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True Private Choice or a Hobson's Choice: Re-thinking *Zelman v. Simmons-Harris* in North Carolina's Opportunity Scholarship Program

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"TRUE PRIVATE CHOICE" OR A "HOBSON'S CHOICE?:" RE-THINKING *ZELMAN V. SIMMONS-HARRIS* IN NORTH CAROLINA'S OPPORTUNITY SCHOLARSHIP PROGRAM

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I. INTRODUCTION

"Hard cases, it has been frequently observed, are apt to introduce bad law."[1] This familiar legal principle is ordinarily invoked when a sympathetic judge offers a "strained interpretation of the law"[2] to avoid a harsh impact on an individual. But, while sympathetic judges may serve justice or equity of the moment, *stare decisis* outlasts sympathy and "hard cases" typically prove to be difficult for general application because the judge's "immediate overwhelming interest...appeals to the feelings and distorts the judgment."[3]

Perhaps no modern First Amendment case illustrates this principle more aptly than *Zelman v. Simmons-Harris*,[4] where the Supreme Court was asked to determine whether Ohio's controversial Pilot Project Scholarship Program ("Pilot Program"), which enabled eligible parents to use "school vouchers" at qualifying public or private schools of their choice, violated the Establishment Clause.[5] The Pilot

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1. *See* Winterbottom v. Wright, (1842) 152 Eng. Rep. 402 (Exch.) 405. Judge Rolfe wrote the majority opinion in *Winterbottom* and is often credited as the first jurist to lay down the principle in print. *See generally* Michael Davis & Andrew Stark, *Conflicts in Rulemaking: Hard Cases and Bad Law, in* CONFLICT OF INTEREST IN THE PROFESSIONS, 4 (Michael Davis & Andrew Stark eds., 2001).

2. NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING 49 (2005).

3. Northern Securities Co. v. United States, 193 U.S. 197, 364 (1904) (Holmes, J., dissenting) (alteration in original).

4. 536 U.S. 639 (2002).

5. *Id.* at 639 (majority opinion).

Program was enacted in response to an "unprecedented" education crisis within Cleveland's inner city schools, prompting Justice Souter to observe that "[i]f there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here."[6] Ultimately, in a split decision, a sympathetic majority held that the Pilot Program was not a violation of the Establishment Clause, even though roughly 96% of all participants in the Pilot Program used their voucher at private Catholics schools.

Over a decade later, the holding in *Zelman* remains controversial for a myriad of reasons. First, *Zelman* disregarded a swath of existing First Amendment doctrine[7] and single-handedly approved the greatest expansion in government aid to religious schools in the Court's history.[8] Second, the majority's "true private choice" test largely ignores the realities of modern education[9] and often leaves parents with no "true" choice but only a "Hobson's Choice" for the education of their child.[10]

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6. *Id.* at 685 (Souter, J., dissenting).

7. *Cf. infra* Part III (analyzing the Supreme Court's religious school aid jurisprudence from 1940-2002, culminating in the Court's decision in *Zelman*) and *infra* Part V.B.3 (analyzing the implications on the *Zelman's* Court's disregard of the "entanglement" and "indoctrination" prongs used in *Agostini* to analyze a government program's "effect" on religion).

8. In "direct-aid" cases, the Court has set firm limiting principles on the amount of money that can reach religious institutions. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 802 (2000) (noting that federal funds could only supplement nonfederal funding sources); Agostini v. Felton, 521 U.S. 203, 210 (1997) (federally funded services could "supplement, and in no case supplant, the level of services" that were already provided). In "in-direct aid" cases, the amount of aid conferred may be substantial to the recipient but it was nominal to the "bottom-line" of the religious institution receiving the benefit and the aggregate religious interest in the state. *See, e.g.*, Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986) (one student received handicapped aid to attend a religious seminary institution); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13–14 (1993) (one student received aid for sign-language interpreter at a private religious school).

9. *See infra* Part III.D (analyzing the *Zelman* Court's rationale for the "true private choice" test).

10. Oxford's dictionary defines a "Hobson's Choice" as "[a] choice of taking what is available or nothing at all." THE NEW OXFORD DICTIONARY 803 (2d. ed. 2005). In his *Zelman* dissent, Justice Souter argued that in the voucher context "true private choice" is eviscerated by practical factors such as income and demographics, leaving Cleveland parents with very little choice, or as he phrased it, a "Hobson's Choice." *See Zelman*, 536 U.S. at 704 (Souter, J., dissenting); *see also supra* Part III.D.3 and Part V.B.2.

Finally, *Zelman's* utility remains questionable.[11] Since *Zelman*, the Court has not granted certiorari in another voucher case and the expansive "true private choice" test has never been applied outside of the unique facts in *Zelman*.[12] Accordingly, many opportunistic state legislatures continue to press constitutional boundaries in the development of their own voucher laws.[13]

North Carolina is the latest battleground in the debate. In the summer of 2013, the North Carolina General Assembly approved a budget bill that provides "Opportunity Scholarships" of up to $4,200 for qualifying low-income students to use at "non-public" schools within the state.[14] Although the word "voucher" is noticeably absent in the program,

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11. *See, e.g.*, David M. Powers, *The Political Intersection of School Choice, Race, and Values*, 60 ALA. L. REV. 1051, 1060–63 (2009); Isabel Chou, *"Opportunity" for All?: How Tax Credit Scholarships Will Fare in New Jersey*, 64 RUTGERS L. REV. 295, 310 (2011) ("Nevertheless, with four justices dissenting and critics calling out the Court's inconsistency, it may only be a matter of time before the issue returns to the Supreme Court."). *See also* Jason S. Marks, *What Wall? School Vouchers and Church-State Separation After* Zelman v. Simmons-Harris, 58 J. MO. B. 354 (2002) (discussing the breakdown of the first amendment after *Zelman*); Elizabeth A. Marino, Comment, *Constitutional Law-School Voucher Programs Providing Access to Private Religious Schools Do Not Violate the Establishment Clause-*Zelman v. Simmons-Harris, 536 U.S. 639 (2002), 37 SUFFOLK U. L. REV. 1243 (2004).

12. Although the "true private choice" test has never been applied in another voucher case, by implication, the test has become a staple of the Roberts Court's hands off approach to public prayer, especially Legislative Prayer. *See, e.g.*, Town of Greece v. Galloway, 572 U.S.___, 134 S. Ct. 2811 (2014) (holding that the Town of Greece was not constitutionally prohibited from opening its meetings with prayer because the prayers were optional). *See generally* Scott Gaylord, *When the Exception Becomes the Rule:* Marsh *and Sectarian Legislative Prayer Post-*Summum, 79 U. CIN. L. REV. 1017, 1066–67 (2011) (relying on *Zelman* to argue that the frequency of particular prayers are unimportant in the legislative prayer inquiry because they are simply a product of demographics beyond the court's reach).

13. *See, e.g.*, Owens v. Colo. Cong. of Parents, Teachers & Students, 92 P.3d 933, 944 (Colo. 2004) (finding Colorado's voucher program unconstitutional under Colorado state law); Bush v. Holmes, 919 So. 2d 392, 413 (Fla. 2006) (holding that Florida's voucher program violated the Florida Constitution's educational uniformity clause).

14. *See* N.C. Gen. Stat. §§ 115C-562.1-562.7 (2013); *see also infra* Parts III.A–B (tracing the legislative history of North Carolina's Opportunity Scholarship Program and explaining the mechanics of the statute).

North Carolina's "Opportunity Scholarships" are analogous to the Pilot Program at issue in *Zelman,* as well as similar voucher legislation enacted in 39 other states around the country.[15] Like other states, North Carolina's citizens immediately challenged the voucher legislation on constitutional grounds in state court.[16]

Although state law may ultimately resolve North Carolina's voucher dispute altogether, this paper seeks to address the issues a future plaintiff might face in bringing a federal Establishment Clause challenge to a contemporary voucher program under a post-*Zelman* regime.[17] To lay the proper foundation, Part II briefly demarcates the educational policy debate surrounding vouchers and "school choice." Part III traces the historical development of government aid to religious schools in the Supreme Court, and includes a detailed analysis of the conflicting majority, concurring and dissenting opinions in *Zelman.* Part IV analyzes the legislative history, mechanics and implementation of North Carolina's voucher legislation. Part V then argues that North Carolina's Opportunity Scholarship Program ("O.S.P.") violates the Establishment Clause in two respects: it fails *Zelman's* "true private choice" test and its

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15. *See Ed Choice 101: Facts,* AMERICAN FEDERATION FOR CHILDREN, http://www.federationforchildren.org/ed-choice-101/facts (last visited December 11, 2014 8:37am). For a state-by-state comparison on voucher programs around the country, see *School Voucher Laws: State-by-State Comparison,* NATIONAL CONFERENCE OF STATE LEGISLATURES (last visited December 11, 2014 8:37am), http://www.ncsl.org/
research/education/voucher-law-comparison.aspx;, http://www.ncsl.org/research/education/voucher-law-comparison.aspx.

16. *See* Amended Complaint, Hart v. North Carolina, (December 11, 2013) (No. 13-CVS-16771) *available at* http://www.ncae.org/wp-content/uploads/Vouchers-Complaint-Final.pdf [hereinafter "Hart Complaint"]; Complaint for Declatory Judgment and Injunctive Relief, Richardson v. North Carolina (Dec. 16, 2013) (No. 13-CVS-16484), *available at* http://www.ncsba.org/clientuploads/DocumentsPDF/13Complaint.pdf [hereinafter "Richardson Complaint"].

17. This paper relies on the working assumption that the North Carolina Supreme Court will uphold the voucher law under the North Carolina Constitution and a North Carolina citizen or advocacy group will pursue further litigation in federal court, a prediction already made by Professor Gene Nichol. *See* Gene Nichol, *Gene Nichol: Law takes a beating in NC voucher saga,* RALEIGH NEWS AND OBSERVER, June 21, 2014, http://www.newsobserver.com/2014/06/21/3952326/gene-nichol-law-takes-a-beating.html.
law.unc.edu/documents/poverty/publications/lawtakesabeatinginncvouchersaga.pdf .

"effects" raise additional "entanglement" concerns that were not at issue in *Zelman* but are still constitutionally significant to the advancement of religion under the First Amendment.

