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—**Sunshine
Replaces
the Cloud**

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The June 27, 2002, decision of the United States Supreme Court in *Zelman v. Simmons-Harris*¹ is the most important education decision since *Brown v. Board of Education*,² for it opens an array of policy options by which to address the urgent crisis of urban education. Equally important, the 5–4 decision provides jurisprudential support for the right of parents to direct and control the nature of their children’s education.

The reaction among opponents of school choice³ to the decision was predictably histrionic. The ill-named National Education Association and People for the American Way pro-

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1. 122 S. Ct. 2460 (2002).

2. 347 U.S. 483 (1954).

3. “School choice” can have a variety of meanings, but I use it to encompass publicly supported private school options, whether through vouchers or tax credits for tuition or scholarships. I support deregulated public “charter” schools, but believe that choice is not meaningful (or optimally effective in its competitive effects) if it is constrained to the public sector. For a broader explication of the imperative of school choice, see Clint Bolick, *Transformation: The Promise and Politics of Empowerment* (Oakland, Calif.: Institute for Contemporary Studies, 1998), pp. 43–53.

nounced the opinion a disaster for public education. Barry Lynn of Americans United for Separation of Church and State characterized the decision as a “wrecking ball” for the First Amendment’s prohibition of religious establishment. The Court’s dissenters agreed, predicting all manner of religious strife.

On the contrary, the decision marks no significant jurisprudential innovation, for as the Court observes, it fits neatly within “an unbroken line of decisions rejecting challenges to similar programs.”⁴ But its real-world impact is potentially titanic. That is because the case is really not about religion at all, but rather about the distribution of power over education. And that is why the main challengers are not advocates of separation of church and state, but teachers unions, who otherwise couldn’t care less about religious establishment. In the end, the Court recognized that the “primary effect” of the Cleveland Scholarship Program was not to advance religion but to expand educational opportunities, and appropriately concluded that allowing parents to direct a portion of public education funds to the schools of their choice, public or private, does not constitute religious establishment. What is far more surprising than the outcome is that four justices could disagree.⁵

Much as school integration did not instantly appear after *Brown*, so too will school choice not immediately materialize after *Zelman*. Serious legal obstacles remain in the form of state

4. *Zelman*, 122 S. Ct. at 2473.

5. Illustrating that the academic consensus is broad that school choice is constitutional was an amicus curiae brief prepared by former Berkeley law school dean Jesse Choper on behalf of three dozen law professors reflecting a broad philosophical spectrum. In addition to the professors signing the brief, prominent liberal academics taking the same view include Laurence Tribe, Douglas Laycock, Jeffrey Rosen, Samuel Estrreicher, Akhil Amar, and former U.S. Solicitor General Walter Dellinger.

constitutional provisions that are more explicit with regard to separation of church and state than the federal constitution. And school choice advocates still face powerful special-interest opposition in legislative arenas. But the Supreme Court has made it clear that there are no federal constitutional impediments; and it may yet again play an important role in removing discriminatory state constitutional barriers that stand in the path of expanding educational opportunities for children who need them desperately.

The Omnipresent Cloud

For as long as school choice has appeared on the policy horizon, constitutional questions have dogged it. Every school choice program adopted before 2000—whether vouchers or tax credits—was promptly subjected to legal challenge. The teachers unions brought out federal Establishment Clause (or, as they call it, “separation of church and state”)⁶ claims as well as state analogs, along with whatever other state constitutional claims they could pull out of their bag of tricks. Moreover, as we pointed out in our petition for writ of *certiorari* in the U.S. Supreme Court, constitutional objections repeatedly have been raised against school choice proposals in the legislative context. So it was imperative for school choice proponents to remove this major obstacle to reform. Dating from the enactment of the first urban school choice program in Milwaukee in 1990, the task took a dozen years.

Before and during that time, the Supreme Court considered a number of cases dealing with various types of programs in which aid found its way into religious institutions. Two seem-

6. The First Amendment provides in relevant part that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

ingly irreconcilable sets of precedents emerged. The first, reflecting a long period in which the Court's jurisprudence demanded a rigorous separation of church and state and evidenced a hostility toward religion, culminated in *Committee for Public Education v. Nyquist*, a 1973 decision striking down a package of religious school aid programs.⁷ The second, emanating from the view that the religion clauses of the First Amendment require governmental "neutrality" toward religion, produced six consecutive decisions sustaining direct and indirect aid programs.⁸ The apparently disparate frameworks resulted in divergent decisions among lower courts over school choice. Courts that found *Nyquist* controlling invariably found school choice programs unconstitutional; courts that found the subsequent cases controlling upheld them.

In fact, the two sets of precedents are harmonious. In *Nyquist*, the state provided loans, tax deductions, and other support exclusively for private schools and students who patronized them. The program was aimed at bailing out religious schools that were closing, and whose students were returning to public schools at considerable taxpayer expense. Applying the three-part Establishment Clause framework first set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1973),⁹ the Court concluded that the program's "primary effect" was to advance religion. The reasons for the Court's decision were understandable. Though acknowledging the strong secular purpose of pro-

7. 413 U.S. 756 (1973).

8. *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Wash. Dept. of Services for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000).

