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

Gary D. Allison
SCHOOL VOUCHERS:
THE EDUCATIONAL SILVER BULLET,
OR AN IDEOLOGICAL BLANK ROUND?

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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

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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.


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

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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. 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. 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; and


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]rovide[d]... 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 ($0.023 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, CLEVPD). 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, CLEVPD). 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 12% of Cleveland households [had] children attending 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, CLEVPD). 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. 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, CLEVPD). 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), affd on remand, 455 F. Supp. 546, 550 (N.D. Ohio 1978), affd 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... [and... hir[ing] additional teachers, ... pyschologists, 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

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15. Id. pt. 2, at 1576.
16. Id. pt. 3, at 1576.
17. Id. at 1577.
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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{24} this law established a limited right of students to transfer from their native district to an adjacent district without paying tuition.\textsuperscript{25} "The idea was to give some students a chance to attend another, perhaps better, school system... [in the belief that] if students and parents had a choice, ... school districts [would be forced] to compete."\textsuperscript{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

\textsuperscript{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, \textit{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, \textit{Kindergartens to Be Trimmed: Full Days Seen As Too Costly}, The Plain Dealer 2B (May 27, 1995) (available in LEXIS, News Library, CLEVPD).

\textsuperscript{22.} See generally supra n. 11 and accompanying text.

\textsuperscript{23.} \textit{Takeover Order}, 1995 U.S. Dist. LEXIS 3814 at **7-9.

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

\textsuperscript{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. \textit{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, \textit{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, \textit{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, \textit{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; \textit{id.} § 3313.98(C)(4); or  
5. The student required special services not offered by the adjacent district. \textit{Id.} § 3313.98(C)(2).

\textsuperscript{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 as 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.
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, CLEVPD), 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 "called for poor parents in selected school districts to receive a $2500 voucher they could 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.

36. See Stephens, supra n. 31.
37. Id.
39. Accordingly, the Governor said, "Let's stick it in Cleveland. Let's try it. Let's see if it works." Id.
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-Harris v. Goff, 1997 Ohio App. LEXIS 1766 at *33-39 (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-Harris 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.\textsuperscript{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.”\textsuperscript{44} The Voucher Program is scheduled to receive only $18,066,820 in fiscal year 2003.\textsuperscript{45} “In the 1999-2000 school year, . . . more than 3,700 students participated in the . . . program”\textsuperscript{46} out of the “more than 75,000 children enrolled in the Cleveland School District.”\textsuperscript{47}

The Voucher Program establishes that scholarships paid by the state to educate voucher recipients will not exceed $2,250,\textsuperscript{48} a level that appears to have been set by reference to tuition normally charged by private parochial schools.\textsuperscript{49} Scholarships are available only to students who reside in the Cleveland School District.\textsuperscript{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.\textsuperscript{51} As a practical matter, however,
vouchers 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 Program 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. Fifty-six private schools participated in the program in the 1999-2000 academic year. Of great relevance to the Establishment Clause challenge was the fact that 46 or (82%) of the participating private schools had a religious affiliation and 96% of voucher students attended religious schools.

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, 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. 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.

Ohio Rev. Code Ann. § 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).
55. *Id.*
56. *Id.*
58. *Id.* § 3313.975(B).
equal in value to that amount.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{63} Not only do these tuition subsidies enable students to attend private religious schools who otherwise could not afford it,\textsuperscript{64} they also further parochial schools’ religious purposes by enabling them to expose more students to their religious tenets.\textsuperscript{65}

\textsuperscript{59} The state will provide low-income families with ninety percent of the basic scholarship amount, \textit{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. \textit{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.” \textit{id.}

\textsuperscript{60} \textit{id.} § 3313.978(A).

\textsuperscript{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 . . . .”

\textsuperscript{62} \textit{Zelman}, 122 S. Ct. at 2464.

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

\textsuperscript{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 poor families, and even middle-class families, lack the same choices.” Deborah L. Owens, \textit{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 . . . .” \textit{id.}

\textsuperscript{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 \textit{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, \textit{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).

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.”
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. 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.

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]." 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, for in pervasively sectarian schools "the secular education . . . goes hand in hand with the religious mission . . . [so that] the two are inextricably intertwined." 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 . . . concerning 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, 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. In *Meek v. Pittenger,* 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. 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," in *Meek* the Court held that such secular aid could not be given directly to a pervasively sectarian school.

