court has consistently upheld aid to students attending nonpublic schools, provided 1) that the aid is neutral among educational choices, and 2) that any religious use is the product of private independent choice."); cf. Dwyer, supra note 181, at 981 (2001) ("[T]he neutrality position has come to dominate judicial application of the Establishment Clause."); Davidson, supra note 37, at 483 ("A survey of relevant case law has shown that in order to pass constitutional muster under Establishment Clause jurisprudence, such a program should include provisions adhering to the overarching principles of: (1) secular purpose; (2) neutrality; and (3) private choice."). See generally SMITH, supra note 181, at 77-97 (discussing the pillar of neutrality). But see Jeffries & Ryan, supra note 106, at 280 (contending that no true principles of law govern the Establishment Clause and that the entire body of Establishment Clause jurisprudence is a product of politics).

259. Frank, supra note 138, at 1038 ("The United States Supreme Court's understanding of the Establishment Clause has obviously meandered over the years.").

260. Johnson, supra note 179, at 15-17 (noting that the Supreme Court has consistently applied the principle of neutrality to aid-to-education cases following Everson v. Board of Education, with only a few exceptions).

261. McConnell, Defense of Educational Choice, supra note 56, at 852 (stating that the Supreme Court has consistently upheld government programs that direct aid to religious schools when the programs are neutral with respect to religion and "religious use is the product of private independent choice"); see Kemerer, Constitutionality of School Vouchers, supra note 127, at 21-22 (noting that the recent aid-to-education cases have followed the reasoning of Mueller and applied the principle of private, independent choice). Although the Court has abandoned many of the constitutional criteria that emerged from the Lemon test, the Lemon test itself remains "the doctrinal ordeal any state's real school-choice program must endure." Garnett & Garnett, supra note 4, at 318.

262. See McConnell, Defense of Educational Choice, supra note 56, at 852.

In fact, with the exception of a few aberrant decisions in the 1970's and early 1980's, several of which have been overruled, the Supreme Court has consistently upheld aid to students attending nonpublic schools, provided (1) that the aid is neutral among educational choices, and (2) that any religious use is the product of private independent choice.

ld.; cf. Davidson, supra note 37, at 481 (noting that Establishment Clause jurisprudence requires government programs to have secular purposes, to be religiously neutral, and to direct aid to religious institutions as the result of private choice).
III. DISCUSSION

In *Zelman v. Simmons-Harris*, the Supreme Court held that Cleveland’s voucher program did not violate the Establishment Clause because the program was neutral with respect to religion and aid reached religious schools as a result of private, independent choices of parents in Cleveland.263 This decision was the culmination of a long legal battle regarding the constitutionality of Cleveland’s voucher program.264 The United States District Court for the Northern District of Ohio, as well as the Sixth Circuit Court of Appeals, initially invalidated the voucher program.265 After the non-public schools and the parents participating in the voucher program successfully petitioned for certiorari, however, the United States Supreme Court validated the voucher program in a 5-4 decision.266 Justices O’Connor267 and Thomas268 filed concurring opinions, while Justices Stevens,269 Souter,270 and Breyer271 each dissented.

A. Facts

In 1995, after examining the workings of the Cleveland City School District, the United States District Court for the Northern District of Ohio declared a “crisis of magnitude.”272 With only ten percent of its ninth graders passing basic proficiency tests and less than one third of its students successfully graduating from high school, the Cleveland school district miserably failed to meet any state performance standards.273 In an attempt to remedy these problems, the district court placed the entire school district under state control.274 In response, the Ohio legislature enacted its Pilot Project Scholarship Program to

264. See infra Part III.A–B (discussing the facts and procedural history of the *Zelman* decision).
266. Id. at 2462–63.
267. Id. at 2473–80 (O’Connor, J., concurring); see infra Part III.C.2 (discussing Justice O’Connor’s concurring opinion).
268. *Zelman*, 122 S. Ct. at 2480–84 (Thomas, J., concurring); see infra Part III.C.3 (discussing Justice Thomas’s concurring opinion).
269. *Zelman*, 122 S. Ct. at 2484–85 (Stevens, J., dissenting); see infra Part III.C.4 (discussing Justice Stevens’s dissenting opinion).
270. *Zelman*, 122 S. Ct. at 2485–502 (Souter, J., dissenting); see infra Part III.C.5 (discussing Justice Souter’s dissenting opinion).
271. *Zelman*, 122 S. Ct. at 2502–08 (Breyer, J., dissenting); see infra Part III.C.6 (discussing Justice Breyer’s dissenting opinion).
273. Id.
274. Id.
provide families living in the failing district with fresh, publicly funded educational opportunities. The program not only provided tuition aid, or "vouchers," for Cleveland students to attend other participating public and private schools but also provided tutorial aid for students who chose to remain in Cleveland's public schools.

The voucher portion of the program enabled Cleveland students, in kindergarten through eighth grade, to attend any participating public or private school located within the school district's boundaries. Both religious and non-religious private schools could participate in the program. Forty-six of the fifty-six private schools that participated in the voucher program, however, had a religious affiliation. Families with income levels below 200% of the poverty line were first to receive the tuition vouchers and could receive up to $2250 to cover a private school's tuition. Other families could then receive tuition vouchers for up to $1875 if the number of available scholarships exceeded the number of low-income children participating in the voucher program. Any suburban public school located adjacent to the Cleveland school district could participate in the program and would receive an additional $2250 for each student admitted. However, no adjacent public schools chose to participate in the voucher program. The schools that did participate, however, could not discriminate on the basis of religion, race, or ethnic background, and the Ohio school district could not coerce families to choose one particular school over another.

275. Id.; see also OHIO REV. CODE ANN. §§ 3313.974–979 (West 1999 & Supp. 2002) (setting forth the provisions of the Pilot Project Scholarship Program); supra note 171 and accompanying text (discussing the program’s purpose and implementation).
276. Zelman, 122 S. Ct. at 2463. Through the tutorial aid portion of the program, “[p]arents arrange for registered tutors to provide [educational] assistance to their children and then submit bills for their services to the State for payment.” Id. at 2464.
277. Id. The schools that participated in the program must also meet the statewide educational standards. Id.
278. Id.
279. Id. at 2464.
280. Id. The amount of money provided for each student could not exceed 90% of the tuition. Id. The program, however, did prevent private schools from charging a parental co-payment greater than $250. Id.
281. Id. The amount of money provided for each of these students could not exceed 75% of the tuition, and no co-payment cap existed for these families. Id. The Ohio Superintendent for Public Instruction determines the number of scholarships available for each covered district annually. OHIO REV. CODE ANN. § 3313.978(A)–(B) (West 1999 & Supp. 2002).
282. Id. at 2463 n.1.
283. Id. at 2464.
284. Id. at 2463–64.
Like the voucher portion of the Pilot Project Scholarship Program, the distribution and amount of tutorial aid for students also depended on the financial status of the family.\textsuperscript{285} Moreover, the program required the number of tutorial aid offered to students remaining in the district to equal the number of vouchers provided.\textsuperscript{286} Finally, parents could choose to enroll their children in a community school or a magnet school.\textsuperscript{287} If parents chose to send their children to one of these special public schools, then the school received substantial funding from the state, through various other educational programs, in excess of the amount received by a traditional state school.\textsuperscript{288}

B. The Lower Court Decisions

The legal battle began in the Franklin County Court of Common Pleas, where the trial court granted summary judgment for the State.\textsuperscript{289} On appeal, the Ohio Court of Appeals declared the school voucher program unconstitutional.\textsuperscript{290} The Ohio Supreme Court, however, held that the voucher program neither violated the United States Constitution nor the religious provisions of the Ohio Constitution.\textsuperscript{291} The plaintiffs then brought suit in federal court, where the United States District Court

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\textsuperscript{285} Id. at 2464. Families with income levels below 200% of the poverty line could receive up to $360 to cover 90% of a tutor’s cost, and all other students could receive 75% of the tutor’s cost. \textit{id.}

\textsuperscript{286} \textit{Id.} Section 3313.975 of the current Ohio Code provides:

The state superintendent shall award as many scholarships and tutorial assistance grants as can be funded given the amount appropriated for the program. In no case, however, shall more than fifty per cent of all scholarships awarded be used by students who were enrolled in a nonpublic school during the school year of application for a scholarship.

\textbf{OHIO REV. CODE ANN.} \textsection{3313.975(B) (West 1999 & Supp. 2002).}

\textsuperscript{287} \textit{Zelman}, 122 S. Ct. at 2464–65; see also supra notes 155–59 and accompanying text (defining “community” and “magnet schools”).

\textsuperscript{288} \textit{Zelman}, 122 S. Ct. at 2464–65.


\textsuperscript{290} Simmons-Harris, 711 N.E.2d at 206 (holding that the voucher program violated the Establishment Clause of the United States Constitution; the School Funds Clause of Section 2, Article VI of the Ohio Constitution; the Establishment Clause of Section 7, Article I of the Ohio Constitution; and the Uniformity Clause of Section 26, Article II of the Ohio Constitution; but also holding that the voucher program did not violate the Thorough and Efficient Clause of Section 2, Article VI of the Ohio Constitution or the one-subject rule of Section 15(D), Article II of the Ohio Constitution).

\textsuperscript{291} \textit{Id.} See generally Byrd, supra note 4, at 563 (examining the Ohio Supreme Court’s reasoning).
for the Northern District of Ohio,\textsuperscript{292} as well as the Sixth Circuit Court of Appeals, invalidated the voucher program.\textsuperscript{293} The United States Supreme Court, however, granted certiorari, and in a 5-4 decision upheld the voucher program.\textsuperscript{294}

1. Ohio State Court

In 1996, a group of Ohio taxpayers brought suit in state court, challenging the voucher program on both state and federal grounds.\textsuperscript{295} Specifically, the taxpayers contended that the voucher program violated the Establishment Clause of the First Amendment to the United States Constitution\textsuperscript{296} and the Ohio State Constitution’s Establishment Clause,\textsuperscript{297} School Funds Clause,\textsuperscript{298} Thorough and Efficient Clause,\textsuperscript{299}

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\textsuperscript{292} Zelman v. Simmons-Harris, 72 F. Supp. 2d 834, 836 (N.D. Ohio 1999), aff’d, 234 F.3d 945 (6th Cir. 2000), rev’d, 122 S. Ct. 2460 (2002).

\textsuperscript{293} Simmons-Harris v. Zelman, 234 F.3d 945, 963 (6th Cir. 2000), rev’d, 122 S. Ct. 2460 (2002).

\textsuperscript{294} Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2462-63 (2002).

\textsuperscript{295} Simmons-Harris, 711 N.E.2d at 206.

\textsuperscript{296} Id. See generally U.S. CONST. amend. I (“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 peaceably to assemble, and to petition the Government for a redress of grievances.”).

\textsuperscript{297} See Simmons-Harris, 711 N.E.2d at 206. See generally OHIO CONST. art. I, § 7. The Ohio Establishment Clause provides:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

OHIO CONST. art. I, § 7.

\textsuperscript{298} See Simmons-Harris, 711 N.E.2d at 206. See generally OHIO CONST. art. VI, § 2. The School Funds Clause of Ohio provides:

The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but 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.

OHIO CONST. art. VI, § 2 (emphasis added).

\textsuperscript{299} See Simmons-Harris, 711 N.E.2d at 206. See generally OHIO CONST. art. VI, § 2. The Thorough and Efficient Clause of Ohio provides:

The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient
Uniformity Clause, 300 and one-subject rule. 301 The Franklin County Court of Common Pleas granted the State's motion for summary judgment. 302 On appeal, the Ohio Court of Appeals declared the school voucher program unconstitutional, holding that the program violated both the Establishment Clause of the United States Constitution and various provisions of the Ohio State Constitution. 303

In May 1999, the State appealed, bringing Cleveland's voucher program before the Ohio Supreme Court. 304 The Ohio Supreme Court held that the voucher program violated neither the United States Constitution nor the Ohio Constitution, except for Ohio's one-subject rule, which prohibits legislative bills from containing more than one subject. 305

The Ohio Supreme Court applied the condensed Lemon test to determine whether the program violated the Establishment Clause of the
Applying the condensed Lemon test, the Ohio Supreme Court first examined whether the program had a secular legislative purpose. The court found that the voucher program had a valid secular purpose because it merely provided certain children with scholarships to attend alternative schools. The Ohio Supreme Court then analyzed whether the voucher program’s primary effect advanced or inhibited religion. The taxpayers argued that Cleveland’s voucher program was unconstitutional under Nyquist, in which the United States Supreme Court had held a tuition reimbursement program to be unconstitutional. The Ohio Supreme Court, however, declined to follow Nyquist, stating that subsequent case law had undermined the vitality of the Nyquist holding.

Instead, the Ohio Supreme Court followed the criteria set forth in Agostini v. Felton, examining: “(1) whether the program results in governmental indoctrination, (2) whether the program’s recipients are defined by reference to religion, and (3) whether the program creates an excessive entanglement between government and religion.” Because public funds could reach a sectarian school only as the result of the private and independent choice of a Cleveland parent, the Ohio Supreme Court held that the program did not result in governmental

306. Simmons-Harris, 711 N.E.2d at 208; see also supra Part II.G.2 (discussing the Lemon test). Although the Supreme Court has abandoned many of the constitutional criteria that emerged from the Lemon test, the condensed Lemon test itself remains “the doctrinal ordeal any state’s real school-choice program must endure.” Garnett & Garnett, supra note 4, at 318. The Court applied the condensed Lemon test that emerged from Agostini. Simmons-Harris, 711 N.E.2d at 208. Thus, the Supreme Court first examined if the program had a valid secular purpose. Id. Then, the Court examined whether the voucher program’s primary purpose or effect advanced or inhibited religion by applying the three factors set forth in Agostini: “(1) whether the program results in governmental indoctrination, (2) whether the program’s recipients are defined by reference to religion, and (3) whether the program creates an excessive entanglement between government and religion.” Id. at 208-09.

307. Simmons-Harris, 711 N.E.2d at 208.

308. Id. (“On its face, the School Voucher Program does nothing more or less than provide scholarships to certain children residing within the Cleveland City School District to enable them to attend an alternative school.”).

309. Id.; see also supra notes 193–99 and accompanying text (discussing the Nyquist decision).

310. Id.; see also supra notes 193–99 and accompanying text (discussing the Nyquist decision).

311. Simmons-Harris, 711 N.E.2d at 208 (referring to Agostini v. Felton, 521 U.S. 203 (1997), and Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986)); see also supra notes 193–99 and accompanying text (discussing the Nyquist decision); supra notes 238–39 and accompanying text (discussing the Witters decision); supra notes 246–51 and accompanying text (discussing the Agostini decision).

312. Agostini, 521 U.S. at 230–33.

313. Simmons-Harris, 711 N.E.2d at 208–09 (citing Agostini, 521 U.S. at 230–33); see also supra notes 246–51 and accompanying text (discussing the Agostini decision).
indoctrination. Yet, the Ohio Supreme Court also held that one provision of the statute did improperly define who could receive the vouchers by religion. Nevertheless, the court explained that the improper provision of the statute could be “severed” easily from the rest of the statute to validate the voucher program. Finally, the Ohio Supreme Court applied the third prong of the Agostini criteria and held that no excessive entanglement resulted through the voucher program because aid reached sectarian schools indirectly only by the private and independent decisions of Cleveland parents. Accordingly, the Ohio Supreme Court held that the voucher program did not violate the Establishment Clause of the United States Constitution. Moreover, the court held that the voucher program did not violate the religious provisions of the Ohio Constitution.