9. In assessing aid programs, the Court assessed whether the program (1) has a secular purpose, (2) has a primary effect that neither advances nor inhibits religion, and (3) excessively entangles the state and religion.

viding educational opportunities outside the public educational sector, the Court looked at the aid programs and found that they were skewed entirely in favor of private schools. And among private schools, religious schools heavily predominated. Because the program was not “neutral” in that it defined its beneficiaries in terms of the (private) schools they attended, and because the beneficiaries by definition overwhelmingly attended religious schools, the Court held that the aid scheme had the impermissible primary effect of advancing religion. Given that it was the program’s aim to help religious schools and their patrons, the decision was not surprising.

Had *Nyquist* been more categorical in its repudiation of school choice—adopting the separationists’ position that the moment a dollar of public funds crosses the threshold of a religious school that it is unconstitutional—it would have destroyed any chance for school choice programs. Fortunately, the Court created an escape valve. It probably did so because it recognized that the door to such aid already had been opened through such enormously popular programs as the G.I. Bill and Pell Grants. So in a footnote, the Court planted the seeds of an exception, one that eventually would become the general rule to which *Nyquist* would become the exception. Specifically, the Court held open the question of “whether the significantly religious character of the statute’s beneficiaries might differentiate the present cases from a case involving some form of public assistance (for example, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.”¹⁰

The Court returned to that question for the first time a decade later in *Mueller*. There the Court examined a Minnesota tax deduction for educational expenses. Because public school

10. *Nyquist*, 413 U.S. at 782 n. 38.

parents incur few expenses, the vast majority of tax deductions—allegedly 96 percent—were claimed by private school parents. The facts seemed eerily like those presented in *Nyquist*. But by a 5–4 vote, the Court upheld the deductions in a decision written by then–Associate Justice William Rehnquist and, notably, joined by Justice Powell, who had written *Nyquist*. The Court distinguished *Nyquist* on two main grounds: (1) all of the money that flowed to religious schools through tax deductions did so only as a result of independent choices made by families; (2) the program was neutral on its face, extending benefits to public and private school parents alike. The Court rejected the invitation to apply some sort of mathematical formula regarding the percentage of the program’s beneficiaries attending religious schools in order to determine the program’s primary effect. “We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law,” the Court declared.¹¹ Departing from a rule of facial neutrality, the Court emphasized, would render the constitutional inquiry hopelessly subjective. “Such an approach would scarcely provide the certainty that this field stands in need of,” the Court explained, “nor can we perceive principled standards by which such statistical evidence might be evaluated.”¹² Ultimately, the Court concluded that “[t]he historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.”¹³

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

12. *Id.*

13. *Id.* at 400.

Jurisprudentially, the battle over school choice was over once *Mueller* was decided—a fact that the dissenters in *Zelman* nearly two decades later explicitly would acknowledge. *Mueller* provided the framework that would henceforth consistently apply, holding that aid that found its way into religious schools was constitutionally permissible so long as two criteria were present: (1) the aid was directed to religious institutions only as a result of the independent decisions of parents and students (“indirect aid”), and (2) religious entities were only one of the options available (“neutrality”). That framework was entirely congenial to school choice programs, whether vouchers or tax credits, and school choice advocates now had a constitutional road map by which to craft programs.

Mueller also disposed of a troublesome argument, articulated by the Court in prior cases, that college aid programs were conceptually different from elementary and secondary school programs, because children in elementary and secondary schools are more impressionable and therefore more susceptible to religious school indoctrination. Though *Mueller* did not address the question directly, it was implicitly subsumed within the concept of parental choice. In cases involving public schools, such as school prayer cases, a doctrine of relative impressionability seems appropriate. But in indirect aid cases, children are hearing a religious message only because of their parents’ choice. In essence, parental choice operates as a constitutional “circuit breaker” between church and state.

Mueller also would impact *Zelman* in its rejection of a mathematical formula for determining Establishment Clause violations. The most troublesome fact in the record of the Cleveland program was that the overwhelming majority of students receiving scholarships were attending religious schools. *Mueller* confronted that issue head-on, subsuming it within both prongs of the inquiry, facial neutrality and indirect aid,

and established a firm rule basing a program's constitutionality on facial neutrality.

The Court reinforced those criteria three years later in *Witters*, which involved the use of college aid by a blind student studying for the ministry in a school of divinity. It is hard to imagine an atmosphere more pervasively sectarian than that; yet the Court upheld the use of the aid in a unanimous decision by Justice Thurgood Marshall.¹⁴ The Court emphasized that few students likely would use the aid in religious schools or for religious vocations. In *Zelman*, anti-school choice advocates seized upon that language to suggest that religious schools appropriately could comprise only a small part of a broader aid program.

But writing separate concurring opinions, five justices reiterated the more expansive criteria set forth in *Mueller*. Most notably, Justice Powell articulated a clear neutrality standard, declaring that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate" the primary effect test.¹⁵ Justice Powell also emphasized that such programs should not be viewed in isolation, but rather that the proper inquiry must encompass "the nature and consequences of the program *viewed as a whole*."¹⁶ That observation would prove helpful in the Cleveland case, in which the Court viewed the scholarship program in the broader context of school choices available to Cleveland families.

The next case, *Zobrest*, began to blur the lines between

14. Despite the decisive win, *Witters* came away empty-handed. When the case was remanded, the use of the aid was invalidated by the Washington Supreme Court under the "Blaine amendment" of its state constitution, discussed *infra*.

