

Tulsa Law Review

Volume 38
Number 2 2001-2002 Supreme Court Review

Volume 38 | Number 2

Winter 2002

School Vouchers: The Educational Silver Bullet, or an Ideological Blank Round

Gary D. Allison

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Gary D. Allison, *School Vouchers: The Educational Silver Bullet, or an Ideological Blank Round*, 38 Tulsa L. Rev. 329 (2002).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol38/iss2/5>

This Supreme Court Review Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

SCHOOL VOUCHERS: THE EDUCATIONAL SILVER BULLET, OR AN IDEOLOGICAL BLANK ROUND?

Gary D. Allison*

*If the fact alone be determinative that religious schools are engaged in education, thus promoting the general and individual welfare, . . . then I can see no possible basis . . . for the state's refusal to make full appropriation for support of private, religious schools, just as is done for public instruction.*¹

I. INTRODUCTION

On the last day of its 2001 Term, the United States Supreme Court released one of its most anticipated decisions in the school voucher case of *Zelman v. Simmons-Harris*.² The Court's five conservatives joined in a majority opinion to hold that Ohio's Pilot Scholarship Program ("Voucher Program")³ does not offend the Establishment Clause.⁴ They reached this result by dramatically altering the scope of an Establishment Clause neutrality test conservative Justices have aggressively developed and expanded over the last twenty years.⁵

* Professor of Law, The University of Tulsa College of Law. LL.M., Columbia University School of Law (1976); J.D., University of Tulsa College of Law (1972); B.S., University of Tulsa (1968). The author wishes to thank Jake Woodard, his research assistant of last spring, who contributed greatly to the author's creation of background analyses of the United States Supreme Court's key church-state decisions.

1. Taken from Justice Rutledge's prescient dissent in *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 49-50 (1947), wherein he decried the Supreme Court's refusal to find that the Township of Ewing's practice of reimbursing parents for the cost of transporting their children to public or Catholic schools violated the Establishment Clause.

2. 122 S. Ct. 2460 (2002).

3. Ohio's current Pilot Scholarship Program is authorized by Ohio Rev. Code Ann. §§ 3313.974-3313.979 (West 2002).

4. *Zelman*, 122 S. Ct. at 2462-73 (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy & Thomas, JJ., majority opinion). The Establishment Clause states, "Congress shall make no law respecting an establishment of religion . . ." U.S. Const. amend. I.

5. The neutrality test altered by the *Zelman* majority is a religiously-neutral-beneficiary-selection-criteria/private-choice framework crafted by conservative Justices in three major cases involving government aid programs that helped individuals pursue education in private schools run by religious organizations. See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3-14 (1993) (Rehnquist, C.J., joined by White, Scalia, Kennedy & Thomas, JJ., majority opinion); *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 490-93 (1986) (White, J., concurring; Powell, J., joined by Burger, C.J., & Rehnquist, J., concurring; O'Connor, J., concurring in part and concurring in the judgment); *Mueller v. Allen*, 463 U.S. 388, 390-404 (1983) (Rehnquist, J., joined by Burger, C.J., White, Powell & O'Connor, JJ., majority opinion). *Zelman*, 122 S. Ct. at 2467-71 (majority's application of the neutrality test to Ohio's Voucher Program).

The conservative Justices were compelled to alter the scope of their neutrality test because, as will be documented in Part II of this article, Ohio's Voucher Program was designed so that it was inevitable that the vast majority of voucher recipients (all of whom live within the boundaries of the Cleveland School District, and most of whom are from low-income families) would use their vouchers to attend religious private schools.⁶ Obviously, then, the *Zelman* decision cannot be assessed adequately without a good understanding of the Ohio Voucher Program's design and the major factors that influenced it. Accordingly, Part II of this article also contains a detailed description of the Ohio Voucher Program and a brief discussion of the circumstances out of which it arose.

It is also impossible to assess *Zelman* without a good understanding of how the conservatives' neutrality test was created and applied prior to *Zelman*, and how the *Zelman* majority altered it. So, Part III of this article supplies an exposition of how the Court's conservatives developed their neutrality test. Using the pre-*Zelman* neutrality test as a template, Part IV documents how the *Zelman* majority altered it so that it not only envelops the unique facts of Ohio's Voucher Program, but also practically insures that every conceivable federal government voucher program, including those associated with faith-based initiatives, will be immune from Establishment Clause attack.

Given that the primary beneficiaries of Ohio's Voucher Program are minority students from low-income families who would otherwise attend Cleveland's allegedly poor performing public schools,⁷ it is not surprising that *Zelman* has been hailed by some as a great victory for securing equal educational opportunities for minority students on par with the great desegregation victory of *Brown v. Board of Education*.⁸ Equal educational opportunity is not the concern

6. As stated by the Court:

The program has been in operation within the Cleveland City School District since the 1996-1997 school year. In the 1999-2000 school year, 56 private schools participated in the program, 46 (or 82%) of which had a religious affiliation. . . . More than 3,700 students participated . . . , most of whom (96%) enrolled in religiously affiliated schools. Sixty percent of these students were from families at or below the poverty line.

Zelman, 122 S. Ct. at 2464.

7. *Id.*

8. 347 U.S. 483 (1954). In *Brown*, the United States Supreme Court unanimously held that the intentional segregation of public schools was unconstitutional through the following famous passage:

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Id. at 495. Proponents of school vouchers enthusiastically praised *Zelman* as a victory for educational equality on par with *Brown*. For example, on July 1, 2002, President Bush praised the *Zelman* decision in a speech delivered in Cleveland by stating that:

the Supreme Court in 1954 declared that our nation cannot have two education systems. And that was the right decision. Can't have two systems, one for African Americans and one for whites. Last week, what's notable and important is that the Court declared that our nation will not accept one education system for those who can afford to send their children to a school of their choice and for those who can't. [sic] And that's just as historic.

of the Establishment Clause, but, as demonstrated in Part V of this article, the hard lot of minority students in Cleveland supplied leverage and collateral justification for the majority's results-oriented alteration of the conservatives' Establishment Clause neutrality test. Hard facts often provide the impetus for changing the law, but bad law can also create hard facts. Part VI of this article presents an argument that conservative forces on courts and in legislatures produced the desperate academic conditions in urban schools that induced some minority community leaders to join with conservatives in demanding the creation of school voucher programs.

II. OHIO'S VOUCHER PROGRAM: ITS ORIGINS & DESIGN

On March 3, 1995, the federal district court handling a desegregation case against the Cleveland School District ordered the State of Ohio to assume operational control over the Cleveland Public Schools.⁹ The takeover was triggered because the Cleveland School District was in an extreme financial crisis that threatened its ability to finance its share of the costs of implementing an education reform program known as Vision 21.¹⁰ Two malign forces caused the financial crisis that triggered the takeover:

- (1) Ohio's system of funding public education, which underfunded education generally, and produced great disparities of education funding among school districts because of its heavy reliance on local property taxes;¹¹ and

President George W. Bush, Speech, *President Lauds Supreme Court School Choice Decision* (Cleveland, Ohio, July 1, 2002) (available at <<http://www.whitehouse.gov/news/releases/2002/07/20020701-7.html>>) (accessed July 20, 2002).

9. On March 3, 1995, the United States District Court for the Northern District of Ohio ordered the Ohio State Superintendent of Public Instruction to take over the operation of the Cleveland Public School District in order to prevent a fiscal crisis from interrupting the implementation of the Court's Desegregation Remedial Orders and accompanying consent decree of May 25, 1994. Or. *Sua Sponte* of J. Krupansky, in *Reed v. Rhodes*, 1995 U.S. Dist. LEXIS 3814 (N.D. Ohio Mar. 3, 1995). (Note, the LEXIS document falsely indicates that this order is published at 1 F. Supp. 2d 705, which is the cite of a 1998 decision that relieved the Cleveland School District from federal court desegregation orders) ("*Takeover Order*").

10. The immediate cause of the financial crisis was a projected budgetary shortfall of \$29.5 million for the fiscal year ending June 30, 1995, Finding No. 2, *id.* at **2-3, and the refusal of the State Superintendent of Public Instruction to support the Cleveland School District's attempts to secure a loan in that amount because the District's Board had failed to account for forty million dollars advanced to it by the state for 1994-95, failed to account for forty million in matching funds it was to provide in compliance with the Desegregation Compliance Plan and Consent Decree of May 25, 1994, and refused to approve an acceptable Compliance Management Plan. Finding No. 3, *id.* at *4. Moreover, the District had the highest debt-to-revenue ratio among comparable Ohio school districts, Finding No. 5, *id.*, and it projected an increasing indebtedness of \$147,478,000 by June 30, 1996. Finding No. 6, *id.*

11. On December 19, 1991, numerous plaintiffs filed suit against the State of Ohio, asserting that Ohio's methods of funding public education violated numerous provisions of Ohio's Constitution. *DeRolph v. St.*, 677 N.E.2d 733 (Ohio 1997) ("*DeRolph I*"). After a thirty day trial that commenced on October 25, 1993, the trial judge held that Ohio's public school financing scheme violated several Ohio constitutional provisions, including: requirements that Ohio provide "equal protection and benefit" to its citizens, Ohio Const. art. I, § 2, "encourage schools and the means of instruction," *id.* art. I, § 7, ensure that all general laws "have a uniform operation," *id.* art. II, § 26, "make such provision[. . . as . . . will secure a thorough and efficient system of common schools throughout the State," *id.* art. VI, § 2, "[p]rovi[de] . . . for the organization, administration and control of the public school system of the state supported by public funds," *id.* art. VI, § 3, and "provide for raising revenue . . . sufficient to

- (2) The unwillingness or inability of Cleveland taxpayers to impose a high enough levy on their taxable property in order to fund the Cleveland Public Schools properly.¹²

defray the expenses of the state . . . for each year.” *Id.* art. XII, § 4. *DeRolph v. St.*, 1995 Ohio App. LEXIS 3915 at *27 (Ohio App. 5th Dist. Aug. 30, 1995). To cure these violations, the trial judge entered an order that would have essentially required the state legislature to take steps to increase the state’s funding of education and to eliminate “wealth-based disparities [among school districts].” *Id.* at **20-22. On August 30, 1995, just two months after Ohio’s Voucher Program was signed into law, the trial court’s decision was overturned by the Ohio Appeals Court for the Fifth District mostly on grounds that the constitutionality of Ohio’s system of funding primary and secondary education had been settled in a prior case. *Id.* at **6-22.

The Ohio Supreme Court reversed the Court of Appeals, finding instead that Ohio’s system of financing public schools violated Ohio’s constitutional duty to provide a thorough and efficient system of common schools throughout the state. *DeRolph I*, 677 N.E.2d at 747. In 2000, the Ohio Supreme Court found the General Assembly’s response to *DeRolph I* to be deficient. *DeRolph v. St.*, 728 N.E.2d 993, 1020-22 (2000) (“*DeRolph II*”). About sixteen months later, the court generally praised the general assembly’s efforts to comply with *DeRolph II*, *DeRolph v. St.*, 754 N.E.2d 1184, 1199-1200 (2001) (“*DeRolph III*”), which included:

- A new base cost formula for calculating state aid based on the average costs per pupil of highly successful school districts that promised to generate more money for education, *DeRolph III*, 754 N.E.2d at 1191-92;
- Gap aid to provide more money to districts with tax bases inadequate to fund fully their local share of the base cost (\$.023 x property valuation), *id.* at 1192-93;
- Parity aid to provide districts ranked below the eightieth percentile in taxable property wealth with funding above its base cost share, with such aid to be calculated as the difference between what such districts can raise on 9.5 mills and what 9.5 mills will produce in the eightieth percentile district, *id.*; and
- New mechanisms for state financing of facilities construction, renovation, and maintenance that reflected a substantial increase in the state’s commitment to assuring that all educational facilities were safe and adequate, *id.* at 1193-96.

Nevertheless, the court still found several technical deficiencies in the state’s modified public school financing scheme that kept it from being fully constitutional. *Id.* at 1199-1201. Then, about two months later, in response to a motion to reconsider its order in *DeRolph III*, the court ordered all the parties into mediation before finally determining whether to overturn or modify its *DeRolph III* decision. *DeRolph v. St.*, 93 Ohio St. 3d 628, 629-31 (2001). As of August 6, 2002, Ohio’s Supreme Court had yet to rule finally on the motion to reconsider and Ohio’s General Assembly still had not come up with a fully constitutional system of financing Ohio’s public schools. See Staff Reports, *Justices in ‘State of Flux’ over School-Funding Fix*, The Columbus Dispatch 7B (Aug. 6, 2002) (available in LEXIS, News Library, COLDIS).