II. VOUCHER POLICY AND SCHOOL CHOICE

In its simplest form, a school voucher is a certificate of funding issued by a state for the benefit of an eligible student enrolled at a qualified educational institution of the parent's choice.[18] Whether such a scheme makes for sound public policy has become a lightning rod for debate in the era of de-segregation following *Brown v. Board of Education*.[19]

Proponents present a mixture "of market and non-market rationales" to support the implementation of school vouchers.[20] From a market perspective, proponents cite the works of Milton Friedman, an economist who coined the term "voucher" during the 1950's.[21] Friedman argued that the monopolistic features of public education bred complacency[22] and like businesses, public education could boost its efficiency if supply and demand principles were introduced into the education marketplace.[23] Therefore, Friedman proposed offering parents a government credit, or a "voucher," for use as tuition at the school of their choice, forcing public schools to compete with private institutions for student enrollment.[24] From a non-market perspective, proponents also contend that empirical studies suggest educational outcomes are

18. Academics formally define the term "voucher" as "an entitlement extended to an individual by government permitting that individual to receive educational services up to the maximum dollar amount specified." *See* THOMAS L. GOOD & JENNIFER S. BRADEN, THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS, AND CHARTERS 90–91 (2000) (quoting AUSTIN D. SWANSON & RICHARD A. KING, SCHOOL FINANCE: ITS ECONOMICS AND POLITICS 414 (2d ed. 1997)).

19. 347 U.S. 483 (1954) (holding that state laws permitting "separate but equal" treatment in educational facilities violate the 14th Amendment).

20. Chou, *supra* note 11, at 298.

21. *See id.* at 298–99 (citing MILTON FRIEDMAN, CAPITALISM AND FREEDOM 93–100 (1962)).

22. *See id.* (citing MILTON FRIEDMAN, CAPITALISM AND FREEDOM 93–98 ("competition cannot be relied on to protect the interests of parents and children.")).

23. *See id.*

24. *See id.*

enhanced when parents are given more autonomy to tailor instruction to meet their child's needs.[25] Likewise, enhanced autonomy over instruction also bolsters the transmission of important cultural and social values to children, especially in predominately minority communities.[26]

Conversely, North Carolina opponents argue that voucher programs, while benefiting some, "transfer public funds to unaccountable private schools"[27] and reduce the overall amount of funding available for public education.[28] As a result, students are denied a "sound basic education:"[29] a fundamental goal of state and local government, guaranteed by North Carolina's Constitution.[30] Opponents also argue that voucher programs are ripe for fraud and abuse[31] and where implemented have done little to reduce the achievement gap,[32] a stated goal of North Carolina's voucher law.[33]

Notwithstanding strong policy arguments on the right and the left, school vouchers also raise constitutional concerns. As Part III explores, because school vouchers inherently require the transfer of public funds to private individuals, many of whom use their entitlement at private religious schools, the argument continues to be made that

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25. *See id.* at 299 (citing JEFFREY R. HENIG, RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR 15–16 (1994)).

26. *See id.* (citing JEFFREY R. HENIG, RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR 16 (1994)).

27. *See* Plaintiffs Memorandum in Support of Motion for Preliminary Injunction at 4, Hart v. North Carolina (Jan. 30 2014) (No. 13-CVS-16771) (on-file with author).

28. *Id.* at 4–9.

29. *See* Leandro v. State, 346 N.C. 336 (1997) (holding that the North Carolina Constitution required the State to provide every student "a sound basic education").

30. *Id.*

31. Lindsay Wagner, *School Vouchers: A Pathway towards Fraud and Abuse of Taxpayer Dollars*, NCPOLICYWATCH.COM (April 24, 2013), http://www.ncpolicywatch.com/2013/04/24/school-vouchers-a-pathway-toward-fraud-and-abuse-of-taxpayer-dollars.

32. Matthew Ellinwood, *Education Policy Perspectives: Public Money for Private Schools*, Policy Brief: NORTH CAROLINA JUSTICE CENTER (April 24, 2013), http://www.ncjustice.org/?q=education/education-policy-perspectives-public-money-private-schools.

33. *See infra* Part IV.A.

vouchers unfairly advance religion and violate the First Amendment's Establishment Clause.[34]

III. THE *ZELMAN* DOCTRINE

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion."[35] However, for the first half of United States history, Establishment Clause principles were foreclosed to direct application among the states.[36] But, once the First Amendment became applicable to the states[37] through the Fourteenth Amendment, the Supreme Court gradually heard more Establishment Clause cases, which in turn significantly expanded the doctrine.[38] As Parts III A, B, and C demonstrate, in the context of government aid to private religious schools, Establishment Clause jurisprudence has vacillated greatly over the last half century.

A. Early Cases

In *Everson v. Board of Education*[39] Justice Black, writing for the majority, articulated what is still considered to be the "modern conception" of the Establishment Clause:[40]

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34. *See, e.g.*, Anderson v. Town of Durham, 895 A.2d 944 (Me. 2006), *cert. denied*, 549 U.S. 1051 (2006) (upholding the validity of a Maine tuition payment statute, finding it neither improperly infringed on the free exercise of religion nor violated the Establishment Clause in an action brought by parents electing to send their children to private religious schools that did not qualify as nonsectarian schools for payment of tuition with public funds).

35. U.S. CONST. amend. I.

36. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1 (1947) (holding that the Fourteenth Amendment incorporated the First Amendment's Establishment Clause provisions to the states); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("[T]he fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment.") (internal citation omitted).

37. *See Everson*, 330 U.S. at 1; *Cantwell*, 310 U.S. at 303.

38. *See generally* Kristopher L. Caudle, Note, *Unanswered Prayers:* Lund v. Rowan County *and the Permissiveness of Sectarian Prayer in Municipalities*, 12 FIRST AMEND. L. REV. 625, 633 (2014) (framing the historical context of a modern Establishment Clause inquiry).

39. 330 U.S. 1, 3 (1947) (majority opinion).

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.... No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.[41]

In *Everson*, the Court addressed the constitutionality of a New Jersey statute that gave local governments discretion to re-imburse parents for the costs of transporting their children to school on "regular buses operated by the public transportation system."[42] Because re-imbursement was funded from taxpayer dollars and part of the funds went to parents of children educated at Catholic parochial schools, a taxpayer alleged that the program violated the Establishment Clause.[43] In its opinion, the majority acknowledged some First Amendment tension with the scheme[44] but ultimately reasoned that the Establishment Clause was no bar to "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[45] Therefore, even though some public funds reached Catholic parochial schools, since the program was designed to benefit all parents neutrally, regardless of religion, it did not violate the Establishment Clause.[46]

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40. Zelman v. Simmons-Harris, 536 U.S. 639, 687 (2002) (Souter, J., dissenting).

41. *Everson*, 330 U.S. at 15–16.

42. *Id.* at 3.

43. *Id.*

44. *See id.* at 16 ("New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion.").

45. *Id.* at 18.

46. *Id.* at 17.

Similarly, in *Board of Education v. Allen*,[47] the Court upheld a New York statute that required school boards to loan textbooks to students at private religious schools.[48] Relying on *Everson*, the Court made no distinction between government aid available for student transportation and textbooks made available for student instruction.[49] Like the statute in *Everson*, the New York statute in *Allen* provided for a general program not to advance religion but instead to advance a secular purpose: the "furtherance of the educational opportunities available to the young."[50] However, the *Allen* Court was careful to note the statute did not "authorize the loan of religious books"[51] and all textbooks required approval by local authorities such that only secular books could receive approval.[52]

Unlike *Everson* and *Allen*,[53] where government aid was funneled to parents and students, in *Lemon v. Kurtzman*,[54] the Court unanimously struck down a Pennsylvania statute on Establishment Clause grounds because the statute provided a *direct* 15% salary supplement to teachers in non-public schools.[55] Likewise, the *Lemon* Court's Establishment Clause holding largely turned on the "excessive entanglement" between government and religion that would necessarily result when teachers accepted direct salary supplements to teach secular subjects at private religious schools.[56]

Ultimately, the *Lemon* Court combined *Everson* and *Allen* to articulate a workable analysis under the Establishment Clause.[57] To survive Establishment Clause scrutiny under the *Lemon* test, a

47. 392 U.S. 236 (1968).

48. *See id.* at 242–43.

49. *Id.*

50. *Id.* at 243.

51. *Id.* at 244.

52. *Id.* at 244–45.

53. Lemon v. Kurtzman, 403 U.S. 602, 617 (1971) ("In *Allen* the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the State would be asked to provide. We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books.").

54. 403 U.S. 602 (1971).

55. *Id.* at 606–08. The Court also noted that nearly 95% of teachers that received the salary supplement were employed by Catholic Schools. *Id.*

56. *Id.* at 614.

57. *Id.* at 612–13.

government aid program: (1) "must have a secular legislative purpose;" (2) "its principal or primary effect must be one that neither advances nor inhibits religion;" and (3) the policy "must not foster 'an excessive government entanglement with religion.'" [58] To determine whether an "entanglement" is "excessive," a court must evaluate the "character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[59] While the *Lemon* Test has not achieved universal application in Establishment Clause cases,[60] as Parts III B and C explain, *Lemon*'s three-prong analysis and its permutations[61] continue to guide the constitutional inquiry in cases where government aid reaches religious schools.

B. Lessons from Lemon: Forming the "Direct" and "In-direct" Distinction

The lessons from *Lemon* were crucial in distinguishing "direct-aid" from "in-direct aid" during the 1970's and 1980's. In a line of cases following *Lemon*, the Court applied the three-prong *Lemon* test to invalidate numerous government programs that, like *Lemon*, provided "direct aid" to religious schools.

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58. *Id.* (quoting Walz v. Tax Comm., 397 U.S. 664, 674 (1970)).

59. *Id.* at 615.

60. *See, e.g.*, Hunt v. McNair, 413 U.S. 734, 741 (noting that the *Lemon* Test was "no more than helpful signposts" in interpreting the Establishment Clause). Justice Scalia has been the most colorful critic in the application of the *Lemon* test. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 397–98 (1993) (Scalia, J., and Thomas, J., concurring in the judgment) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.").

61. Since *Lemon*, the Court has folded the "entanglement" prong of the *Lemon* test into the "effects" prong. *See* Agostini v. Felton, 521 U.S. 203, 232 (1997). As Justice O'Connor noted in *Zelman*, "[t]his made sense because both inquiries rely on the same evidence, [] and the degree of entanglement has implications for whether a statute advances or inhibits religion." Zelman v. Simmons-Harris, 536 U.S. 639, 668–69 (2002) (O'Connor, J., concurring) (alteration in original).

1. Direct Aid Cases

In *Committee for Public Education and Religious Liberty v. Nyguist* [62] the Court held that a New York statute providing direct money grants to private schools "for the 'maintenance and repair of . . . school facilities . . .'"[63] violated the Establishment Clause because it subsidized religious activities and had the primary effect of advancing religion.[64] Similarly, in *Meek v. Pittenger*,[65] the Court struck down a Pennsylvania statute which allowed the State to loan "instructional materials and equipment"[66] directly to qualifying private religious schools. Because the loans were made directly to the school, as opposed to the loans in *Allen* (which were made to a parent or student), and 75% of the loans went to private religious schools,[67] the Court held that the statute had the primary effect of advancing religion and therefore failed the first prong of the *Lemon* test.[68]

Finally, in both *Aguilar v. Felton*,[69] and *School District of the City of Grand Rapids v. Ball*,[70] the Court followed the logic in *Meek* and

62. 413 U.S. 756 (1973).