2. District Court

In July of 1999, Ohio taxpayers again challenged the constitutionality of the amended voucher program, this time in the federal court system. The United States District Court for the Northern District of Ohio granted summary judgment for the taxpayers, holding that the program violated the Establishment Clause. In reaching its decision,
the district court first noted that the condensed Lemon test was applicable. Because the voucher program had a valid secular purpose and no party contended that the program created excessive entanglement between the government and religion, the Court focused its inquiry on whether the voucher program had the improper effect of advancing or inhibiting religion. After examining Nyquist, the court held that the voucher program did advance religion impermissibly. The court explained that the facts of Nyquist were indistinguishable from the details of Cleveland’s voucher program. Moreover, the court rejected the State’s contention that subsequent case law undermined the Nyquist holding. Therefore, the district court held that the voucher program violated the Establishment Clause and granted the taxpayer’s motion for summary judgment.

3. Sixth Circuit Court of Appeals

The court of appeals affirmed the district court, holding that the voucher program violated the Establishment Clause because neither neutrality nor parental choice distinguished the voucher program from the unconstitutional program of Nyquist. Like the district court, the Sixth Circuit Court of Appeals applied the condensed Lemon test to the voucher program and compared the voucher program to the tuition

322. Zelman, 72 F. Supp. 2d at 844; see also supra Part II.G.2 (discussing the Lemon test). Although the Supreme Court has abandoned many of the constitutional criteria that emerged from the Lemon test, the condensed Lemon test itself remains “the doctrinal ordeal any state’s real school-choice program must endure.” Garnett & Garnett, supra note 4, at 318.


324. Id. at 849; see also supra notes 193–99 and accompanying text (discussing the Nyquist opinion).

325. Zelman, 72 F. Supp. 2d at 847.

The Voucher Program is clearly similar to the tuition reimbursement program in Nyquist in two respects. First, while both public and private schools are eligible, only private schools have chosen to participate in the Program, and the vast majority of them are parochial. Second, as in Nyquist, the Voucher Program provides unrestricted tuition grants to parents whose children are eligible for the Program and who attend qualifying schools.

Id.; see also supra notes 193–99 and accompanying text (discussing the Nyquist opinion).

326. Zelman, 72 F. Supp. 2d at 850–64 (rejecting the contention that Mueller, Witters, Zobrest, or Rosenberger undermined Nyquist); see also supra notes 193–99 and accompanying text (discussing the Nyquist opinion); supra notes 227–36 and accompanying text (discussing the Mueller decision); supra notes 238–39 and accompanying text (discussing the Witters decision); supra notes 241–44 and accompanying text (discussing the Zobrest opinion).

327. Zelman, 72 F. Supp. 2d at 865.

reimbursement program of Nyquist. Specifically, the court of appeals examined whether the voucher program was distinguishable from Nyquist due to its neutrality or due to the extent that private choice determined the destination of the vouchers.

The court of appeals held that the voucher program was not neutral with respect to religion because few non-religious private schools and no public schools participated in the program. The court explained that "facial neutrality alone does not bring state action into compliance with the First Amendment." Moreover, the court stated that the program's tuition cap actually discouraged non-religious private school participation because such schools usually had higher tuition than religious schools. Thus, the mere fact that non-religious schools could participate in the voucher program did not render the program neutral, and therefore, the program was not distinguishable from the program at issue in Nyquist.

Furthermore, the court of appeals held that parental choice was not the main reason public funds reached religious institutions under the Ohio program. The court explained that the parents lacked true choice because no adjacent public schools and few non-religious private

329. Id. at 959; see also supra Part II.G.2 (discussing the Lemon test); supra notes 193–99 and accompanying text (discussing the Nyquist opinion). Although the Supreme Court's application of the Lemon test has changed with time, the Court still applies a condensed version of the Lemon test to all school choice programs. Garnett & Garnett, supra note 4, at 318.

330. Simmons-Harris, 234 F.3d at 955; see also supra notes 193–99 and accompanying text (discussing the Nyquist opinion). The United States Supreme Court had found that various programs were constitutional after noting their neutrality and the role of private choice in Mueller v. Allen, Winters v. Washington Department of Services for the Blind, Agostini v. Felton, and Mitchell v. Helms. Simmons-Harris, 234 F.3d at 955–57. Thus, the court examined whether the voucher program was neutral with respect to religion and if the aid reached religious schools solely as the result of private choice, as in Mueller, Winters, Agostini, and Mitchell, or whether the voucher program was more similar to Nyquist. Id.; see also supra notes 227–36 and accompanying text (discussing the Mueller decision); supra notes 238–39 and accompanying text (discussing the Winters decision); supra notes 241–44 and accompanying text (discussing the Zobrest opinion); supra notes 252–57 and accompanying text (discussing the Mitchell opinion).

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

332. Id.

333. Id. ("Practically speaking, the tuition restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs."); see also Findings, supra note 131 ("In 1993–94, the average tuition paid by private school students was about $3100, but ranged from a low of about $1600 in Catholic elementary schools to a high of about $9500 in nonsectarian secondary schools.").

334. Simmons-Harris, 234 F.3d at 959 ("The school voucher program is not neutral in that it discourages the participation by schools not funded by religious institutions, and the Cleveland program limits the schools to which a parent can apply the voucher funds to those within the program."); see also supra notes 193–99 and accompanying text (discussing the Nyquist opinion).

335. Simmons-Harris, 234 F.3d at 959–60.
schools participated in the program. Therefore, the parental choice within the program was “illusory” and could not be used to validate an otherwise improper program. In fact, the court stated that it was inappropriate to hold the voucher program to be constitutional on the basis of parental choice because the government greatly restricted the available choices by mandating tuition caps. Therefore, the court held that parental choice did not distinguish the voucher program from the program in Nyquist. Accordingly, because neither neutrality nor parental choice distinguished the voucher program from Nyquist, the court of appeals affirmed the district court, holding that the voucher program violated the Establishment Clause.

Unhappy with the Sixth Circuit’s decision, the State petitioned the United States Supreme Court for certiorari. The United States Supreme Court granted certiorari in September 2001. The court of appeals stayed its mandate pending the decision of the Supreme Court. In June 2002, approximately six years after the taxpayers first brought suit, the United States Supreme Court decided whether Cleveland’s voucher program violated the Establishment Clause.

C. The Supreme Court Decision

In a 5-4 opinion written by Chief Justice Rehnquist, the Supreme Court reversed the Sixth Circuit. The majority held that the voucher program did not violate the Establishment Clause because the program was religiously neutral and directed aid to religious institutions only through private, independent choices and, thus, did not impermissibly advance or inhibit religion. Justice O’Connor concurred, stressing that the majority had correctly analyzed the issue and had not radically

336. Id. (“The alleged choice afforded both public and private school participants in this program is illusory in that the program’s design does not result in the participation of the adjacent public schools from outside the Cleveland school district. . . . Therefore, the program clearly has the impermissible effect of promoting sectarian schools.”).

337. Id.

338. Id.

339. Id.; see also supra notes 193–99 and accompanying text (discussing the Nyquist opinion).

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

341. Id. at 961; see also supra notes 193–99 and accompanying text (discussing the Nyquist opinion).


344. Id.


346. Id. at 2462.

347. Id. at 2473; see also infra Part III.C.1 (discussing the majority’s opinion).
departed from prior Establishment Clause jurisprudence.\textsuperscript{348} Justice Thomas also concurred and questioned whether the Establishment Clause should even apply to state governments.\textsuperscript{349} Justice Stevens dissented, criticizing the majority for wrongfully focusing on Cleveland’s “educational crisis,” the non-traditional public school options, and private choice when determining the constitutionality of the voucher program.\textsuperscript{350} Justice Souter’s dissent contended that the majority’s Establishment Clause test as a whole was improper; alternatively, Justice Souter argued that the voucher program did not meet the majority’s Establishment Clause test of neutrality and private choice.\textsuperscript{351} Finally, Justice Breyer dissented, arguing that the voucher program would create religious conflict.\textsuperscript{352}

1. The Majority Opinion

The majority held that the voucher program did not violate the Establishment Clause because the program had a valid secular purpose and did not advance or inhibit religion.\textsuperscript{353} Specifically, the Court reasoned that the voucher program did not advance religion because the program was religiously neutral and directed aid to religious schools only due to private, independent choices.\textsuperscript{354} The Court compared the voucher program to the neutral programs of genuine private choice in \textit{Mueller}, \textit{Witters}, and \textit{Zobrest} and found Cleveland’s voucher program indistinguishable from them.\textsuperscript{355} However, the Court held that the voucher program was distinguishable from \textit{Nyquist} because, unlike the

\textsuperscript{348} \textit{Zelman}, 122 S. Ct. at 2473; \textit{see also infra} Part III.C.2 (discussing Justice O’Connor’s concurring opinion).

\textsuperscript{349} \textit{Zelman}, 122 S. Ct. at 2481–82; \textit{see also infra} Part III.C.3 (discussing Justice Thomas’s concurring opinion).

\textsuperscript{350} \textit{Zelman}, 122 S. Ct. at 2484–85; \textit{see also infra} Part III.C.4 (discussing Justice Stevens’s dissenting opinion).

\textsuperscript{351} \textit{Zelman}, 122 S. Ct. at 2485–2502; \textit{see also infra} Part III.C.5 (discussing Justice Souter’s dissenting opinion).

\textsuperscript{352} \textit{Zelman}, 122 S. Ct. at 2502–07; \textit{see also infra} Part III.C.6 (discussing Justice Breyer’s dissenting opinion).

\textsuperscript{353} \textit{Zelman}, 122 S. Ct. at 2465, 2473. The Court reversed the Sixth Circuit. \textit{Id.} at 2473. A government program has a valid secular purpose if the purpose of the program is to advance a legitimate government goal and not to advance religion or a religious belief. \textit{See} \textit{Lemon} v. \textit{Kurtzman}, 403 U.S. 602, 612–13 (1971).

\textsuperscript{354} \textit{Zelman}, 122 S. Ct. at 2473.

\textsuperscript{355} \textit{Id.} at 2466–71 (comparing the voucher program to \textit{Mueller}, \textit{Witters}, and \textit{Zobrest}); \textit{supra} notes 227–36 and accompanying text (discussing the \textit{Mueller} decision); \textit{supra} notes 238–39 and accompanying text (discussing the \textit{Witters} decision); \textit{supra} notes 241–44 and accompanying text (discussing the \textit{Zobrest} decision).
Nyquist program, public schools could participate in Cleveland’s voucher program.356

After noting that the Establishment Clause applied to the states through the doctrine of incorporation,357 the Court began its opinion with the condensed Lemon test.358 Because all parties agreed that the voucher program had a legitimate secular purpose of improving educational options for Cleveland students, the Court immediately looked to whether the voucher program had the effect of advancing or inhibiting religion.359

The Court explained that programs providing aid to religious institutions do not have the effect of advancing religion if the programs are “neutral” with respect to the religious status of the beneficiaries or the service providers, and the aid reaches religious institutions solely as a result of “genuine and independent private choice.”360 The Court noted that it has consistently upheld such neutral government programs involving “true private choice.”361 To demonstrate the propriety and longstanding use of the neutrality and private choice analysis, the Court surveyed several recent cases with neutral private choice programs.362

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356. Id. at 2472–73 (comparing the voucher program to Nyquist); see also supra notes 193–99 and accompanying text (discussing the Nyquist opinion).

357. Zelman, 122 S. Ct. at 2465; see also supra notes 183–91 and accompanying text (discussing the Everson opinion, in which the Court first expressly held that the Establishment Clause applied to the states); supra Part II.B (examining the incorporation of the Establishment Clause).

358. Zelman, 122 S. Ct. at 2465; see also supra notes 200–26 and accompanying text (discussing the Lemon decision); supra notes 69–78 and accompanying text (discussing the incorporation of the Establishment Clause). In Lemon v. Kurtzman, the Court established the three-step Establishment Clause 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 . . .; finally, the statute must not foster excessive government entanglement with religion.” Lemon, 403 U.S. at 612–13. The Court in Agostini v. Felton later condensed the Lemon test, stating that the third prong of entanglement was merely “an aspect of the inquiry into a statute’s effect” (the second prong). Agostini v. Felton, 521 U.S. 203, 233 (1997); see also supra notes 246–51 and accompanying text (discussing the Agostini decision). Thus, the condensed Lemon test requires government programs to have secular legislative purposes and to neither advance nor inhibit religion. See Agostini, 521 U.S. at 232. Although the Court has abandoned many of the constitutional criteria that emerged from the Lemon case, the condensed Lemon test itself remains “the doctrinal ordeal any state’s real school-choice program must endure.” Garnett & Garnett, supra note 4, at 318.


360. Id. at 2467.

361. Id. at 2466 (noting that although the jurisprudence regarding direct aid programs has changed substantially, the jurisprudence regarding private choice programs has remained “consistent and unbroken”).

362. Id. at 2466–67.
Specifically, the Court examined *Mueller v. Allen*, Witters v. Washington Department of Services for Blind, and *Zobrest v. Catalina Foothills School District*.

Subsequently, the Court held that, like the programs in *Mueller*, Witters, and Zobrest, Cleveland's voucher program was neutral with respect to religion. The Court explained that because all schools and children in the Cleveland area were eligible to participate in the program, the voucher program was neutral. Furthermore, the Court found that families received no financial incentive to attend a religious private school. In fact, the Court noted that the amount of money allocated to a student was substantially less if the family chose to enroll him in a private school instead of one of the community or magnet schools. Moreover, the Court stated that the only non-neutral portion of the program was its preference for low-income families when distributing the aid. Finally, the Court rejected the taxpayers' contention that the voucher program gave the impression of government endorsement of religion. The Court stated that it has repeatedly noted that "no reasonable observer" would think that the government was actually endorsing religion when neutral aid reached religious institutions solely through private choice. Therefore, because the

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363. *Id.* at 2466 (examining the *Mueller* decision, which upheld a school choice program in Minnesota because it was a program of "true, private choice"); see also supra Part II.G.3 (discussing the *Mueller* decision).

364. *Zelman*, 122 S. Ct. at 2466 (examining the *Witters* decision, which rejected an Establishment Clause challenge to a vocational scholarship program); see also supra notes 238–39 and accompanying text (discussing the *Witters* decision).

365. *Zelman*, 122 S. Ct. at 2467 (examining *Zobrest*, where the Court rejected an Establishment Clause challenge to a federal program that permitted a sign-language interpreter to assist deaf children enrolled in religious schools); see also supra notes 241–44 and accompanying text (discussing the *Zobrest* decision).

366. *Zelman*, 122 S. Ct. at 2467; see also supra Part II.G.3 (discussing the *Mueller* decision); supra notes 238–39 and accompanying text (discussing the *Witters* decision); supra notes 241–44 and accompanying text (discussing the *Zobrest* decision).