12. Ohio’s great reliance on property taxes to provide funding for public schools presented Cleveland with a large problem in convincing voters to approve the levies necessary to finance its Vision 21 matching funds. Cleveland’s low property values and its residents’ low average income meant that Cleveland had an inadequate capacity for raising property tax levies. Scott Stephens, *13.5 Mills Leaves Some Wary; What If Tax Hike Doesn’t Make Schools Better, Some in Cleveland Ask*, The Plain Dealer 1A (Nov. 3, 1996) (available in LEXIS, News Library, CLEVDP). This was because Cleveland’s low property values required the District to seek “higher tax millage to match revenue in other districts,” but its residents’ low average income limited their capacity and willingness to pay higher taxes. *Id.* This problem was further exacerbated by Cleveland’s falling school property taxes, which “dropped 7 percent in Cleveland” between 1990 and 1995, a time in which “school property taxes rose 34 percent statewide.” *Cleveland School District Discouraged*, The Plain Dealer 2B (Jan. 8, 1996) (available in LEXIS, News Library, CLEVDP). As a consequence, as of fall 1996, local property taxes supplied only 32.4% of the Cleveland Public Schools revenue, which was “well below the state average of 50.4% . . .” See Stephens, *supra*.

The Cleveland School District’s ability to raise property taxes was further hindered by demographics and racial divisions. “Only about 17% of Cleveland households ha[d] children . . . attend[ing] city schools.” See Patrice M. Jones & Evelyn Theiss, *Schools’ Next Battle Is at the Ballot Box*, The Plain Dealer 1A (Feb. 26, 1994) (available in LEXIS, News Library, CLEVDP). Not only do such “people feel they have done their share,” but they may also be “older voters on a fixed income . . . [for whom tax increases are] . . . a financial hardship.” Evelyn Theiss, *Levy Campaign Gets Failing Grades; Cleveland School Officials Ignored Some Political Truths, Observers Say*, The Plain Dealer 1B

It was important that Vision 21 be implemented successfully because it was designed to eliminate the educational vestiges of segregation within the Cleveland Public Schools so that a twenty-two year old desegregation controversy could come to an end.¹³ The key elements of Vision 21 included:

(May 8, 1994) (available in LEXIS, News Library, CLEVPD) (comments of James Kweder, Associate Professor of Political Science at Cleveland State University). Worse yet, there was a bitter racial divide in Cleveland's electorate that traditionally pitted white voters predominantly located on Cleveland's west side against African-American voters predominantly located on Cleveland's east side. *See id.* Cleveland's west side white voters traditionally rejected school levies overwhelmingly, and this tendency seemed to get worse as they began to send their children to parochial private schools at a time when the Cleveland School District student population was becoming seventy percent African-American. *Id.*

All these factors combined to help cause the defeat of two Cleveland School District levies designed to head off financial crisis and provide the funds necessary to meet the District's Vision 21 matching funds obligations. On May 3, 1994, Cleveland voters defeated a 12.9 mill levy. *Id.* Six months later, on November 8, 1994, Cleveland voters turned down a 9 mill levy. *See* Scott Stephens & Patrice M. Jones, *Board Ponders Defeat, Looks to Next Levy Try*, *The Plain Dealer* 1A (Nov. 10, 1994) (available in LEXIS, News Library, CLEVPD).

As a practical matter, Cleveland's low property tax revenues meant that funding for its public schools was limited to that provided by the state's foundation formula. This is because the state's foundation formula insured that each district would receive at minimum a foundation per pupil funding amount by providing state funds to any district for which the foundation amount exceeded what could be generated by levying twenty mills on local property subject to property taxes. *DeRolph v. St.*, 1995 Ohio App. LEXIS 3915 at **4-5, 11, 13 (Ohio App. 5th Dist. 1995). Cleveland's low property tax revenue meant it would receive only the foundation amount, a revenue stream consistently attacked by Ohio's State Board of Education as too little to finance an adequate education program. *Id.* at *5. Moreover, as an urban school district, Cleveland faced higher education costs than non-urban districts, because it had to educate a higher percent of low-income and special education students. Tim Doulin, *Urban Kids Have Greater Needs; It Costs More to Educate Them, Group Says*, *The Columbus Dispatch* 1B (June 21, 1996) (available in LEXIS, News Library, COLDIS). Although "[t]he state . . . g[ave] . . . extra . . . money . . . for special-ed and low-income kids, . . . it [wa]s all a straight formula. There [wa]s no analysis to consider, 'Is this enough?'" *Id.*

13. A federal lawsuit charging the Cleveland Public Schools with deliberately operating a segregated school system in violation of the Equal Protection Clause of the United States Constitution was filed on December 12, 1973. *See Reed v. Rhodes*, 1 F. Supp. 2d 705, 709 (N.D. Ohio 1998). On August 31, 1976, federal district Judge Battisti found that the Cleveland Public schools were highly segregated in that as of 1975 88.21 percent of all students attended schools that were essentially one-race schools and 91.75 percent of Cleveland's African-American students attended one-race schools. *Reed v. Rhodes*, 422 F. Supp. 708, 796 (N.D. Ohio 1976) ("*Reed I*"). Judge Battisti further found that this segregation had resulted from "the Cleveland Board of Education . . . violat[ing] the . . . [Equal Protection Clause] by intentionally creating and maintaining a segregated school system." *Reed v. Rhodes*, 422 F. Supp. 708, 796 (N.D. Ohio 1976), *remanded for reconsideration in light of Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977), 559 F.2d 1220 (6th Cir. 1977), *aff'd on remand*, 455 F. Supp. 546, 550 (N.D. Ohio 1978), *aff'd as to liability of Cleveland Bd. of Educ.*, 607 F.2d 714, 717, 722-37 (6th Cir. 1979), *cert. denied, sub nom. Cleveland Bd. of Educ. v. Reed*, 445 U.S. 935 (1980). Finally, Judge Battisti held that Ohio's State Board of Education had contributed to the fostering of the Cleveland Public Schools' unconstitutional segregation in part because it "chose not to actively pursue the goal of integration, but rather . . . s[at] back and let the problem come to them. . . ." *Reed v. Rhodes*, 422 F. Supp. 708, 796 (N.D. Ohio 1976), *remanded for reconsideration in light of Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977), 559 F.2d 1220 (6th Cir. 1977), *aff'd on remand*, 455 F. Supp. 546, 550 (N.D. Ohio 1978), *remanded for reconsideration in light of Penick v. Columbus Bd. of Educ.*, 583 F.2d 787 (6th Cir. 1978) *as to the liability of Ohio St. Bd. of Educ.*, 607 F.2d 714, 718 (6th Cir. 1979), *aff'd on remand*, 500 F. Supp. 404, 424-26 (N.D. Ohio 1980), *aff'd*, 662 F.2d 1219, 1227-28 (6th Cir. 1981), *cert. denied, sub nom. Ohio St. Bd. of Educ. v. Reed*, 455 U.S. 1018 (1982). The defendants' recalcitrance caused great delay in the implementation of the district court's remedial orders so that it was not until 1994 that any great progress was made to implement programs intended to remove the educational vestiges of past discrimination. *Reed v. Rhodes*, 869 F. Supp. 1274, 1276-78, 1283-84 (N.D. Ohio 1994). In 1994, the federal district court relaxed somewhat its racial balancing orders so that an education reform program known as Vision 21 could be implemented as the means of eliminating the education vestiges of segregation within the Cleveland School District. *Id.* at 1277, 1283-84; *Reed v. Rhodes*

- (1) *Establishing Middle Schools* by altering the intermediate school structure from grades seven and eight to the middle school structure of grades six through eight and financing 175 new teachers in order to reduce the middle school staffing ratio to 19:1;¹⁴
- (2) *Expanding the Magnet School Program* by “implement[ing] nine magnet themes at fifteen schools” and “enlarg[ing magnet school] . . . capacity . . . from 6,800 seats in 1992-93 to approximately 12,800 seats by the 1994-95 school year”;¹⁵
- (3) *Creating Community Model Schools* by converting “all non-magnet elementary schools . . . [into] . . . schools that . . . incorporate one of several nationally recognized, research-based models of elementary school instruction . . . [, providing] full-day kindergarten programs . . . [, and] . . . hir[ing] additional teachers, . . . psychologists, social workers and other specialists to implement these programs”;¹⁶
- (4) *Initiating Comprehensive New Reading Programs* by “implement[ing] . . . nationally-recognized reading programs for first graders . . . [and] one-on-one tutoring for each child”;¹⁷
- (5) *Preparing Children Do Well In First Grade Reading Programs* by implementing “developmentally appropriate preschool programs” for every “four-year-old child[] . . . scheduled to enter kindergarten . . .,” and “developmentally appropriate *full-day* kindergartens.”¹⁸

The state was to provide twenty million dollars to fund Vision 21, plus additional funding of up to \$275 million, payable in varying annual amounts not to exceed sixty million dollars in any one year, contingent upon the Cleveland School District providing a matching \$275 million by getting Cleveland to approve the necessary levies.¹⁹

As the state took over operation of the Cleveland Public Schools, it was obvious to interested observers that system-wide reform of the Cleveland Public Schools would not soon significantly improve the prospects of Cleveland children receiving good public educations. The twenty-plus year desegregation conflict had combined with management and financial crises to make the Cleveland School District poorer, less integrated, and one of Ohio's worst performing school systems.²⁰ These problems thwarted the implementation of Vision 21.²¹ The state

Educ. Settlement Agreement § 6.1-2, in *Reed v. Rhodes*, 869 F. Supp 1265, 1269-70 (N.D. Ohio 1994) (“Settlement Agreement”).

14. Settlement Agreement, App. B: Vision 21 Programs Supported by State Matching Funds, p. 1., in App. C of *Reed v. Rhodes*, 934 F. Supp. 1533, 1575-76 (N.D. Ohio 1996) (Matching Funds).

15. *Id.* pt. 2, at 1576.

16. *Id.* pt. 3, at 1576.

17. *Id.* at 1577.

18. Cleveland Sch. Dist., Settlement Agreement, App. A: The Cleveland School District's Executive Summary of Vision 21, pt. B.2., in App. C of *Reed v. Rhodes*, 934 F. Supp. at 1570.

19. Settlement Agreement, §§ 7, 8, *supra* n. 13, at 1270.

20. Cleveland experienced a substantial loss of middle class and upper class families from the 1970s until the Spring of 1995, see Andrew Benson, *Rich or Poor; Family Income Is Prime Predictor of How Well a Student Will Perform in School*, The Plain Dealer 1C (Oct. 8, 1995) (available in LEXIS, News Library, CLEVPD), and eight of ten students were eligible for free and reduced lunches. *Id.* This

was not interested in making substantial new investments in the Cleveland Public Schools.²² Moreover, the court-ordered state takeover of the Cleveland Public Schools had stripped Cleveland residents of local control over the public schools that served Cleveland children.²³

Further adding to the plight of students living in the Cleveland School District was the failure of an Ohio public school choice law to serve them. Enacted in 1993,²⁴ this law established a limited right of students to transfer from their native district to an adjacent district without paying tuition.²⁵ "The idea was to give some students a chance to attend another, perhaps better, school system . . . [in the belief that i]f students and parents had a choice, . . . school districts [would be forced] to compete."²⁶ Unfortunately, this choice program was unavailable to students if the adjacent district to which they wanted to transfer did not "adopt[] a resolution . . . permit[ing] enrollment of students from all adjacent

compares with a poverty rate of about fifty percent among only the predominantly African-American schools in 1973. *Id.*

By the Spring, 1995, "[t]he Cleveland [Public] Schools [we]re about 70 percent black." See *The Cleveland Schools Crisis*, The Plain Dealer 4B (March 9, 1995) (available in LEXIS, News Library, CLEVPD) [hereinafter *Cleveland Crisis*]. "When busing began in 1978, the schools were 63 percent black. . . . Pupil populations . . . dropped since the case began, from 132,000 to 74,000." *Id.*

On the basis of achievement test performance, the Cleveland Public Schools "ranked 595th out of 600 school districts in Ohio, and 95th out of 96 school districts in the seven-county Greater Cleveland area[.]" in August of 1995. See Benson, *supra*. However, after these rankings were corrected to account for the negative effects of poverty, "Cleveland students ranked eighth among 96 Greater Cleveland students [sic]." *Id.* Nevertheless, the educational outcomes of students attending Cleveland Public Schools were abysmal. See *id.*

21. See generally *supra* nn. 9-19 and accompanying text. Note also that on January 31, 1995, Vision 21 received only a C grade by a fifty person committee commissioned by the Cleveland superintendent to monitor its implementation and results. See Patrice M. Jones, *City Schools' "Vision 21" Reform Plan Gets C Grade*, The Plain Dealer 1B (Feb. 1, 1995) (available in LEXIS, News Library, CLEVPD). According to the committee, less than half of the Vision 21 programs were in place and no educational performance progress had been achieved. *Id.* After the district's operations were taken over by the state, the full-day kindergarten program, which was considered one of the most important Vision 21 reforms, was substantially cut to provide budget savings. See Patrice M. Jones, *Kindergartens to Be Trimmed: Full Days Seen As Too Costly*, The Plain Dealer 2B (May 27, 1995) (available in LEXIS, News Library, CLEVPD).