63. *Id.* at 762. The Court found that the stated purpose of New York's statute–a concern for the health and safety of students in poorly maintained building–was a valid secular purpose under *Lemon*. *Id.* at 773.

64. *Id.* at 774.

65. 421 U.S. 349 (1975)), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

66. *Id.* at 354. Under the statute "'Instructional materials' are defined to include periodicals, photographs, maps, charts, sound recordings, films, 'or any other printed and published materials of a similar nature.' 'Instructional equipment,' . . . includes projection equipment, recording equipment, and laboratory equipment." *Id.* at 354–55. However, it "would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian." *Id.* at 365.

67. *Id.* at 364.

68. *Id.* at 363.

69. 473 U.S. 402 (1985) *overruled by* Agostini v. Felton, 521 U.S. 203 (1997) (holding that New York's use of federal Title I aid to pay public school teachers to instruct private religious school students was a violation of the Establishment Clause).

70. 473 U.S. 373, 393 (1985) *overruled by* Agostini v. Felton, 521 U.S. 203 (1997) (holding that the shared time and community resources program which

struck down New York's Title I program and Pennsylvania's "Shared Time" program because they too had the primary effect of advancing religion. In addition, maintenance of the programs in these cases required "excessive entanglement" between the government and religion, violating the third prong of *Lemon*.[71]

2. In-direct Aid Cases

Conversely, in another line of cases following *Lemon*, the Court took a different approach when government aid reached religious institutions "in-directly" through the private and independent choices of some, or many, individual recipients of government aid.

In *Mueller v. Allen*,[72] the Court upheld a Minnesota statute allowing citizens to deduct "tuition, textbooks and transportation"[73] expenses incurred by parents in their state income tax return, even though statistical evidence tended to show that the vast majority of parents claiming the deduction enrolled their children in private religious schools.[74] Applying the *Lemon* test, the Court reasoned that Minnesota's tax deduction had a valid secular purpose and did not have the "primary effect" of advancing religion because it was only one of many deductions available under Minnesota's tax laws and it could be claimed by all parents, whether their children were enrolled in public school, sectarian or non-sectarian private schools.[75] Thus, Minnesota's program was neutral because the benefits likely to inure to religious interests were

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provided the classes to nonpublic school students at public expense in classrooms located in and leased from nonpublic schools had the "'primary or principal' effect of advancing religion and therefore violate[d] dictates of the establishment clause of the First Amendment.").

71. *See Aguilar*, 473 U.S. at 413; *Ball*, 473 U.S. at 397.

72. 463 U.S. 388 (1983).

73. *Id.* at 391.

74. *Id.* at 401–02. The Petitioners in *Mueller* also pointed out that even though the statute applied to all parents, the benefits to a parent with a child in public school were "negligible in value," in that, parents of public school children had little to no tuition expenses to claim as a deduction. *Id.*

75. *Id.* at 400–02. The *Mueller* Court also found with relative ease that the Minnesota statute fulfilled the other remaining prongs of the *Lemon* test. *See id.* at 394–95 (valid secular purpose), 403–04 (entanglement prong).

"attenuated" and only resulted by the independent choices of private citizens.[76]

Three years after *Mueller*, the Court reached substantially the same result in *Witters v. Washington Department of Services for the Blind*.[77] In *Witters*, a Washington statute authorized funding to assist "visually handicapped" students in achieving vocational, secondary, or higher education degrees within the State.[78] The petitioner, Larry Witters qualified to receive assistance under the statute but was denied because he planned to use the entitlement as tuition at a private seminary school.[79] As in *Mueller*, the Court applied the *Lemon* test and found no Establishment Clause violation because tuition money was transferred to Mr. Witters personally and whether the aid was directed to a sectarian or non-sectarian institution was considered his private and independent choice.[80] However, the *Witters* Court made an important distinction that was only implicit in *Mueller*'s rationale: the amount of money expended to any individual recipient under the statute would only be expected to nominally advance religious interest as a whole.[81]

Finally, the Court applied the logic in *Mueller* and *Witters* to uphold a similar Establishment Clause challenge in *Zobrest v. Catalina Foothills School District*.[82] In *Zobrest*, a deaf student requested the use of a sign-language interpreter at a private religious school.[83] When the school district denied the request, Zobrest's parents brought suit alleging, *inter alia*, that use of state funds for the purposes of retaining an interpreter was not a violation of the Establishment Clause.[84] The Supreme Court agreed, holding that the statute authorizing sign-language interpreters was designed primarily to assist in the education of handicapped students, not to benefit religious interests.[85] In that light, any financial benefits accruing to the school were "incidental" and merely a product of the parent's private and independent choice to send

76. *Id.* at 400–01.
77. 474 U.S. 481 (1986).
78. *Id.* at 483.
79. *Id.* at 483–84.
80. *See id.* at 487–89.
81. *Id.*
82. 509 U.S. 1 (1993).
83. *Id.* at 3–4.
84. *Id.* at 11–12.
85. *Id.*

their child to a religious school when other non-religious public school options were available.[86] Moreover, the physical presence of an interpreter assisting in the sectarian education of a recipient alone was not enough to raise a constitutional issue in itself under the Establishment Clause.[87]

C. Re-Designing Lemon's Entanglement Prong

With the assistance of the *Lemon* test, by the late 1990's, the Supreme Court's government aid to religious school doctrine seemed to settle into two discrete categories on opposite ends of the Establishment Clause spectrum: "direct-aid" and "in-direct aid." On the "direct-aid" end of the spectrum, cases like *Lemon*, *Nyquist*, *Meek*, *Aguilar*, and *Ball* violated *Lemon* because government money grants or benefits made in-kind were provided directly to religious institutions. On the "in-direct aid" end of the spectrum, cases like *Everson*, *Allen*, *Mueller*, *Witters*, and *Zobrest* did not violate *Lemon* because government aid only reached religious schools in-directly, through the private genuine and independent choices of individuals. Then, the Court decided *Agostini v. Felton*[88] and *Mitchell v. Helms*,[89] two cases that overturned prior precedent, blurred the direct/in-direct aid distinction and paved the way for the majority's holding in *Zelman*.

In *Agostini*, the Court was asked to revisit the same Title I program it held to be unconstitutional in *Aguilar*.[90] In *Aguilar*, New York's implementation of Title I, which allowed public school teachers to provide remedial instruction in private religious schools, was deemed to violate the "excessive entanglement" prong of the *Lemon* test.[91] However, in light of the Court's recent holdings in *Witters* and *Zobrest*,[92] the Court granted certiorari pursuant to Federal Rule of Civil Procedure 60(b)(5) and overturned *Aguilar*, holding that implementation of Title I services at private religious schools was not an Establishment Clause

86. *Id.* at 12–13.
87. *Id.* at 13–14.
88. 521 U.S. 203 (1997).
89. 530 U.S. 793 (2000) (plurality opinion).
90. *See supra* notes 69–71 and accompanying text.
91. *See id.*
92. *See* Agostini v. Felton, 521 U.S. 203, 216 (1997).

violation because it was rendered "on a neutral basis" and adequate "safeguards" were in place to prevent excessive entanglement of government and religion.[93]

In reaching this result, the *Agostini* Court modified the *Lemon* test, collapsing the "excessive entanglement" prong into a broader determination of a government program's general "effect" on the advancement of religion.[94] In their opinion, the *Agostini* Court stated that a government aid program might violate the "effects" prong if it: (1) was likely to lead to "governmental indoctrination," (2) "define[d] its recipients by reference to religion," or (3) created an "excessive entanglement" between the government and religion.[95]

While the majority in *Agostini* focused primarily on the "indoctrination" prong of the "effects" test to resolve the case,[96] "excessive entanglement" was still relevant to the Court's decision.[97] Indeed, the Court articulated three additional "entanglement" factors that courts should take into consideration when judging establishment clause violations: (1) whether the government program required "pervasive monitoring by public authorities," (2) whether the government program required "administrative cooperation[] between [a government agency] and parochial schools," and (3) whether "the program might increase the dangers of "political divisiveness."[98]

Within this framework, the *Agostini* Court primarily focused on "pervasive monitoring."[99] The Court determined that *Aguilar* rested on

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93. *See id.* at 234–35.

94. *See id.* at 233 ("it is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect.").

95. *Id.* at 234.

96. *See id.*

97. *See id.* at 233–35.

98. *See id.* at 233 (internal quotation marks omitted).

99. *See id.* As to the other two prongs of "excessive entanglement," the *Agostini* Court held that "administrative cooperation" and "political divisiveness" were "insufficient by themselves to create an 'excessive' entanglement" because they were "present no matter where Title I services [were] offered, and no court [had] held that Title I services cannot be offered off campus." *Id.* at 233–34 (citing Aguilar v. Felton, 473 U.S. 402, 425 (1985) (limiting holding to on-premises services); Walker v. San Francisco Unified School Dist., 46 F.3d 1449 (9th Cir. 1995) (same); Pulido v. Cavazos, 934 F.2d 912, 919–920 (8th Cir. 1991); Comm. for Public Ed. & Religious Liberty v. Sec'y, United States Dept. of Ed., 942 F.Supp. 842 (E.D.N.Y.1996) (same)) (alteration in original).

the false assumption that public school employees would, as a matter of law, naturally "inculcate religion" when teaching in private schools and that "pervasive monitoring" would be required to assure Establishment Clause compliance, necessitating an "excessive entanglement" between government and religion.[100] Ultimately, *Agostini* retreated from this position, noting that *Zobrest* abandoned the presumption relied on in *Aguilar*,[101] that teachers had no financial incentive to "modify their religious beliefs"[102] and that there was no reason pervasive monitoring for Title I teachers was *required* under the Establishment Clause.[103] However, the holding in *Agostini* does not suggest that pervasive monitoring would *never* be necessary to control a government aid scheme, only that it was not *required* by the Establishment Clause in the context of Title I services.[104]

Three years after *Agostini*, the Court decided *Mitchell v. Helms*,[105] a religious aid case similar to the facts of *Allen* and *Meek*.[106] In *Helms*, educational supplies such as library and multi-media equipment were loaned to public and private religious schools to implement "secular, neutral, and nonideological" programs.[107] In a plurality opinion, the *Helms* Court reversed the Fifth Circuit Court of Appeals and overturned *Meek*, largely because the principle cases relied upon by the respondents were either overturned or called into question by *Agostini*.[108]

The plurality began their opinion by reflecting on the implications of the holding in *Agostini*.[109] First, the plurality acknowledged *Agostini*'s re-design of the *Lemon* test, noting the shift

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100. *See id.* at 234.

101. *See id.* at 225.

102. *See id.* at 230–32 (referring to Title I services: "This incentive is not present . . . 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.").