367. *Zelman*, 122 S. Ct. at 2467–68 (noting that the voucher program gave no preferential treatment to parents or schools with religious affiliations). Any parent could choose for his or her child to participate in the program; however, there were a limited number of vouchers available, and low-income parents were the first parents to receive vouchers. *Id.* at 2468.

368. *Id.*

369. *Id.; see also supra notes 155–59 and accompanying text (defining "community" and "magnet" schools).


371. *Id.*

372. *Id.* (citing *Mueller*, *Witters*, *Zobrest*, and *Mitchell*); see also supra Part II.G.3 (discussing the *Mueller* decision); supra notes 238–39 and accompanying text (discussing the *Witters* decision); supra notes 241–44 and accompanying text (discussing the *Zobrest* decision); supra notes 252–57 and accompanying text (discussing the *Mitchell* decision).
program placed no emphasis on the religious affiliation of the schools or parents, created no financial incentive to attend a religious school, and gave no impression of government endorsement of religion, the Court held that the voucher program was neutral with respect to religion.\textsuperscript{373}

The Court then examined whether the voucher program was a true private choice program like those in \textit{Mueller}, \textit{Witters}, and \textit{Zobrest}.\textsuperscript{374} Although forty-six out of the fifty-six participating private schools were religiously affiliated, the Court held that the voucher program satisfied the private choice portion of its constitutional inquiry.\textsuperscript{375} The Court explained that because parents may choose to keep their children in Cleveland's public schools or to send their children to community schools, magnet schools, or one of the ten non-religious private schools, the families of Cleveland do have genuine opportunities to enroll their children in nonreligious schools.\textsuperscript{376} Furthermore, the Court held that the number of participating religious schools and the number of individuals attending religious schools did not indicate a lack of genuine choice.\textsuperscript{377} The Court explained that the level of certainty necessary in gathering such statistics and the degree of "principled standards" necessary to evaluate statistics for constitutional purposes simply did not exist.\textsuperscript{378} Moreover, the Court had specifically rejected attaching constitutional significance to the number of students enrolled in religious schools in \textit{Mueller}.\textsuperscript{379} Thus, the Court found that the voucher program was a true private choice program in which aid reached religious schools only as a result of the genuine and independent decisions of Cleveland parents.\textsuperscript{380}

\textsuperscript{373} \textit{See Zelman}, 122 S. Ct. at 2468–69.

\textsuperscript{374} \textit{Id.} at 2468–70; \textit{see also supra} Part II.G.3 (discussing the \textit{Mueller} decision); \textit{supra} notes 238–39 and accompanying text (discussing the \textit{Witters} decision); \textit{supra} notes 241–44 and accompanying text (discussing the \textit{Zobrest} decision).

\textsuperscript{375} \textit{Zelman}, 122 S. Ct. at 2469.

\textsuperscript{376} \textit{Id.}

\textsuperscript{377} \textit{Id.} at 2469–70. The Court explained that because the preponderance of religious schools did not occur as a result of the voucher program, the number of religious schools participating in the program was irrelevant. \textit{Id.} In fact, the Court stated that

\begin{quote}
\[\textit{t}o \text{attribute constitutional significance to this figure... would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are religious schools... but not in inner-city Cleveland, where Ohio has deemed such programs most sorely needed, but where the preponderance of religious schools happens to be greater.}\]
\end{quote}

\textit{Id.} at 2470.

\textsuperscript{378} \textit{Id.} at 2470.

\textsuperscript{379} \textit{Id.}; \textit{see also supra} Part II.G.3 (discussing the \textit{Mueller} decision).

\textsuperscript{380} \textit{Zelman}, 122 S. Ct. at 2469–70.
Finally, the Court held that the Nyquist decision did not control the fate of Cleveland's voucher program. The Court distinguished Cleveland's voucher program, stating that the Nyquist program was not neutral because it expressly prohibited benefits from reaching public schools. Then the Court pointed to footnote thirty-eight in Nyquist, which reserved judgment regarding cases in which aid was made available to a broad class of individuals and religion was not a determining factor. Therefore, the Court held that Nyquist did not govern the neutral private choice voucher program of Cleveland.

Accordingly, the majority held that the voucher program did not violate the Establishment Clause of the First Amendment to the United States Constitution and reversed the Court of Appeals for the Sixth Circuit's decision. Cleveland's voucher program placed no significance on the religious affiliation of the participating parents or schools. Moreover, public funds reached religious schools only as a result of private decisions, made by Cleveland parents, to send their children to religious schools. Under these circumstances, the majority held that the State's voucher program was constitutionally permissible.

2. Justice O'Connor's Concurring Opinion

Justice O'Connor joined in the majority's opinion. However, Justice O'Connor wrote separately to emphasize that the majority's opinion was not a drastic shift in Establishment Clause jurisprudence and that the majority appropriately considered all educational options open to Cleveland parents.

First, Justice O'Connor stated that the majority's opinion was not "a dramatic break from the past" because the religious schools did not receive a significant amount of public money through the voucher program. She noted that community schools and magnet schools

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381. Id. at 2472; see also supra notes 192-99 and accompanying text (discussing the Nyquist opinion).
382. Zelman, 122 S. Ct. at 2472; see also supra notes 192-99 and accompanying text (discussing the Nyquist decision).
384. Id.
385. Id. at 2473.
386. Id.
387. Id.
388. Id.
389. Id. at 2473 (O'Connor, J., concurring).
390. Id. (O'Connor, J., concurring).
391. Id. (O'Connor, J., concurring).
received a far greater amount of public funds than the private schools received through the voucher program.\textsuperscript{392} Moreover, she stated that religious institutions already receive a substantial amount of money through various federal, state, and local government programs, such as tax exemptions.\textsuperscript{393}

Justice O'Connor then explained that the majority's opinion was consistent with prior Establishment Clause jurisprudence.\textsuperscript{394} Noting \textit{Everson}'s emphasis on religious neutrality, Justice O'Connor stated that the constitutional inquiry has basically remained the same for forty years.\textsuperscript{395} She reasoned that any refinements in the law since \textit{Everson} merely clarify how to apply the condensed \textit{Lemon} test and \textit{Everson}'s pillar of neutrality.\textsuperscript{396} Therefore, Justice O'Connor stated that the majority's inquiry and answer were consistent with precedent and not a drastic constitutional shift.\textsuperscript{397}

Second, Justice O'Connor stressed that the majority correctly examined all of the educational options available to Cleveland parents.\textsuperscript{398} She stated that because Establishment Clause jurisprudence required the Court to evaluate whether genuine choice existed between religious and non-religious schools, the Court properly examined the non-religious and religious private schools participating in the program, the community schools, the magnet schools, and Cleveland's public schools.\textsuperscript{399} By examining the full range of schools, the majority's

\textsuperscript{392} \textit{Id.} (O'Connor, J., concurring) (noting that the State provides community schools with about $4518 per pupil and magnet schools with about $7097 per pupil, whereas religious schools can receive only a maximum of $2250 per pupil through the voucher program).

\textsuperscript{393} \textit{Id.} at 2474 (O'Connor, J., concurring). Moreover, Justice O'Connor noted that public aid reaches religious institutions through educational programs such as the Pell Grant program and the G.I. Bill, through public health programs like Medicare, and through child care programs such as Child Care and Development Block Grant Program. \textit{Id.} at 2475 (O'Connor, J., concurring).

\textsuperscript{394} \textit{Id.} at 2476 (O'Connor, J., concurring).

\textsuperscript{395} \textit{Id.} (O'Connor, J., concurring); \textit{see also supra} notes 183–91 and accompanying text (discussing the \textit{Everson} decision).

\textsuperscript{396} \textit{Zelman}, 122 S. Ct. at 2476 (O'Connor, J., concurring) ("What the Court clarifies in these cases is that the Establishment Clause also requires that state aid flowing to religious organizations through the hands of beneficiaries must do so only at the direction of those beneficiaries. Such a refinement of the \textit{Lemon} test surely does not betray \textit{Everson}."); \textit{see also supra} notes 183–91 and accompanying text (discussing the \textit{Everson} decision).

\textsuperscript{397} \textit{Zelman}, 122 S. Ct. at 2476 (O'Connor, J., concurring).

\textsuperscript{398} \textit{Id.} at 2477 (O'Connor, J., concurring); \textit{see also supra} notes 374–80 and accompanying text (discussing the majority's analysis of whether the voucher program provided genuine choice to Cleveland parents).

\textsuperscript{399} \textit{Zelman}, 122 S. Ct. at 2478 (O'Connor, J., concurring); \textit{see also supra} notes 374–80 and accompanying text (discussing the majority's analysis of whether the voucher program provided genuine choice to Cleveland parents).
analysis was not skewed and the majority saw how Cleveland's educational system actually functioned. Concluding, Justice O'Connor stated that the majority’s opinion was both “consistent with the realities of the Cleveland educational system” and consistent with prior Establishment Clause jurisprudence.

3. Justice Thomas’s Concurring Opinion

Although Justice Thomas joined in the majority’s opinion, he wrote separately because he questioned whether the Court should apply the condensed Lemon test to the states. Justice Thomas stated that the Establishment Clause applies solely to the federal government. He noted that only through the Fourteenth Amendment and the incorporation doctrine does the Establishment Clause apply to the states. Justice Thomas then explained that because the general purpose of the Fourteenth Amendment is to advance individual liberty, the Court should not use the Fourteenth Amendment to restrict individual liberty. Justice Thomas stated that it would be a “tragic irony” to use the Fourteenth Amendment’s assurance of individual liberty to prohibit educational choice.

Instead, Justice Thomas suggested that courts should evaluate state action with terms different from those used to evaluate the federal government: terms with more latitude and fewer constitutional constraints. Justice Thomas argued that the states must have the

400. Zelman, 122 S. Ct. at 2473 (O'Connor, J., concurring) (“To do otherwise is to ignore how the educational system in Cleveland actually functions.”); see also supra notes 374–80 and accompanying text (discussing the majority’s analysis of whether the voucher program provided genuine choice to Cleveland parents); supra notes 183–91 and accompanying text (discussing the Everson decision).

401. Zelman, 122 S. Ct. at 2480 (O'Connor, J., concurring); see also supra notes 374–80 and accompanying text (discussing the majority’s analysis of whether the voucher program provided genuine choice to Cleveland parents).

402. Zelman, 122 S. Ct. at 2480–81 (Thomas, J., concurring); see also supra Part II.G.2 (discussing the Lemon test).

403. Zelman, 122 S. Ct. at 2481 (Thomas, J., concurring); see also supra notes 69–78 and accompanying text (discussing the incorporation of the Establishment Clause).

404. Zelman, 122 S. Ct. at 2481 (Thomas, J., concurring).

405. Id. (Thomas, J., concurring) (“When rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty.”); see also supra notes 69–78 and accompanying text (discussing the incorporation of the Establishment Clause).

406. Zelman, 122 S. Ct. at 2482 (Thomas, J., concurring) (“There would be a tragic irony in converting the Fourteenth Amendment’s guarantee of individual liberty into a prohibition on the exercise of educational choice.”); see also supra notes 69–78 and accompanying text (discussing the incorporation of the Establishment Clause).

freedom to experiment with education, for only with education can one exercise the personal and political liberties guaranteed by the Fourteenth Amendment. Finally, Justice Thomas pointed to Cleveland's failing school districts as evidence of the need for educational reform and argued that to deny Cleveland parents educational choice through the Fourteenth Amendment greatly disadvantaged the neediest American citizens and misconstrued the principles of the Constitution.

4. Justice Stevens's Dissenting Opinion

Justice Stevens dissented, criticizing the majority for wrongfully focusing on various factual matters throughout its opinion. Justice Stevens argued that the constitutionality of Cleveland's voucher program should not turn on such facts as Cleveland's "educational crisis," the alternative public school options, or the voluntary nature of parental choice. Also, he noted his fear that the voucher program could result in religious strife.

First, Justice Stevens observed that the terrible state of Cleveland's public school system was irrelevant to the constitutionality of the voucher program and should not be a reason for state-funded religious education. Second, Justice Stevens contended that the wide range of educational options within the public school system was also irrelevant to the constitutionality of the voucher program. He believed that the majority's conclusion—that genuine choice existed because parents could choose to send their children to traditional public schools, sectarian schools, magnet schools, or community schools—was

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408. Id. (Thomas, J., concurring) ("Respondents advocate using the Fourteenth Amendment to handcuff the State's ability to experiment with education. But without education one can hardly exercise the civic, political, and personal freedoms conferred by the Fourteenth Amendment."); see also VITERITTI, CHOOSING EQUALITY, supra note 85, at 197 ("First there is the obvious: how providing poor people access to better schools gives them the resources needed to pursue a fuller political and economic life [sic].").

409. Zelman, 122 S. Ct. at 2482–83 (Thomas, J., concurring); see also supra notes 69–78 and accompanying text (discussing the incorporation of the Establishment Clause). Justice Thomas explained that "[a]lthough one of the purposes of public schools was to promote democracy and a more egalitarian culture, failing urban public schools disproportionately affect minority children most in need of educational opportunity." Zelman, 122 S. Ct. at 2483 (Thomas, J., concurring).

410. Zelman, 122 S. Ct. at 2484 (Stevens, J., dissenting).

411. Id. at 2484–85 (Stevens, J., dissenting).

412. Id. at 2485 (Stevens, J., dissenting) ("Admittedly, . . . I have been influenced by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, North Ireland, and the Middle East to mistrust one another.").

413. Id. at 2484 (Stevens, J., dissenting) (noting that the situation in Cleveland was grave, but rejecting the educational crisis as a factor in the constitutional analysis of the voucher program).