22. See generally *supra* n. 11 and accompanying text.

23. *Takeover Order*, 1995 U.S. Dist. LEXIS 3814 at **7-9.

24. Ohio H. 152, § 1, 1993 Ohio Laws File 30 (June 30, 1993) (available in Westlaw at OH-LEGIS-OLD).

25. See Ohio Rev. Code § 3313.98(B)-(G) as stated in Ohio H. 152, § 1, 1993 Ohio Laws File 30. The right was limited in that the receiving adjacent district had to agree to participate, *id.* § 3313.98(B), and the student would not be allowed to transfer to the adjacent district if:

- (1) The adjacent district's student population was already taxing capacity limits on grade levels, buildings or programs, *id.* § 3313.98(B)(2)(b)(i);
- (2) There was not room for the student after the adjacent district accommodated all native students and previously attending adjacent district students, *id.* § 3313.98(B)(2)(b)(ii);
- (3) The student's enrollment would violate procedures established to maintain appropriate racial balances in the receiving and sending school districts, *id.* §§ 3313.98(B)(2)(b)(iii), 3313.98(F)(1)(a);
- (4) The student had been a particularly difficult discipline problem to his/her native district; *id.* § 3313.98(C)(4); or
- (5) The student required special services not offered by the adjacent district. *Id.* § 3313.98(C)(2).

26. See Benson, *supra* n. 20.

districts in accordance with a policy contained in the resolution.”²⁷ Even though the receiving adjacent districts received additional state funding equal to (their basic per pupil state aid amount multiplied by the number of non-vocational students accepted from an adjacent district) plus (state aid covering the excess costs of any non-vocational student “receiving special education and related services”),²⁸ none of the districts adjacent to the Cleveland School District had chosen to participate as of October, 1995.²⁹ So, prior to the enactment of Ohio’s Voucher Program, “no Cleveland students had the opportunity to transfer.”³⁰

Given the dreadful academic and financial circumstances of the Cleveland Public Schools, the failure of the Vision 21 reform movement, the dim prospects for significant improvements anytime soon, and the exclusion of Cleveland students from Ohio’s public school choice program, it was certainly understandable why low-income Cleveland families who valued education began to support the enactment of a school voucher plan that would enable their children to attend private schools.³¹ The intensity of these parents’ support of vouchers was captured perfectly in interchanges that occurred during a January 31, 1995, legislative lobbying effort led by Cleveland Councilwoman Fannie M. Lewis. One parent, Genevieve Mitchell, told legislators that “[t]he public schools are preparing black children for prison, the welfare office or the graveyard, . . . [and a]s a black parent, that’s unacceptable.”³² When confronted by an anti-voucher state senator who represented her ward, “Lewis yanked the microphone away from [him,] and ignored his request for an apology [by saying] ‘I’m sure no legislator in his right mind is going to tell us we can’t have a choice[.]’”³³ In response to an anti-voucher State Representative’s assertion that “[t]he question before us is how do we improve the public schools . . .,” Leonard Cummings . . . “wanted to know how he could make a better choice than public schools for his [five-year old] daughter . . .” “‘If the government’s not going to do it,’ Cummings said, ‘you have to take charge and do it yourself.’”³⁴

In 1995, these parents found a receptive audience in Ohio’s Republican Governor, George V. Voinovich, and an Ohio General Assembly that was totally controlled by the Republicans for the first time in over twenty years.³⁵ On January

27. See Ohio Rev. Code § 3313.98(B) as stated in Ohio H. 152, § 1, 1993 Ohio Laws File 30.

28. *Id.* § 3313.981(B)(1)-(2).

29. See Benson, *supra* n. 20.

30. *Id.*

31. See Scott Stephens, *Storming the Statehouse; Local Voucher Plan Supporters State Their Case in Columbus*, *The Plain Dealer* 1B (Feb. 1, 1995) (available in LEXIS, News Library, CLEVDPD).

32. *Id.*

33. *Id.*

34. *Id.*

35. See Mary Beth Lane, *State Republican Majority Targets School Issues*, *The Plain Dealer* 14B (Dec. 18, 1994) (available in LEXIS, News Library, CLEVDPD), reporting that Governor Voinovich was introducing a school voucher program and that the “Senate is eager to work with . . . House revolutionaries to reshape education in the GOP mold.” In that vein, Rep. Michael A. Fox, the new chair of the House Education Committee, declared that “I’ve waited 20 years to put my oar in the [education reform] water and I’ll be damned if my will will weaken now.” *Id.* This plan was adopted through a state budget bill that was “the first written in 22 years by a General Assembly completely

31, 1995, Governor Voinovich presented his original voucher proposal, which “call[ed] for poor parents in selected school districts to receive a \$2500 voucher they c[ould] apply to their children’s tuition at a private or parochial school of their choice.”³⁶ The “proposal did not specify the communities in which the pilot plan would be tested, but the governor said an area with a high level of poverty—such as the Cleveland School District—would be the likely candidate.”³⁷ In light of the court-ordered state takeover of the Cleveland Public Schools, on May 19, 1995, Governor Voinovich abandoned his original proposal and backed a House plan to create a limited voucher experiment and implement it only in the Cleveland School District.³⁸ He did so because he believed “Cleveland’s troubled schools might be the best environment to determine if pupils can benefit from vouchers.”³⁹

The House plan was signed into law on June 30, 1995, and it provided in relevant part that “[t]he superintendent of public instruction shall establish a pilot project scholarship program in one school district that, as of March 1995, was under a federal court order requiring supervision and operational management of the district by the state superintendent.”⁴⁰ In response to nettlesome litigation challenging the constitutionality of the voucher law, the General Assembly broadened the district selection criteria to include “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.”⁴¹ However, the Cleveland School District is still the only school district participating in Ohio’s Voucher Program, since it is the only school district that has ever been taken over by the state pursuant to a federal court order.⁴²

Consistent with its experimental nature, and Ohio’s modest state funding of common education, the Ohio Voucher Program is severely limited in scope.

ruled by the GOP,” for in the previous session the House had been controlled by the Democrats. See Thomas Suddes, *Budget Accord Has Few Surprises; Highlights Are Tax Cut and Voucher Pilot*, The Plain Dealer 1A (June 25, 1995) (available in LEXIS, News Library, CLEVDPD).

36. See Stephens, *supra* n. 31.

37. *Id.*

38. See Thomas Suddes, *Governor Urges Cleveland Vouchers; Wants Mandatory School Program As a Test*, The Plain Dealer 6B (May 20, 1995) (available in LEXIS, News Library, CLEVDPD).

39. Accordingly, the Governor said, “Let’s stick it in Cleveland. Let’s try it. Let’s see if it works.” *Id.*

40. Ohio H. 117, § 1, 1995 Ohio Laws File 28 (June 30, 1995) (available in Westlaw at OH-LEGIS-OLD).

41. Ohio Rev. Code Ann. § 3313.975(A). The current criteria was enacted into law at the end of the 1997 legislative session, Ohio H. 215, 1997 Ohio Laws File 37 (June 30, 1997) (available in Westlaw at OH-LEGIS-OLD), after the original district selection law had been declared by an Ohio Court of Appeals to be a violation of the Uniformity Clause of Ohio’s Constitution because it applied to only one school district. *Simmons-Harriss v. Goff*, 1997 Ohio App. LEXIS 1766 at **35-39 (10th Dist. May 1, 1997). These criteria were reenacted by the General Assembly in 1999, Ohio H. 282, § 1, 1999 Ohio Laws File 37 (June 29, 1999) (available in Westlaw at OH-LEGIS-OLD), to revive the Ohio Voucher Program after the Ohio Supreme Court declared that its original enactment as a part of House Bill 117 violated Ohio’s single subject rule. *Simmons-Harriss v. Goff*, 711 N.E.2d 203, 214-16 (Ohio 1999).

42. See Ruth E. Sternberg, *Columbus Diocese Not Counting on Vouchers; Lawmakers, Parents on Both Sides of Issue*, The Columbus Dispatch 1A (June 29, 2002) (available in LEXIS, News Library, COLDIS).

Vouchers are available only to the extent that the General Assembly chooses to fund them.⁴³ In its first full year of operation, academic year 1996-97, the Voucher Program was allocated only five million dollars as compared to \$136 million allocated the previous year to provide transportation to students attending private schools, to “help private schools comply with state laws and regulations,” and to help private schools with “auxiliary services that cover such things as textbooks, science equipment and reading and math help.”⁴⁴ The Voucher Program is scheduled to receive only \$18,066,820 in fiscal year 2003.⁴⁵ “In the 1999-2000 school year, . . . [m]ore than 3,700 students participated in the . . . program⁴⁶ out of the “more than 75,000 children enrolled in the Cleveland School District.”⁴⁷

The Voucher Program establishes that scholarships paid by the state to educate voucher recipients will not exceed \$2,250,⁴⁸ a level that appears to have been set by reference to tuition normally charged by private parochial schools.⁴⁹ Scholarships are available only to students who reside in the Cleveland School District.⁵⁰ Recipients may use voucher scholarships only to attend grades kindergarten through eight at registered private schools located within the Cleveland School District or participating public schools located in districts adjacent to the Cleveland School District.⁵¹ As a practical matter, however,

43. Ohio Rev. Code Ann. § 3313.975(C)(1)-(2).

44. Ohio Sen. 310, 1996 Ohio Laws File 179 (June 18, 1996) (available in Westlaw at OH-LEGIS-OLD); see *Ohio Subsidizing Private Schools at Expense of Public*, Report Says, The Columbus Dispatch 4B (July 22, 1996) (available in LEXIS, News Library, COLDIS).

45. Ohio H. 299, § 3, 2001 Ohio Laws File 19 (June 29, 2001) (available in Westlaw at OH-LEGIS-OLD).

46. See *Zelman*, 122 S. Ct. at 2464.

47. *Id.* at 2463.

48. Ohio Revised Code Annotated § 3313.978(C)(1) provides that “[i]n the case of basic scholarships, the scholarship amount shall not exceed the lesser of the tuition charges of the alternative school the scholarship recipient attends or an amount established by the state superintendent not in excess of twenty-five hundred dollars.” (Note, however, the superintendent is required to provide increased basic scholarships to mainstreamed handicapped students and separately educated handicapped students at levels set after consideration of “the instruction, related services, and transportation costs of educating such students.” *Id.* § 3313.978(C)(2)). But the state will only pay families of voucher students seventy-five percent or ninety percent of the basic scholarship amount depending on their income. *Id.* § 3313.978(A).

49. At the beginning of 1992, most private schools charged tuition of \$2,000 or less, and one of the sponsor’s of a voucher bill that failed that year expected that most voucher recipients would attend parochial schools. Mary Yost, *Legislative Plan Seeks Test of Public vs. Private Schools*, The Columbus Dispatch 4D (Jan. 24, 1992) (available in LEXIS, News Library, COLDIS). During the first year of the Voucher Program, it was reported that “[a]n analysis of eight of 31 . . . Catholic schools [participating in the Voucher Program] found that the cost of teaching a student was \$1,849 for the 1996-97 school year—45 percent more than the average \$1,272 tuition charged by the schools.” See Catherine Candisky, *Vouchers No Ticket to Wealth; Report: Catholic Schools Lose Money*, The Columbus Dispatch 1B (Dec. 24, 1996) (available in LEXIS, News Library, COLDIS).