103. *See id.* at 226–27 ("Certainly, no evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students.").

104. *See id.*

105. 530 U.S. 793 (2000) (plurality opinion).

106. *See supra* notes 45–50, 63, and 65–68 and accompanying text.

107. *Helms*, 530 U.S. at 831 (plurality opinion).

108. *See id.* at 835.

109. *See id.* at 807–37.

from *Lemon*'s traditional three-prong analysis to a broader two-step "purpose" and "effect" analysis.[110] Second, the plurality recognized the utility of the three primary criterion of *Agostini*'s "effects" prong: religious indoctrination, description by religion, and excessive entanglement.[111] More importantly, however, the plurality noted that only the first two criterions of *Agostini*'s "effects" prong applied to the facts before them in *Helms*.[112] As a result, the excessive entanglement element of the "effects" prong played no part in the plurality's holding,[113] and the bulk of the "effects" inquiry focused on governmental indoctrination.[114]

As to indoctrination, the plurality relied heavily on the Court's rationale in *Agostini*, holding that "whether . . . aid . . . results in governmental indoctrination" was "ultimately a question [of] whether any religious indoctrination" occurring in the schools "could reasonably be attributed to governmental action."[115] Moreover, to determine indoctrination the Court explained that it "consistently turned to the principle of neutrality,"[116] and where government aid was conferred as "a result of the genuinely independent and private choices of individuals," no indoctrination was attributable to the State.[117] Furthermore, the plurality reasoned that the principles embedded in their indoctrination

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110. *Id.* at 807–808.

111. *Id.* at 808.

112. *Id.*

113. In *Helms*, the plaintiffs did not allege an "excessive entanglement" violation. *Id.* at 808. Moreover, the *Helms* Court recognized that the Supreme Court's Establishment Clause jurisprudence had "pared somewhat the factors that could justify a finding of excessive entanglement." *Id.* As a result, this element of the "effects" test has been largely marginalized by the indoctrination element. *See infra* Part V.B.2(b).

114. The second criterion of *Agostini*'s "effects" test requires a court to consider whether an aid program "define[s] its recipients by reference to religion." *Helms*, 530 U.S. at 808 (quoting Agostini v. Felton, 521 U.S. 203, 234 (1997)). The *Helms* Court largely blended their analysis of this prong into their analysis of indoctrination. *Id.* at 813 ("*Agostini*'s second primary criterion for determining the effect of governmental aid is closely related to the first . . . this second criterion looks to the same set of facts as does our focus, under the first criterion, on neutrality.") (alteration in original).

115. *See id.* at 809.

116. *Id.*

117. *Id.* at 810.

analysis, mainly neutrality and private choice, made the "direct" and "in-direct" labels that were critical under the *Lemon* test[118] all but meaningless under the re-formed *Agostini* test.[119]

Although *Helms* was only a plurality, the Court's holding was critical to the outcome in *Zelman* for two reasons. First, the Court affirmed the re-design of the *Lemon* test,[120] applying the same test from *Agostini* that the majority applied in *Zelman*.[121] Second, the plurality bolstered the aggregate rationale of *Mueller*, *Witters*, *Zobrest*, and *Agostini*,[122] a line of cases that greatly influenced the majority's development of the "true private choice" test in *Zelman*.[123]

D. Zelman v. Simmons-Harris

Although governmental aid cases flooded the Supreme Court docket in the second half of the twentieth century, the constitutionality of school vouchers remained an open question until 2001 when the Court granted certiorari in *Zelman v. Simmons-Harris*.[124] But, given that the Court had only incrementally advanced the doctrine through its in-direct aid line of cases, and that *Helms*, the most recent religious school aid case, was only a plurality opinion, where vouchers would fall on the

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118. *Compare supra* Part III.A (tracing the Supreme Court's development of the *Lemon* Test) *and* Part III.B (illustrating how the Court demarcated cases under the *Lemon* doctrine based on whether the government aid was "direct" or "in-direct") *with* Part III.C (explaining how *Agostini's* "purpose and effect" test shifted the inquiry away from this dual distinctions).

119. *Helms*, 530 U.S. at 815–16 ("Although some of our earlier cases, particularly *Ball*, . . . did emphasize the distinction between direct and indirect aid, the purpose of this distinction was merely to prevent 'subsidization' of religion . . . . As even the dissent all but admits, . . . our more recent cases address this purpose not through the direct/indirect distinction but rather through the principle of private choice, as incorporated in the first *Agostini* criterion (*i.e.*, whether any indoctrination could be attributed to the government).").

120. *See supra* note 110 and accompanying text.

121. *See infra* Part III.D.

122. *See Helms*, 530 U.S. at 810–11 (plurality opinion) ("The principles of neutrality and private choice, and their relationship to each other, were prominent not only in *Agostini* . . . but also in *Zobrest*, *Witters*, and *Mueller*.") (alteration in original).

123. *See infra* Part III.D.

124. 536 U.S. 639 (2002).

Court's newly re-designed Establishment Clause spectrum remained uncertain. *Zelman*'s 5-4 opinion was widely debated among the Court and ultimately proved unsatisfying to members of the dissent looking beyond the sympathetic facts in Cleveland and towards the prospective application of the majority's rule. Thus, to begin the analysis, a brief overview of the factual narrative in *Zelman* is necessary.

For decades Cleveland's inner city school system was consistently ranked as one of the worst performing school systems in the country, failing to a degree "perhaps unprecedented in the history of American education."[125] Most of the 75,000 children living in Cleveland were from "low-income and minority" families who lacked the appropriate resources to send their children to better performing schools outside of the inner city.[126] In response, the Ohio Legislature approved funding for the Pilot Program,[127] which was designed to enhance the educational opportunities of low-income families with children attending public schools in the Cleveland City School District.[128]

The Pilot Program offered two forms of assistance for eligible parents: "tuition aid" or "tutorial aid."[129] Under the first option, parents could accept "tuition aid [for their child] . . . to attend a participating *public* or *private* school" of their choice.[130] The amount of tuition aid available was determined by need, but families falling below 200% of the poverty line were given priority and could receive up to $2,250 per year.[131] Under the Pilot Program, tuition aid could be used inside or outside of the Cleveland City School district. Inside the district, parents could use tuition aid at a religious or non-religious private school, as well

125. *Id.* at 644. To avoid hyperbole, the *Zelman* Court specifically noted the disparity between Cleveland City Schools and other comparable Ohio Schools. *Id.* When the lawsuit was commenced Cleveland's schools failed to meet "18 state standards for minimal acceptable performance," more than two-thirds of all Cleveland students failed to graduate high school, and only 1 in 10 ninth graders "could pass a basic proficiency examination." *Id.*

126. *Id.* at 644.

127. OHIO REV. CODE ANN. §§ 3313.974–3313.979 (West 2013).

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

129. *Id.* at 645 (citing OHIO REV. CODE ANN. §§ 3313.975(B), (C)(1) (West 2013)).

130. *Id.* (emphasis added).

131. *Id.* at 646.

as public community or magnet school.[132] Additionally, parents were given the option of using tuition aid at adjacent public schools outside of the district.[133] As a condition to participation in the Pilot Program, all schools accepting vouchers agreed, "not to discriminate on the basis of race, religion, or ethnic background, or to 'advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.'"[134]

Alternatively, parents could accept "tutorial aid" for their child to remain enrolled in their current public school and receive personal education assistance from a state certified tutor.[135] Ultimately, where parents directed their aid was solely a product of their independent choice, however, once the parent chose to send their child to a private school "checks [were] made payable to the parents who then [could] endorse the checks over to the chosen school."[136]

The Pilot Program was implemented in the 1996-1997 school year.[137] By 2000, over 3,700 students participated in the program and nearly 96% of those students enrolled in private religious schools.[138] Of the fifty-six private schools that accepted tuition aid, "46 (or 82%) . . . had a religious affiliation."[139] As a result, the face of the Pilot Program appeared to overwhelmingly benefit private religious interests and a group of Ohio taxpayers filed state[140] and federal[141] lawsuits alleging,

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132. *Id.* at 645.

133. *Id.*

134. Zelman v. Simmons-Harris, 536 U.S. 639, 645–46 (2002) (quoting OHIO REV. CODE ANN. § 3313.976(A)(6) (West 2013)).

135. *Id.* (citing OHIO REV. CODE ANN. § 3313.975(A) (West 2013)). Under the Pilot Program parents seeking tutorial assistance for children remaining in their public school were responsible for scheduling a registered tutor and submitting receipts to the state for re-imbursement. *Id.* at 646. Parents could receive up to 90% of the amount charged for tutoring services or a maximum of $360. *Id.*

136. *Id.* at 646 (citing OHIO REV. CODE ANN. § 3313.979 (West 2013)) ("Each scholarship to be used for payments to a registered private school is payable to the parents of the student entitled to the scholarship.").

137. *Id.* at 647.

138. *Id.*

139. Zelman v. Simmons-Harris, 536 U.S. 639, 647 (2002).

140. *See* Simmons-Harris v. Goff, 86 Ohio St. 3d 1, 9 (1999). The Ohio Supreme Court held that the Pilot Program violated the Ohio State Constitution but did not violate the U.S. Constitution's Establishment Clause. *Id.* at 9, 17. However, as the *Zelman* Court noted, the Ohio State constitutional provision at issue was a

inter alia, that the Pilot Program violated the First Amendment's Establishment Clause.[142]

Thereafter, the Ohio District Court[143] and the Sixth Circuit Court of Appeals determined that the Pilot Program violated the Establishment Clause because it had the "primary effect" of advancing religion.[144] Subsequently, the Supreme Court granted certiorari[145] and reversed the Sixth Circuit Court of Appeals, holding that the Pilot Program was not a violation of the Establishment Clause.[146]

1. Majority Opinion

Chief Justice Rehnquist, writing for the majority, began by applying the re-developed *Lemon* test from *Agostini*, explaining that to survive Establishment Clause scrutiny a government aid program must not have the "'purpose' or 'effect' of advancing or inhibiting religion."[147] Because the Pilot Program was enacted to aid the education of low-income students in a "demonstrably failing public school system," Justice Rehnquist reasoned that the Pilot Program had a valid secular purpose and the only Establishment Clause question was whether the Pilot Programs had the "'effect' of advancing or inhibiting religion."[148]

To determine whether the program's "effect" was one that advanced religion, the Court analyzed the Pilot Program against *Mueller*, *Witters*, and *Zobrest*, cases where the Court had previously upheld government aid that reached "religious schools only as a result of the

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procedural defect that was immediately cured by the Ohio Legislature. *Zelman*, 536 U.S. at 648.

141. *See* Simmons-Harris v. Zelman, 54 F. Supp. 2d 725, 741–42 (N.D. Ohio 1999) (granting preliminary injunction to Pilot Program but holding that program likely violated the Establishment Clause and granting preliminary injunction to enjoin the Superintendent from continuing the program); Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000) (affirming district court holding that the Pilot Program violated the Establishment Clause because it had the "primary effect" of advancing religion).