414. Id. (Stevens, J., dissenting).
flawed.\textsuperscript{415} Third, Justice Stevens stated that the voluntary character of genuine private choice was also irrelevant to the voucher program’s constitutionality.\textsuperscript{416} Finally, Justice Stevens stated that the majority had increased the risk of religious strife by permitting aid to reach religious schools through the voucher program.\textsuperscript{417} Therefore, because the majority wrongfully focused on various factual matters throughout its opinion and because of the voucher program’s potential for religious strife, Justice Stevens respectfully dissented.\textsuperscript{418}

5. Justice Souter’s Dissenting Opinion

Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, criticized the majority for ignoring prior Establishment Clause jurisprudence and, alternatively, for ignoring reality when it applied its Establishment Clause test of neutrality and private choice.\textsuperscript{419} Justice Souter explained that a tough problem, such as a failing school system, was no reason to ignore proper constitutional analysis.\textsuperscript{420} Finally, Justice Souter argued that the majority’s holding was “profoundly at odds with the Constitution.”\textsuperscript{421}

Justice Souter first argued that the majority’s Establishment Clause test as a whole was improper because the test ignored the ruling of \textit{Everson v. Board of Education}.\textsuperscript{422} In \textit{Everson}, the Court expressly prohibited the government from levying taxes in support of any religious activity.\textsuperscript{423} Thus, Justice Souter contended that the majority effectively overruled \textit{Everson} with its ruling on Cleveland’s voucher program.

\begin{itemize}
\item \textsuperscript{415} See \textit{id.} (Stevens, J., dissenting).
\item \textsuperscript{416} \textit{id.} at 2485 (Stevens, J., dissenting) (explaining that the mere fact that Cleveland parents would like to send their children to religious schools, although they could not afford such schools, did not justify the impermissible use of public funds in support of religious private institutions).
\item \textsuperscript{417} \textit{id.} at 2484–85 (Stevens, J., dissenting).
\item \textsuperscript{418} \textit{id.} at 2486 (Souter, J., dissenting).
\item \textsuperscript{419} \textit{id.} at 2485 (Souter, J., dissenting) (arguing, as did Justice Stevens, that Cleveland’s failing school district should not be a factor when determining the constitutionality of the voucher program).
\item \textsuperscript{420} \textit{id.} at 2497 (Souter, J., dissenting). Justice Souter contended that the program was “profoundly at odds with the Constitution” because the amount of money allocated to religious schools through the program was unprecedented and the voucher program directly defied the purposes of the Establishment Clause. \textit{id.} (Souter, J., dissenting).
\item \textsuperscript{421} \textit{id.} at 2486 (Souter, J., dissenting); see \textit{also supra} notes 183–91 and accompanying text (discussing the \textit{Everson} decision).
\item \textsuperscript{422} \textit{id.} at 2485 (Souter, J., dissenting); \textit{see also supra} notes 183–91 and accompanying text (discussing the \textit{Everson} decision). “No tax in any amount, large or small, can be levied to support any religious activities or institutions . . . .” \textit{Everson v. Bd. of Educ.}, 330 U.S. 1, 16 (1947).
\end{itemize}
program. Justice Souter explained that the Court's Establishment Clause analysis had changed over time; nevertheless, he noted that not until this ruling had the Court ignored the extent of aid as a factor in its analysis. Justice Souter argued that even if neutrality and private choice were proper constitutional factors, Everson and its progeny still required the Court to examine the extent of the aid provided to religious institutions. Because the Court failed to examine the extent of the government aid to the religious schools of Cleveland, as Everson and its progeny required, Justice Souter rejected the majority's analysis.

Alternatively, Justice Souter contended that even if it was unnecessary to examine the extent of the public aid, and the majority's Establishment Clause test of neutrality and private choice alone was proper, the voucher program failed to meet this test. He opined that the voucher program was not neutral because it provided financial incentives to attend religious schools. He then argued that parents participating in the voucher program lacked true private choice because few quality non-religious schools participated in the program. Moreover, Justice Souter argued that the majority's analysis of neutrality and private choice was so broad that neutrality and private choice no longer functioned as criteria "with a practical capacity to screen something out."

424. Zelman, 122 S. Ct. at 2486 (Souter, J., dissenting).
425. Id. (Souter, J., dissenting). Justice Souter claimed that the majority's holding created a new stage in Establishment Clause jurisprudence, where the extent of aid had no constitutional significance. Id. (Souter, J., dissenting). He explained that from 1947 to 1968 the Court prohibited all aid from reaching religious institutions, from 1968 to 1983 the Court permitted aid to reach religious institutions only if the aid was divertible to secular activities alone, and from 1983 to date the Court permitted aid to reach religious institutions only if the amount of aid was insubstantial. Id. (Souter, J., dissenting). In particular, Justice Souter noted that even in the recent cases of Witters, Zobrest, and Rosenberg the amount of "aid... was isolated and insubstantial." Id. at 2490 (Souter, J., dissenting). Therefore, he concluded that only in the plurality opinion of Mitchell and the majority opinion of Zelman did the Court find the substantiality of aid irrelevant. Id. (Souter, J., dissenting).
426. Id. at 2490 (Souter, J., dissenting) ("Ih was not until today that substantiality of aid has clearly been rejected as irrelevant by a majority of this Court . . . ."); see also supra notes 183–91 and accompanying text (discussing the Everson decision).
427. See Zelman, 122 S. Ct. at 2490 (Souter, J., dissenting); see also supra notes 183–91 and accompanying text (discussing the Everson decision).
428. Zelman, 122 S. Ct. at 2490 (Souter, J., dissenting) ("[E]ven [the existence of neutrality and private choice] cannot convincingly legitimize the Ohio scheme.").
429. Id. at 2491 (Souter, J., dissenting).
430. Id. at 2492 (Souter, J., dissenting).
431. Id. at 2494 (Souter, J., dissenting) (referring only to the criterion of private choice in this instance, although indicating similar sentiments toward neutrality earlier in his opinion).
Citing *Mitchell,* Justice Souter noted that neutrality is "evenhandedness in setting eligibility as between potential religious and secular recipients of public money." He then contended that the voucher program was not neutral because the tuition program favored religion by providing larger funds to private schools through the voucher system than to public schools through tutorial aid. Justice Souter also rejected the inclusion of community and magnet schools as secular alternatives to the religious voucher schools when determining the neutrality of the program because the voucher program did not appropriate funds to community or magnet schools. Therefore, Justice Souter concluded that the voucher program was not neutral with respect to religion.

Furthermore, Justice Souter explained that the voucher program failed to provide families with genuine options for non-religious education because few quality non-religious private schools participated in the program. Justice Souter again rejected the inclusion of community and magnet schools as secular alternatives to the religious voucher schools because community and magnet schools did not receive money through the voucher program but were funded through separate state spending. Thus, he concluded that the voucher program also failed to meet the true private choice criterion of the majority’s Establishment Clause inquiry. Accordingly, because the voucher program failed to meet either prong of the majority’s Establishment Clause test, Justice Souter rejected the majority’s opinion.

434. *Id.* (Souter, J., dissenting).
435. *Id.* (Souter, J., dissenting) (noting that the majority looked beyond *Ohio Rev. Code Ann.* § 3313.976 (West 1999 & Supp. 2002), the specific section that authorized Ohio’s Pilot Project Scholarship Program, to every educational opportunity provided for within Ohio’s Code and rejecting this approach); see also supra note 171 (discussing the Pilot Project Scholarship Program). The majority did note that the Ohio State Legislature funded neither the community schools, nor magnet schools through the Pilot Project Scholarship Program. *Zelman,* 122 S. Ct. at 2471 n.6.
436. See *Zelman,* 122 S. Ct. at 2492 (Souter, J., dissenting).
437. *Id.* (Souter, J., dissenting).
438. *Id.* at 2493 (Souter, J., dissenting) (noting that the majority looked beyond *Ohio Rev. Code Ann.* § 3313.976 (West 1999 & Supp. 2002), the specific section that authorized Ohio’s Pilot Project Scholarship Program, to every educational opportunity provided for within Ohio’s Code and rejecting this approach); see also supra note 171 (discussing the Pilot Project Scholarship Program).
440. *Id.* at 2490 (Souter, J., dissenting).
Finally, Justice Souter contended that the program was "profoundly at odds with the Constitution" for two reasons. First, Justice Souter concluded that the voucher program was at odds with the Establishment Clause because the amount of money allocated to religious schools through the program was unprecedented. Second, Justice Souter reasoned that the voucher program was in direct defiance of the purposes of the Establishment Clause because the program entangled the government with the religious community, creating religious strife and a weaker democracy. Thus, Justice Souter concluded that the voucher program was impermissible, regardless of precedent and the majority's faulty application of its own Establishment Clause test. Accordingly, because the majority ignored Establishment Clause precedent, wrongly applied its own criteria of neutrality and private choice, and validated a program entirely at odds with the Establishment Clause, Justice Souter dissented.

6. Justice Breyer's Dissenting Opinion

Justice Breyer, joined by Justices Stevens and Souter, also dissented from the majority's opinion. Justice Breyer wrote his separate dissent to stress the likelihood that Cleveland's voucher program would create religious strife. Justice Breyer first noted that the Framers added the Establishment Clause to the Constitution because they believed that liberty and social stability could exist only with religious tolerance. He then explained that when governments allied themselves with a particular religion in the past, those with minority religious beliefs faced hatred and persecution. Justice Breyer stated that the purpose of the Establishment Clause was not to guarantee an equal opportunity for

441. \textit{Id.} at 2497 (Souter, J., dissenting).
442. \textit{Id.} at 2497–98 (Souter, J., dissenting) (noting that Ohio had already spent thirty-three million dollars on the voucher program and that experts expected costs to rise).
443. \textit{Id.} at 2498–99 (Souter, J., dissenting) (stating that the purposes of the Establishment Clause were "freedom of conscience" and "to save religion from its own corruption").
444. \textit{Id.} at 2502 (Souter, J., dissenting).
445. \textit{Id.} at 2485, 2497 (Souter, J., dissenting).
446. \textit{Id.} at 2502 (Breyer, J., dissenting).
447. \textit{Id.} (Breyer, J., dissenting) ("I write separately, however, to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict.").
448. \textit{Id.} (Breyer, J., dissenting); \textit{see also supra} notes 58–62 and accompanying text (discussing the role that religious tolerance played in the formation of the Establishment Clause).
449. \textit{Zelman}, 122 S. Ct. at 2502–03 (Breyer, J., dissenting) (pointing to the previous religious strife in Europe and in America); \textit{see also supra} notes 63–68 and accompanying text (discussing the role that religious strife played in the formation of the Establishment Clause).
each religion to secure public funds, for such an interpretation would create religious conflict. Instead, Justice Breyer concluded that the purpose of the Establishment Clause was to guarantee that no one religion received advantages from the government over another religion. Because he strongly believed that religious strife always followed government funding of religious activities, Justice Breyer dissented from the majority’s opinion and concluded that the voucher program violated the Establishment Clause.

IV. ANALYSIS

In Zelman v. Simmons-Harris, the Court correctly held that Cleveland’s voucher program did not violate the Establishment Clause because the program had a valid secular purpose and did not advance or inhibit religion. This Part first demonstrates why the majority opinion is consistent with prior Establishment Clause jurisprudence. Second, this Part determines that the majority correctly analyzed all of the education options available in Cleveland in reaching its decision and correctly held that Nyquist was not controlling law. This Part then discusses the dissents’ mistaken arguments, which incorrectly focused on potential religious strife, incorrectly interpreted the Everson holding, and incorrectly interpreted the majority’s discussion of Cleveland’s educational crisis. Finally, the analysis turns to Justice Thomas’s attempt to revitalize federalism in his concurring opinion, in

450. Zelman, 122 S. Ct. at 2504 (Breyer, J., dissenting). Moreover, Justice Breyer stated that it would be very difficult to provide all religions equal opportunity to public funds because of the sheer number of religions in the United States. Id. (Breyer, J., dissenting).

451. Id. (Breyer, J., dissenting).

452. Id. at 2508 (Breyer, J., dissenting).

453. See supra Part III.C.1 (discussing the majority’s holding that the voucher program did not violate the Establishment Clause).

454. See infra Part IV.A (demonstrating the consistency of the majority’s opinion with prior Establishment Clause jurisprudence).

455. See infra Part IV.B (arguing that the majority correctly analyzed all of the educational options available to Cleveland parents, instead of limiting its analysis to the options created through the challenged Pilot Project Scholarship Program).

456. See infra Part IV.C (demonstrating that the majority correctly held that Nyquist did not govern the neutral voucher program in Zelman); see also supra notes 193–99 and accompanying text (discussing the Nyquist opinion).

457. See infra Part IV.D (determining that the majority correctly refrained from placing constitutional significance on the potential religious strife that could result due to the voucher program, that the dissent incorrectly argued that the majority’s reason betrays Everson, and that the dissent incorrectly contended that the majority placed constitutional significance on the condition of Cleveland’s public schools).
which he correctly questioned the propriety of incorporating the First Amendment against the states.\footnote{458}

\textbf{A. The Majority Opinion Is Consistent with Prior Establishment Clause Jurisprudence}

The majority did not suddenly tear down the wall of separation between church and state; the majority merely applied Establishment Clause precedent to the voucher program.\footnote{459} In fact, a survey of Establishment Clause case law reveals that, for over fifty years, the Court has permitted public funds to reach religious institutions.\footnote{460} Moreover, the two pillars of Establishment Clause jurisprudence, religious neutrality and private choice, have remained consistent over the years.\footnote{461} In 1947, in 	extit{Everson v. Board of Education}, the Court first mandated religious neutrality,\footnote{462} and in 1983, in 	extit{Mueller v. Allen}, the Court began to require private choice.\footnote{463} Because the Establishment Clause merely requires genuine private choice and religious disinterestedness, not religious hostility, the Court properly upheld Cleveland's voucher program.\footnote{464} Accordingly, the Court simply

\footnote{458. See infra Part IV.D (discussing Justice Thomas's invitation to the Court to reconsider the incorporation of the Establishment Clause against the states).
460. See supra notes 183–91 and accompanying text (noting that in 1947, in 	extit{Everson v. Board of Education}, the Court found that public funds could benefit religious institutions and upheld a government program that reimbursed the bus fares of all children, regardless whether they attended religious or non-religious schools).
461. Zelman, 121 S. Ct. at 2476 (O'Connor, J., concurring); see McConnell, 	extit{Defense of Educational Choice}, supra note 56, at 852 (noting that the Supreme Court repeatedly has upheld government programs that are neutral with respect to religion and direct aid to religious institutions solely as the result of private, independent choice); Davidson, supra note 37, at 481–82 (arguing that modern Establishment Clause jurisprudence has consistently examined whether government programs have a secular purpose, are neutral with respect to religion, and direct aid to religious institutions solely as the result of true private choice); supra notes 182–257 and accompanying text (demonstrating that modern Establishment Clause jurisprudence has consistently examined whether the government program was neutral with respect to religion and whether public funds reached religious institutions solely as the result of private choice).
462. See Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947); see also supra notes 183–91 and accompanying text (discussing the 	extit{Everson} decision).
463. See Mueller v. Allen, 463 U.S. 388, 400–01 (1983); see also supra notes 183–91 and accompanying text (discussing the 	extit{Everson} decision); supra notes 227–36 and accompanying text (discussing the 	extit{Mueller} decision).
464. See Garnett & Garnett, supra note 4, at 334–35 (discussing the Supreme Court's basic requirement for school choice programs: neutrality and indirection); Davidson, supra note 37, at 481–82 (contending that Establishment Clause jurisprudence has consistently required government programs to have secular purposes, to be religiously neutral, and to direct aid to religious institutions solely as the result of true private choice); see also supra notes 182–257 and accompanying text (demonstrating that modern Establishment Clause jurisprudence has
applied the Establishment Clause precedent from Zelman to reach its sound decision.\textsuperscript{465}

\textbf{B. Realistic Analysis of the Facts}

The majority also correctly analyzed all of the education options available in Cleveland when it evaluated whether Cleveland parents had genuine opportunities to enroll their children in non-religious schools.\textsuperscript{466} The Court did not limit its inquiry to the two types of schools participating in the voucher program; it considered every type of school actually available in the Cleveland area (public schools, magnet schools, community schools, non-religious private schools, and religious private schools).\textsuperscript{467} By examining every educational option, regardless of which particular section of the Ohio Code provided funds to the school, the Court could more accurately determine whether Cleveland parents actually had the option to send their children to non-religious schools.\textsuperscript{468} As Justice O'Connor noted, "[t]o do otherwise [would be] to ignore how the educational system in Cleveland actually functions."\textsuperscript{469} Therefore, the majority correctly examined all of the education options in Cleveland, providing a more accurate analysis of the facts and a conclusion more in tune with reality.\textsuperscript{470}

\footnotesize
\textsuperscript{465} See Zelman, 122 S. Ct. at 2466; Davidson, supra note 37, at 481–82 (arguing that the Supreme Court's test for Establishment Clause cases has required government programs to have secular purposes, be religiously neutral, and to direct aid to religious institutions solely as the result of true private choice); see also supra notes 389–401 and accompanying text (examining Justice O'Connor's concurring opinion, in which she stated that the majority's opinion was consistent with precedent); supra notes 182–257 and accompanying text (demonstrating that the Supreme Court has consistently held that government programs did not violate the Establishment Clause if the program was neutral with respect to religion and the public funds reached religious institutions solely as the result of private choice).