50. Ohio Rev. Code Ann. § 3313.975(A).

51. With respect to the grade limitations, Ohio Revised Code Annotated § 3313.975(C)(1) states in relevant part that “[i]n each year the program continues, no new students may receive scholarships unless they are enrolled in grade kindergarten, one, two or three. However, any student who has received a scholarship the preceding year may continue to receive one until the student has completed grade eight.” Section 3313.975(A) provides in relevant part that “[t]he program shall provide for a number of students residing in . . . [a participating] district to . . . attend alternative schools[.]” The term “alternative school” is defined as “a registered private school located in a school district or a

voucher students may only attend private schools within the Cleveland School District, because, to date, public schools in adjacent school districts have not participated in the Voucher Program⁵² even though they would receive the student's basic scholarship plus the per-pupil amount paid by the state to the voucher student's native district under the foundation aid formula.⁵³ Fifty-six private schools participated in the program in the 1999-2000 academic year.⁵⁴ Of great relevance to the *Zelman* Establishment Clause challenge was the fact that "46 or (82%) of the participating private schools had a religious affiliation"⁵⁵ and "96% of voucher students attended religious schools."⁵⁶

Ohio's Voucher Program only modestly favors low-income families despite its proponents' claims that low-income families would be its primary clients. The state superintendent is to give preference to low-income families in establishing criteria for selecting students to receive scholarships,⁵⁷ but this advantage is neutralized somewhat by the fact that up to "fifty percent of all scholarships [may be] awarded . . . [to] students who were enrolled in a nonpublic school during the school year of application for a scholarship."⁵⁸ Moreover, low-income families must pay ten percent of the tuition charged by the private schools their children attend up to a maximum of \$250, or provide the schools with in-kind services

public school located in an adjacent school district." *Id.* § 3313.974(G). Registered private schools are those that meet the following requirements:

- (1) The school is located within the boundaries of the pilot project school district;
- (2) The school indicates in writing its commitment to follow all requirements for a state-sponsored scholarship program;
- (3) The school meets all state minimum standards for chartered nonpublic schools in effect on July 1, 1992, except that the state superintendent at the superintendent's discretion may register nonchartered nonpublic schools meeting the other requirements of this division;
- (4) The school does not discriminate on the basis of race, religion, or ethnic background;
- (5) The school enrolls a minimum of ten students per class or a sum of at least twenty-five students in all the classes offered;
- (6) The school does not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion;
- (7) The school does not provide false or misleading information about the school to parents, students, or the general public;
- (8) The school agrees not to charge any tuition to low-income families participating in the scholarship program in excess of ten per cent of the scholarship amount established . . . [by the Voucher Program] excluding any increase described in . . . [the program]. The school shall permit any such tuition, at the discretion of the parent, to be satisfied by the low-income family's provision of in-kind contributions or services.

Ohio Rev. Code Ann. § 3313.976(A)(1)-(8). Public schools within school districts adjacent to the pilot project district will not be deemed alternative schools unless "the superintendent of the district in which such public school is located notifies the state superintendent prior to the first day of March that the district intends to admit students from the pilot project district for the ensuing school year . . ." *Id.* § 3313.976(C).

52. *Zelman*, 122 S. Ct. at 2624.

53. *See id.* More specifically, *see* Ohio Rev. Code Ann. § 3313.979(B) (the voucher scholarship amount) and *id.* § 3317.022(A)(1) (formula for computing state base cost funding).

54. *Zelman*, 122 S. Ct. at 2624.

55. *Id.*

56. *Id.*

57. Ohio Rev. Code Ann. § 3313.978(A).

58. *Id.* § 3313.975(B).

equal in value to that amount.⁵⁹ In addition, even families earning up to 200 percent of the low-income family's maximum earnings may receive ninety percent of the basic scholarship, and families earning more may receive seventy-five percent of the basic scholarship.⁶⁰ As for gaining admission to participating private schools, low-income students are given preference only as to twenty percent of the seats at each grade level for kindergarten through third grade to the extent that they that remain open after the private schools admit students who attended the previous year and the siblings of such students.⁶¹ It is perhaps instructive that only sixty percent of the 3,700 voucher students "were from families at or below the poverty line" during the 1999-2000 school year.⁶²

III. THE CONSERVATIVES' NEUTRALITY TEST: ITS DEVELOPMENT & EVOLUTION

Ohio's Voucher Program provides government funding that subsidizes a substantial portion of parochial school tuition paid by recipient families.⁶³ Not only do these tuition subsidies enable students to attend private religious schools who otherwise could not afford it,⁶⁴ they also further parochial schools' religious purposes by enabling them to expose more students to their religious tenets.⁶⁵

59. The state will provide low-income families with ninety percent of the basic scholarship amount, *id.* § 3313.978(A), and voucher students from low-income families may not be charged more than ten percent of the basic scholarship amount by any private school they attend. *Id.* § 3313.976(A)(8). Further, the private school must permit the low-income family's share of the tuition "to be satisfied by the low-income family's provision of in-kind contributions or services." *Id.*

60. *Id.* § 3313.978(A).

61. Ohio Revised Code Annotated § 3313.977(A)(1) states that:

Each registered private school shall admit students to kindergarten and first, second and third grades in accordance with the following priorities:

- (a) Students who were enrolled in the school during the preceding year;
- (b) Siblings of students enrolled in the school during the preceding year, at the discretion of the school;
- (c) 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"

62. *Zelman*, 122 S. Ct. at 2464.

63. See Ohio Rev. Code Ann. §§ 3313.977(A)(1), 3313.978(A), 3313.978(C)(1); text accompanying *supra* nn. 48, 59-60.

64. Thus, a voucher proponent, who also was a member of a public school board of education, wrote an impassioned editorial in the fall of 1994 in which she noted that "[w]ealthy families already . . . practice . . . [school choice] by buying homes in the school district they select or by sending their children to private schools[, but p]oor families, and even middle-class families, lack the same choices." Deborah L. Owens, *School Choice: Parental Empowerment, or Sabotage of Public Schools? Program Would Free Middle-Class Families from Government Monopoly on Education*, *The Columbus Dispatch* 9A (Sept. 14, 1994). Believing this was inequitable, she proposed that Ohio establish a voucher program that "would allow many families to exercise school choice" *Id.*

65. In December, 2001, a team of Rand Institute scholars released a new study of school vouchers and charter schools. In comparing program content of voucher and charter schools, the study found that "[f]or many private schools, adherence to a particular educational philosophy—whether based on Roman Catholic faith or the teachings of Maria Montessori, for example, is *their primary reason for existence and their primary focus of difference from conventional public schools.*" Brian P. Gill, P. Michael Timpane, Karen E. Ross & Dominic J. Brewer, *Rhetoric Versus Reality: What We Know and What We Need to Know about Voucher and Charter Schools* 64 (Rand 2001) (emphasis added). And,

Illustrative of the religious missions of parochial schools participating in the Ohio Voucher Program are passages from the parent-student handbooks of such schools quoted in Justice Souter's dissenting opinion. Saint Jerome School professed that "FAITH must dominate the entire educational process so that the child can make decisions according to Catholic values and choose to lead a Christian Life."⁶⁶ The Westside Baptist Christian School proclaimed that "Christ is the basis of all learning. All subjects will be taught from the Biblical perspective that all truth is God's truth."⁶⁷ It was the specter of government money aiding the religious missions of parochial schools that lead opponents of Ohio's Voucher Program to file Establishment Clause challenges to its constitutionality in federal district court.⁶⁸

A. *The Traditional Establishment Clause Test Applicable To Government Aid Cases*

In the 1971 case of *Lemon v. Kurtzman*,⁶⁹ the United States Supreme Court formulated an Establishment Clause test, the general principles of which govern cases challenging the provision of government aid to religious private schools.⁷⁰ Known as the *Lemon* test, it involved a tripartite analysis of whether the aid (1) has a secular purpose, (2) produces a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) does "not foster 'an excessive entanglement with religion.'"⁷¹

In cases involving government providing material aid to religious private schools, the Court virtually accepted at face value the government's insistence that its purpose is to advance the cause of secular education, so the Court's purpose inquiries in these cases have been quite perfunctory.⁷² By applying the effects prong of the *Lemon* test, until conservative Justices began their movement toward a neutral selection/private choice analysis, the Court developed a consensus that government aid to religious private schools violates the Establishment Clause if it

Justice Souter observed in his *Zelman* dissent that Ohio's vouchers "will thus pay for eligible students' instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension." *Zelman*, 122 S. Ct. at 2486 (Souter, J., dissenting).

66. *Id.* (quoting from the *Saint Jerome School Parent and Student Handbook: 1999-2000*, at 1).

67. *Id.* (quoting from the *Westside Baptist Christian School Parent-Student Handbook*, at 7).

68. Br. for Respt. at 3-5, *Zelman*, 122 S. Ct. 2460.

69. 403 U.S. 602 (1971).

70. See *Agostini v. Felton*, 521 U.S. 203, 218, 222 (1997), wherein the Court noted that the case under review was first decided in 1985 by application of the test laid down in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and that "the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since . . . [that case] was decided."

71. *Lemon*, 403 U.S. at 612-13.

72. For example, in *Lemon* the Court found that state programs to enhance the salaries of parochial school teachers who taught only secular subjects served the secular purpose of "enhanc[ing] the quality of the secular education in all schools covered by . . . compulsory attendance laws." *Id.* at 613. See *School District of the City of Grand Rapids v. Ball*, 105 S. Ct. 3216 (1985), where the Court began its Establishment Clause analysis by observing that "[a]s has often been true in school aid cases, there is no dispute as to the first test." *Id.* at 3222.

supports, or threatens to support, the schools' religious missions.⁷³ The Court used the entanglement prong to determine whether the government aid program would necessitate the creation of a comprehensive monitoring program to ensure that aid was not used improperly for religious purposes, involve close administrative cooperation, or provoke political divisiveness.⁷⁴

To the Court, the key to preventing government aid from advancing a religious mission was to restrict severely the ability of government to provide aid to pervasively sectarian recipients. Recipients were classified as pervasively sectarian if "a substantial portion of . . . [their] functions [we]re subsumed in . . . religious mission[s]."⁷⁵ Given this definition of pervasively sectarian, the Court believed there was always a high risk that any aid provided to a pervasively sectarian organization will somehow advance religion,⁷⁶ for in pervasively sectarian schools "the secular education . . . goes hand in hand with the religious mission . . . [so that] the two are inextricably intertwined."⁷⁷ As a consequence, in

73. See *Mitchell v. Helms*, 530 U.S. 793, 876-78 (2000) (Souter, J., dissenting). Government aid was deemed to have advanced a religious school's religious mission if it created the risk that the aid would be used to "indoctrinate . . . students in particular religious tenets at public expense . . ., [create a] symbolic union of church and state . . . [that] threatens to convey a message of state support for religion to students and to the general public[, or] . . . subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." *Ball*, 473 U.S. at 397.

74. See *Aguilar v. Felton*, 473 U.S. 402, 412-14 (1985). According to the Court, the problem with pervasive monitoring and close administrative cooperation is that they:

produce "a . . . continuing day-to-day relationship which the policy of neutrality seeks to minimize," which may increase "the dangers of political divisiveness along religious lines" because government agents must make "numerous judgments . . . concern[ing] matters that may be subtle and controversial . . . [and] of deep religious significance to the controlling denominations," and "raise[] more than an imagined specter of governmental secularization of a creed."

Id. at 413-14 (citations omitted). In addition, the Court has raised concern that certain types of aid to religious schools could provoke "political divisiveness related to religious belief and practice . . . [if they involve a] need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow." *Lemon*, 403 U.S. at 623.

75. See *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 752 (1976) (internal citations omitted). So, for example, Roman Catholic elementary and secondary schools were often classified as pervasively sectarian because they tended to be "located close to parish churches," have school buildings filled with "identifying religious symbols" (crosses, crucifixes, religious paintings, religious statues), make "instruction in faith and morals [a] part of the total educational process," sponsor "religiously oriented extracurricular activities," have faculties comprised substantially of nuns or priests, and be "dedicated . . . [to] provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life . . ." See *Lemon*, 403 U.S. at 615-16. By contrast, religiously affiliated colleges were not labeled pervasively sectarian unless they possessed most of the following characteristics: "impose[] religious restrictions on admissions, require[] attendance at religious activities, compel[] obedience to the doctrines and dogmas of the faith, require[] instruction in theology and doctrine, and . . . propagate a particular religion." See *Tilton v. Richardson*, 403 U.S. 672, 682 (1971).

76. See *e.g. Lemon*, 403 U.S. at 616-19, where the Court declared unconstitutional a government financed salary supplement for nonpublic school teachers who taught secular subjects largely because it believed that the pervasively religious atmosphere in which they taught created a substantial risk that the teachers would intentionally or inadvertently interject religious content into their secular courses.

77. *Ball*, 473 U.S. at 384 (internal citation omitted). This finding directly contradicted the Court's finding in *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 248 (1968), that it could not "agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion."