15. *Witters*, 474 U.S. at 490–91 (Powell, J., concurring).

16. *Id.*, p. 492 (emphasis in original).

direct and indirect aid. In that case, a school district refused to provide an interpreter for a deaf student attending a Catholic high school, to which he would have been entitled if he had chosen a public or nonsectarian private school, on the grounds that it would violate the First Amendment. After all, the district asserted, the interpreter would sign religious as well as secular lessons. *Zobrest* raised a crucial question: would aid have to be segregated between religious and nonreligious instruction? If so, it surely would trigger the third part of the Establishment Clause test, excessive entanglement between the state and religion.¹⁷ Fortunately for subsequent school choice programs, the answer was no. Again the Court assessed the issue in terms of indirectness of the aid: the fact that a child is attending a religious school and receiving religious instruction “cannot be attributed to state decisionmaking.”¹⁸

The *Zobrest* dissenters focused on the symbolism created by a public school employee interpreting lessons in a religious school, which in their view raised the specter of state sponsorship. Because of that special problem, *Zobrest* in some ways presented a tougher case than a school choice program, which imparts no physical indicia of state sponsorship. Indeed, perhaps unwittingly, the dissenters acknowledged as much. Justice Harry Blackmun, joined by Justice David Souter, objected to the symbolic message implied when a public employee who was involved “in the teaching and propagation of religious doctrine.” By contrast, the dissenters aptly observed, “[w]hen government dispenses public funds to individuals who employ them to finance private choices, it is difficult to argue that government is actually endorsing

17. The excessive governmental entanglement prong of the *Lemon* test provides an important safeguard against legitimate libertarian concerns about government regulation of private schools in school choice programs.

18. *Zobrest*, 509 U.S. at 10.

religion.”¹⁹ Unfortunately, that probative insight would elude Justice Souter nine years later in *Zelman*.

Rosenberger buttressed the neutrality principle even more. The University of Virginia excluded student-sponsored religious publications from support from student fees on the grounds that it would violate the First Amendment to include them. To the contrary, the Court ruled: it violates the First Amendment to *exclude* them, an act that constitutes impermissible content-based speech discrimination. The Court applied its now-familiar Establishment Clause framework to find that financial support for religious publications, within the broader context of student activities, did not have the primary effect of advancing religion.

The criteria set forth in *Mueller* and subsequent cases seemed hospitable to school choice programs. By definition, such programs are indirect in that funds flow to religious schools only if parents choose to send their children there. Neutrality is slightly more difficult if states already provide public school choices or if suburban schools are unwilling to participate. If the courts were willing to look at the broader context of school choices, such as open public school enrollment or charter schools, the neutrality criterion could easily be satisfied. And all of the contemporary school choice programs were designed with the Supreme Court’s framework in mind.

The two most recent cases—*Agostini*, involving the provision of public school teachers for remedial instruction in religious schools, and *Mitchell*, which considered computers and other materials for aid-eligible students in religious schools—also authorized neutral aid but created some uncertainty. Because the aid was provided directly to schools for eligible

19. *Id.* at 22–23 (Blackmun, J., dissenting).

students, the Court considered it relevant whether public funds “ever reach the coffers of religious schools.”²⁰ *Agostini* was written for a 5–4 majority by Justice O’Connor, and it applied the same two-part framework applied in the post-*Nyquist* cases. *Agostini* signaled a willingness on the part of the Court to overrule *Nyquist*-era precedents that seemed to require discrimination against religious schools rather than neutrality. The Court also subtly modified the definition of neutrality. In *Nyquist*’s footnote 38 and in subsequent decisions, the Court had depicted neutrality as encompassing public and private choices. But in *Agostini*, the Court found that the neutrality criterion was satisfied where “the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.”²¹ School choice programs easily could satisfy that standard, even if they did not explicitly include public schools within the range of options.

But in *Mitchell*, the plurality opinion for four justices, written by Justice Clarence Thomas, determined that neutrality should be the sole criterion in aid cases. Though joining in the plurality’s conclusion that the aid was permissible, Justice O’Connor concurred separately with Justice Stephen Breyer to delineate the differences between indirect (“true private choice”) and direct aid programs, emphasizing again that direct aid programs may be unconstitutional if they result in public funds reaching religious school coffers. Justice O’Connor seemed merely to be reiterating the two-pronged approach—neutrality plus true private choice—that the Court had applied since *Mueller*; but her alliance with Justice Breyer,

20. *Agostini*, 521 U.S. at 228.

21. *Id.* at 231.

who had not previously displayed moderation on Establishment Clause issues, was worrisome. Was Justice Breyer now a possible vote in favor of school choice? Was Justice O'Connor a possible vote against?

The Cleveland Program

It was amidst that uncertainty—a congenial constitutional standard but a closely divided Court—that the Cleveland case went up to the U.S. Supreme Court, with the future of educational freedom at stake.