\textsuperscript{466} See Zelman, 122 S. Ct. at 2469.

\textsuperscript{467} \textit{Id.} The Court concluded that Cleveland parents had genuine opportunities to enroll their children in non-religious schools without even emphasizing that the failing Cleveland public schools were secular options. \textit{Id.} Commentator Richard Weicher, however, concludes that the "failing" public schools of Cleveland should constitute educational options. Weicher, supra note 191, at 318–19. Weicher states that although the legislature has labeled the school as failing, "presumably, however, that [the legislatures] left the school open means it decided that the school can still educate a number of students, just not the number it typically expects from its schools." \textit{Id.} at 318. Therefore, Weicher believes that the failing public schools of Cleveland do constitute educational options. \textit{Id.} at 318–19. Weicher states that "[t]o do [otherwise] is to challenge, and essentially overrule, a legislative determination that such a school is a viable option to which it should continue to provide money and resources." \textit{Id.} at 320.

\textsuperscript{468} Weicher, supra note 191, at 318–20.

\textsuperscript{469} Zelman, 122 S. Ct. at 2473 (O'Connor, J., concurring).

\textsuperscript{470} See \textit{id.} at 2469.
C. Nyquist Was Not Controlling Law

Finally, the majority correctly held that Nyquist was not controlling law, for unlike the government program in Nyquist, Cleveland’s voucher program was neutral with respect to religion.\(^{471}\) In Nyquist, the government program provided financial assistance only to parents who sent their children to private schools; the program expressly prohibited the participation of public schools.\(^{472}\) In contrast, the vouchers in Zelman were available to students who chose to attend neighboring public schools, non-religious private schools, and religious private schools.\(^{473}\) Moreover, Cleveland students could choose to attend a community or magnet school.\(^{474}\) Because Cleveland’s voucher program was neutral with respect to religion, the majority correctly held that Nyquist did not control the constitutionality of the Zelman voucher program.\(^{475}\)

Furthermore, the majority correctly held that Nyquist was not controlling law because, in footnote thirty-eight of the Nyquist opinion, the Court expressly limited the holding of Nyquist to non-neutral government programs.\(^{476}\) In this footnote, the Court distinguished the non-neutral Nyquist program from the neutral programs in Everson and Allen, as well as from the religiously neutral federal G.I. Bill, which authorized the government to issue tuition grants to both non-religious and religious private universities and colleges.\(^{477}\) Thus, footnote thirty-eight suggested that government programs were constitutional if they provided financial assistance without regard to the religious status of the

\(^{471}\) See id. at 2472; see also Frank, supra note 138, at 1047 (contending that the Sixth Circuit incorrectly held that Nyquist governed Cleveland’s voucher program); supra notes 193-99 and accompanying text (discussing the Nyquist opinion).


\(^{473}\) Zelman, 122 S. Ct. at 2463-65.

\(^{474}\) Id. at 2464-65.

\(^{475}\) See id. at 2472; see also supra notes 193-99 and accompanying text (discussing the Nyquist opinion).

\(^{476}\) See Zelman, 122 S. Ct. at 2472; Nyquist, 413 U.S. at 782 n.38 (“[W]e 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.”); see also supra notes 193-99 and accompanying text (discussing the Nyquist opinion).

\(^{477}\) Nyquist, 413 U.S. at 782 n.38; Garnett & Garnett, supra note 4, at 321; see also supra notes 193-99 and accompanying text (discussing the Nyquist opinion).
beneficiaries. Accordingly, because footnote thirty-eight implied that neutral tuition grants were constitutional and Cleveland’s voucher program was religiously neutral, the Zelman majority correctly held that Nyquist was not controlling law.

D. The Dissenting Opinions

1. The Constitutional Significance of Potential Religious Strife

All three dissenting opinions incorrectly placed constitutional significance on the religious strife that possibly could follow the voucher program. The likelihood of such religious strife in the future was simply too speculative to be constitutionally significant, especially since the voucher program had not created any strife other than the taxpayers’ lawsuit. Moreover, none of the dissenters cited authority in support of this proposition, and all failed to provide the Court with any standards to determine whether a government program likely would produce religious strife. In addition, the Supreme Court had already rejected placing constitutional significance on speculative religious strife or political divisiveness in Mitchell v. Helms. Accordingly, the majority correctly rejected considering potential religious strife as a factor in its constitutional analysis.
2. Betrayal of *Everson*

Justice Souter, in his dissent, incorrectly concluded that the majority’s Establishment Clause test of neutrality and private choice betrayed the ruling of *Everson v. Board of Education*.\(^{486}\) In *Everson*, the Court expressly stated that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions.”\(^{487}\) Yet, despite this statement, the Court upheld a government program that reimbursed parents for the transportation costs of sending their children to both public schools and religious private schools.\(^{488}\) In its reasoning, the Court explained that the Establishment Clause merely required the government to be neutral with respect to religious institutions, not to be adversarial.\(^{489}\) Thus, the majority’s opinion in *Zelman* did not ignore or betray *Everson*.\(^{490}\) The majority opinion merely refined *Everson*’s Establishment Clause analysis by also requiring government aid to flow to religious institutions through true private choice.\(^{491}\) In addition, this refinement was not sudden because the Court has required true private choice since *Mueller v. Allen* was decided in 1983.\(^{492}\) Nevertheless, Justice Souter contended that the majority drastically departed from the precedent of *Everson* and others by not considering the substantiality of

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\(^{486}\) *See id.* at 2486–90 (Souter, J., dissenting); *id.* at 2476 (rejecting the dissent’s contention that the neutrality and private choice inquiries betray *Everson*); *see also supra* notes 419–27 and accompanying text (discussing Justice Souter’s argument that the majority effectively overruled *Everson* through its decision in *Zelman*); *supra* notes 183–91 and accompanying text (discussing the *Everson* decision).

\(^{487}\) *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947); *see also supra* notes 183–91 and accompanying text (discussing the *Everson* decision).

\(^{488}\) *Everson*, 330 U.S. at 18; *see also supra* notes 183–91 and accompanying text (discussing the *Everson* decision).

\(^{489}\) *Everson*, 330 U.S. at 18 (“[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.”); *see also supra* notes 183–91 and accompanying text (discussing the *Everson* decision).

\(^{490}\) *See Zelman*, 122 S. Ct. at 2476 (rejecting the dissent’s contention that the majority had ignored the *Everson* decision by utilizing the neutrality and private choice inquiries); *see also supra* notes 183–91 and accompanying text (discussing the *Everson* decision). *But see supra* notes 419–27 and accompanying text (discussing Justice Souter’s contention that, through the *Zelman* decision, the majority effectively overruled *Everson*).

\(^{491}\) *See Zelman*, 122 S. Ct. at 2476 (rejecting the dissent’s contention that the neutrality and private choice inquiries betray *Everson*); *see also supra* notes 183–91 and accompanying text (discussing the *Everson* decision). *But see supra* notes 419–27 and accompanying text (discussing Justice Souter’s argument that the majority effectively overruled *Everson* through its decision in *Zelman*).

\(^{492}\) *See supra* notes 228–57 and accompanying text (demonstrating that the Court first required aid to reach religious institutions solely through private choice in *Mueller v. Allen* and that the Court has continued this inquiry in all subsequent cases).
aid to the religious institutions. However, Justice Souter refuted his own argument by noting that the Court had upheld substantial aid to religious institutions in Agostini v. Felton and in Mitchell v. Helms. Also, in Witters v. Washington Department of Services for the Blind, five members of the Court, in separate opinions, found the substantiality of the aid irrelevant to the Court’s constitutional inquiry. Therefore, Justice Souter incorrectly reasoned that the majority’s Establishment Clause test of neutrality and private choice betrayed the ruling of Everson v. Board of Education.

3. The Constitutional Significance of Cleveland’s Educational Crisis

Finally, Justice Stevens, in his dissent, incorrectly criticized the majority for placing constitutional significance on the educational crisis in Cleveland because the majority did not consider the failing school district as a factor in its constitutional inquiry. The majority did not mention Cleveland’s educational emergency at all when examining the neutrality of the voucher program and the effect of private choice on the program. The majority noted the severity of Cleveland’s educational problem only while commenting on the facts of the case. Thus, the majority did not appear to place any constitutional significance on the

493. Zelman, 122 S. Ct. at 2490 (Souter, J., dissenting) (“[I]t was not until today that substantiality of aid has clearly been rejected as irrelevant by the majority of this Court . . . “); see also supra notes 183–91 and accompanying text (discussing the Everson decision).
494. See Zelman, 122 S. Ct. at 2490 (Souter, J., dissenting) (stating that “[t]o be sure, the aid in Agostini was systematic and arguably substantial” and noting that the aid in Mitchell was substantial); see also supra notes 246–51 and accompanying text (discussing the Agostini decision); supra notes 252–57 and accompanying text (discussing the Mitchell decision).
495. See Witters v. Wash. Dep’t of Servs. for the Blind, 474 U.S. 481, 490–92 (1986); id. at 493 (O’Connor, J., concurring in part and concurring in judgment); id. at 490 (White, J., concurring); Zelman, 122 S. Ct. at 2466–67 (noting that the Court already rejected considering the substantiality of aid in Witters); see also supra notes 238–39 and accompanying text (discussing the Witters decision).
496. See Zelman, 122 S. Ct. at 2486–90 (Souter, J., dissenting); id. at 2476 (rejecting the dissent’s contention that the neutrality and private choice inquiry betrays Everson); see also supra notes 419–27 and accompanying text (discussing Justice Souter’s argument that the majority effectively overruled Everson through its decision in Zelman); supra notes 183–91 and accompanying text (discussing the Everson decision).
497. See Zelman, 122 S. Ct. at 2483–85 (Stevens, J., dissenting); see also supra notes 410–18 and accompanying text (discussing Justice Stevens’s dissenting opinion).
498. See Zelman, 122 S. Ct. at 2465–73 (examining whether the voucher program was religiously neutral and whether the program directed aid to religious schools solely as a result of true private choice); see also supra notes 353–88 and accompanying text (discussing the majority’s reasoning in Zelman).
499. See Zelman, 122 S. Ct. at 2463–65 (describing the facts of the case); see also supra notes 272–88 and accompanying text (discussing the facts of Zelman).
educational crisis in Cleveland, and Justice Stevens’s contention was otherwise incorrect.\(^{500}\)

**E. Justice Thomas’s Invitation to Revitalize Federalism**

In his concurring opinion, Justice Thomas interestingly invited the Court to reconsider whether the Establishment Clause should apply to the states.\(^{501}\) He sent this invitation to the Court because he questioned the propriety of using the Fourteenth Amendment to constrain individual liberty, given that the purpose of the Fourteenth Amendment was to "ensure[,] that states would not deprive citizens of liberty without due process of the law."\(^{502}\) Justice Thomas correctly noted the "tragic irony" of using the Fourteenth Amendment to constrain, rather than advance, individual liberty.\(^{503}\) The purpose of the Fourteenth Amendment, however, is not the only support for Thomas’s contention; additional support exists in the purpose of the Bill of Rights as a whole,\(^{504}\) the original draft of the Establishment Clause,\(^{505}\) and the reasoning, or rather the lack of reasoning, in *Everson v. Board of Education*.\(^{506}\)

As scholar James McClellan noted, the Framers designed the Bill of Rights not only to restrict the federal government from depriving citizens of certain liberties, but also to restrict the federal government from intruding upon the states’ jurisdiction over such liberties.\(^{507}\) In

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500. *See Zelman*, 122 S. Ct. at 2463–73; *id.* at 2484 (Stevens, J., dissenting); *see also supra* notes 272–88 and accompanying text (discussing the facts of *Zelman*); *supra* notes 353–88 and accompanying text (discussing the majority’s reasoning in *Zelman*); *supra* Part III.C.4 (discussing Justice Stevens’s dissenting opinion).

501. *See Zelman*, 122 S. Ct. at 2480–84 (Thomas, J., concurring); *see also Meese & Eastman, supra* note 71 (noting that Justice Thomas invited the Court to reconsider its "wholesale incorporation of the Establishment Clause"); *supra* Part II.B (discussing the incorporation of the Establishment Clause).

502. *Zelman*, 122 S. Ct. at 2481 (Thomas, J., concurring); *see also supra* Part II.B (discussing the incorporation of the Establishment Clause).

503. *See Zelman*, 122 S. Ct. at 2482 (Thomas, J., concurring); *see also supra* Part II.B (discussing the incorporation of the Establishment Clause).

504. *See McClellan, supra* note 69, at 45–46 (noting that the Bill of Rights was designed, in part, to assure the states that the federal government would not infringe their jurisdictions); *see also supra* Part II.B (discussing the incorporation of the Establishment Clause); *supra* Part II.A (discussing the origin of the Bill of Rights and the Establishment Clause specifically).

505. McClellan, *supra* note 69, at 47; Meese & Eastman, *supra* note 71; *see also supra* Part II.B (discussing the incorporation of the Establishment Clause).

506. Jeffries & Ryan, *supra* note 106, at 294–96; McClellan, *supra* note 69, at 44–45; *see also supra* notes 183–91 and accompanying text (discussing the *Everson* decision); *supra* Part II.B (discussing the incorporation of the Establishment Clause).

507. McClellan, *supra* note 69, at 45; *see also* BARRON, *supra* note 48, at 379; *see also supra* Part II.A (discussing the origin of the Bill of Rights and the Establishment Clause specifically). Scholar Jerome Barron notes that the Supreme Court reasoned, in *Barron v. Mayor & City
fact, the dominant theme of the Bill of Rights for many was federalism and states’ rights. Therefore, given the federalist purpose of the Bill of Rights, Justice Thomas was correct to question the Establishment Clause’s application against the states in *Zelman*, especially because state governments traditionally have power and jurisdiction over matters of education.

The original draft of the Establishment Clause provides additional support for Justice Thomas’s contention. The first draft stated that “the Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established.” This language indicates that the prohibition against the establishment of religion applied only to the federal government, leaving the states free to choose their relationship with and extent of support for religion. Thus, Justice Thomas’s invitation to the Court to reconsider whether the Establishment Clause should apply against the states is not without merit.

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508. McClellan, *supra* note 69, at 46; see also *supra* Part II.A (discussing the origin of the Bill of Rights and the Establishment Clause specifically). But see Gressman, *supra* note 507, at 1336 (contending that the Civil Rights Amendments inherently changed the relationship between the United States Government and state governments).