Board of Education of Central School District No. 1 v. Allen,⁷⁸ the Court indicated that any aid government provides a pervasively sectarian organization must be supplemental in the sense that it will not supplant anything the pervasively sectarian organization was already committed to providing.⁷⁹ In *Meek v. Pittenger*,⁸⁰ the Court cast doubt that government could give even supplemental educational aid to pervasively sectarian schools by holding that any substantial aid to the education missions of pervasively sectarian schools inevitably benefits their religious missions.⁸¹ Despite the Court's indication in *Lemon* that government could provide pervasively sectarian schools with "secular, neutral, . . . non-ideological services, facilities, or materials," such as "[b]us transportation, school lunches, public health services, and secular textbooks,"⁸² in *Meek* the Court held that such secular aid could not be given directly to a pervasively sectarian school.⁸³

In *Allen* and *Meek* the Court signaled that government could provide aid indirectly to pervasively sectarian schools by giving it directly to students, for the Court upheld state programs for loaning text books directly to students of pervasively sectarian schools because "no funds or books [we]re furnished to parochial schools, and the financial benefit [went] to parents and children, not [to] schools."⁸⁴ But, in *Wolman v. Walter*,⁸⁵ the Court held that government programs for directly providing to students attending pervasively sectarian schools such neutral and secular aid as instructional materials and equipment produced a primary effect indistinguishable from the effect produced by the aid program invalidated in *Meek*.⁸⁶ Therefore, the Court refused to distinguish *Wolman* from *Meek* because to do so would "exalt form over substance."⁸⁷ The Court also indicated in *Wolman* that government could not provide pervasively sectarian schools with neutral and secular aid, such as projectors, that could be diverted from secular uses to religious uses.⁸⁸ Furthermore, in *Committee for Public Education and Religious Liberty v. Nyquist*,⁸⁹ the Court invalidated a program providing parents with children in non-public schools either partial tuition reimbursements or tax relief in the form of tuition deductions because the pervasively sectarian nature of most of the state's non-public schools led it to

78. 392 U.S. 236 (1968).

79. *See id.* at 244 n. 6; *Mitchell*, 530 U.S. at 896-98 (Souter, J., dissenting).

80. 421 U.S. 349 (1975).

81. *Id.* at 363-66.

82. *Lemon*, 403 U.S. at 616.

83. *Meek*, 421 U.S. at 362-66.

84. *Id.* at 360-62; *Allen*, 392 U.S. at 243-44.

85. 433 U.S. 229 (1977).

86. *Id.* at 249-51. The impermissible effect arose because the secular and religious missions of pervasively sectarian schools are so intertwined that "[s]ubstantial aid to the educational function of such schools . . . necessarily results in aid to the sectarian school enterprise as a whole." *Id.* at 250 (citing *Meek*, 421 U.S. at 366).

87. *Id.*

88. *See id.* at 251 n. 18.

89. 413 U.S. 756 (1973).

conclude that the program's primary effect was to advance religion by encouraging parents to send their children to religious schools.⁹⁰

B. The Conservatives' Neutral Selection / Private Choice Neutrality Test

The Court began dismantling its restrictions on providing aid to pervasively sectarian schools in 1983, when, in *Mueller v. Allen*,⁹¹ a majority comprised of conservative Justices upheld a Minnesota tax provision allowing the parents of public and private school children to deduct certain educational expenses, including tuition, for purposes of calculating their state income taxes.⁹² In doing so, the Court distinguished *Mueller* from *Nyquist* with respect to the nature of the benefit conferred and the way it was packaged. The *Mueller* tax deductions were available only for expenditures on educational goods and services of the type the Court had previously permitted government to furnish attendees of sectarian schools.⁹³ By comparison, the Court characterized the deduction involved in *Nyquist* as "thinly disguised 'tax benefits,' actually amounting to tuition grants."⁹⁴ Most significantly, the Court noted that the benefited class in *Mueller* included parents of all Minnesota school children instead of just those parents who sent their children to non-public schools.⁹⁵ This distinction was crucial, for the Court believed the broader class of beneficiaries made the tax deduction "neutrally available to nonreligious as well as religious . . . [taxpayers]."⁹⁶

The Court also distinguished *Mueller* from cases where government aid was found to have gone directly to the schools by noting that the tax benefit first went to parents of private school students.⁹⁷ As a consequence, any financial advantage the tax deduction conferred on religious schools was the "result of numerous, private choices of individual parents of school-age children."⁹⁸ This laid the groundwork for undermining *Wolman's* holding that channeling government aid to a pervasively sectarian school by giving it first to parents or students was as impermissible as providing the aid directly to a pervasively sectarian school. After opining that in the twentieth century "[t]he risk of significant religious or denominational control over our democratic processes—or even of deep political divisiveness] along religious lines—is remote," the Court found any such remaining risk to be "entirely tolerable in light of the [positive contributions of

90. *Id.* at 780-87, 789-94.

91. 463 U.S. 388 (1983).

92. *Id.* at 390-91 (Rehnquist, J., joined by Burger, C.J., White, Powell & O'Connor, JJ., majority opinion).

93. *Id.* at 393-94.

94. *Id.* at 394.

95. *Id.* at 397-99.

96. *Mueller*, 463 U.S. at 397 (modifying a quotation in *Widmar v. Vincent*, 454 U.S. 263, 274 (1981), in order to make an analogy between the effects of the tax deduction and the opportunity for religious and non-religious speakers to participate in a designated public forum established by a public university).

97. *Id.* at 399.

98. *Id.*

sectarian schools and the Court's] continuing oversight"⁹⁹ The Court also stated that consideration of the potential for political divisiveness should be "confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools."¹⁰⁰ Most importunately, the Court undercut the technique used in *Nyquist* to demonstrate that the aid was intended to benefit religious schools—empirical research showing that most of the benefits would go to parents with children in religious schools—by refusing to consider similar empirical studies because it was "loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."¹⁰¹

Witters v. Washington Department of Services for the Blind,¹⁰² a 1986 case, further undermined *Wolman's* holding that funneling aid to the education program of a pervasively sectarian school through the conduit of a private individual impermissibly advances religion. Although he was blind, Witters was denied a rehabilitation grant he otherwise was qualified to receive, for his desire to attend a Bible College led the Washington Supreme Court to hold that his receipt of the grant would violate the state's policy of not allowing these grants to be used to further religious careers.¹⁰³ The Court came to this holding out of belief that it was necessary to prevent a violation of the Establishment Clause violation.¹⁰⁴ Had he received the grant, Witters would have transmitted it to the Bible college.¹⁰⁵ Nevertheless, the U.S. Supreme Court reversed the Washington Supreme Court's decision, holding that any aid reaching a religious school under the grant program would be the result of a private choice rather than an act of the state.¹⁰⁶ The Court also held that the grant program did not create any "financial incentive for students to undertake sectarian education,"¹⁰⁷ for it was "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."¹⁰⁸ Thus, religion would neither be advanced nor endorsed if grant recipients used the to grants to obtain a religious education.¹⁰⁹ Finally, the Court attached importance to the fact that no "significant portion of the aid expended under the . . . program as a whole will end up flowing to religious education[, for t]he function of the . . . program . . . does

99. *Id.* at 400.

100. *Id.* at 403 n. 11.

101. *Mueller*, 463 U.S. at 401.

102. 474 U.S. 481 (1986).

103. *Id.* at 483-84.

104. *Id.* at 482.

105. *Id.* at 487-88.

106. *Id.* at 487-89. The majority was comprised of four liberals—Justices Brennan, Marshall, Blackman, and Stevens—and four conservatives—Chief Justice Burger, and Justices White, Powell, and Rehnquist.

107. *Witters*, 474 U.S. at 488.

108. *Id.* at 488 (quoting *Nyquist*, 413 U.S. at 782-83).

109. *Id.* at 488-89.

not seem well suited to serve as a vehicle” for “provid[ing] desired financial support for nonpublic, sectarian institutions.”¹¹⁰

Inexplicably, the majority opinion in *Witters* did not, in any substantive way, rely on *Mueller*.¹¹¹ Although four of the Court’s five conservative justices joined the majority opinion, all five expressed through concurring opinions their belief that the principles of *Mueller* controlled the outcome of *Witters*, and that nothing in *Witters* undermined or weakened *Mueller*.¹¹² In his concurrence, Justice Powell provided the following succinct black-letter summary of the conservatives’ take on *Mueller*: “[S]tate programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the . . . [effects] test, because any aid to religion results from the private choices of individual beneficiaries.”¹¹³

Relying heavily on *Mueller* and *Witters*, a bare majority comprised of conservative Justices held in *Zobrest v. Catalina Foothills School District*,¹¹⁴ a 1993 case, that it did not violate the Establishment Clause for a federal program offering aid to people with disabilities to provide a sign language interpreter to a deaf high school student enrolled in a pervasively sectarian school.¹¹⁵ *Mueller* and *Witters* were cited as prime support for the proposition “that government 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 . . . benefit.”¹¹⁶ Applying that proposition, the Court found that the benefits program provided no incentive for a person to attend a sectarian school because it defined beneficiaries neutrally by their disabilities.¹¹⁷ The Court concluded that the provision of a government-paid interpreter to a student at a sectarian school did not violate the Establishment Clause since the interpreter arrived at a sectarian school only as a result of the private choice of the student and his parents.¹¹⁸ However, the Court did not simply justify its opinion solely on the neutral selection / private choice mantra, for it went on to emphasize that:

no funds traceable to the government ever find their way into sectarian schools’ coffers . . . [and that t]he only indirect economic benefit a sectarian school might receive . . . is the disabled child’s tuition— . . . assuming [of course] that the school makes a profit on each student; that, without [the aid] . . . the child would have gone

110. *Id.* at 488.

111. *Id.* at 490-92 (Powell, J., joined by Burger, C.J., & Rehnquist, J., concurring).

112. *Witters*, 474 U.S. at 490 (White, J., concurring); *id.* at 490-92 (Powell, Rehnquist, JJ., & Burger, C.J., concurring); *id.* at 493 (O’Connor, J., concurring).

113. *Id.* at 490-91 (Powell, Rehnquist, JJ., & Burger, C.J., concurring) (citing *Mueller*, 463 U.S. at 398-99).

114. 509 U.S. 1 (1993).

115. *Id.* at 3 (Rehnquist, C.J., joined by White, Scalia, Kennedy & Thomas, JJ., majority opinion).

116. *Id.* at 8-10.

117. *Id.* at 10.

118. *Id.*

to school elsewhere; and that the school, then, would have been unable to fill that child's spot.¹¹⁹

Most critically, the Court rejected assertions that in *Meek* and *Ball* it had made the supplying of an interpreter unconstitutional by striking down programs for providing secular services and education on the premises of religious school with government-paid personnel.¹²⁰ The Court characterized *Meek* and *Ball* as standing mainly for the proposition that government impermissibly advances religion by providing substantial aid to the educational mission of a pervasively sectarian school because this relieves the "schools of costs they otherwise would have borne in educating their students."¹²¹ Applying this proposition, the Court found that the aid program at issue in *Zobrest* would neither provide sectarian schools with substantial benefits nor relieve them of any "expense [they] otherwise would have assumed in educating [their] students."¹²² The Court then emphatically rejected the assertion that the Establishment Clause bars "the placing of a public employee in a sectarian school" by finding that "[s]uch a flat rule, smacking of antiquated notions of 'taint,' would indeed exalt form over substance."¹²³ With respect to substance, the Court concluded that there was little risk that a sign language interpreter would impermissibly advance religion by finding that he or she "would do [no] more than accurately interpret whatever material is presented to the class as a whole."¹²⁴

In sum, the neutrality test developed by conservatives through *Mueller*, *Witters*, and *Zobrest* certainly provided a pathway around the barriers erected by the pervasively sectarian doctrine to government providing aid to pervasively sectarian schools. In each case, great emphasis was placed on the fact that aid first flowed from government to private individuals, who received it by meeting religiously neutral eligibility criteria, and then reached a sectarian school only because of the private choices of the government beneficiaries. However, *Mueller* was partially decided on the basis that its benefits were not in reality devices for government subsidizing tuition payments to sectarian institutions disguised as tax deductions.¹²⁵ Likewise, in *Witters* the Court supported its decision with the conclusion that the government assistance program was not "well suited to serve as a vehicle" of "provid[ing] desired financial support for nonpublic, sectarian institutions."¹²⁶ Even in *Zobrest*, the Court added more analysis beyond the facial neutrality of the program to demonstrate that the program did not substantially aid the religious mission of a sectarian school.¹²⁷ In *Witters* and *Zobrest*, the Court assessed the constitutionality of the government benefit being challenged by

119. *Zobrest*, 509 U.S. at 10-11.

120. *Id.* at 11-13.

121. *Id.* at 12.

122. *Id.*

123. *Id.* at 13.

124. *Zobrest*, 509 U.S. at 13.

125. *Mueller*, 463 U.S. at 394-95; see text accompanying *supra* notes 93-94.

126. *Witters*, 474 U.S. at 488; see text accompanying *supra* notes 110.