The Cleveland program arose amidst a chronically mismanaged school system whose control had been seized by a federal court from local officials and transferred to the state. When the program was enacted in 1995, Cleveland students had a one-in-14 chance of graduating on time with senior-level proficiency and a one-in-14 chance of being a victim of crime inside the public schools each year. The state responded in part with an array of educational options, including the Cleveland scholarship program.²²

The Cleveland scholarship program was designed to satisfy the Court's Establishment Clause criteria. Eligible students, defined by residence and family income, could direct a portion of their state education funds as full payment of tuition at participating schools. Both private schools inside Cleveland and public schools in the surrounding suburbs were invited to par-

22. Milwaukee has the oldest urban school choice program for low-income students, dating to 1990. It was expanded in 1995 to include religious schools. Florida created a statewide choice program for students in failing public schools in 1999. Arizona enacted scholarship tax credits, by which taxpayers can receive a tax credit for contributions to private scholarship funds, a program that subsequently has been emulated by Pennsylvania and Florida. All those programs and others were taken into consideration in the U.S. Supreme Court's deliberations over the Cleveland program.

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ticipate. Private schools would receive a maximum of \$2,500 per student; suburban public schools would receive approximately \$6,000. Unfortunately, although all private schools in Cleveland signed up for the program, no suburban public schools did. Moreover, the two largest nonsectarian private schools in the program converted to community (charter) school status, thereby receiving about twice as much reimbursement as they had in the scholarship program. As a result, approximately 82 percent of the schools in the program were religious, enrolling about 96 percent of the scholarship students.

A panel of the U.S. Court of Appeals for the Sixth Circuit, by a 2–1 vote, found that those facts amounted to a violation of the Establishment Clause.²³ In assessing the program’s neutrality, the court did not examine the program on its face, but instead looked at the percentages of religious schools in the program and the students attending them. The court viewed the scholarship program in isolation, declining to consider the broader context of school choices, including publicly funded private nonsectarian community schools. The court also concluded that no true private choice existed, because few of the participating schools were nonsectarian. That fact the court attributed to the small amount of the scholarship and the state’s failure to compel suburban public schools to participate.

In taking the case to the Supreme Court, we expected one of the following outcomes: (1) the Court would issue an opinion broadly validating school choice; (2) the Court would strike down the program based on some peculiar aspect of its design, providing a road map for future school choice programs; or (3) the Court would uphold the program, but the majority would

23. *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000). Previously the Ohio Supreme Court had reached the opposite result; *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

factionalize, as in *Mitchell*, thereby depriving us of a clear rule of law. Based on recent precedents, we did not think the Court would broadly disavow school choice. Any of the likely outcomes would give us greater certainty; but of course the first one—a clear and decisive victory—would have the greatest beneficial impact for school choice. And that, of course, is what school choice advocates aimed to achieve.

Knowing that the State of Ohio would exhaustively confront the Establishment Clause issues, we decided to take a more expansive approach in our brief.²⁴ First we moved to blunt the plaintiffs’ tactical advantage of defining the terms of the debate. We sought to do that by setting forth crucial “background principles” that should inform the Court’s deliberation. The case did not merely implicate religious establishment issues, we argued. It also raised important considerations of federalism, parental liberty, and equal educational opportunities, all of which are values deeply embedded in our nation’s constitutional tradition, and which were promoted by expanding parental choice and educational options. Moreover, the First Amendment contains not only a prohibition against religious establishment but also a guarantee of the free exercise of religion. That combination translates appropriately, as the Court has recognized, into a requirement of nondiscrimination, or neutrality, toward religion. Again, we suggested, the program serves the principle of nondiscrimination, whereas the exclusion of religious schools would violate it.

We then went on to address the “primary effect” criterion in real-world terms. The Cleveland scholarship program grew out of a severe crisis in the Cleveland City Public Schools, whose administration had been turned over to the state by fed-

24. I discuss our litigation strategy in much greater detail in Clint Bolick, *Voucher Wars: Waging the Litigation Battle Over School Choice* (Washington, D.C.: Cato Institute, 2003).

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eral court order, and which in the previous school year had satisfied zero out of 28 state performance criteria. The program sought to enlist the widest possible range of educational options, and it operates within a broad array of public educational choices. The program's neutrality, we urged, should be determined on its face, not on the basis of statistics, for two reasons. First, hitching a program's constitutionality to the actions of third parties renders the process hopelessly subjective; and indeed, third parties (such as suburban public schools) could effectively veto the constitutionality of a program by refusing to participate. It seemed perverse that because some schools refused to throw inner-city youngsters an educational life preserver, then no schools would be allowed to do so. Second, statistics can change from year to year.

Moreover, the program should be evaluated not in isolation, we argued, but in its broader context. We presented a study by education researcher Jay Greene showing that if all schools of choice in Cleveland, including magnet and community schools, were taken into account, only 16.5 percent of Cleveland schoolchildren were enrolled in religious schools of choice. If the state had adopted all the choice programs at one time, under a statistical standard the program unquestionably would be constitutional. Why should it matter that the state adopted different options one step at a time? We introduced evidence showing that after the litigation ceased in Milwaukee, the number of nonsectarian private schools participating in the program—and the percentage of children attending them—increased substantially. We also cited affidavits and studies demonstrating the educational effects of school choice, showing again that the program's primary effect was not to advance religion but to expand educational opportunities for children who desperately needed them.

Finally, we argued that the program marked no revolution

in Establishment Clause jurisprudence. Others who were involved in the litigation were interested in reforming that area of the law, urging the Court to overrule *Nyquist*, or even *Lemon*. We always have taken a much more conservative approach: our goal is to defend school choice programs, rather than to remake Establishment Clause law. So we urged that *Nyquist* need not be overruled. To the contrary, school choice presented an easier case than the programs presented in *Agostini* and *Mitchell*, because the transmission of aid depends entirely on the independent decisions of parents. That characteristic attenuates any perception of state endorsement of religion, a recurrent Establishment Clause concern.