509. See McClellan, *supra* note 69, at 45; see also *supra* notes 69–78 and accompanying text (discussing the incorporation of the Establishment Clause); *supra* Part II.A (discussing the origin of the Bill of Rights and the Establishment Clause specifically). But see Levy, *supra* note 34, at 226 (stating that it is completely “unrealistic” to expect the Supreme Court to reverse years of precedent to reconsider the incorporation doctrine); Gressman, *supra* note 507, at 1336 (contending that the Civil Rights Amendments inherently changed the relationship between the United States Government and state governments).

510. See McClellan, *supra* note 69, at 47; see also Meese & Eastman, *supra* note 71 (pointing to the original wording of the Establishment Clause to prove the worthiness of Justice Thomas’s invitation to the Court to reconsider its incorporation of the Establishment Clause against the states); *supra* Part II.B (discussing the incorporation of the Establishment Clause).

511. McClellan, *supra* note 69, at 47 (emphasis added) (quoting the draft language of the Establishment Clause); see also *supra* Part II.B (discussing the incorporation of the Establishment Clause).

512. McClellan, *supra* note 69, at 47; see also *supra* Part II.B (discussing the incorporation of the Establishment Clause). But see Gressman, *supra* note 507, at 1336 (contending that the Civil Rights Amendments inherently changed the relationship between the United States Government and state governments).

513. See McClellan, *supra* note 69, at 47; see also Meese & Eastman, *supra* note 71 (noting that Justice Thomas’s invitation to the Court “is an invitation worthy of the Court’s reply”). But
Finally, Justice Thomas was correct to question the Establishment Clause’s application against the states because the Court first incorporated the Establishment Clause in *Everson v. Board of Education* without any constitutional analysis or reasoning whatsoever.\(^{514}\) Instead, the Court used the Fourteenth Amendment to simply incorporate the Establishment Clause against the states.\(^{515}\) Unsupported propositions are far less persuasive than propositions sustained after extensive analysis.\(^{516}\) Therefore, Justice Thomas properly questioned the wholesale incorporation of the Establishment Clause against the states, which first occurred in *Everson*.\(^{517}\)

Accordingly, the purpose of the Fourteenth Amendment, the purpose of the Bill of Rights as a whole, the original draft of the Establishment Clause, and the lack of reasoning in *Everson* all suggest that Justice Thomas was correct to question the Establishment Clause’s application

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\(^{514}\) See *Zelman v. Simmons-Harris*, 121 S. Ct. 2460, 2480–84 (2002) (Thomas, J., concurring) (questioning the Court’s conclusion in *Everson*); *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (incorporating the Establishment Clause against the states without thorough constitutional analysis); see also Jeffries & Ryan, supra note 106, at 294–99 (noting that the *Everson* opinion ”displays little research and zero interest in conflicting evidence, competing inferences, or alternative interpretations”); McClellan, supra note 69, at 44 (noting that the Court, in *Everson*, applied the Establishment Clause against the states without a supporting argument); Meese & Eastman, supra note 71 (pointing out that the Court incorporated the Establishment Clause against the states without any constitutional analysis in *Everson*); supra notes 183–91 and accompanying text (discussing the *Everson* decision); supra Part II.B (discussing the incorporation of the Establishment Clause).

\(^{515}\) See *Everson*, 330 U.S. at 15; see also McClellan, supra note 69, at 44 (stating that through a “radical innovation the Court overturned more than one hundred and fifty years of constitutional law” without any support); Meese & Eastman, supra note 71 (noting that the Supreme Court in *Everson* applied the Establishment Clause against the states without any constitutional analysis); supra notes 183–91 and accompanying text (discussing the *Everson* decision); supra Part II.B (discussing the incorporation of the Establishment Clause).

\(^{516}\) See LINDA HOLDEMAN EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS AND ORGANIZATION 62 (2d ed. 1999).

\(^{517}\) See McClellan, supra note 69, at 44; see also Jeffries & Ryan, supra note 106, at 294–99 (noting that the Court first incorporated the Establishment Clause against the states in *Everson*, with “little research and zero interest in conflicting evidence”); Meese & Eastman, supra note 71 (stating that the Supreme Court incorporated the Establishment Clause without any constitutional analysis in *Everson*); supra notes 183–91 and accompanying text (discussing the *Everson* decision); supra Part II.B (discussing the incorporation of the Establishment Clause). But see Levy, supra note 34, at 226 (stating that it is completely “unrealistic” to expect the Supreme Court to reverse years of precedent to reconsider the incorporation doctrine).
The question remains, however, whether the Court will accept Justice Thomas's invitation to revitalize federalism. 519

518. See McClellan, supra note 69, at 44–45; see also Meese & Eastman, supra note 71 (stating that Justice Thomas correctly questioned the Court's wholesale incorporation of the Establishment Clause against the states due to the original wording and purpose of the Clause and the Court's lack of constitutional analysis in Everson); supra notes 183–91 and accompanying text (discussing the Everson decision); supra Part II.B (discussing the incorporation of the Establishment Clause); cf. Jeffries & Ryan, supra note 106, at 294–99 (noting that the purpose of the Establishment Clause and the Court's lack of constitutional analysis in Everson all suggest that the Supreme Court did not incorporate the Establishment Clause against the states based on the Framers' intent, but incorporated the Clause due to the prevalent political views at the time of Everson). But see LEVY, supra note 34, at 226 (stating that it is completely "unrealistic" to expect the Supreme Court to reverse years of precedent to reconsider the incorporation doctrine); Gressman, supra note 507, at 1336 (contending that the Civil Rights Amendments inherently changed the relationship between the United States Government and state governments). Scholars Edward S. Corwin and Robert G. McClosky also provide support for Justice Thomas's contention that the Fourteenth Amendment should not incorporate the Establishment Clause against the states. LEVY, supra note 34, at 228 (discussing Corwin and McClosky's views). These scholars argue that the Establishment Clause is fundamentally different from the other provisions of the Bill of Rights and should not apply against the states because the Establishment Clause does not protect any individual freedom or provide individuals with the right to take some action. Id. Indeed, the Establishment Clause restricts the government's actions. See U.S. CONST. amend. 1 ("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 peaceably to assemble, and to petition the Government for a redress of grievances."). Corwin and McClosky, hence, contend that because the Establishment Clause does not act as a special guarantor of a particular personal liberty, there is no true need to incorporate the clause against the states. LEVY, supra note 34, at 228 (discussing Corwin and McClosky's views).

519. See Meese & Eastman, supra note 71. Many scholars, including Edwin Meese, James McClellan, Robert Cord, Charles Rice, and Daniel Dreisbach, contend that the incorporation of the Establishment Clause rests on precarious grounds. LEVY, supra note 34, at 226 (discussing those who question the propriety of incorporating the Establishment Clause against the states). Yet, others, such as Leonard Levy, exclaim that "[t]o expect the Supreme Court to turn back the clock by scrapping the entire incorporation doctrine is so unrealistic as not to warrant consideration." Id. at 226. Levy explains that the First Amendment is, in fact, the least likely amendment constituting the Bill of Rights for the Court to remove from the liberty box of the Fourteenth Amendment because the Court has stated that "no freedoms are more precious or more basic than those protected by the First Amendment." Id. at 228 (quoting Palko v. Conn., 302 U.S. 319 (1937)). Also, Levy argues that the Court will not reconsider the incorporation of the Establishment Clause because both the liberal and conservative Justices of the Court are respectful of the doctrine of stare decisis. Id. at 232. Levy notes that the Court avoids "dramatic overruling of precedents" whenever possible and points to the Court's refusal to overturn Roe v. Wade, 410 U.S. 113 (1973), in Planned Parenthood v. Casey as an example of the Court's respect for precedent. LEVY, supra note 34, at 232 (citing Planned Parenthood v. Casey, 505 U.S. 833 (1992)). Therefore, Levy contends that the Court will not remove the Establishment Clause from the liberty box of the Fourteenth Amendment because the Court can promote the interests of religious institutions without overturning incorporation. Id. at 233.
V. IMPACT

The Supreme Court's ruling in Zelman v. Simmons-Harris is a victory for both religious groups and underprivileged urban children. With the fear of litigation gone, voucher programs are likely to grow and emerge elsewhere. Only the anti-religion clauses found within many state constitutions still present legal hurdles. Voucher programs now have the constitutional authority to do the previously unimaginable: to improve the educational setting for urban children in the short run and to improve the entire education system in the long run. Yet, the Court left one important question unanswered: What regulatory strings may states attach to religious schools participating in voucher programs without violating the Constitution?

A. The Likely Expansion of Voucher Programs

With the threat of litigation reduced, voucher programs like Cleveland's will emerge across the United States. As of November 2002, voucher systems were in place in only Wisconsin, Ohio, and Florida. However, after Zelman, voucher programs no longer have an uncertain constitutional status. Thus, with the legal impediment of the Establishment Clause eliminated, other states are sure to follow Ohio's example. Moreover, because the administration of President

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520. A Chance for Choice, 14 NAT'L REV., July 29, 2002 (stating that Zelman was a victory for urban children and for the proponents of publicly funded religious organizations within the administration of President George W. Bush, which argued for the constitutionality of voucher programs), available at 2002 WL 11777512 [hereinafter Chance]; see also Meese & Eastman, supra note 71 (arguing that the Zelman decision will affect thousands of students).

521. See Meese & Eastman, supra note 71 (arguing that the Zelman decision will affect thousands of students).

522. See infra Part V.A (discussing the likely expansion of voucher programs).

523. See infra Part V.B (discussing the limitation that Blaine Amendments place on the impact of Zelman).

524. See infra Part V.C (discussing the impact of voucher programs on the education of American children).

525. See infra Part V.D (discussing the uncertainties and fear that result from voucher regulatory strings).


527. Id.; cf. Heytens, supra note 110, at 119 (noting that Florida enacted the first statewide voucher program in June of 1999).


529. See Stohr, supra note 526. But cf. Peyser, supra note 99, at 631 (noting that California's voucher referendum, Proposition 174, lost by a margin of more than two-to-one and that not one significant constituency embraced the voucher system); Linda Greenhouse, The Supreme Court:
George W. Bush argued for the constitutionality of Cleveland's voucher program and President Bush publicly supported the Court's decision in Zelman, there is a possibility that a federal voucher program could emerge.530

B. The Limitation that the Blaine Amendments Place on Voucher Expansion

Although the Zelman Court gave its stamp of approval to voucher programs, Zelman's stamp covered only one legal challenge: the Establishment Clause of the United States Constitution.531 For voucher programs to thrive across the nation, they must also withstand state constitutional challenges.532 As noted previously, more than half of the

530. See Chance, supra note 520 (noting that the Bush administration had argued for the constitutionality of voucher programs); John J. Miller, School Choice, Not An Echo, 14 NAT’L REV., July 29, 2002 (noting President Bush’s support of the Court’s decision in Zelman), available at 2002 WL 11777515; see also Erwin Chemerinsky, Why the Rehnquist Court is Wrong About the Establishment Clause, 33 LOY. U. CHI. L.J. 221, 221 (2001) (noting that soon after taking office, President George W. Bush created the office of faith-based programs to direct public funds to religious institutions). Legislation creating a voucher program for the District of Columbia reached President William J. Clinton’s desk in 1998, but Clinton vetoed the bill “quietly and out of sight because he didn’t want to broadcast his opposition.” Miller, supra. In 2001, President George W. Bush proposed a federal voucher program; this proposal received criticism from both Republicans and Democrats and did not receive the necessary votes. Neal, supra note 5, at 357. In fact, President Bush conceded defeat on his voucher proposal before Congress voted on it. Id. at 357 n.100. He explained: “There are people that are afraid of choice. They really are. And, I’m a realist. I understand that. It doesn’t change my opinion [regarding vouchers], but it’s not going to change the votes, either.” Id. The Senate also rejected President Bush’s voucher proposal. Garnett, supra note 252, at 1284 n.15. Senator Hillary Clinton of New York explained that although choice “sounds so good . . . we know that vouchers do not help the students who need the help most. They do nothing to help improve public schools. Vouchers only further segregate and stratify our public schools.” Id. Nevertheless, Bush’s 2003 budget proposed money for school choice. Miller, supra.

531. See Zelman, 122 S. Ct. at 2465. The Ohio Supreme Court, in 1999, found that the voucher program did not violate its state constitution in any respect, except for the procedural one-subject rule. Simmons-Harris v. Goff, 711 N.E.2d 203, 211–16 (Ohio 1999), rev’d 1997 WL 217583 (Ohio Ct. App. 1997). The legislature then cleared the procedural defect. Zelman, 122 S. Ct. at 2465. Thus, when the taxpayers brought suit in federal court, they contended that the voucher program violated the Establishment Clause only. Id.

532. See Frank R. Kemerer, State Constitutions and School Vouchers, 120 EDUC. L. REP. 1, 2 (1997) [hereinafter Kemerer, State Constitutions]; Heytens, supra note 110, at 123; Treene, supra note 118, at 2; see also infra notes 115–22 and accompanying text (discussing the Blaine Amendments).
states enacted Blaine Amendments in an attempt to curtail Catholic political gains.\textsuperscript{533} If state courts interpret these Blaine Amendments more strictly than the Supreme Court has interpreted the Establishment Clause, then the possibility of expanding voucher programs across the nation is greatly reduced.\textsuperscript{534}

Therefore, the essential question is whether state courts are likely to interpret their Blaine Amendments more strictly than the Supreme Court interpreted the Establishment Clause.\textsuperscript{535} Unfortunately, research indicates that many of the Blaine Amendments will be interpreted more strictly, thus precluding the expansion of voucher programs.\textsuperscript{536} For instance, the State of Washington has already interpreted its anti-religion clause more strictly than the Supreme Court's interpretation of the Establishment Clause in \textit{Witters v. Washington Department of Services for the Blind}.\textsuperscript{537} In \textit{Witters}, the United States Supreme Court held that, without violating the Establishment Clause, a state vocational rehabilitation services program could financially assist a blind student as he studied to become a minister.\textsuperscript{538} The Washington State Supreme Court, however, invalidated the tuition grant based on its Blaine Amendment.\textsuperscript{539} Moreover, almost twenty state courts have expressly stated that they will not be bound by the United States Supreme Court's interpretation of the Establishment Clause when examining their state

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  \item 533. Jeffries & Ryan, \textit{supra} note 106, at 305 (stating that twenty-nine states adopted establishment clauses); Margaret Graham Tebo, \textit{Seeking the Right Equation: Educators and Parents Seek Legal Answers on How to Balance Students' Special Needs with Broader School Goals}, 2002 A.B.A. J. 48, 54 (stating that thirty-eight state constitutions have establishment clauses); Heytens, \textit{supra} note 110, at 123 (stating that thirty state constitutions have Blaine-like amendments); Treene, \textit{supra} note 118, at 3 (stating that thirty-seven state constitutions have establishment clauses); see also \textit{supra} Part II.C (discussing the origin of the Blaine Amendments).
  \item 534. Kemerer, \textit{State Constitutions}, \textit{supra} note 532, at 2; Treene, \textit{supra} note 118, at 4; see also \textit{supra} Part II.D (discussing the origin of the Blaine Amendments).
  \item 535. See Kemerer, \textit{State Constitutions}, \textit{supra} note 532, at 2; Heytens, \textit{supra} note 110, at 123; Treene, \textit{supra} note 118, at 2; see also \textit{supra} Part II.D (discussing the origin of the Blaine Amendments).
  \item 536. Kemerer, \textit{State Constitutions}, \textit{supra} note 532, at 20 (concluding, after examining the language of each state's clause, case law, and attorney general's opinion, that seventeen states will interpret their establishment clauses more strictly than the Supreme Court's interpretation of the Establishment Clause); Tony Mauro, \textit{Next School Voucher Case to Contest Ancient Ban Born of Anti-Catholic Bias}, 169 N.J. L.J. 486 (Aug. 5, 2002) (stating that seventeen states will interpret their Blaine Amendments more strictly); Heytens, \textit{supra} note 110, at 126–31 (discussing the results of Kemerer's extensive study); see also \textit{supra} Part II.D (discussing the origin of the Blaine Amendments).
\end{itemize}
establishment clauses. Consequently, the Blaine Amendments are a formidable obstacle for voucher programs.