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 textbooks 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." But, in *Wolman v. Walter,* 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.* Therefore, the Court refused to distinguish *Wolman* from *Meek* because to do so would "exalt form over substance." 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. Furthermore, in *Committee for Public Education and Religious Liberty v. Nyquist,* 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
conclude that the program’s primary effect was to advance religion by encouraging parents to send their children to religious schools.\textsuperscript{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 \textit{Mueller v. Allen},\textsuperscript{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.\textsuperscript{92} In doing so, the Court distinguished \textit{Mueller} from \textit{Nyquist} with respect to the nature of the benefit conferred and the way it was packaged. The \textit{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.\textsuperscript{93} By comparison, the Court characterized the deduction involved in \textit{Nyquist} as “thinly disguised ‘tax benefits,’ actually amounting to tuition grants.”\textsuperscript{94} Most significantly, the Court noted that the benefited class in \textit{Mueller} included parents of all Minnesota school children instead of just those parents who sent their children to non-public schools.\textsuperscript{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].”\textsuperscript{96}

The Court also distinguished \textit{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.\textsuperscript{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.”\textsuperscript{98} This laid the groundwork for undermining \textit{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

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 789-94.
\item 463 U.S. 388 (1983).
\item \textit{Id.} at 390-91 (Rehnquist, J., joined by Burger, C.J., White, Powell & O’Connor, JJ., majority opinion).
\item \textit{Id.} at 393-94.
\item \textit{Id.} at 394.
\item \textit{Id.} at 397-99.
\item \textit{Mueller}, 463 U.S. at 397 (modifying a quotation in \textit{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).
\item \textit{Id.} at 399.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
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 importantly, 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 the ... function of the ... program ... does
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] the 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

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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).
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.\textsuperscript{119}

Most critically, the Court rejected assertions that in \textit{Meek} and \textit{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.\textsuperscript{120} The Court characterized \textit{Meek} and \textit{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."\textsuperscript{121} Applying this proposition, the Court found that the aid program at issue in \textit{Zobrest} would neither provide sectarian schools with substantial benefits nor relieve them of any "expense [they] otherwise would have assumed in educating [their] students."\textsuperscript{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."\textsuperscript{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."\textsuperscript{124}

In sum, the neutrality test developed by conservatives through \textit{Mueller}, \textit{Witters}, and \textit{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, \textit{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.\textsuperscript{125} Likewise, in \textit{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."\textsuperscript{126} Even in \textit{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.\textsuperscript{127} In \textit{Witters} and \textit{Zobrest}, the Court assessed the constitutionality of the government benefit being challenged by

\begin{itemize}
\item \textsuperscript{119} \textit{Zobrest}, 509 U.S. at 10-11.
\item \textsuperscript{120} \textit{Id.} at 11-13.
\item \textsuperscript{121} \textit{Id.} at 12.
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.} at 13.
\item \textsuperscript{124} \textit{Zobrest}, 509 U.S. at 13.
\item \textsuperscript{125} \textit{Mueller}, 463 U.S. at 394-95; see text accompanying \textit{supra} notes 93-94.
\item \textsuperscript{126} \textit{Witters}, 474 U.S. at 488; see text accompanying \textit{supra} notes 110.
\item \textsuperscript{127} \textit{Zobrest}, 509 U.S. at 10-11; see text accompanying \textit{supra} notes 119.
\end{itemize}
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 “[t]heir decisions consistently have recognized that traditionally ‘[t]he legislatures 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 [a]nd . . . [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,\footnote{137. See Zelman, 122 S. Ct. at 2496, 2496 n. 17 (Souter, J., dissenting).} and the per pupil property tax level in the receiving
district may be much higher than the scholarship provided by Ohio's Voucher
Program.\footnote{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 an an 'academic emergency'
district."} 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.\footnote{139. See supra
nn. 24-30 and accompanying text.} 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.\footnote{140. See Zelman,
122 S. Ct. at 2624; Ohio Rev. Code Ann. § 3313.975(C)(1); supra nn. 52-53 and
accompanying text.}

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,\footnote{141. Ohio Rev. Code Ann. § 3313.978(A); see text accompanying supra
notes 59-60.} so it functions as a tuition grant, just as did the Nyquist tax
deduction.\footnote{142. Nyquist, 413 U.S. at 789-94.}