In sum, our approach and that of our allies was to depict the case as one about education, not religion. The plaintiffs inadvertently gave sanction to that argument through their mere identity: teachers unions, after all, care little about religious establishment, but greatly about educational policy. And if the program really was about education, we reasoned, then its “primary effect” could not be to advance religion.

Supreme Decision

The Court’s decision vindicated the most optimistic hopes of school choice supporters. Though a 5–4 decision, the Court majority spoke with a single, decisive voice, providing precisely the clarity necessary for the school choice movement to progress. Inexplicably, Justice Breyer retreated from the framework set forth in his *Mitchell* concurrence; but Justice O’Connor remained true. Writing the decision for the majority,²⁵ Chief Justice Rehnquist moderated his position from

25. It was fitting that the chief justice wrote the majority, for he also wrote the *Mueller* decision in 1983, which inaugurated the modern era of Establishment Clause jurisprudence.

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Mitchell, accommodating Justice O'Connor by retaining the "true private choice" criterion that the *Mitchell* plurality sought to jettison.

In addition to Rehnquist, four justices fully joined the majority opinion: O'Connor, Anthony Kennedy, Scalia, and Thomas. The chief justice began by recounting the grievous educational conditions giving rise to the Cleveland scholarship program. It was against that backdrop, the Court observed, that the scholarship program was adopted as "part of a broader undertaking by the State to enhance the educational options of Cleveland's schoolchildren" in response to the education crisis.²⁶ The Court examined other educational options, including magnet and community schools, as well as the higher dollar amount they commanded. The Court did not suggest that such options were essential to the constitutionality of the choice program, but merely illustrated that when the legislature enacted the school choice program, it was simply adding religious schools to a broader range of secular educational alternatives.

Applying the law, Rehnquist observed that "our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools . . . and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."²⁷ Whereas the Court's recent cases had expanded the permissible realm of direct aid, "our jurisprudence with respect to true private choice programs has remained consistent and unbroken."²⁸ Recounting that jurisprudence, Chief Justice Rehnquist declared that "where a government aid program is neutral with

26. *Zelman v. Simmons-Harris*, 122 S. Ct. at 2464.

27. *Id.* at 2465.

28. *Id.* at 2466.

respect to religion, and provides assistance to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, [it] is not readily subject to challenge under the Establishment Clause.”²⁹

The Court was convinced that the program was both neutral and “a program of true private choice,” as part of “a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district.”³⁰ “It confers educational assistance directly to a broad class of individuals defined without reference to religion.”³¹ Moreover, “[t]he program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so.”³² By contrast, the program did not provide a financial incentive for parents to choose religious schools; to the contrary, it creates “financial *disincentives* for religious schools.”³³ Parents receiving scholarships have to co-pay a part of their tuition (\$250), whereas parents choosing traditional, magnet, or community schools pay nothing. Emphasizing that although “such features of the program are not necessary to its constitutionality,” they “clearly dispel” any notion that the program is skewed toward religion.³⁴

Citing the Greene study, the Court viewed the program in the broader context of school choices, and rejected the statistical snapshot as a touchstone of constitutionality: “The Establishment Clause question is whether Ohio is coercing parents

29. *Id.* at 2467.

30. *Id.* at 2467–68.

31. *Id.* at 2468 (citations omitted).

32. *Id.* (emphasis in original).

33. *Id.* (emphasis in original).

34. *Id.*

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into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a private scholarship and then choose a religious school.”³⁵ Beyond that, the Court emphasized, “The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.”³⁶

Finally, the Court confronted *Nyquist*, finding no reason to overrule it because it did not compel the Court to strike down the program. After all, *Nyquist* involved programs that were designed unmistakably to aid religious schools, and the Court expressly had left open the question—answered subsequently in *Mueller* and other cases—of the constitutionality of a genuinely neutral aid program. Hence, the Court’s ruling changed jurisprudence not at all.

In closing, the Court underscored the moderation of its decision:

In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.³⁷

Justice O’Connor wrote separately to emphasize two points: that the decision does not mark “a dramatic break from

35. *Id.* at 2469 (emphasis in original).

36. *Id.* at 2470.

37. *Id.* at 2473.

the past,” and that the inquiry regarding “true private choice” should “consider all reasonable educational alternatives to religious schools that are available to parents.”³⁸ In the overall context of school choices in Cleveland, Justice O’Connor emphasized, religious schools played a small role. Moreover, government policies in general, including tax exemptions for religious institutions, already bestow a substantial financial benefit. That context, she explained, “places in broader perspective the alarmist claims about implications of the Cleveland program” sounded by the dissenters.³⁹

Justice Thomas’s concurring opinion was especially poignant, remarking that “[t]oday many of our inner-city public schools deny emancipation to urban minority students,” who “have been forced into a system that continually fails them.”⁴⁰ He observed, “While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children, who will certainly need it to function in our high-tech and advanced society.”⁴¹ The Cleveland scholarship program, he concluded, “does not force any individual to submit to religious indoctrination or education. It simply gives parents a greater choice as to where and in what manner to educate their children. This is a choice that those with greater means have routinely exercised.”⁴²

Displaying a penchant for original intent jurisprudence that makes him one of the Court’s greatest modern justices, Justice Thomas also raised the question whether the Establishment Clause should be construed to limit state action. By its

38. *Id.* (O’Connor, J., concurring).