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

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

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

145. Zelman v. Simmons-Harris, 533 U.S. 976, 976 (2001).

146. Zelman v. Simmons-Harris, 536 U.S 639, 662–63 (2002).

147. *Id.* at 648–49.

148. *Id.* at 649.

genuine and independent choices of private individuals."[149] The majority reasoned that because the Pilot Program provided government aid to a broad range of parents in Cleveland, who were then free to direct their aid to numerous public and private educational institutions on a non-discriminatory basis, the Pilot Program was one of "true private choice" like those of *Mueller*, *Witters*, and *Zobrest*, and not readily susceptible to Establishment Clause challenge.[150] Furthermore, the amount of aid conferred by the government raised no constitutional issue,[151] nor did the fact that 96% of vouchers were directed to private religious schools.[152] Rather, any "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."[153]

2. Justice O'Connor's Concurrence

Justice O'Connor agreed with the majority's result but wrote a concurring opinion that provides additional context for application of the "true private choice" test.[154] In Justice O'Connor's opinion, the "true private choice" test largely turned on "whether beneficiaries of indirect aid have a *genuine choice* among religious and nonreligious

149. *Id.*

150. *Id.* at 653–54.

151. *Id.* at 651. ("Five Members of the Court, in separate opinions, emphasized the general rule from *Mueller* that the amount of government aid channeled to religious institutions by individual aid recipients was not relevant to the constitutional inquiry."). Justice O'Connor's concurrence also noted that while the state would spend millions of dollars on their voucher program these figures "pale[]" in comparison to other areas of coordinated government subsidies to religious interests upheld by the court, such as religious organizations' non-exempt status for income tax purposes, and charitable deductions for corporations, trusts, and estates to "qualified religious groups." *See id.* at 665 (O'Connor, J., concurring).

152. *Zelman*, 536 U.S. at 658. Even though the vast majority of voucher recipients were Catholic parochial schools, the *Zelman* majority reasoned that "no reasonable observer familiar with the history of the Establishment Clause" would believe a neutral program of private choice carries with it the "imprimatur" of government endorsement. *Id.* at 654–55.

153. *Id.* at 652.

154. *See id.* at 663–76. The majority also addressed the genuineness of choice available under the Pilot Program. *See id.* at 655–56.

organizations when determining"[155] where to direct their aid. For Justice O'Connor, a "genuine choice" did not require that public school options be equal to or superior to religious ones in every way, only that there were "adequate substitutes"[156] to religious schools available to parents under the aid program. Thus, the fact that a majority of schools accepting vouchers were religious private schools was not dispositive because the voucher could still be used in a multitude of public and private educational institutions, inside and outside of Cleveland.[157]

3. Justice Souter's Dissent

Justice Souter,[158] Justice Stevens,[159] and Justice Breyer[160] each filed dissenting opinions in *Zelman*; however, Justice Souter's dissent is most relevant to North Carolina's voucher law. In his opinion, Justice Souter criticized two of the criterion in the majority's "true private choice" test: neutrality and choice.[161]

As a preliminary concern, Justice Souter found the amount of aid ($2,250 per student) to be an unconstitutional departure from *Everson*'s interpretation of the Establishment Clause.[162] Likewise, Justice Souter believed the majority's reliance on *Mueller*, *Witters*, and *Zobrest* was inappropriate.[163] Justice Souter explained that while the Pilot Program shared some common features with the programs at issue in these cases, the aid approved by these programs was "isolated"[164] and "unlikely to

155. *Id.* at 669 (O'Connor, J. concurring) (emphasis added).

156. *Id.* at 670–71.

157. *Id.*

158. *See id.* at 686–717 (Souter, J., dissenting).

159. *See id.* at 684–86 (Stevens, J., dissenting).

160. *See id.* at 717–29 (Breyer, J., dissenting).

161. *Id.* at 695–96.

162. *Id.* at 689–90. In Justice Souter's opinion, *Everson* was still the guiding principle in measuring the amount of government aid conferred to religious schools under the Establishment Clause. *See id.* at 689–90 (Souter, J., dissenting). *See id.* (noting that no Justice disagreed with the basic Establishment Clause rule laid down in *Everson*); *see also supra* note 39 and accompanying text (citing the basic rule from *Everson*).

163. *Zelman*, 536 U.S. at 694–95 (Souter, J., dissenting).

164. *Id.* at 694.

afford substantial benefits to religious schools."[165] Moreover, even in contemporary cases like *Agostini* and *Helms*, where the aid was systematic,[166] assistance was "never significant enough to alter the basic fiscal structure of religious schools.[167] Here, unlike *Mueller*, *Witters*, *Zobrest*, *Agostini*, or *Helms*, many of Ohio's private religious school budgets were being supported *entirely* by vouchers[168] and plans to expand the Pilot Program were already afoot.[169]

Next, Justice Souter criticized the bare formality of the "neutrality" and "choice" prongs in the majority's "true private choice" test.[170] For the majority, the Pilot Program satisfied "neutrality" simply because vouchers were made available to "all schools" public and private, religious and non-religious.[171] Conversely, Justice Souter focused on the effects of the Pilot Program and asked "whether the scheme favors a religious direction."[172] In his opinion, when considering the likely effects on "all schools," the criterion could not be classified as neutral.[173]

Much like neutrality, for the majority the Pilot Program offered a "choice" for parents simply because they were free to direct their aid to "all schools" public and private, religious and non-religious.[174] Again,

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165. *Id.* at 688; *see also supra* note 8 (noting *Zelman*'s dramatic expansion in government aid).

166. *Id.* at 714 (Souter, J. dissenting).

167. *Id.*

168. *See id.* (citing People for the American Way Foundation, A Painful Price, 5, 9, 11 (Feb. 14, 2002) ("[O]f 91 schools participating in the Milwaukee program, 75 received voucher payments in excess of tuition, 61 of those were religious and averaged $185,000 worth of overpayment per school, justified in part to 'raise low salaries.'")).

169. *Zelman*, 536 U.S. at 714 (citing Bloedel, Bill Analysis of S.B. No. 89, 124th Ohio Gen. Assembly, regular session 2001–2002 (Ohio Legislative Service Commission)) (noting that private religious school administrators lobbied the Ohio State Senate to increase vouchers from $2,250 to $4,814 per student, the total amount of per pupil spending in public schools in Ohio).

170. *Id.* at 696–700.

171. *Id.* at 696–97.

172. *Id.*

173. *Id.* at 697–98 (emphasis in original). For example, a public school student applying for tutorial aid to remain enrolled at his current public school would receive only $360 whereas the same student applying for a voucher to a private religious school could receive up to $2,250. *Id.*

174. *Id.* at 699.

Justice Souter believed the Establishment Clause required more, explaining that the legitimacy of an aid program was not based simply on whether money passed through private hands but also, "whether the private hand is genuinely free to send the money in either a secular direction or a religious one."[175] In his opinion, the Pilot Program did not—and perhaps could not—create "genuine" choice for parents in Cleveland because of the economics of private school education and the logistics of enrollment.[176] Thus, for the overwhelming majority of voucher recipients in Cleveland, their only practical alternative to public school was a private religious school.

In sum, the *Zelman* majority held that the Pilot Program was enacted with a valid secular purpose and was one of "true private choice." Thus, its "effects" on religion, like *Mueller*, *Witters*, and *Zobrest* were merely "incidental" to the advancement of religion. By harmonizing the Pilot Program with the indirect aid programs upheld in *Mueller*, *Witters*, and *Zobrest* as opposed to direct aid programs, the majority resurrected the direct/indirect distinction the plurality seemed to abandon in *Helms*.[177] Moreover, by categorizing the Pilot Program as a form of indirect aid, the majority largely avoided any analysis of "entanglement," a *Lemon* factor that was merged into the "effects" prong of *Agostini*, but not abandoned altogether.[178]

Conversely, Justice Souter's dissent found the Pilot Program unconstitutional in two ways. First, the amount of aid was a dramatic departure from prior precedent.[179] Second, the "true private choice" test was overly reliant on formal categories of "neutrality" and "choice,"

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175. *Zelman*, 536 U.S. at 699.

176. *See id.* at 705. On one hand, the value of a school voucher ($2,250) was not enough, in itself, to fund tuition at a private non-religious school (around $4,000). *Id.* at 705. Thus, for private non-religious schools to qualify as "genuine" choices for parents, the program's funding would have to be increased, furthering Justice Souter's Establishment Clause worries, see *supra* Part III.D.3(a), or parents would have to pay the difference, an unlikely outcome since eligibility for the program required income 200% below the poverty line. *Zelman*, 536 U.S. at 646 (majority opinion). On the other hand, even if the school voucher did cover private non-religious tuition, none of the participating private non-religious schools had capacity to enroll voucher students in their schools. *Id.* at 704 (Souter, J., dissenting).

177. *See* Mitchell v. Helms, 530 U.S. 793, 815–16 (2000) (plurality opinion).

178. *See supra* note 93–94 and accompanying text.

179. *See supra* Part III.D.3.

which were self-serving and served no practical utility outside of the abstract.[180] More importantly, Justice Souter viewed Cleveland's problems prospectively, looking beyond the "unprecedented" facts in *Zelman* into the ripple effects school vouchers could cause for the Establishment Clause doctrine.[181] As Parts IV and V illustrate, Justice Souter's concerns have now reached fruition in the substance of North Carolina's Opportunity Scholarship Program.

IV. NORTH CAROLINA'S OPPORTUNITY SCHOLARSHIP PROGRAM

A. Legislative History

For the first time in 150 years, North Carolina entered the 2013 legislative session with a Republican majority in all three branches of state government.[182] By summer's end, the General Assembly had enacted a series of conservative reforms impacting North Carolina's election,[183] abortion,[184] and education laws.[185] Many of these reforms led

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180. *Id.*

181. *Zelman*, 536 U.S. at 717 (Souter, J., dissenting) ("[T]he majority has not approved vouchers for religious schools alone, or aid earmarked for religious instruction. But no scheme so clumsy will ever get before us, and in the cases that we may see, like these, the Establishment Clause is largely silenced. . . . I hope that a future Court will reconsider today's dramatic departure from basic Establishment Clause principle [sic].").

182. *North Carolina's 2013 Legislative Session Recap: Landmark Gains for Conservatism*, NCCIVITAS.ORG (July 30, 2013), http://www.nccivitas.org/2013/2013-legislative-session-recap.