127. *Zobrest*, 509 U.S. at 10-11; see text accompanying *supra* notes 119.

focusing exclusively on the options a person might pursue with the benefit rather than analyzing all possible life options he could have pursued without it.¹²⁸

IV. THE POST-ZELMAN NEUTRALITY TEST:
A UNIVERSAL ESTABLISHMENT CLAUSE ANTIDOTE

Facially, the Ohio Voucher Program meets the main prongs of the conservatives' neutral selection, private choice Establishment Clause test. As noted earlier, the scholarships provided by the program can be used at any public school in a district adjacent to the Cleveland School District, or any private school, religious or otherwise, within the Cleveland School District.¹²⁹ Beneficiary families are selected on the basis of where their children attend school,¹³⁰ what grades their children are in,¹³¹ the levels of their income,¹³² and how many scholarships are available relative to demand.¹³³ A religious private school will receive voucher revenue only if voucher recipients make private choices to attend it.¹³⁴ So, on the face of it, Ohio's Voucher Program selects beneficiaries on the basis of religiously neutral selection criteria, the beneficiaries' options include public and private schools, and a religious private school will receive money only as a result of the private choices of voucher recipients.

In reality, as documented previously, not a single public school district adjacent to the Cleveland School District has chosen to participate in Ohio's Voucher Program, so a voucher recipient's only real choice is to attend a private school located within the Cleveland School District.¹³⁵ This outcome was readily predictable. Cleveland's history of desegregation conflict lead directly to white and middle class families fleeing the Cleveland School District to nearby school districts so their children would not have to attend dysfunctional schools with large numbers of poor minority students.¹³⁶ Ohio's dependency on local property taxes to supply a high percentage of school funding provides economic

128. So, in *Witters*, the Court focused on the myriad of educational and training programs that could be pursued using the government aid, see *Witters*, 474 U.S. at 487-88; and in *Zobrest*, the Court noted that persons receiving a sign language interpreter were free to attend a public school, a private non-religious school or a private religious school. *Zobrest*, 509 U.S. at 10. In *Mueller*, the Court did find it important in the context of tax policy that the education deduction was one of several tax deductions available, but it appeared to have limited this "broader look" approach to tax deductions by commenting that "[o]ur decisions consistently have recognized that traditionally '[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes.'" *Mueller*, 463 U.S. at 396.

129. Ohio Rev. Code Ann. § 3313.975(C)(1); see text accompanying *supra* note 51.

130. Ohio Rev. Code Ann. § 3313.975(A); see text accompanying *supra* note 50.

131. Ohio Rev. Code Ann. § 3313.975(C)(1); see text accompanying *supra* note 51.

132. See text accompanying *supra* notes 58-62.

133. See Ohio Rev. Code Ann. § 3313.975(B).

134. See *id.* § 3313.978(A)(1)-(2).

135. See *Zelman*, 122 S. Ct. at 2624; Ohio Rev. Code Ann. § 3313.975(C)(1); *supra* nn. 52-53 and accompanying text.

136. See *Reed v. Rhodes*, 179 F.3d 453, 458 (6th Cir. 1999) (white flight). Note that from 1970-1990, "[m]ore than twice as many whites as blacks moved out of the city . . . [so that] [t]he white population decreased 45 percent . . . while the black population decreased 18 percent [and] . . . [t]he population of Hispanics, Asians, and American Indians increased by 274 percent" See *Cleveland Crisis*, *supra* n. 20 (middle class flight).

disincentives for school districts to accept transfer students, since the per pupil revenues attributable to the former district's local property taxes do not follow the student to the new district,¹³⁷ and the per pupil property tax level in the receiving district may be much higher than the scholarship provided by Ohio's Voucher Program.¹³⁸ Most importantly, the failure of Ohio's public school choice law to serve Cleveland students certainly should have put Ohio legislators on notice that the public school option in the Ohio Voucher Program would be useless.¹³⁹ Given these circumstances, a good argument could be made that the Ohio Voucher Program's public school choice was just window dressing designed to meet the facial requirements of the conservatives' neutrality test.¹⁴⁰

In absence of a real public school choice, the Ohio Voucher Program's scholarship begins to resemble the so-called "tax deduction" that was found to be in violation of the Establishment Clause in *Nyquist*. As in *Nyquist*, the Ohio voucher recipients' choices are limited to private schools. The voucher benefit is intended explicitly to fund a considerable portion of the recipients' private school tuition costs,¹⁴¹ so it functions as a tuition grant, just as did the *Nyquist* tax deduction.¹⁴²

Most significantly, Ohio's Voucher Program seems to produce effects that would not pass muster under the more substantive effects analyses used in by the Court to bolster its holdings in *Mueller*, *Witters*, and *Zobrest*. By design and circumstances, it seems geared to directing government money into the coffers of parochial schools. Its voucher scholarship levels seem to have been set in accordance with the tuition levels of most parochial schools,¹⁴³ so they appear to be too low to be attractive to public schools in adjacent districts.¹⁴⁴ Parochial schools predominate in Ohio generally,¹⁴⁵ and in Cleveland specifically,¹⁴⁶ so the great majority of private school students will inevitably attend parochial schools. In fact, these factors worked predictably to funnel ninety-six percent of Cleveland's voucher students into parochial schools,¹⁴⁷ so a "significant portion of

137. See *Zelman*, 122 S. Ct. at 2496, 2496 n. 17 (Souter, J., dissenting).

138. See *id.*, wherein Justice Souter notes that "[t]he only adjacent district in which the voucher amount is close enough to cover the local [property tax] contribution is East Cleveland City (local [property tax] contribution, \$2,019 . . .), but its public-school system hardly provides an attractive alternative for Cleveland parents, as it too has been classified by Ohio as an 'academic emergency' district."

139. See *supra* nn. 24-30 and accompanying text.

140. See *Zelman*, 122 S. Ct. at 2490-97 (Souter, J., dissenting), wherein Justice Souter notes that the absence of participation by the adjacent public school districts and the tepid participation of nonreligious private schools demonstrate that Cleveland Voucher Program is neither neutral as to religion nor provides true private choice to voucher recipients.

141. Ohio Rev. Code Ann. § 3313.978(A); see text accompanying *supra* notes 59-60.

142. *Nyquist*, 413 U.S. at 789-94.

143. *Supra* n. 49.

144. See *Zelman*, 122 S. Ct. at 2624; Ohio Rev. Code Ann. § 3313.975(C)(1); *supra* nn. 52-53 and accompanying text.

145. Eighty-one percent of Ohio's private schools are religious schools. See *Zelman*, 122 S. Ct. at 2470.

146. Eighty-two percent of Cleveland's private schools are religious schools. See *id.*

147. *Id.* at 2624; see *supra* n. 56 and accompanying text.

the aid expended under the . . . program as a whole will end up flowing to religious education,"¹⁴⁸ an effect about which the Court expressed disapproval in *Witters*.¹⁴⁹ Given that the program was "enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system,"¹⁵⁰ it is likely that without the scholarships most voucher students would have gone to school elsewhere,¹⁵¹ an effect about which the Court expressed disapproval in *Zobrest*.¹⁵²

By comparison to the crabbed choices available to the beneficiaries of Ohio's Voucher Program, the choices available to beneficiaries of the programs at issue in *Mueller*, *Witters*, and *Zobrest* were exceedingly broad. Almost every person receiving a scholarship under Ohio's Voucher Program can realistically expect to do only one thing with it: pay tuition at a parochial school located in the Cleveland School District.¹⁵³ Conversely, in *Mueller*, expenditures for a large array of educational expenses associated with any type of school, private or public, secular or religious, could be deducted from the beneficiary's taxable income.¹⁵⁴

148. *Witters*, 474 U.S. at 488.

149. *Id.* at 488. See *Zelman*, 122 S. Ct. at 2496-97 (Souter, J., dissenting), where Justice Souter complains that the lack of real choice makes it inevitable that ninety-six percent of voucher students attend religious private schools.

150. *Zelman*, 122 S. Ct. at 2625.

151. Thus, in an emotion-laden concurring opinion, Justice Thomas noted that Ohio, "[f]aced with a severe educational crisis, . . . enacted a wide-ranging educational reform that allows voluntary participation of private and religious schools in educating *poor urban children otherwise condemned to failing public schools*." *Id.* at 2482 (Thomas, J., concurring) (emphasis added). Justice Thomas also noted that "the appeal of private schools is especially strong among parents who are low in income, minority and live in low-performing districts: precisely the parents who are the most disadvantaged under the current system." *Id.* at 2484 n. 7 (quoting from T. Moe, *Schools, Vouchers, and the American Public* 164 (Brookings Instn. Press 2001)).

152. *Zobrest*, 509 U.S. at 11.

153. *Supra* nn. 52-56 and accompanying text.

154. A very diverse range of expenses qualified for the Minnesota income tax deduction at issue in *Mueller*. First and foremost, were expenditures for tuition, textbooks, and transportation incurred in sending children to "an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Acts of 1964 . . ." *Mueller*, 463 U.S. at 390 n. 1 (quoting Minn. Stat. § 290.09(22) (repealed 1987)). Other types of expenditures found to qualify for the deduction included:

1. Tuition in the ordinary sense.
2. Tuition to public school students who attend public schools outside their residence school districts.
3. Certain summer school tuition.
4. Tuition charged by a school for slow learner private tutoring services.
5. Tuition for instruction provided by an elementary or secondary school to students who are physically unable to attend classes at such school.
6. Tuition charged by a private tutor or by a school that is not an elementary or secondary school, if the instruction is acceptable for credit in an elementary or secondary school.
7. Montessori School tuition for grades K through 12.
8. Tuition for driver education when it is part of the school curriculum.

Allowable deductions for transportation expenditures include the cost of transporting students in school districts that do not provide free transportation, the cost of transporting students who attend school in their residence district but who do not qualify for free transportation because of proximity to their schools of attendance.

The vocational rehabilitation assistance provided in *Witters* could be used to pursue virtually any type of vocational training located anywhere in the state.¹⁵⁵ Similarly, the services available to disabled children through the program at issue in *Zobrest* were greatly varied and could be used in any type of school, public or private, secular or religious.¹⁵⁶ As a consequence, the operational realities of Ohio's Voucher Program do not match the rationale and operational realities of *Mueller*, *Witters*, and *Zobrest*, for Ohio voucher recipients have so few options that they are virtually channeled to parochial schools.

Finally, as pervasively sectarian institutions, Cleveland's parochial schools have religious missions that are inextricably intertwined with their educational missions.¹⁵⁷ As a result, both types of missions are furthered when voucher students attend parochial schools.¹⁵⁸ When a government program is designed or operated in a manner such that it inevitably channels much of its benefits to pervasively sectarian schools, it advances the schools' religious missions more as a function of the intent or will of the government parties who designed it or operate it than as a function of the private choices of parents who are served by it,¹⁵⁹ thereby violating the private choice requirement of the conservatives' neutrality test.¹⁶⁰

On the surface, none of the differences in the operational characteristics between the Ohio Voucher Program and programs approved in *Mueller*, *Witters*, and *Zobrest* seemed to matter to the *Zelman* majority. Ignoring the underlying substantive effects analyses of *Mueller*, *Witters*, and *Zobrest*, the Court asserted

Textbook deductions include not only secular textbooks but also other necessary equipment, such as:

1. Cost of tennis shoes and sweatsuits for physical education.
2. Camera rental fees paid to the school for photography classes.
3. Ice skates rental fee paid to the school.
4. Rental fee paid to the school for calculators for math classes.
5. Costs of home economics materials needed to meet minimum requirements.
6. Costs of special metal or wood needed to meet minimum requirements of shop classes.
7. Costs of supplies needed to meet minimum requirements of art classes.
8. Rental fees paid to the school for musical instruments.
9. Cost of pencils and special notebooks required for class.

Mueller v. Allen, 514 F. Supp. 998, 1000 (D. Minn. 3rd Div. 1981), *aff'd*, 676 F.2d 1195 (8th Cir. 1982), *aff'd*, 463 U.S. 388 (1983).

155. In *Witters*, the Court expressly found that "[a]id recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian." *Witters*, 474 U.S. at 488. Indeed, the statute authorized the provision of aid to the blind such as "special education and/or training in the professions, business or trades" so as to "assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care." *Id.* at 483 (quoting Wash. Rev. Code § 74.16.181 (1981)).

156. "The service at issue [in *Zobrest*] is a part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped' . . . , without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends." *Zobrest*, 509 U.S. at 10.