39. *Id.* at 2475.

40. *Id.* at 2480 (Thomas, J., concurring).

41. *Id.* at 2483.

42. *Id.* at 2482.

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terms, the First Amendment is addressed to Congress. Most of the provisions of the Bill of Rights have been “incorporated” to apply to the states through the Fourteenth Amendment. But as Justice Thomas observed, “When rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty.”⁴³ He concluded that “[t]here would be a tragic irony in converting the Fourteenth Amendment from a guarantee of opportunity to an obstacle against education reform [that] distorts our constitutional values and disserves those in the greatest need.”⁴⁴

Justices John Paul Stevens, Souter, and Breyer penned strident dissents. All of them rejected the Establishment Clause framework that the Court has applied for the past two decades. Justice Stevens raised concerns about “religious strife,” raising the specter of “the Balkans, Northern Ireland, and the Middle East”⁴⁵—concerns echoed by Justice Souter’s claims of “divisiveness”⁴⁶ and Justice Breyer’s warnings of “religiously based conflict”⁴⁷—all notwithstanding that, as the majority pointed out, “the program has ignited no ‘divisiveness’ or ‘strife’ other than this litigation.”⁴⁸ Nor, as the majority observes, do the dissenters propose any rule of law by which the Court could discern when a program is too religiously divisive to sustain.

The fact is that the government already dispenses billions of dollars through the G.I. Bill, Pell Grants, student loans, and other programs that can be used for religious education. Yet Americans are not at each other’s throats in religious conflict.

43. Id. at 2481.

44. Id. at 2482.

45. Id. at 2485 (Stevens, J., dissenting).

46. Id. at 2502 (Souter, J., dissenting).

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

48. Id. at 2472 n. 7.

The reason that we do not see strife is that allowing benefits to be used in a nondiscriminatory fashion and directed by individual choice actually promotes a value that liberals are supposed to support: diversity. No one views a Pell Grant used at Georgetown or Yeshiva University as primarily advancing religion, because of the plethora of available options. Nor have the Cleveland, Milwaukee, or Florida school choice programs created religious strife, because they correctly are perceived as educational programs. By engaging in totally unfounded hyperbole, the dissenters undercut their own credibility.

The main dissenting opinion, written by Justice Souter and signed by Justices Stevens, Ruth Bader Ginsburg, and Breyer, castigated the Court's jurisprudence beginning with *Mueller*. It also concluded that no true private choice exists in Cleveland, but that instead parents are presented with a "Hobson's choice."⁴⁹ The dissenters on this point maintain that the public schools are so bad—and the religious schools by comparison so good—that Cleveland parents have no realistic choice. It seems odd that the proposed solution would be to eliminate the only positive choice. Justice Souter concedes that in his view there is nothing the state permissibly can do to make religious options available. "The majority notes that I argue both that the Ohio program is unconstitutional because the voucher amount is too low to create real private choice and that any greater expenditure would be unconstitutional as well," he observes. "The majority is dead right about this."⁵⁰ For the dissenters, the only constitutionally permissible option is for the state to consign students to government schools, no matter how defective.

49. *Id.*, p. 2497 (Souter, J., dissenting).

50. *Id.*, p. 2496 n. 16.

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Moving to the verge of panic, the dissenters warn that “the amount of federal aid that may go to religious education after today’s decision is startling: according to one estimate,⁵¹ the cost of a national voucher program would be \$73 billion, 25% more than the current national public-education budget.”⁵² It is comforting that the four liberal justices have suddenly assumed the role of guardians of the public fisc; but as a matter of factual analysis and Establishment Clause jurisprudence, it is off base. Not only does the government already spend a great deal on private education—not just at the post-secondary level but at the elementary and secondary levels through the Individuals with Disabilities Education Act—but private school education in the lower grades can actually save the government money (as witness the \$2,250 expended for full payment of private school tuition in the Cleveland program). Moreover, Establishment Clause jurisprudence never has turned upon the amount of money spent (in the view of rigid separationists, one dollar is too much) but rather upon whether government coercion is present. The dissenters would return us to an era in which the U.S. Supreme Court grafted upon the Constitution a requirement of discrimination against religion, perhaps one in which, imagining the unfathomable, a court might even rule it impermissible for a public school to sponsor a salute to the American flag because it contains the words “under God”!

Finally, the four dissenters take up the role of lobbyists, beseeching the “political branches [to] save us from the consequences of the majority’s decision,” and expressing the

51. You guessed it: the “projection” is from the militantly anti-school choice People for the American Way, whose studies are copiously cited by the dissenters, although they are not part of the case record.

52. *Zelman*, p. 2498 n. 20 (Souter, J., dissenting).