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,\footnote{143. See supra n. 49.} so they appear to
be too low to be attractive to public schools in adjacent districts.\footnote{144. Eighty-one percent of Ohio's private schools are religious schools. See Zelman,
122 S. Ct. at 2470.} Parochial
schools predominate in Ohio generally,\footnote{145. Eighty-two percent of Cleveland's private schools are religious schools. See id.} and in Cleveland specifically,\footnote{146. Eighty-two percent of Cleveland's private schools are religious schools. See id.} 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,\footnote{147. Id. at 2624; see supra n. 56 and accompanying text.} so a "significant portion of
the aid expended under the ... program as a whole will end up flowing to religious education," an effect about which the Court expressed disapproval in Witters.\footnote{Witters, 474 U.S. at 488.} 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,"\footnote{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.} it is likely that without the scholarships most voucher students would have gone to school elsewhere, an effect about which the Court expressed disapproval in Zobrest.\footnote{Zelman, 122 S. Ct. 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)).}

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. 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.\footnote{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.}

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. Supra nn. 52-56 and accompanying text.
The vocational rehabilitation assistance provided in Witters could be used to pursue virtually any type of vocational training located anywhere in the state. 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. 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. As a result, both types of missions are furthered when voucher students attend parochial schools. 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, thereby violating the private choice requirement of the conservatives' neutrality test.

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...
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.\textsuperscript{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."\textsuperscript{162} Then, the Court proclaimed that Ohio's Voucher Program was "a program of true private choice, consistent with \textit{Mueller}, \textit{Witters}, and \textit{Zobrest}," after analyzing only its facial characteristics.\textsuperscript{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 "skew" the program toward religious schools."\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{167} Thus,

\begin{itemize}
\item \textsuperscript{161} \textit{Id.} at 2466-67.
\item \textsuperscript{162} \textit{Zelman}, 122 S. Ct. at 2467.
\item \textsuperscript{163} \textit{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. \textit{Id.} at 2468.
\item \textsuperscript{164} \textit{Id.} at 2468 (quoting \textit{Witters}, 474 U.S. at 487-88).
\item \textsuperscript{165} \textit{Id.} at 2468.
\item \textsuperscript{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. \textit{See} Paul A. Samuelson & William D. Nordhaus, \textit{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). \textit{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. \textit{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.
\item \textsuperscript{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
\end{itemize}
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; 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; 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. 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. 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. Perhaps that is why religious schools are willing to accept tuition that is lower than tuition normally charged by non-religious schools.

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. 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. 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.

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. 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.

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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 2469-71. 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. 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. 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.

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. 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. 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.

In light of Ohio's sordid history of desegregation conflicts, public school funding conflicts, and financial difficulty in providing adequate educations in high-poverty urban school districts, 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, "I 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 n.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, for their schools would then have to undertake the difficult tasks of educating a larger number of low-income minority students. 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, 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.

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, 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.” 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 . . . .” 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, 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 IA (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." 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. 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." 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." 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.

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,* 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. 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."
(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.”

(3) Judges are not equipped to handle the complexity of running several school districts simultaneously; and

(4) Illegal desegregation must be remedied only in districts where students were treated disparately on account of race.

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. 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. 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. The Court also asserted that such remedies cannot be justified simply by the occurrence of “white flight.” 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. 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].’”

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
tests, the test of whether a school district has eliminated the educational vestiges
of segregation. 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. 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..." 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.

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
Rodriguez.

The five-to-four majority opinion in Rodriguez essentially rendered useless
the Equal Protection Clause as a source of remediying 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." 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."

Second, and most importantly, the Court held that education is not a
fundamental right. In doing so, the Court acknowledged that "education is
perhaps the most important function of state and local governments," 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.
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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{224} The other rights referred
to were the important rights of expression and voting,\textsuperscript{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."\textsuperscript{226} In sum, the Court concluded that the appellees'
argument:

provid[ed] 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.\textsuperscript{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.\textsuperscript{228}

So, through \textit{Milliken}, \textit{Jenkins}, and, most of all, \textit{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.

\begin{flushright}
223. \textit{Id.} at 30-34.
224. \textit{Id.} at 35-37.
225. \textit{Id.} at 35.
226. \textit{Id.} at 35-36.
228. \textit{Id.} at 45-53.
\end{flushright}
SCHOOL VOUCHERS

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.