157. See *Zelman*, 122 S. Ct. at 2486, 2486 n. 2 (Souter, J., dissenting).

158. See *id.*

159. See *id.* at 2492-97 (Souter, J., dissenting).

160. See *id.* at 2466 (The Court approvingly characterized the program at issue in *Mueller* as "one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools . . .") (emphasis added).

that its holdings in these cases stand for one great proposition: the Establishment Clause cannot be violated by government aid programs that select beneficiaries through religiously neutral criteria and provide benefits directly to those beneficiaries so that aid only reaches religious schools as a function of the beneficiaries' private choices.¹⁶¹ Under such circumstances, said the Court, "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits."¹⁶² Then, the Court proclaimed that Ohio's Voucher Program was "a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*," after analyzing only its facial characteristics.¹⁶³

Inevitably, however, the majority was forced to explain away the operational features of the Voucher Program that made it a less-than-perfect "true private choice" program. In contradiction to the actual economic choices made by schools and parents eligible to participate in the Voucher Program, the Court asserted that "[t]here are no "financial incentive[s]" that "ske[w]" the program toward religious schools."¹⁶⁴ To prove this point, the majority claimed that adjacent public schools could receive two or three times the amount of money available to private schools, and that parents had a financial disincentive to choose religious schools since they were required to pay part of the tuition themselves.¹⁶⁵

When analyzed by microeconomics principles, the Court's economic analysis proves to be utter nonsense, for it fails to explain why none of the school districts adjacent to Cleveland has agreed to accept voucher students. Micro-economics asserts that a prospective seller's refusal to accept an offer results from the price being either lower than the seller's marginal costs in a workably competitive market,¹⁶⁶ or below the level at which the seller will receive marginal revenue that at least equals its marginal costs in a market tending toward monopoly.¹⁶⁷ Thus,

161. *Id.* at 2466-67.

162. *Zelman*, 122 S. Ct. at 2467.

163. *Id.* at 2467-68, drawing this conclusion after citing to the program's selection criteria, asserting that the program includes "all schools within the district, religious or non-religious," and noting that it offers a financial incentive for adjacent public schools to participate. *Id.* at 2468.

164. *Id.* at 2468 (quoting *Witters*, 474 U.S. at 487-88).

165. *Id.* at 2468.

166. Here it is important to note that for economists, costs include not only explicit money outlays made to finance the entity's operations, but also the non-monetized value of the best available alternative use of the entity's resources. See Paul A. Samuelson & William D. Nordhaus, *Economics* 470-72 (12th ed., McGraw-Hill 1985). Under the assumption that there is perfect competition and that the entity wants to maximize profits, its decision to produce and sell one more unit of its product is determined by whether the price it can receive equals the costs of producing that next unit (marginal cost). *Id.* at 477-80. For purposes of a school determining whether to accept one more student, the relevant marginal costs will be the increase to total costs that the school would incur to educate the next student to be admitted. See *id.* at 463. These costs will be quite low unless the addition of another student requires the school to add teachers, classroom space, or expensive equipment.

167. For example, in a monopoly market, a firm will produce and sell one more unit of output if the marginal revenue it will receive equals its marginal costs. At this point, the supply offered is less than total demand for the product, so the monopolist can receive a price higher than his marginal costs. At a lower price, the monopolist cannot receive marginal revenue equal to its marginal costs, so it will not

the refusal of adjacent public school districts to accept voucher students could have been a function of one of three causes:

- (1) Total compensation available to adjacent public school districts was too low to cover their marginal costs, which would validate Justice Souter's complaint that the Ohio's Voucher Program's scholarship levels were set too low to enable voucher recipients to have any attractive public school options;¹⁶⁸ or
- (2) The adjacent public school districts were attempting to extract monopoly profits, which would justify the State intervening to require them to accept voucher students;¹⁶⁹ or
- (3) The adjacent public school districts were simply discriminating against Cleveland's children, in which case the State would intervene to require them to accept voucher students if it sincerely wanted to help poor, minority Cleveland students.

In short, if Ohio's Voucher Program provides incentives that are too low to induce school districts adjacent to Cleveland to participate, or the adjacent school districts are refusing to participate for malevolent reasons and the state refuses to require them to participate, then one can only conclude that Ohio's Voucher Program channels students and revenues into religious schools.

The Court also failed to offer an explanation as to why the parochial schools accepted voucher students even though they are eligible to receive much less funding than public schools.¹⁷⁰ One answer could be that private schools have cost structures and missions so different than those of public schools that they and the public schools operate in two different markets. Indeed, public schools tend to have higher costs than private schools, and religious private schools tend to have lower costs than non-religious private schools.¹⁷¹ As noted previously, religious schools primarily pursue religious missions, so, they are not just in the business of educating children, they are also in the business of saving souls.¹⁷² Perhaps that is why religious schools are willing to accept tuition that is lower than tuition normally charged by non-religious schools.¹⁷³

produce even though the price offered may be much higher than the monopolist's marginal costs. *See id.* at 514-16.

168. *Zelman*, 122 S. Ct. at 2496-97, 2497 n. 17 (Souter, J., dissenting).

169. *See Samuelson & Nordhaus, supra* n. 166, at 520-29 (discussing various government intervention strategies to lessen the cost of monopoly); *id.* at 530-58 (discussing imperfect competition and antitrust policy).

170. Under Ohio's Voucher plan, private schools may receive at maximum only their normal tuition for accepting voucher students, whereas public schools receive the maximum voucher amount plus the normal state per pupil contribution. *See Zelman*, 122 S. Ct. at 2497 n. 17 (Souter, J., dissenting); Ohio Rev. Code Ann. §§ 3313.976(A)(8), 3313.978(C)(1).

171. *See Zelman*, 122 S. Ct. at 2495, 2495 n. 15 (Souter, J., dissenting) (comparing religious private school costs versus non-religious private school costs); *id.* at 2497 n. 17 (discussing public school costs and incentives).

172. *See supra* nn. 66-68 and accompanying text.

173. In a recent General Accounting Office study of vouchers in Cleveland and Milwaukee, "[s]everal representatives from participating religious schools [in Cleveland] stated that their schools' missions were to provide a private-school education to children in their communities, many of whom come from low-income families. The schools purposely subsidize the cost of educating all enrolled

Astoundingly, the Court supported its assertions that parents have a financial disincentive to choose religious schools by observing that parents who did not choose to participate in the Voucher Program had opportunities to send their children free of charge to various types of public schools created and operated under other programs.¹⁷⁴ Bizarrely, the Court also relied on this broader array of options available to parents who did not seek vouchers to demonstrate that the Voucher Program did not fail to provide Cleveland parents with genuine secular educational opportunities.¹⁷⁵ The majority used this same technique to claim that in actuality the percentage of children enrolled in religious schools as a result of the Voucher Program was under twenty percent.¹⁷⁶

This broadening of the universe of choices to include the choices of persons who did not participate in the challenged program was an unprincipled modification of the Court's neutral selection/private choice test. Only in the context of tax policy has the Court referred to options other than those available to persons accepting the challenged benefit in determining the challenged benefit's constitutionality, an approach that was not used in *Witters* and *Zobrest*.¹⁷⁷ Virtually without boundaries, this technique could be used to uphold any program that narrowly channels government benefits toward religious institutions simply by noting all other theoretical options a person could pursue by not participating in the challenged program.¹⁷⁸

students to achieve this mission." U.S. Gen. Acctg. Off. Rpt. to the Hon. Judd Gregg, *School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee* 25 (Aug. 2001).

174. See *Zelman*, 122 S. Ct. at 2470. The Majority rejected the assertion that ninety-six percent of relevant children had not attended religious schools because the denominator did not include "(1) the more than 1,900 Cleveland children enrolled in alternative community schools, (2) the more than 13,000 children enrolled in alternative magnet schools, and (3) the more than 1,400 children enrolled in traditional public schools with tutorial assistance." Thus, the majority contended that "[i]ncluding some or all of these children in the denominator of children enrolled in nontraditional schools during the 1999-2000 school year drops the percentage enrolled in religious schools from 96% to under 20%." *Id.* at 2471.

175. *Id.* at 2469.

176. *Id.* at 2470-71. This was accomplished by counting every child who enrolled in a magnet school, community school or a traditional public school with tutorial assistance rather than only those students participating in the Voucher Program.

177. *Witters*, 474 U.S. at 488 (focusing on the myriad of educational and training programs that could be pursued in using the government aid); *Zobrest*, 509 U.S. at 10 (noting that persons receiving a sign language interpreter were free to attend a public, private non-religious and private religious school).

178. See *Zelman*, 122 S. Ct. at 2491 (Souter, J., dissenting). Justice Souter complains that this broad inclusion of non-voucher options subverts the Court's neutrality principles. He states:

The illogic is patent. If regular, public schools (which can get no voucher payments) "participate" in a voucher scheme with schools that can, and public expenditure is still predominantly on public schools, then the majority's reasoning would find neutrality in a scheme of vouchers available for private tuition in districts with no secular private schools at all. "Neutrality" as the majority employs the term is, literally, verbal and nothing more.

Id. (emphasis added). Justice Souter also complained that the use of alternative options available without using vouchers subverts the Court's insistence that the money wind up in religious coffers through private choices that include many secular options. *Id.* at 2492-97. More specifically, Justice Souter complained that:

If the choice of relevant alternatives is an open one, proponents of voucher aid will always win, because they will always be able to find a "choice" somewhere that will show the bulk of public spending to be secular. The choice enquiry will be diluted to the point that it can

Finally, the Court rejected the notion that there should be any constitutional significance attached to the fact that the Voucher Program funneled ninety-six percent of voucher recipients into religious schools.¹⁷⁹ It did so by invoking *Mueller's* holding that a program's constitutionality should not be judged on the basis of what percentage of its beneficiaries selects a religious school option.¹⁸⁰ In part, the Court justified this approach by contending that the constitutionality of a program ought not turn each year on the basis of fluctuating recipient preferences.¹⁸¹

The Court's fluctuating recipient preferences rationale would have been palatable if Ohio's Voucher Program had offered voucher recipients a true public school option, but it seems to be an insincere concern given the Court's contention that voucher programs should not be declared unconstitutional in areas of the country where the only non-public school options would be overwhelmingly religious.¹⁸² To bolster this contention, the Court, relying on *Mueller*, *Witters*, and *Zobrest*, held that *Nyquist* should not apply to voucher programs offering only a choice between religious and non-religious private schools if the vouchers were given directly to individual beneficiaries on the basis of religiously neutral selection criteria.¹⁸³ But, all this misses the point, for in reality

[t]here is, in any case, no way to interpret the 96.6% of current voucher money going to religious schools as reflecting a free and genuine choice by the families that apply for vouchers. The 96.6% reflects, instead, the fact that too few nonreligious school desks are available and few but religious schools can afford to accept more than a handful of voucher students.¹⁸⁴

In light of Ohio's sordid history of desegregation conflicts,¹⁸⁵ public school funding conflicts,¹⁸⁶ and financial difficulty in providing adequate educations in high-poverty urban school districts,¹⁸⁷ one cannot help but feel that the Court simply did not want to establish a precedent that would force states to make public

screen out nothing, and the result will always be determined by selecting the alternatives to be treated as choices.

Id. at 2493.

179. *Id.* at 2470-71.

180. *Id.* at 2470.

181. *Id.* at 2471, 2471 n. 5.

182. *Id.* at 2470.

183. *Zelman*, 122 S. Ct. at 2472.

184. *Id.* at 2496 (Souter, J., dissenting). Not only did adjacent public school districts not participate in the Voucher Program, but there were also few seats available for voucher students in nonreligious private schools. Only 129 voucher students attended nonreligious schools, but since the total enrollment of all such schools was 510, only a few hundred more students could attend nonreligious students assuming voucher students could comprise their entire enrollments. *Id.* at 2495, 2495 n. 14. Moreover, of the ten "participating" nonreligious private schools, "3 currently enroll no voucher students. And of the remaining seven schools, one enrolls over half of the 129 [voucher] students that attend these nonreligious schools, while only two others enroll more than 8 voucher students." *Id.* at 2495 n. 14. Finally, "nonreligious schools with higher tuition (about \$4,000) stated that they could afford to accommodate just a few voucher students." *Id.* at 2495 (citing U.S. Gen. Acctg. Off. Rpt. to the Hon. Judd Gregg, *supra* n. 173, at 25).