Yet, the Blaine Amendments may be susceptible to challenge under either the Equal Protection Clause or the Free Exercise Clause because of their historical context and blatant discrimination against religious institutions. Accordingly, if the Supreme Court were to hold the Blaine Amendments to be unconstitutional, voucher programs could still prevail in states with restrictive Blaine Amendments.

540. Heytens, supra note 110, at 127. Heytens observed that scholars Frank Kemerer and Joseph Viteritti both conclude that almost twenty state courts will interpret their establishment clauses more strictly than the Supreme Court’s interpretation of the Establishment Clause. Id. In an extensive study, Frank Kemerer states that Michigan’s state constitution actually prohibits the use of vouchers and tax benefits by those attending religious private schools and notes Michigan’s restrictive interpretation of its establishment clause. Kemerer, State Constitutions, supra note 532, at 4–5. Kemerer also notes that the state constitutions of Florida, Georgia, Montana, New York, and Oklahoma specifically prohibit direct and indirect aid to religious schools. Id. at 5. Moreover, Kemerer states that twelve state constitutions impose more general restrictions on aid to religious schools: California, Colorado, Delaware, Hawai’i, Idaho, Illinois, Kansas, Minnesota, Missouri, North Dakota, South Dakota, and Wyoming. Id. at 7. Finally, Kemerer observes that some state supreme courts, such as those in Idaho, South Dakota, and California, have already indicated that federal Establishment Clause case law is not applicable when examining their state establishment clauses. Id. at 7–8.

541. See Kemerer, State Constitutions, supra note 532, at 2; Heytens, supra note 110, at 123; Treene, supra note 118, at 2; see also supra Part II.D (discussing the origin of the Blaine Amendments).

542. U.S. Const. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

543. U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” (emphasis added)).

544. Treene, supra note 118, at 12–13; see Heytens, supra note 110, at 118 (arguing that the Blaine Amendments violate the Equal Protection Clause); see also supra Part II.D (discussing the origin of the Blaine Amendments). Treene suggests that because the Supreme Court often looks at the motivation for legislation when determining its constitutionality, the Court is likely to find the Blaine Amendments in violation of the Equal Protection Clause due to their nefarious origin. Treene, supra note 118, at 12–13. Also, the Supreme Court has noted in dicta that religion is a suspect classification subject to strict scrutiny. Id. In fact, several Supreme Court opinions have already disapproved of government actions that single out and hinder religious institutions. See Heytens, supra note 110, at 118 (arguing that the Blaine Amendments violate the Equal Protection Clause); Treene, supra note 118, at 12–13 (suggesting that the Blaine Amendments may violate the Equal Protection Clause or the Free Exercise Clause). Moreover, in Mitchell v. Helms, the Court mentioned its disgust of the “shameful” historical context of the Blaine Amendments. Mitchell v. Helms, 530 U.S. 793, 828 (2000) (“[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.”). However, unless the Supreme Court holds the Blaine Amendments to be unconstitutional, they could significantly limit the impact of Zelman v. Simmons-Harris. See Heytens, supra note 110, at 123; Treene, supra note 118, at 2. A thorough discussion of the constitutionality of the Blaine Amendments is beyond the scope of this Note.

545. See Heytens, supra note 110, at 118 (arguing that the Blaine Amendments violate the Equal Protection Clause); Treene, supra note 118, at 12–13 (suggesting that the Blaine
C. Improved Education System

With the Establishment Clause no longer an impediment, voucher programs now have the full opportunity to impact the education of children across the nation. In the short run, children in failing school districts in jurisdictions that adopt voucher programs will have the option of attending better performing schools. Research indicates that children who have already exercised the option of attending a private school have improved their test scores immensely. Moreover, in the long run children will perform better in school because voucher programs require parents to take an active role in their children's

Amendments may violate the Equal Protection Clause or the Free Exercise Clause); supra Part II.D (discussing the origin of the Blaine Amendments).

546. See infra Part V.C.1 (discussing the effect of parental empowerment); infra Part V.C.2 (discussing how voucher programs decrease segregation); infra Part V.C.3 (discussing the effect of market competition on the public school system). The impact of Zelman is not limited to education, for the Court gave its constitutional blessing to all neutral government programs that direct funds to religious institutions through private, independent choice. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2472–73 (2002). With this blessing, religious special interest groups are sure to increase in number. Frank, supra note 138, at 1059. In fact, the Court has repeatedly noted that government programs tend to increase in cost and produce aggressive constituencies. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 797 (1973) ("[A]id programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies."). Thus, religious groups might become some of the most proactive and powerful special interest groups on Capitol Hill. Frank, supra note 138, at 1059. Moreover, religious institutions are likely to become more dependent on the government as the amount of money directed toward them increases. Zelman, 122 S. Ct. at 2501 (Souter, J., dissenting); Frank, supra note 138, at 1059; The Voucher Ruling: The Supreme Court Approves The Cleveland Program. That Doesn't Mean That Public Dollars Are Well-Spent, AKRON BEACON J., June 28, 2002, at A10. Therefore, Zelman is likely to increase both the number of religious special interests groups and their dependence on the government. See Frank, supra note 138, at 1059 (noting, prior to the Zelman decision, that if the Supreme Court upholds Cleveland's voucher program, then religious special interest groups will increase along with their dependence on the government). The effect of this proliferation of religious special interest groups is beyond the scope of this Note.

547. See Zelman, 122 S. Ct. at 2463 (stating that the voucher program enabled Cleveland students to attend any participating public or private school).

548. Ellig & Kelly, supra note 145, at 373–95; see also Ted Cruz, A Critical Day, NAT'L REV., Feb. 20, 2002 (discussing Ellig and Kelly's study), available at http://www.nationalreview.com/comment/comment-cruzprint022002.html (last visited Feb. 14, 2003). Ellig and Kelly's study examined all of the research compiled on the school choice programs in Milwaukee, Cleveland, and Florida. Ellig & Kelly, supra note 145, at 376–85. Most of the research demonstrated that students who received vouchers subsequently improved their academic performance. Id. For instance, research indicated that the Milwaukee students with vouchers improved their language and math skills. Id. at 379–80. Also, research regarding the Cleveland program showed an increase of seven percentile points in reading and an increase of fifteen percentile points in math. Id. at 383. Furthermore, not one study demonstrated that children left in the public schools performed worse due to the voucher program. Id. at 376–85.
education.\textsuperscript{549} Also, voucher programs enable children to learn in more racially integrated school settings.\textsuperscript{550} Finally, because voucher programs force public schools to compete with private schools, the condition of the public school system will improve in the long run.\textsuperscript{551}

1. Parental Empowerment

Voucher programs empower parents, which in turn improves their children's scholastic achievement.\textsuperscript{552} Parents want to take responsibility for the education of their children.\textsuperscript{553} Voucher programs provide parents with this much-desired responsibility by enabling them to choose where their children will attend school.\textsuperscript{554} This parental empowerment encourages parents to take a more active role in other aspects of their children's education.\textsuperscript{555} For example, vouchers motivate parents to improve their family practices regarding homework and studying.\textsuperscript{556} Such parental involvement is sure to improve children's success in school.\textsuperscript{557}

\textsuperscript{549}. Harry Brighouse, \textit{School Choice and Social Justice} 29 (2000); see Garnett & Garnett, \textit{supra} note 4, at 355–56 (stating that parental empowerment will equalize educational opportunities); infra Part V.C.1 (discussing the effect of parental empowerment); cf. Gilles, \textit{supra} note 133, at 953 (arguing that students will perform better in school if parents are empowered because parents have the inherent incentive to act in their children's best interests).

\textsuperscript{550}. See Garnett & Garnett, \textit{supra} note 4, at 353; see infra Part V.C.2 (discussing how voucher programs decrease segregation).

\textsuperscript{551}. See Jonathon Rauch, \textit{Reversing White Flight: Even if Vouchers Don't Improve Schools, They Will Almost Certainly Improve Neighborhoods}, \textit{Atlantic Monthly}, Oct. 2002, at 32 (noting that the strongest argument for vouchers is that they will improve public schools through competition); Bodenner, \textit{supra} note 2, at 303; see infra Part V.C.3 (discussing the effect of market competition on the public school system).

\textsuperscript{552}. Brighouse, \textit{supra} note 549, at 29; see also Garnett & Garnett, \textit{supra} note 4, at 355–56 (stating that parental empowerment will equalize educational opportunities); cf. Gilles, \textit{supra} note 133, at 953 (arguing that students will perform better in school if parents are empowered because parents have the inherent incentive to act in their children's best interests).

\textsuperscript{553}. See Garnett & Garnett, \textit{supra} note 4, at 358 ("Parents welcome responsibility; they are tired of being subjects.").

\textsuperscript{554}. See Garnett & Garnett, \textit{supra} note 4, at 359 (explaining that school choice provides parents with "the ability to control their children's destiny [sic]"); Bodenner, \textit{supra} note 2, at 280.

\textsuperscript{555}. See H.M. Levin & C.R. Belfield, \textit{Families as Contractual Partners in Education}, 49 \textit{UCLA L. Rev.} 1799, 1804–05 (2002) (suggesting that school choice will invigorate parents not only to choose their children's schools, but also to improve other aspects of their children's educations); see also Garnett & Garnett, \textit{supra} note 4, at 358–59 (noting that school choice created "enormous enthusiasm" among parents participating in Milwaukee's voucher program). Research from Cleveland does indicate that families that participated in Cleveland's voucher program took a more active role in their children's educations thereafter. Brighouse, \textit{supra} note 549, at 29.

\textsuperscript{556}. Levin & Belfield, \textit{supra} note 555, at 1804.

\textsuperscript{557}. Brighouse, \textit{supra} note 549, at 29; see Garnett & Garnett, \textit{supra} note 4, at 355–56 (stating that parental empowerment will equalize educational opportunities); cf. Gilles, \textit{supra} note
2. Integration

Voucher programs also decrease segregation.\textsuperscript{558} Currently, the majority of public schools are segregated.\textsuperscript{559} In areas with low minority populations, white children attend public schools; however, in areas with high minority populations, white children often abandon the public schools and attend private schools.\textsuperscript{560} In fact, white families often do not live in areas with large minority populations, obstructing white children from attending the same schools as minority children.\textsuperscript{561}

Private schools, on the other hand, are consistently more racially and socio-economically integrated.\textsuperscript{562} Although the total number of minorities admitted to private schools is less than the total number of minorities attending public schools, integration is much more prevalent within each private school.\textsuperscript{563} Moreover, research indicates that students of different racial groups socially interact more often in private schools than in public schools.\textsuperscript{564} Therefore, with vouchers, children

\textsuperscript{133} at 953 (arguing that students will perform better in school if parents are empowered because parents have the inherent incentive to act in their children’s best interests).

\textsuperscript{558} Garnett & Garnett, supra note 4, at 353; cf. Rauch, supra note 551, at 32. A study by Thomas Nechyba suggests that vouchers will decrease the segregation within communities by permitting families to move to areas with undesirable public school districts and yet still provide their children with good educations. Id. Nechyba explains that many white families stretch their budgets simply to live in good school districts; thus, through the voucher system, these parents can live in larger, more affordable homes by moving to undesirable school districts, with larger minority populations, and by using vouchers to send their children to private schools. Id. \textit{But see} Rebecca E. Lawrence, \textit{The Future of School Vouchers in Light of the Past Chaos of the Establishment Clause Jurisprudence}, 55 U. MIAMI L. REV. 419, 423 (2001) (noting that voucher opponents contend that vouchers will increase social divisions); cf. Gary W. Ritter et al., \textit{How Might School Choice Affect Racial Integration in Schools? New Evidence from the ECLS-K}, 7 GEO. PUB. POL’Y. REV. 125, 130 (2002) (arguing that private schools are more segregated than public schools).

\textsuperscript{559} Garnett & Garnett, supra note 4, at 353.

\textsuperscript{560} \textit{Id.} at 352.

\textsuperscript{561} Rauch, supra note 551, at 32.

\textsuperscript{562} \textit{See} Garnett & Garnett, supra note 4, at 351 (observing that private schools “have consistently succeeded in breaking down the economic and racial barriers that still divide students in our public schools”); \textit{see also} Ryan & Heise, supra note 148, at 2097 (noting that private schools are more racially and socioeconomically integrated than public schools). \textit{But see} Ritter, supra note 558, at 130 (arguing that private schools are more segregated than public schools). In fact, using data that the Department of Education had collected from 60,000 students, one study determined that, “even after controlling for students’ family background, private schools produced better cognitive outcomes, [and] provided safer, more disciplined and more racially integrated learning environments.” Garnett & Garnett, supra note 4, at 344–45.

\textsuperscript{563} Garnett & Garnett, supra note 4, at 351; Ryan & Heise, supra note 148, at 2097.

\textsuperscript{564} Garnett & Garnett, supra note 4, at 354; Holland & Soifer, supra note 1, at 364 (“Observations of public and private school lunchrooms also revealed that private-school students mingle interracially more freely than do public-school students. By one measure there was by almost a 2-to-1 margin more voluntary socializing among the races in private lunchrooms than public ones.”).
have the opportunity to leave their segregated public schools and attend the more integrated private schools.\textsuperscript{565} Furthermore, this integration can only increase as more minority children use vouchers to attend private schools.\textsuperscript{566}

3. Competition

Moreover, voucher programs create competition for the public school system, which forces the public school system to improve its performance.\textsuperscript{567} Competition is "the effort or action of two or more commercial interests to obtain the same business from third parties."\textsuperscript{568} Because of competition, America's economy has flourished.\textsuperscript{569} Competition creates better-made products, lower prices, and a wider range of services and products.\textsuperscript{570} Moreover, competition has created what many regard to be the best public universities in the world.\textsuperscript{571} Yet, the benefits of competition do not extend to primary school education because the public school system holds a monopoly on free

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{565} Garnett & Garnett, \textit{supra} note 4, at 353; \textit{see} Holland & Soifer, \textit{supra} note 1, at 363–64 (noting that research regarding the voucher programs of Cleveland and Milwaukee already indicate that the voucher students are learning in more integrated school settings); Ryan & Heise, \textit{supra} note 148, at 2097 (noting that research regarding the voucher programs of Cleveland and Milwaukee already demonstrate that voucher students are learning in schools with increased racial integration). \textit{But see} Lawrence, \textit{supra} note 558, at 423 (noting that voucher opponents contend that vouchers will increase social divisions); Robert K. Vischer, \textit{Racial Segregation in American Churches and Its Implications for School Vouchers}, 53 \textit{FLA. L. REV.} 193 (2001) (contending that school voucher programs will increase segregation due to segregation within churches).