183. On August 12, 2013, Governor Pat McCrory signed into law the Voter Information Verification Act ("VIVA"), a law that requires North Carolina voters to show photo identification at election polls, eliminates same day registration and reduces the early voting period from seventeen days to ten days. *See* Voter Information Verification Act, N.C. Sess. Laws 2013-381 (2013) (codified in N.C. GEN. STAT. § 163-166.13). Subsequently, the United States Department of Justice brought suit against North Carolina under the Civil Rights Act of 1964, arguing that VIVA unfairly discriminates against minorities in elections. *See* Hunter Schwarz, *Justice Department sues North Carolina over voter ID law*, WASHINGTONPOST.COM (July 7, 2013), http://www.washingtonpost.com/blogs/govbeat/wp/2014/07/07/justice-department-sues-north-carolina-over-voter-id-law.

to impassioned public debate, national news coverage, and forms of civil disobedience not seen since the 1960's Civil Rights era.[186]

Among the General Assembly's education reforms was the Opportunity Scholarship Act ("O.S.A."),[187] an education bill with a stated purpose to further the "sound basic education" of all students, reduce the achievement gap, and improve the quality of education for the State of North Carolina.[188] Sponsors of the O.S.A. proposed to use $10 million of tax revenues to fund a private scholarship program for low-income families to use as tuition at private "non-public" schools in North Carolina.[189] The O.S.A. was referred to both the Education and Appropriations Committees but was never officially voted on as a stand-alone bill.[190] Rather, the substance of the O.S.A. was added to the Current Operations and Capital Improvements Appropriations Act ("Appropriations Act"), a spending bill designed to provide funding for

184. During the 2013 legislative session, House Bill 695, entitled the Family, Faith and Freedom Act, proposed to hold North Carolina abortion clinics to the same regulations as ambulatory centers and allow health care workers to opt out of performing abortions if they held a moral objection. Family, Faith and Freedom Act, H.R. 695, 2013-2014 Reg. Sess. (N.C. 2013). Ultimately, House Bill 695 was unable to pass both the House and Senate as a stand-alone bill and was attached to Senate Bill 353, an otherwise unrelated motorcycle safety bill. Health and Safety Law Changes, S. 353, 2013-2014 Reg. Sess. (N.C. 2013). Senate Bill 353 was signed into law by Governor McCrory and is codified in N.C. Gen. Stat. § 90-21.3. *See* Juliet Eilprien, *N.C. Gov. McCrory signs anti-abortion bill into law Monday night*, WASHINGTONPOST.COM (July 29, 2013), http://www.washingtonpost.com/blogs/post-politics/wp/2013/07/29/nc-gov-mccrory-signs-anti-abortion-bill-into-law-monday-night.

185. Along with House Bill 944, the Opportunity Scholarship Act discussed *infra*, the North Carolina General Assembly also proposed to end public teacher tenure. *See* Excellent Public Schools Act of 2013, Senate Bill 361, 2013-2014 Reg. Sess. (N.C. 2013).

186. *See generally* Anne Blythe, *Largest Moral Monday Crowd Yet Floods Downtown Raleigh,* RALEIGH NEWS & OBSERVER (July 29, 2013), http://www.newsobserver.com/2013/07/29/3068037/largest-moral-monday-crowd-yet.html (recounting the unprecedented crowds and public demonstrations in Raleigh during the 2013 legislative session).

187. North Carolina Opportunity Scholarship Act, House H.R. 944, 2013-2014 Reg. Sess. (N.C. 2013), *available at* http://www.ncleg.net/Sessions/2013/Bills/House/PDF/H944v0.pdf.

188. *Id.*

189. *Id.*

190. *Id.*

the state budget during the 2013-2014 fiscal years.[191] Thus, with little public debate, on July 26, 2013, Governor Pat McCrory signed the Appropriations Act into law, and funding for the newly created "Opportunity Scholarship Program" was procured for the 2014-2015 school year.

B. Mechanics of the Opportunity Scholarship Program

The Opportunity Scholarship Program ("O.S.P.") is codified in N.C. Gen. Stat. §§ 115C-562.1-562.7. Pursuant to statute, the State Educational Assistance Authority ("the Authority") is empowered to make scholarship grants of up to $4200 available to families with "eligible" students to use at qualifying "non-public schools."[192] Each year a list of all "non-public" schools located in North Carolina is required to be provided by the State.[193] Currently, there are 696 registered "non-public" schools in North Carolina, composed primarily of religious and non-religious private day schools, although the financing, tuition, curriculum, staff, and facilities of these schools are widely disparate.[194] Applicants are eligible to receive scholarship funds if they meet two requirements.[195] First, the applicant must meet one of five criteria, whether (1) a full time student assigned to and attending public school in the previous semester, (2) received a grant in the previous year, (3) entering kindergarten or first grade, (4) is in foster care, or (5) was adopted within one year.[196] Second, the recipient must reside in a household with an aggregate income at or below 185% of the federal

191. Current Operations and Capital Improvements Appropriations Act of 2013, Senate Bill 402 2013-2014 Reg. Sess. (ratified as 2013 N.C. Sess. Laws 360 Law 2013-360).

192. N.C. GEN. STAT. § 115C-562.2(a)–(b) (2014).

193. *Id.* at § 115C-562.2(a) ("The Authority shall make available no later than February 1 annually applications to eligible students for the award of scholarship grants to attend any nonpublic school. Information about scholarship grants and the application process shall be made available on the Authority's Web site.").

194. Report, *Characteristics of North Carolina Private Schools (preliminary findings),* Children's Law Clinic, Duke University Law School, February 2014, 6 (on-file with author).

195. N.C. GEN. STAT. §115C-562.2(a) (2014).

196. *Id.* at § 115C-562.1(3)(a).

poverty line, not in excess of 133% of the amount required to qualify for federal free or reduced lunch ($43,568 for a family of four).[197]

Once individual eligibility for a scholarship grant is established, the Authority determines scholarship priority for disbursement.[198] Initially, students enrolled in the O.S.P. during the previous academic year receive priority.[199] However, at least 50% of scholarship funds must be disbursed to students at or below the threshold to qualify for federal free and reduced lunch and no more than 35% of scholarship funds can be awarded to students entering kindergarten or first grade.[200] All remaining funds are to be distributed to eligible applicants pursuant to rules and regulations established by the Authority.[201] The Authority is also charged with certifying all non-public school compliance and facilitating remission of scholarship funds to recipients.[202] Non-public schools have six fundamental obligations to receive scholarship money[203] and as to remission, the Authority is required to send a scholarship payment certificate directly to the private school where at least one of the student's parents or guardians is required to endorse the certificate before the funds can be deposited into the school's account.[204]

Originally, the O.S.P. contained no anti-discrimination clause[205] and by implication, there was no statutory barrier for non-public schools

197. *Id.* at § 115C-562.1(3)(b).

198. *Id.* at § 115C-562.2(a).

199. *Id.* at § 115C-562.1(3)(a)(1).

200. *Id.* at § 115C-562.2(a)(2)(a)–(b).

201. *Id.* at § 115C-562.2(a)(2)(c)–(d).

202. *Id.* at § 115C-562.4, 562.6.

203. *Id.* at § 115C-562.5(a)(1)–(6). The Authority must insure that non-public schools: (1) provide documentation of tuition fees charged to students, (2) conduct a criminal background check of "all staff members with highest decision making authority," (3) provide annual written reports on students progress, (4) administer a nationally standardized test at least once a year, (5) provide documentation of graduation rates, and (6) contract with a Certified Public Accountant to conduct an annual financial review, if the school accepts over $300,000 of scholarship money in a school year. *Id.* Non-public schools have three additional ministerial obligations that are immaterial to the purposes of this paper listed in §115C-562.5(b)–(d).

204. *Id.* at § 115C-562.6.

205. North Carolina Opportunity Scholarship Act, H.R. 944, 2013-2014 Reg. Sess. (N.C. 2013), *available at* http://www.ncleg.net/Sessions/2013/Bills/House/PDF/H944v0.pdf. *See id.* at §115C-562.2 (noting proposing statute without absence of an "anti-discrimination" clause within original statute).

to give preference to eligible students on the basis of race, religion, or national origin. However, in the midst of implementing the O.S.P (discussed more fully in Part IV.C), the North Carolina General Assembly amended the original statutory language, adding a new section entitled "Opportunity Scholarship Grant Clarifications" that includes a non-discrimination clause.[206] The newly amended section provides that a "non-public school shall not discriminate with respect to categories listed in 42 U.S.C. § 2000(d)."[207] This section of the federal code prevents discrimination based on "race, color, or national origin," but does not preclude discrimination based on religion.[208] Therefore, "non-public" schools accepting voucher money in North Carolina are not precluded from discriminating among recipients based on religion.

Furthermore, much like the Pilot Program in *Zelman*,[209] the General Assembly also contemplates an expansion in voucher funding and widening eligibility criteria for voucher applicants in subsequent years of the program. The fiscal note accompanying the original Opportunity Scholarship Act predicted that the initial $10 million funding the program will be increased to $40 million after year one and $50 million in subsequent fiscal years.[210] Whereas the original threshold for income eligibility under the O.S.P. was at or below 185% of the poverty line,[211] or an annual income of $43,568 for a family of four in 2013, subsequent years of the O.S.P. widen eligibility standards by one

206. *See* The Current Operations and Capital Improvement Act of 2014, S.B. 744, § 8.25(d) (2014) (codified in N.C. GEN. STAT. § 115C-562.5(c1)).

207. *Id.*

208. *See* 42 U.S.C. § 2000d (2014) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

209. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 714–15 (2002) (Souter, J., dissenting).

210. N.C. GEN. ASSEMB. FISCAL RESEARCH DIVISION, *Legislative Fiscal Note: The Opportunity Scholarship Act, House Bill 944*, 52 (2013), *available at* http://www.ncleg.net/Sessions/2013/FiscalNotes/House/PDF/HFN0944v2.pdf [hereinafter O.S.A. Fiscal Note]. The chart located on page 2 of the O.S.A. Fiscal Note illustrates how the income eligibility for the O.S.P. will grow after the 2013-14 fiscal years.

211. This is the limit for eligibility for federal free and reduced lunch. Child Nutrition Programs, Income Eligibility Guidelines, 78 Fed. Reg. 19179 (2013).

third to include families at or below 246% of the poverty line,[212] or an annual income of $58,683 for a family of four in 2014.[213] Thus, after the first year of implementation, many more middle class parents with children enrolled in public schools will be able to claim vouchers and direct them to non-public schools.

C. *Implementation of the Opportunity Scholarship Program*

While plans for the implementation of the O.S.P. materialized, the legal debate surrounding the constitutionality of the law intensified. Opponents of the O.S.P. criticized the wisdom of imparting such an important shift in education policy as part of a voluminous budget bill with very little opportunity for public comment.[214] In response, multiple citizen lawsuits were filed,[215] challenging the validity of the O.S.P. under Article I, V, and VII of the North Carolina State Constitution.