“hope that a future Court will reconsider today’s dramatic departure from basic Establishment Clause principle.”⁵³

Not content with Justice Souter’s 34-page opus, Justice Breyer presented a separate dissent, joined by Justices Stevens and Souter (but curiously, not by Justice Ginsburg). He wrote separately “because I believe that the Establishment Clause concern for protecting the Nation’s social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program.”⁵⁴ For Justice Breyer, it is not enough to vindicate the express intent of the First Amendment—to prohibit laws “respecting an establishment of religion”—but also to avoid “religiously based social conflict.”⁵⁵ In this regard, it doesn’t seem to matter that the program, in its sixth year of existence, has not created religious conflict, nor that its aim is educational. Instead, Breyer views the program against the backdrop of religious strife both in the United States and abroad. Helpfully, he informs us that in the United States, “Major religions include, among others, Protestants, Catholics, Jews, Muslims, Buddhists, Hindus, and Sikhs. . . . And several of these major religions contain different subsidiary sects with different religious beliefs.”⁵⁶ Apparently, the only way we can all get along is if each group is denied the opportunity to direct government benefits as they see fit—or, even worse, to direct them across religious lines, as with the large percentage of non-Catholic families sending their children in inner-city Catholic schools.

Justice Breyer concedes that the “consequence” of existing aid programs that include religious options “has not been great

53. *Id.* at 2502. Justice Souter took the additional dramatic step of reading his dissent from the bench.

54. *Id.* (Breyer, J., dissenting).

55. *Id.* at 2505.

56. *Id.*

turmoil.”⁵⁷ Nor is there evidence that the Cleveland program—or any other school choice program—has caused religious strife. But a voucher program, in Justice Breyer’s view, “risks creating a form of religiously based conflict potentially harmful to the Nation’s social fabric.”⁵⁸ Note the hypothetical language: it does not *do* it, it only *risks* it; and what it risks is not invariable harm but *potential* harm. On this double hypothesis, the dissenters would substitute their abstract concerns for the State of Ohio’s urgent effort to deliver educational opportunities in the all-too-real bedlam of Cleveland.

One wonders whether, in five years, or ten, when the dire prognostications of religious strife pass unfulfilled, the dissenters would reconsider their opinions. Likewise, it is curious that the dissenters focused on an argument that the plaintiffs made only in passing. The plaintiffs focused mainly on efforts to shoehorn the Cleveland program into the *Nyquist* construct. The dissenters implicitly acknowledged that the past twenty years of jurisprudence firmly sanction school choice programs. Instead, they embraced an ends-justifies-the-means rationale that substitutes the subjective fears of individual justices for the clear command of governmental neutrality embodied in the First Amendment’s religion clauses. Fortunately, that view did not prevail, but it is genuinely alarming that it attracted four votes.

The Road Ahead

Notwithstanding the dissenters’ shrill rhetoric, the majority opinion is the law of the land, and it dissipates the cloud over school choice programs. All recent voucher programs and proposals readily would satisfy the applicable criteria, particu-

57. Id. at 2506.

58. Id. at 2508.

larly if they operate in a broader context of secular educational choices. Likewise, so do scholarship and tuition tax credit programs.⁵⁹ It now seems entirely permissible for the government to adopt a program in which *all* education funding is channeled through students, to public and private schools alike. The decision could help usher in an era of child-centered public education reform whereby the state is primarily a *funder* rather than a *provider* of education, focusing less on *where* children are being educated and more on *whether* children are being educated.

The immediate beneficiaries of the decision are families in school choice programs who have lived in constant fear that their children will be pried out of the only good schools they have ever attended. The anti-school choice lobby is deprived of one of its most potent legal weapons. In Florida, where litigation challenging the state's opportunity scholarship program is ongoing, the federal constitutional cause of action has evaporated.

The federal constitutional objection has presented not only a legal obstacle but also a legislative one. School choice opponents surely will continue to resist tenaciously any effort to dismantle the public school monopoly, but no longer will they be able to credibly assert that such efforts are unconstitutional, at least as a matter of federal constitutional law.

The litigation focus will shift to state constitutions. Among other provisions, forty-seven states have religious establishment provisions that are more explicit than the First Amendment. They fall into two categories. The first is "Blaine amendments," tracing back to the late nineteenth century when anti-Catholic activists succeeded in adding restrictive

59. Indeed, because *Mueller* is so closely on point, tax credit programs have fared more easily in litigation so far. In our three cases defending tax credits, we have not lost a single round in any court.

language to state constitutions in an effort to preserve Protestant hegemony over public schools and taxpayer funding.⁶⁰ Typically, the Blaine amendments prohibit “aid” or “support” of sectarian schools. The second is “compelled support” provisions, which prohibit the state from compelling individuals to support religion. About three dozen states have Blaine amendments, and several have both Blaine amendments and compelled support provisions. School choice opponents have challenged existing programs under such provisions in every case so far; and with the federal Establishment Clause no longer at their disposal, they will rely even more heavily upon them in the future to thwart school choice.

Whether a Blaine amendment or compelled support provision prevents school choice depends upon how it is interpreted by state courts. The commonsense perspective is that the state constitutional provisions have the same meaning as the federal constitution; after all, the First Amendment forbids “support” of religious schools just as do the state constitutions. School choice channels aid or support not to schools but to students. *Zelman* should provide enormous conceptual assistance to state courts interpreting such constitutional provisions.

And indeed some state courts, such as in Wisconsin and Arizona, have construed their constitutional provisions in harmony with the First Amendment, finding that school choice programs do not aid or support private schools but instead aid and support students.⁶¹ In its decision upholding scholarship

60. See, e.g., Joseph P. Viteritti, “Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law,” 21 Harv. J. L. & Pub. Pol’y 657 (1998).