\item\textsuperscript{566} \textit{See} Garnett & Garnett, \textit{supra} note 4, at 353.

\item\textsuperscript{567} Rauch, \textit{supra} note 551 (noting that the strongest argument for vouchers is that they will improve public schools through competition); Bodemner, \textit{supra} note 2, at 303 (arguing that competition within a public school system creates more efficient schools that provide a better product through improve services). \textit{But see} Eric Bredo, \textit{Choice, Constraint, and Community, in The Politics of Excellence and Choice in Education} 67, 69 (William Lowe Boyd & Charles Taylor Kerchner eds., 1988) (contending that competition will not improve public schools because parents will not make logical patterned decisions that schools can learn from and respond to, given the nature of education's short-run and long-run benefits); Lawrence, \textit{supra} note 558, at 423 ("By introducing competition into education, some schools will attract the best students, parents, and teachers. The resources provided by certain parents and students, which now are dispersed, will become concentrated into particular schools . . . [and s]tudents in poorer schools will have even fewer resources than before."); \textit{cf.} Robert Boston, \textit{Why the Religious Right is Wrong About Separation of Church & State} 132 (1993) (arguing that real competition will not exist between public and private schools because private schools have the right to expel students at anytime and have selective admissions policies).

\item\textsuperscript{568} \textit{BLACK'S LAW DICTIONARY}, \textit{supra} note 5, at 228.

\item\textsuperscript{569} Bodemner, \textit{supra} note 2, at 288.

\item\textsuperscript{570} \textit{Id.}

\item\textsuperscript{571} Rauch, \textit{supra} note 551, at 32 ("American higher education has long been effectively voucherized, because students can take their government loans and grants to private colleges. Not coincidentally, America's public universities are the best in the world.").
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education.\textsuperscript{572} Vouchers, however, bring competition and its benefits into the grade schools and high schools of America.\textsuperscript{573} With a voucher system in place, the public schools must fight to maintain and attract clientele.\textsuperscript{574} Therefore, just as competition has improved the performance of America’s businesses and public universities, it will also improve the performance of America’s public schools.\textsuperscript{575} In fact, research already indicates that the quality of public schools has improved in areas where voucher programs were enacted.\textsuperscript{576}

Accordingly, voucher programs are likely to improve the educational setting for urban children in the short run and improve the education system as a whole in the long run because \textit{Zelman} has removed the Establishment Clause as a legal impediment to enacting voucher programs.\textsuperscript{577}

\textbf{D. The Unanswered Question: Regulatory Strings}

The Court in \textit{Zelman} clearly held that religiously neutral voucher programs of true private choice are constitutional.\textsuperscript{578} The Court, however, left one important question unanswered: What regulatory strings may the government attach to religious schools participating in voucher programs without violating the Constitution?\textsuperscript{579}

\begin{itemize}
\item \textsuperscript{572} See Bodenmner, supra note 2, at 302.
\item \textsuperscript{573} \textit{Id.} at 287; Rauch, supra note 551, at 32 (noting that the strongest argument for vouchers is that vouchers will improve public schools through competition).
\item \textsuperscript{574} See Levin & Belfield, supra note 555, at 1804; Bodenmner, supra note 2, at 304.
\item \textsuperscript{575} See Rauch, supra note 551, at 32 (noting that the strongest argument for vouchers is that vouchers will improve public schools through competition); Bodenmner, supra note 2, at 304 (arguing that competition within a public school system creates more efficient schools that provide a better product through improve services). \textit{But see} Bredo, supra note 567, at 69 (contending that competition will not improve public schools because parents will not make logical patterned decisions that schools can learn from and respond to, given the nature of education’s short-run and long-run benefits); \textit{cf.} \textit{Boston}, supra note 567, at 132 (arguing that real competition will not exist between public and private schools because private schools have the right to expel students at anytime and have selective admissions policies).
\item \textsuperscript{576} See Ellig & Kelly, supra note 145, at 373–95; \textit{see also} Cruz, supra note 548.
\item \textsuperscript{577} See supra Part V.C (discussing the impact of voucher programs on the education of American children).
\item \textsuperscript{578} Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2473 (2002).
Regulatory strings are requirements that the government places on institutions that receive public funding; often these strings are quite restrictive. Thus, many advocates of religious freedom oppose vouchers because they fear that the government will require religious schools to "water down" their religious character in order to receive public funding. To demonstrate the effect of regulatory strings, these religious-freedom advocates point to religious universities and colleges, which abandoned much of their religious character in order to retain discriminatory denial of aid to individuals or entities with religious affiliations, specifically Rosenberger v. University of Virginia and Peter v. Wedl, 155 F.3d 992 (8th Cir. 1998)); see also Treene, supra note 118, at 12–13 (citing Peter v. Wedl as an example in which the Free Exercise Clause barred state action, but noting that the Ninth Circuit found that the Free Exercise Clause was irrelevant in a case with similar facts to those of Peter v. Wedl). On the other hand, Toby Heytens argues that excluding religious schools from voucher programs would violate the Equal Protection Clause. Heytens, supra note 110, at 153–55. Nevertheless, because the emphasis of this Note is on the Establishment Clause's effect on voucher programs, the question of whether it would be unconstitutional to exclude religious schools from voucher programs will remain unanswered. See supra Part II.A (discussing the origin of the Establishment Clause); Part II.G (discussing modern Establishment Clause jurisprudence).

See Garnett & Garnett, supra note 4, at 339 (discussing regulatory strings generally); Johnson, supra note 179, at 41–43 (same). For instance, to receive federal education grants, state universities must agree to enroll students based on affirmative action. See Lynn A. Baker, The Spending Power and the Federalist Revival, 4 Chap. L. Rev. 195, 214–15 (2001) (noting that when a state chooses to prohibit affirmative action, the choice "can be understood as a state's determination that, for it, the benefits of a particular provision of state statutory or constitutional law exceeds the costs" of foregoing federal funding). Similarly, to receive federal money to repair interstate highways, states have to agree to prohibit persons under twenty-one years of age from purchasing or possessing in public any alcoholic beverage. Lynn A. Baker, Conditional Federal Spending After Lopez, 95 Colum. L. Rev. 1911, 1978 (1995). Thus, Susan Rose-Ackerman notes that the "federal programs that have caused the most controversy and opposition at the state level are those with small appropriations tied to large regulatory strings," pointing to the Education for All Handicapped Children Act of 1975 and the 1978 amendments to the Developmental Disabilities Act, as examples. Susan Rose-Ackerman, Cooperative Federalism and Co-optation, 92 Yale L.J. 1344, 1346 (1983). For more information on Congress's spending power and its threat to federalism, see generally Baker, supra, at 195. State legislatures have already attached some regulatory strings to voucher programs; for instance, schools participating in Cleveland's voucher program could not discriminate on the basis of religion. Zelman, 122 S. Ct. at 2463. In Milwaukee, schools participating in the voucher program could not discriminate on the basis of religion and had to permit students to "opt out" of religious activities. Garnett & Garnett, supra note 4, at 339 n.200. On the other hand, some "schools are freed from complying with various regulations—relating to such issues as teacher hiring, curriculum, calendar, and length of school day—in exchange for accountability for performance." Ryan & Heise, supra note 148, at 2074.

See Garnett & Garnett, supra note 4, at 339; Chemerinsky, supra note 530, at 228 ("[W]hen the government gives money, it must make sure that the funds are used for their intended purpose. This necessarily involves the government placing conditions on the funds and monitoring how it is [sic] spent. Such government entanglement is a threat to religion."); see Paul J. Weber, Neutrality and First Amendment Interpretation, in EQUAL SEPARATION 11 (Paul J. Weber ed., 1990) (noting that if the Court uses neutrality as a factor in its constitutional analysis, many fear that religious institutions will be secularized).
federal funding.\textsuperscript{582} Similarly, religious-freedom advocates point to the government program upheld in \textit{Board of Education v. Allen}.\textsuperscript{583} In \textit{Allen}, the Supreme Court permitted the state to provide textbooks to religious schools; however, to receive the textbooks, parochial schools were forced to use the same secular textbooks that the public schools used.\textsuperscript{584} Scholar Michael McConnell remarks that this decision effectively forced religious schools to secularize their lesson plans in order to receive public aid.\textsuperscript{585} Moreover, advocates of religious freedom realize that voucher opponents will subject religious institutions that receive public funds to increased oversight.\textsuperscript{586}

If regulatory strings truly require religious institutions to compromise their religious character and mission, however, such secularizing regulation would likely violate the Free Exercise Clause.\textsuperscript{587} The government’s authority to regulate private religious schools does not increase simply because the religious school accepted public aid

\textsuperscript{582} BOSTON, supra note 567, at 136–37; Garnett & Garnett, supra note 4, at 339.

\textsuperscript{583} See McConnell, \textit{Defense of Educational Choice}, supra note 58, at 133 (noting that the government program in \textit{Allen} involved regulatory strings); see also supra note 191 (briefly discussing the Supreme Court’s decision in \textit{Allen}).

\textsuperscript{584} Bd. of Educ. v. Allen, 392 U.S. 236, 248 (1968); see also supra note 191 (discussing the Supreme Court’s decision in \textit{Allen}).

\textsuperscript{585} McConnell, \textit{Crossroads}, supra note 58, at 133; cf. Johnson, supra note 179, at 41 (noting that regulatory strings also required religious schools to water down their religious character in \textit{Lemon v. Kurtzman}).

\textsuperscript{586} Garnett & Garnett, supra note 4, at 339.

\textsuperscript{587} McConnell, \textit{Crossroads}, supra note 58, at 185–86. McConnell first notes that the Free Exercise Clause prohibits the government from discriminating against an institution solely because the institution is religious. \textit{Id.} at 185. He explains that it “follows that if religious organizations have a constitutional right to equal access to public programs, the government may not condition their access on rules which burden their practice of religion, unless the rules are closely related to the purposes of the program.” \textit{Id.} at 186. Therefore, he concludes that the government could not require Catholic schools participating in a voucher program to distribute birth control devices because such devices compromise the religious principles of Catholics, unless birth control distribution was necessary for education. \textit{Id.} Similarly, he states that the government could not provide funds to all entities that wish to create vocational training programs but require all recipients of the funds to remain open on Saturday, because the condition would effectively exclude Jewish organizations from participating in the program. \textit{Id.}; cf. Garnett & Garnett, supra note 4, at 340 (“Perhaps the better argument is that any secularizing strings would themselves be unconstitutional if they required religious schools to compromise their religious mission as a condition of participating in an otherwise neutral school-choice program—that is, as a condition of anti-religious discrimination.”); Gilles, \textit{supra} note 133, at 1008. Gilles explains that “government may not do indirectly what it is forbidden to do directly.” Gilles, \textit{supra} note 133, at 1008. He cites commentator Cass Sunstein and states that “when the government . . . attach[es] ‘strings’ to the exercise of constitutional rights, and although this may sometimes be permissible, ‘the pressure imposed by the strings . . . is constitutionally troublesome.’” \textit{Id.} (quoting Cass R. Sunstein, THE PARTIAL CONSTITUTION 303 (1993)).
through a voucher program.\textsuperscript{588} Thus, the government may continue to impose safety requirements and anti-discrimination laws on private schools, but the government may not suddenly expand its influence and impose all-encompassing curriculum requirements.\textsuperscript{589} Nevertheless, the fear of secularizing regulation is not unreasonable or unfounded, for if religious schools must dilute their religious character to receive public funds, then religious schools are not offering a clear alternative to the public school system.\textsuperscript{590}

Accordingly, although the Court, in \textit{Zelman}, did not address what type of regulatory strings are constitutionally permissible, regulation that effectively eliminates the non-secular character of religious schools is most likely unconstitutional,\textsuperscript{591} while basic safety measures are probably constitutional.\textsuperscript{592}


\textsuperscript{589} Johnson, \textit{supra} note 179, at 42–43 (noting that religious schools and public schools alike are already subject to a variety of state and federal regulations, even in the absence of financial aid to the religious schools); CLINT BOLICK & RICHARD D. KOMER, INST. FOR JUSTICE, \textit{SCHOOL CHOICE: ANSWERS TO THE MOST FREQUENTLY ASKED LEGAL QUESTIONS} (4th ed. 2003), at http://www.ij.org/cases/school/faq.shtml (last visited Mar. 4, 2003). Bolick and Komer note that most, if not all, states already require private schools to comply with safety and health requirements, as well as minimum days and hours and standard courses. \textit{Id}. Moreover, Bolick and Komer note that 42 U.S.C. § 1981, which the Supreme Court found applicable to private schools in \textit{Runyon v. McCrary}, 427 U.S. 160 (1976), already prohibits schools from discriminating on the basis of race. \textit{Id}. However, no federal statute prohibits gender discriminatory admissions processes because Title IX contains a religious exemption, permitting public aid to reach religious schools that engage in gender discrimination. \textit{See} 20 U.S.C. § 1681(a)(3) (2000 & West Supp. 2002). Also, no federal statute prohibits religious discriminatory admission processes. BOLICK & KOMER, \textit{supra}. Thus, unless state law or the voucher program itself prohibits such discrimination, religious schools will be free to use religious criteria when admitting students into their schools. \textit{Id}.

\textsuperscript{590} See Garnett & Garnett, \textit{supra} note 4, at 340. \textit{But see} Dwyer, \textit{supra} note 181, at 992 (stating that regulatory strings are necessary and beneficial to children to assure that the public “money is being used to provide secular education, rather than to support denial of a good secular education and perhaps even activities that affirmatively harm children—for example, explicit and aggressive sexist teaching”).

\textsuperscript{591} See McConnell, \textit{Crossroads}, \textit{supra} note 58, at 185–86 (arguing that if the government conditions receipt of funds by secularizing strings, the regulation probably violates the Free Exercise Clause); Garnett & Garnett, \textit{supra} note 4, at 340 (contending that regulatory strings are probably unconstitutional if they require religious schools to compromise their religious mission); Gilles, \textit{supra} note 133, at 1008 (noting that regulatory strings are constitutionally “troublesome”).

\textsuperscript{592} See Johnson, \textit{supra} note 179, at 42–43 (noting that religious schools and public schools alike are already subject to a variety of state and federal regulations, even in the absence of financial aid to religious schools).
VI. CONCLUSION

In Zelman v. Simmons-Harris, the Court correctly held that Cleveland’s school voucher program did not violate the Establishment Clause. Although the Establishment Clause prohibits government programs that overtly advance or inhibit religion, Cleveland’s voucher program did not offend the Establishment Clause because it was neutral with respect to religion and aid reached religious schools solely as a result of genuine and independent private choice. Both Establishment Clause precedent and the specific facts of the case support the Court’s decision. Consequently, voucher programs now have the constitutional authority both to improve the educational setting for urban children in the short run and to improve the entire education system in the long run. Nevertheless, voucher programs must withstand yet another legal challenge: the state establishment clauses. Therefore, although Zelman established that voucher programs do not violate the Establishment Clause, the ultimate legality of voucher programs remains precarious.