One of these citizen suits is *Hart v. North Carolina*.[216] In *Hart*, a group of twenty-five North Carolina residents alleged, *inter alia*, that the O.S.P. unconstitutionally appropriated tax funds exclusively reserved for a "uniform system of free public schools" and that schools receiving such appropriation were free to discriminate on the basis of race, sex, national origin or religion in their selection of students.[217] In February 2014, Wake County Superior Court Judge William Hobgood granted a preliminary injunction enjoining implementation of the O.S.P. until after resolution of the lawsuits and on August 21, 2014, Judge Hobgood entered an order ruling that the O.S.P violated North Carolina's Constitution.[218]

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212. *See* N.C. GEN. STAT. §115C-562.1(3)(b) (multiplying the federal reduced lunch limit (185%) by 133% equals new eligibility limit of 246%).

213. Child Nutrition Programs, Income Eligibility Guidelines, 79 Fed. Reg. 12467 (2014) ($44,123 (185% of federal poverty level) times 133%). The O.S.A. Fiscal Note charts the expected fiscal impact from enhanced Scholarship Grants spanning until the 2017-18 fiscal years. O.S.A. Fiscal Note, *supra* note 210, at 11.

214. *See* Amended Complaint at 8, ¶¶ 37–38, Hart v. North Carolina, No. 13-CVS-16771 (D. N.C. Jan. 30, 2014) [hereinafter Hart Complaint].

215. *See id.*; Complaint, Richardson v. North Carolina, No. 13-CVD-16484 (D. N.C. Dec. 16, 2013) [hereinafter Richardson Complaint].

216. *See, e.g.* Hart Complaint, *supra* note 214.

217. *Id.* at 13–16.

218. *See* Transcript of Proceedings at 7–8, Hart v. State of North Carolina, (Aug. 21, 2014) (No. 13- CVS-6771) *available at* https://s3.amazonaws.com/

In his order, Judge Hobgood ruled on state law grounds that the O.S.P. drained public schools of necessary funding and operated to deny students a "sound basic education" as required by *Leandro v. North Carolina*.[219] More importantly, Judge Hobgood found that the O.S.P. allowed non-public schools to discriminate based on religion.[220] Immediately following the ruling, North Carolina filed their notice of appeal and currently *Hart* is under consideration in the North Carolina Supreme Court.[221]

Judge Hobgood's Superior Court Order is important to a future federal First Amendment Challenge for two reasons. First, the parties did not raise or litigate any Establishment Clause allegations in their complaint and Judge Hobgood's "religion" holding was largely in the context of equal protection under North Carolina constitution, not the Federal Establishment Clause. Second, Judge Hobgood's finding that the O.S.P. allows for discrimination based on religion seems to directly implicate the "non-discrimination" requirement in the "true private choice" test under *Zelman*.

In sum, Part IV illustrates how the context and substance of the O.S.P. differ from the Pilot Program in *Zelman*. As a consequence, as Part V explores, a different Establishment Clause outcome may be expected, if and when, the O.S.P. is challenged in federal court.

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s3.documentcloud.org/documents/1279134/nc-ruling.pdf [hereinafter Hart Transcript]; Jane Stancill and Colin Campbell, *NC Supreme Court Will Take Up School Voucher Appeal*, RALEIGH NEWS & OBSERVER, October 10, 2014, http://www.newsobserver.com/2014/10/10/4222443_nc-supreme-court-will-take-up.html?rh=1.

219. *See* Hart Transcript, *supra* note 218, at 7–8. Hart v. State of North Carolina, (Aug. 21, 2014) (No. 13- CVS-6771) *available at* https:// s3.amazonaws.com/s3.documentcloud.org/documents/1279134/nc-ruling.pdf.

220. *Id.* at 4–5. ("The Court finds from the record beyond a reasonable doubt that the Opportunity Scholarship Program funds a system of private schools from taxpayer dollars as an alternative to the public school system in direct contravention of the North Carolina Constitution, Article 1, Sections 15 and 19, with respect to religion, and that with respect to religion of the declaration of rights, Article 9, Sections 1, 2, (1), 6, 7 (V) and the public purpose clause of Article 5, Section 2 (1) and Section 2 (7).").

221. *See* Stancill and Campbell, *supra* note 218.

V. NORTH CAROLINA'S OPPORTUNITY SCHOLARSHIP PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE

A. Jurisdiction for an Establishment Clause Claim

Two jurisdictional issues could pose potential barriers to challenging the O.S.P. in federal court: standing and preclusion. As Part V.A explains, both issues would likely be litigated, but neither issue should conclusively bar adjudication in federal court.

The Supreme Court has generally recognized that taxpayer lawsuits are non-justiciable in federal court because they assert, "generalized grievances" that are common to the electorate as a whole and lack the particularity to satisfy the injury-in-fact requirements for standing.[222] However, in *Flast v. Cohen*,[223] the Court recognized a limited exception to the taxpayer standing rule, holding that a taxpayer may still achieve standing if they can demonstrate "a 'logical link' between the [plaintiff's taxpayer status] 'and the type of legislative enactment attacked . . .' and a "nexus' between [such taxpayer's] status and 'the precise nature of the constitutional infringement alleged.'"[224] In subsequent cases, the Court has construed the *Flast* exception narrowly.[225] However, the Court's most recent addition to the taxpayer standing doctrine may have a direct impact on standing in future voucher cases.

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222. *See e.g.*, Frothingham v. Mellon, 262 U.S. 447 (1923); Doremus v. Bd. of Ed. of Borough of Hawthorne, 342 U.S. 429 (1952).

223. 392 U.S. 83 (1968).

224. *Id.*

225. *See e.g.*, Hein v. Freedom From Religion Foundation, 551 U.S. 587 (2007) (plurality opinion) (holding that President George W. Bush's Faith Based initiative program did not meet the *Flast* exception because it was an executive ministerial program, not a Congressional spending program); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) (holding that conveyance of property made by the United States G.S.O was not a Congressional spending program); United States v. Richardson, 418 U.S. 166 (1974) (holding that a taxpayer's lack of information from CIA spending failed *Flast* because the CIA's spending was not Congressional spending); Schlesinger v. Reservists Committee to Stop War, 418 U.S. 208 (1974) (holding Congressman serving as Army Reservists failed *Flast* because it challenged an executive decision not Congressional spending decision).

In *Arizona Christian School Tuition Organization v. Winn*,[226] a majority of the Court held that taxpayers lacked standing to challenge whether Arizona's "tuition tax credit" violated the Establishment Clause because the tax credit was not a legislative spending program and therefore failed the first prong of *Flast*.[227] Because challenges to state voucher programs have historically been brought by taxpayers,[228] commentators have questioned whether a taxpayer challenging a state's voucher program could now survive both *Flast* and *Winn*.[229]

Although *Winn* leaves the standing issue unsettled, a litigant challenging North Carolina's voucher legislation on Establishment Clause grounds in federal court would still likely have standing. Even though the Court has construed the *Flast* exception narrowly,[230] if a petitioner has alleged an Establishment Clause violation that is derivative of legislative spending program, *Flast* does not bar standing.[231] Here, unlike *Winn*[232] and other antecedent cases where standing was denied under *Flast*,[233] a litigant challenging North Carolina's voucher legislation would assert a challenge to the Appropriations Act, a spending program

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226. 563 U.S. ___, 131 S. Ct. 1436 (2011).

227. *Winn*, 131 S. Ct. at 1447–49.

228. *See e.g.*, Bush v. Holmes, 919 So. 2d 392, 398–99 (Fla. 2006) (parents of elementary and secondary students brought suit as taxpayers); Simmons-Harris v. Goff, 86 Ohio St. 3d 1, 9, 711 N.E.2d 203, 211 (1999) (citizens and teachers unions brought suit in their individual and representative capacity as taxpayers). Of course standing is ordinarily not a problem when voucher cases are bought at the state level because most state declatory acts provide standing for constitutional challenges. And, in *Zelman v. Simmons-Harris*, 533 U.S. 976 (2001), the only voucher case to reach the Supreme Court, taxpayer standing was not an issue.

229. *Compare* Bruce R. Van Baren, *Tuition Tax Credits and Winn: A Constitutional Blueprint for School Choice*, 24 REGENT U. L. REV. 515, 515–16 (2012) (arguing that standing may preclude taxpayers from litigating voucher cases and state school choice programs) *with* Isabel Chou, *"Opportunity" for All?: How Tax Credit Scholarships Will Fare in New Jersey*, 64 RUTGERS L. REV. 295, 332 n.85 (2011) (arguing that because *Winn* was the first tax credit program to reach the Supreme Court that the Court's rationale may deviate from the Court in *Zelman*).

230. *See supra* note 225.

231. *See supra* note 225.

232. In *Winn*, the Court found that Arizona's tax tuition credit did not meet the *Flast* exception because the program was authorized under the state's authority to tax, not spend. *Winn*, 131 S. Ct. at 1447–49.

233. *See supra* note 225.

authorized by the North Carolina's General Assembly,[234] along with a colorable Establishment Clause violation,[235] to meet the essential elements for standing under the *Flast* exception. Accordingly, standing should provide no bar to a North Carolina taxpayer asserting an Establishment Clause challenge in federal court.

A second jurisdictional concern to federal adjudication is the preclusive effect of state court proceedings. If the North Carolina Supreme Court ultimately overturns *Hart*, plaintiffs would likely then file a complaint in federal district court raising an Establishment Clause violation to the First Amendment of the United States Constitution.[236] While no such federal claim was raised in state court, two closely related issues regarding religion were litigated and decided by Judge Hobgood at the superior court level.[237] As a result, North Carolina might try to assert that the doctrine of collateral estoppel precludes litigation on the religion issue altogether.[238]

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234. *See supra* Part IV.A (analyzing the legislative history of North Carolina's voucher legislation, culminating in passage of the Appropriations Act by the General Assembly).

235. *See infra* Part V.B (analyzing the Establishment Clause issues in North Carolina's voucher legislation).

236. In fact, this would be the only available avenue to litigate the federal Establishment Clause issue. Because the federal issue was not raised in state court, plaintiffs cannot appeal a final judgment in the North Carolina Supreme Court to the United States Supreme Court. *See* Murdock v. City of Memphis, 87 U.S. 590, 638 (1875) (establishing the long-standing jurisdictional principle that the Supreme Court has no appellate jurisdiction to review final judgments in state supreme courts that turn solely on state law issues).

237. *See supra* notes 216–218 and accompanying text.

238. *See* Remo Hotel, L.P. v. City & Cnty of San Francisco, 545 U.S. 323, 336, n.16 (2005) (explaining that "[u]nder collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."). It is also conceivable that *res judicata* could be raised as an affirmative defense by North Carolina in a subsequent federal challenge. *See id.* (explaining that "[u]nder res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."). However, this defense is likely to fail because the doctrine requires that the "same parties" attempt to re-litigate a claim that was previously decided in a court proceeding. Since voucher challenges are ordinarily taxpayer lawsuits, a new taxpayer harmed by the voucher legislation, not involved in the original state proceeding, could easily file the lawsuit to avoid the effect of *res judicata* on the federal claim.