61. *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), cert. denied, 525 U.S. 997 (1998); *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), cert. denied, 528 U.S. 921 (1999).

tax credits, the Arizona Supreme Court expressly recognized that “the Blaine Amendment was a clear manifestation of religious bigotry,” which constrained the Court to interpret it narrowly.⁶² But at least a dozen states have interpreted their constitutions as forbidding aid to students in religious schools, and others are very much in question. In Florida, for instance, a state court ruled after *Zelman* that the state’s opportunity scholarship program fell under its Blaine Amendment.⁶³

Interpretations of state constitutions that require discrimination against religious options seem plainly to violate the First Amendment’s command of neutrality. As discussed earlier, the U.S. Supreme Court in *Rosenberger* rejected the University of Virginia’s attempt to single out religious publications for exclusion from student fee funding. The nondiscrimination principle has deep jurisprudential roots in both freedom of speech and free exercise of religion. For instance, in *Widmar v. Vincent*,⁶⁴ the Court held that a state university that made its facilities generally available to the public could not prevent use of the facilities for religious worship. The Court reached a similar decision allowing religious groups to use meeting spaces in public schools in *Lamb’s Chapel v. Center Moriches Union Free District*.⁶⁵ Moreover, the Court signaled that it was cognizant of the history of the Blaine amendments when the plurality remarked in *Mitchell v. Helms* that “hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.”⁶⁶

Fortunately, the *Zelman* decision allows the school choice

62. *Kotterman* at 624.

63. *Holmes v. Bush*, No. CV 99-3370, slip op. (Fla. Cir. Ct. Aug. 5, 2002).

64. 454 U.S. 263 (1981).

65. 508 U.S. 384 (1993); accord, *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

66. *Mitchell*, 530 U.S. at 828.

movement, for the first time in twelve years, to shift from defense to offense in the courts. Rather than fighting the Blaine Amendment issue state-by-state, we will seek a U.S. Supreme Court precedent establishing that state constitutional provisions that discriminate against religious options are themselves unconstitutional under the First Amendment. That opportunity will arise in the U.S. Supreme Court term that begins in October 2003. The Court will review the decision of the U.S. Court of Appeals for the Ninth Circuit in *Davey v. Locke*,⁶⁷ which held that the State of Washington's exclusion of theology students from otherwise available college student aid violates the First Amendment. The state justified the discrimination under its Blaine Amendment, but the Ninth Circuit ruled that the state constitution must yield to the neutrality principle of the federal constitution. A favorable precedent in the U.S. Supreme Court would establish that states may not discriminate against religious school options, rendering Blaine amendments harmless. An adverse decision would mean that we must continue litigating Blaine amendments state-by-state, as we presently are doing in defending school choice programs in Florida and Colorado.

State constitutions can provide opportunities for school choice as well. The school choice movement can now argue forcefully that instead of remedies calling for more money, cases of educational deprivations under state constitutional guarantees can be remedied through vouchers. Although the federal constitution does not affirmatively create a right to education, many state constitutions guarantee public education that is "uniform," "thorough and efficient," "high quality," or consistent with some other standard. In at least a dozen states, state courts have found that certain tax schemes (such as prop-

67. *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002).

erty taxation) violate those provisions because poorer school districts receive less in the way of state funds. The problem with such remedies is that they do not accrue to the intended beneficiaries of the constitutional guarantees: children. We have sought to intervene in Arizona in an ongoing “tax equity” lawsuit arguing that giving more money to failing school districts does not remedy the constitutional violation. Only a monetary damages remedy—that is, vouchers—will allow students to acquire high-quality education without delay.

Such a remedy may seem novel and radical, but it would be unusual only in the educational context. Monetary damages are the typical form of relief in torts and contracts cases. For instance, were a consumer to purchase a car that turned out to be a lemon, a court would not order a tax increase in order to give the car company more money to build a better car. Rather, it would order a refund of the consumer’s money, and the consumer would purchase a different car. Viewing state constitutional guarantees as a form of “warranty” would increase public school accountability and provide real alternatives to children whose schools are failing them. Such a result would be fully compatible with *Zelman*—and with court remedies under the federal Individuals with Disabilities Education Act, under which school districts that fail to provide a free “appropriate” education to disabled students must do so in a private school.

It is remarkable that it took twelve years of intense litigation to establish the baseline principle that parents may be entrusted with the decision of how to direct the education spending devoted to their children’s education. It will take much more work to establish even more ambitious principles of educational freedom; but in a free society, the task is an essential one. To paraphrase Winston Churchill, this triumph marks only the end of the beginning.

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But for now, advocates of educational freedom have much to celebrate. In common cause with economically disadvantaged families, we have prevailed in our first big test in the U.S. Supreme Court. The special interest groups dedicated to the status quo are momentarily vanquished. The empire will strike back, for sure; but this decision shows that they can be beaten, that David can indeed slay Goliath.

When the unions first challenged the Cleveland scholarship program in 1997, they characterized the parents as “inconsequential conduits” for the transmission of aid to religious schools. The unions, as usual, got it exactly backward: the parents *were* inconsequential, but they no longer are. In fact, in Cleveland and Milwaukee and other pockets in America, the parents are finally, and forever, in charge.

That’s exactly what threatens the education establishment so much. Let’s hope it proves contagious.