185. See *supra* nn. 9, 13-17, 20-21 and accompanying text.

186. See *supra* nn. 9-12 and accompanying text.

187. See Doulin, *supra* n. 12.

school districts accept voucher students from other public school districts in order to sustain the constitutionality of their voucher programs. Such a requirement would undoubtedly displease residents of suburban school districts that were the beneficiaries of white and middle class flight from urban areas,¹⁸⁸ for their schools would then have to undertake the difficult tasks of educating a larger number of low-income minority students.¹⁸⁹ This displeasure would be especially acute in Ohio, where local property taxes play a large role in financing education in ways that have caused educational opportunities to be very unequal among school districts,¹⁹⁰ and the voucher tuition payment would likely be much less than the share of per pupil expenditures financed by the receiving district's local property taxes.¹⁹¹

V. EDUCATIONAL INEQUALITY: ITS INFLUENCE ON THE *ZELMAN* MAJORITY

One of *Zelman's* great ironies was the conservative Justices' use of educational inequality generally, and the plight of poor urban minority students specifically, to leverage their Establishment Clause holdings. Despite finding that only sixty percent of the voucher recipients are from low-income families,¹⁹² thereby confirming that Ohio's Voucher Program only somewhat favors low-income students, the majority boldly declared that the "program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system."¹⁹³ The Court then enhanced its argument that voucher programs should not be declared unconstitutional simply because they do not provide many non-religious school options by noting that such an outcome would disadvantage "inner-city Cleveland, where Ohio has deemed such programs most sorely needed . . ."¹⁹⁴ In doing so, the Court seemed to be insinuating that the Establishment Clause should be interpreted in such a manner as to promote more educational equality.

In his concurring opinion, Justice Thomas made this insinuation explicit. Extolling vouchers as instruments of racial educational equality,¹⁹⁵ he characterized voucher opponents as "wish[ing] to invoke the Establishment Clause . . . to constrain a State's neutral efforts to provide greater educational

188. See *supra* n. 137 and accompanying text.

189. See e.g. Patrice M. Jones, *Searching for Solutions; Reynoldsburg Blazes a New Trail in Quest for Better Results*, The Plain Dealer 1A (Aug. 24, 1995) (available in LEXIS, News Library, CLEVPD) (documenting how a relatively affluent suburban school district's academic problems were increasing as some 30,000 persons left urban Columbus, bringing their poverty and family problems with them). In this regard, the United States General Accounting Office recently published a study showing that Cleveland voucher students came from families that were somewhat better educated, poorer and more likely to be headed by a single mother than Cleveland students who did not receive vouchers. U.S. Gen. Acctg. Off. Rpt. to the Hon. Judd Gregg, *supra* n. 173, at 12-15.

190. See generally *DeRolph v. St.*, 78 Ohio St. 3d 193 (1997); *supra* n. 11 and accompanying text.

191. See *Zelman*, 122 S. Ct. at 2496; *supra* n. 139 and accompanying text.

192. *Zelman*, 122 S. Ct. at 2464.

193. *Id.* at 2465.

194. *Id.* at 2469-70.

195. See *id.* at 2480, 2483 (Thomas, J., concurring).

opportunity for underprivileged minority students.”¹⁹⁶ This led him to suggest that the Establishment Clause ought to be applied to states in a loose manner so that it advances, rather than constrains, individual liberty.¹⁹⁷ For Justice Thomas, such an approach would free states to “pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest.”¹⁹⁸ This would insulate states from Establishment Clause challenges to their educational experiments, such as vouchers, “that allow[] voluntary participation of private and religious schools in educating poor urban children otherwise condemned to failing public schools.”¹⁹⁹ Justice Thomas expressed graphically his belief that such experiments are badly needed, for he contended forcefully that:

[T]he promise of public school education has failed poor inner-city blacks. While in theory providing education to everyone, the quality of public schools varies significantly across districts. Just as blacks supported public education during Reconstruction, many blacks and other minorities now support school choice programs because they provide the greatest educational opportunities for their children in struggling communities.²⁰⁰

VI. SCHOOL VOUCHERS:

THE CONSERVATIVES’ SOLE CURE FOR EDUCATIONAL INEQUALITY

What is so galling about the conservatives’ crocodile tears for the plight of poor minority students, and their insistence that vouchers are the tools of liberation, is their complete lack of acknowledgment that conservative United States Supreme Court majorities took away almost all other tools that could have helped inner-city schools avoid the crises endured by the Cleveland School District. In *Milliken v. Bradley*,²⁰¹ the Court produced a five-to-four opinion holding that federal judges could not desegregate an illegally segregated school district through remedial orders requiring inter-district racial balancing, even though the desegregating district would essentially be all African-American in absence of an inter-district remedial order, unless the outlying districts themselves had been involved in activity that facilitated the illegal segregation.²⁰² The court justified this outcome on four main grounds:

- (1) “[D]esegregation . . . does not require any particular racial balance in each ‘school, grade or classroom.’”²⁰³

196. *Id.* at 2480.

197. *Zelman*, 122 S. Ct. at 2481.

198. *Id.*

199. *Id.* at 2482.

200. *Id.* at 2483.

201. 418 U.S. 717 (1974).

202. *Id.* at 745 (Burger, C.J., joined by Stewart, Blackman, Powell & Rehnquist, JJ., majority opinion).

203. *Id.* at 740-41 (citation omitted).

- (2) Permitting inter-district remedies would erode the nation's tradition of supporting local control "thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process,"²⁰⁴
- (3) Judges are not equipped to handle the complexity of running several school districts simultaneously;²⁰⁵ and
- (4) Illegal desegregation must be remedied only in districts where students were treated disparately on account of race.²⁰⁶

This holding enabled white, middle-class families who had supported illegal segregation in one district to escape participating in desegregation remedies by moving from the desegregating district to another adjoining area just outside of the district's boundaries.

The ability of federal judges to relieve the plight of poor minority students in districts that were illegally desegregated was further reduced significantly in *Missouri v. Jenkins*.²⁰⁷ In *Jenkins*, another five-to-four decision, the Court struck down the federal district court's desegregative attractiveness/suburban comparability remedy that required the upgrading of the desegregating district's academic programs and facilities so that they would attract white, middle-class students living in other school districts.²⁰⁸ Relying on *Milliken*, the Court justified its holding on the basis that remedies designed to attract students from other districts are invalid inter-district remedies not tailored to eliminating the vestiges of segregation within the desegregating district.²⁰⁹ The Court also asserted that such remedies cannot be justified simply by the occurrence of "white flight."²¹⁰ Finally, the Court was concerned that the desegregative attractiveness/suburban comparability doctrine imposes no practical boundaries in terms of money and time on federal courts' remedial authority.²¹¹ In this regard, the Court noted that "desegregative attractiveness had been used 'as the hook on which to hang numerous policy choices about improving the quality of education in general within the . . . [district].'"²¹²

The *Jenkins* decision also greatly hampered federal district courts' authority to impose educational remedies in desegregation orders. Specifically, the Court found it impermissible for federal district courts to make the achievement of certain academic performance standards, such as national norms on standardized

204. *Id.* at 742-43.

205. *Id.* at 743-44.

206. *Millikin*, 418 U.S. at 746-47.

207. 515 U.S. 70 (1995).

208. *Id.* at 91-100. Chief Justice Rehnquist was joined by Justices O'Connor, Scalia, Kennedy, and Thomas in the majority opinion.

209. *Id.* at 91-96.

210. *Id.* at 96-98.

211. *Id.* at 98-100. In this regard, the Court noted that the federal district court had on many occasions acceded to the school district's requests for expensive upgrades to its programs and facilities "based on hopes that they will succeed in the desegregation effort." *Id.* at 98-99.

212. *Jenkins*, 515 U.S. at 99 (quoting *Mo. v. Jenkins*, 495 U.S. 33, 76 (1990)).

tests, the test of whether a school district has eliminated the educational vestiges of segregation.²¹³ Instead, the Court saddled district courts with the nearly impossible task of tailoring their educational remedies so that they target only the precise incremental effects of segregation on minority student achievement without attempting to cure other problems caused by external factors that are not the result of segregation.²¹⁴ Citing to expensive upgrades in facilities and programs already made in the district, the Court advised the district court to “consider that many goals of its quality education plan already have been attained”²¹⁵ This advice was ironic, given that conservatives tend to argue that taxpayers should not have to make expensive investments in educational inputs because they often do not lead to improvements in minority student achievement.²¹⁶

Milliken and *Jenkins* concern the plight of children within school districts that once were illegally segregated racially. Arguably, students who live in districts that are systemically underfunded by state school funding systems that produce large funding disparities among school districts are also discriminated against. In fact, this was the basis of an Equal Protection suit against the way Texas financed public education in *San Antonio Independent School District v. Rodriguez*.²¹⁷

The five-to-four majority opinion in *Rodriguez* essentially rendered useless the Equal Protection Clause as a source of remedying inadequate education in systemically underfunded school districts. First, the Court found the plaintiff class was “a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts.”²¹⁸ Such a class, said the Court, did not have any “of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”²¹⁹

Second, and most importantly, the Court held that education is not a fundamental right.²²⁰ In doing so, the Court acknowledged that “education is perhaps the most important function of state and local governments,”²²¹ because:

It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it

213. *Id.* at 100-02.

214. *Id.* at 101-02.

215. *Id.* at 102.

216. Cf. David C. Berliner & Bruce J. Biddle, *The Manufactured Crisis: Myths, Fraud, and the Attack on America's Public Schools* 70-74 (Perseus Books 1995); Jonathan Kozol, *Savage Inequalities: Children in America's Schools* 74, 82 (Harper Perennial 1991).

217. 411 U.S. 1, 4-6 (1973).

218. *Id.* at 28. Justice Powell was joined by Chief Justice Burger and Justices Stewart, Blackman, and Rehnquist in the majority opinion.

219. *Id.*

220. *Id.* at 29-39.

221. *Id.* at 29 (citing *Brown*, 347 U.S. at 493).

is a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.²²²

Nevertheless, the Court noted that it could not find something to be a fundamental right simply because it was of great social or economic importance.²²³ It then rejected the “appellees’ contention . . . that education [should be declared fundamental] because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution.”²²⁴ The other rights referred to were the important rights of expression and voting,²²⁵ but after acknowledging the importance of education to a person’s ability to effectively exercise these rights, the Court held that “we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice.”²²⁶ In sum, the Court concluded that the appellees’ argument:

provide[d] no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where . . . no charge fairly could be made that the system fails to provide each child with an opportunity to acquire *the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.*²²⁷

Employing the rational basis test of Equal Protection, the Court then found that Texas’ system of funding education was rationally related to assuring a basic education for every child in the state [while] permit[ting] and encouraging a large measure of participation and control in each district’s schools at the local level.²²⁸

So, through *Milliken*, *Jenkins*, and, most of all, *Rodriguez*, the conservatives on the United States Supreme Court have stripped minority children of the ability to get federal relief from obstinate state and local governments which have discriminated against them, allowed many citizens responsible for the discrimination to abandon them by fleeing to the suburbs, and provided them with educations so poor that they do not even rise to the basic level. It is, therefore, understandable why it was so difficult for parents in the Cleveland School District to produce any better outcomes to their segregation, funding, and management problems than those described in this paper. It is also understandable that conservatives would now resort to undermining the tenants of the Establishment Clause to provide their victims with the band-aid remedy of school vouchers.

222. *Rodriguez*, 411 U.S. at 29-30 (citing *Brown*, 347 U.S. at 493).

223. *Id.* at 30-34.

224. *Id.* at 35-37.

225. *Id.* at 35.

226. *Id.* at 35-36.

227. *Rodriguez*, 411 U.S. at 37 (emphasis added).

228. *Id.* at 45-53.

VII. CONCLUSION

Measured against the comprehensive reform efforts embodied in Cleveland's Vision 21 reform program, it seems a cruel joke for any serious person, much less a United States Supreme Court Justice, to insist that a voucher program reaching five percent of Cleveland's school-aged children is the magic bullet that will make Cleveland an educational Mecca. For now, however, it is painfully obvious that taxpayers outside of urban areas such as Cleveland are unwilling to pay for comprehensive reforms and restructuring that involve expensive investments in new teachers, additional classrooms, better equipment, new technology, better training, and innovative new methods of helping students learn how to learn. As a consequence, concerned minority parents will continue to clamor for some type of voucher system that will at least provide an escape route for a few children. Anxious to avoid united political movements demanding that urban schools have the same tools used in wealthy suburban schools, conservative legislators, judges, and taxpayers will be all too happy to provide vouchers as a means of pacifying concerned minority parents who otherwise could have been the leaders of a real reform movement.

Zelman permits this charade to continue by altering significantly the conservatives' neutral selection/private choice rationale for relieving those who would fund religious missions from the rigors of the Establishment Clause's traditional effects test. Previously, this neutrality test at least required the Court to determine whether (1) beneficiaries were selected through criteria that were in fact neutral as to religion; and (2) the decisions of government beneficiaries to redistribute their benefits to religious organizations were indeed privately directed. In *Zelman*, however, the Court essentially held that facial neutrality alone is enough to satisfy the Establishment Clause. Facial neutrality can be satisfied simply by cleansing government benefits selection criteria of overt religious classifications and distributing the benefits first to private individuals. By exalting form over substance, *Zelman's* conservative majority has all but held that only a secular purpose is needed to justify government providing religious organizations with the same benefits it provides secular organizations.