Although a collateral estoppel claim is cognizable, it is not likely to succeed for two reasons. First, while North Carolina's Constitution mimics the United States', equal protection under North Carolina's laws and establishment of religion under the U.S. Constitution are separate and distinct issues. Second, even though the North Carolina ruling was litigated and will be "actually decided," it still may not be "necessary" to the North Carolina Supreme Court's forthcoming holding. Therefore, North Carolina would be unlikely to meet all of the required elements for collateral estoppel and a federal court is likely not precluded from reaching the merits of a future Establishment Clause challenge.

B. Substance of the Establishment Clause Claim

The *Zelman* Court began its Establishment Clause inquiry by applying the "purpose and effect" test utilized in *Agostini*.[239] In *Agostini*, the Court collapsed the traditional three-prong *Lemon* test into a broader inquiry that asks only two Establishment Clause questions: (1) does the challenged government program have a valid secular purpose, and if so (2) does the effect of the government program advance religion?[240] Under *Agostini*'s "effects" prong, a court is instructed to balance three factors: (1) whether aid is likely to lead to government "indoctrination," (2) whether recipients are defined by religion, and (3) whether aid leads to "excessive entanglement" between the government and religion.[241]

After *Agostini*, the plurality in *Helms* explained that the "effects" prongs often overlap and the primary criterion for a court to consider is "indoctrination," which largely turns on the neutrality principle.[242] Furthermore, the *Helms* Court noted that where a government aid program provided "genuine and independent" private choice, neutrality was satisfied.[243] However, this proposition also applies in the inverse, such that where a government aid program *does not* provide a "genuine

239. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 648–49 (2002); Agostini v. Felton, 521 U.S. 203, 222–23 (1997).

240. *See Agostini*, 521 U.S. at 222–23.

241. *Id.* at 234.

242. *See* Mitchell v. Helms, 530 U.S. 793, 809–10 (2000); *see also supra* notes 109–119 and accompanying text.

243. *See Helms*, 530 U.S. at 809–10; *supra* notes 109–119 and accompanying text.

and independent" private choice, it ceases to be neutral, the "indoctrination" prong may go unsatisfied and other factors such as "entanglement" become salient. On balance, the Court may find the government program's "effect" advances religion, and violates the Establishment Clause.

Herein lies the problem. The *Zelman* Court expanded the singular focus of *Helms*, "genuine and independent private choice," into its broader "true private choice" test for the purposes of a school voucher analysis. And, as the *Zelman* Court explained, the "true private choice" test is satisfied if a voucher program: (1) provides direct aid to a broad class of beneficiaries, (2) in a non-discriminatory fashion, (3) neutral to religion, and (4) results from the "genuine and independent" private choice of citizens.[244] As a result, the *Zelman* Court reasoned that when the "true private choice" test is met, the "effects" prong of *Agostini* is also met.[245]

However, in *Zelman* only a slim 5-4 majority found the Pilot Program actually met the "true private choice" test while a strong group of dissenters reached the opposite result.[246] Likewise, because resolution of the "true private choice" test informs "indoctrination," the primary inquiry in the "effects" test, the *Zelman* majority gave short shrift to other potential "entanglement" issues vouchers might present.[247]

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244. *See Zelman*, 536 U.S. at 652.

245. *See id.* at 649, 653–54.

246. *Cf. supra* Parts III.D.1–3. It is also important to note the reasons for marginalization of the "excessive entanglement" element of the "effects" test. In *Agostini*, the Court ultimately found the absence of indoctrination more compelling than any potential "entanglement issues." *See supra* notes 94–104 and accompanying text. However, the factors giving rise to "excessive entanglement" were still discussed at length by the Court. *See supra* notes 94–104 and accompanying text. Similarly, in *Helms*, "excessive entanglement" played no part in the rationale. Not because it was irrelevant but because it was not affirmatively plead by the plaintiffs counsel. *See supra* note 113 and accompanying text. Therefore, while the Court's ultimate focus on indoctrination may have been appropriate in *Agostini* and the plaintiff's tactical decision may have been appropriate in *Helms*, outside of these two circumstances excessive entanglement is still a cause for concern. *See, e.g.*, Part V.B.2 (b) (analyzing possible "entanglement" issues within the O.S.P).

247. *See Zelman*, 536 U.S. at 662–63 (finding that Ohio's program was neutral with respect to religion and allowed individuals to exercise private choice, but

Therefore, outside of the unique facts in *Zelman*, a school voucher program may fail to satisfy both the "indoctrination" and "entanglement" prongs of the "effects" test in *Agostini*.[248]

Accordingly, for North Carolina's O.S.P. to survive constitutional scrutiny under both *Agostini* and *Zelman,* it must be enacted with a valid secular purpose and fulfill each of the "true private choice" factors. If the O.S.P fails the "true private choice" test then other remaining prongs of the "effects" test may be needed to resolve whether or not the program advances religion and violates the Establishment Clause. Parts V.B.1–2(a) explores the former while Part V.B.2 (b) explores the latter.

1. "Valid Secular Purpose" Prong

The stated purpose of North Carolina's O.S.P. is to reduce the achievement gap and enable families with limited financial resources to choose among educational alternatives.[249] Voucher opponents would likely argue that there was no pressing need for the O.S.P. because North Carolina schools are not failing to the same degree as Cleveland's school district in *Zelman.* While empirical evidence supports this assertion,[250] ultimately enactment of a voucher law is a policy decision made by democratically elected officials, not a constitutional one for a federal judge. Moreover, in nearly every case addressing aid to religious schools over the past fifty years the Court has found a valid secular purpose[251]

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stopping short a full analysis addressing the issue of entanglement between the state and religion).

248. *See supra* note 241 and accompanying text.

249. *See supra* Parts IV.A–B.

250. *See* North Carolina Department of Public Instruction, *How Do North Carolina Public Schools Measure Up*? (last updated Oct. 2014), *available at* http://www.ncpublicschools.org/docs/data/reports/education-data/other/measure-up.pdf. The North Carolina Department of Public Instruction reports that North Carolina has a four-year high school graduation rate of 83.9% and an annual drop out rate of 2.45%. *Id.* These figures, while not comprehensive, still demonstrate the stark difference in the prevailing educational climate in Cleveland when *Zelman* was decided. *Cf. supra* notes 125–128 and accompanying text (noting the extreme education issues the Ohio legislature faced prior to enactment of the Pilot Program).

251. *See supra* Part III (noting that all major cases decided by the court turned on the challenged program's effect not its secular purpose).

and as Justice Souter noted in *Zelman*, it is unlikely the Court would ever have a serious challenge to this prong because "no scheme so clumsy will ever get before us."[252] North Carolina's O.S.P. would likely fair no differently. However, the crux of the constitutional analysis turns on whether the O.S.P. has the "effect" of advancing religion, discussed in Part V.2.

2. The "Effects" Prong

a. Application of the "True Private Choice" Test[253]

As a preliminary matter, there may be cause for concern in the methodology used to transfer voucher funds from North Carolina to eligible parents. In *Zelman*, participating schools did not directly receive voucher funds.[254] Rather, eligible parents received a check from Ohio that they were then free to use for "tuition aid" at a participating school or "tutorial aid" at their existing school.[255] Unlike *Zelman*, the O.S.P. directs the authority to remit money directly to the non-public school of the parents choice where parents are then required to appear at the campus and physically endorse the check before any disbursement of funds occurs.[256] Therefore, although the school cannot gain access to the money until the parent endorses the check, the parent has no actual tangible control over use of voucher funds.

On the surface, this provision is likely an administrative necessity, however, it does seem to undermine a parent's "genuine private and independent choice," the underlying logic for the result in *Zelman*. However, the plurality in *Helms* seemed unconcerned with this

252. Zelman v. Simmons-Harris, 536 U.S. 639, 717 (2002) (Souter, J., dissenting).

253. For brevity this section omits any analysis of the "broad beneficiaries" prong. To the extent this issue bears on resolution of the "true private choice" test, the O.S.P. is made available to parents of low-income parents whose children are currently enrolled in public schools across the state. *See id.* at 654–55 (majority opinion) (finding that this factor was easily filled). There is no reason to believe it would have serious bearing on the constitutionality of the O.S.P.

254. *See supra* note 125–128 and accompanying text.

255. *See supra* notes 129–134 and accompanying text.

256. *See supra* notes 252–253 and accompanying text.

issue, passing on a formalistic requirement for transmission of funds, noting that "[a]lthough the presence of private choice is easier to see when aid literally passes through the hands of individuals . . . there is no reason why the Establishment Clause requires such a form."[257] While the "form" alluded to in *Helms* may not be "required" by the Establishment Clause, the fact that the O.S.P. creates a system where funds go directly to private religious schools, not parents, may be salient on balance with other competing factors to a future court. Likewise, forced systematic interactions between parents and administrators of religious schools tighten the nexus between the state and religion and could also bring "entanglement" issues to bear.[258] Therefore, this factor of the "true private choice" test would likely receive some scrutiny by a court but could easily be blended into a comprehensive analysis of other competing factors.

The first major requirement under the "true private choice" test is that a voucher program be non-discriminatory.[259] In *Zelman*, discrimination was not at issue amongst the Justices because the Pilot Program explicitly required that "[p]articipating private schools must agree not to discriminate on the basis of race, religion, or ethnic background."[260] However, North Carolina's O.S.P. does not have a comparable restriction.[261] Originally, the O.S.P. included no anti-discriminatory clause, however, the law has since been amended to prohibit discrimination based on "race, color, or national origin,"[262] but not religion. Thus, non-public schools accepting vouchers in North Carolina are free to discriminate based on this category and private religious schools may, without penalty, give preference to members of

257. Mitchell v. Helms, 530 U.S. 793, 816 (2000). The Court went on to note that "[t]o the extent that respondents intend their direct/indirect distinction to require that any aid be literally placed in the hands of schoolchildren rather than given directly to the school . . . , the very cases on which respondents most rely, Meek and Wolman, demonstrate the irrelevance of such formalism." *Id.* at 817.

258. *See infra* Part V.B.2.b (discussing the implications of "entanglement" issues on the overall "effects" of a religious aid program).

259. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 653–54 (2002) (explaining that the nondiscriminatory prong requires that there are no incentives for religious schools over nonreligious schools).

260. *See id.* at 645.

261. *See supra* notes 204–207 and accompanying text.

262. *See supra* notes 204–207 and accompanying text.

the patron faith over non-believers in the admission process, a fact that did not escape Judge Hobgood in North Carolina Superior Court.[263]

In fact, the potential for voucher discrimination already exists. In *Hart v. State of North Carolina*, plaintiffs exposed discriminatory patterns among multiple eligible religious non-public schools in North Carolina. For example, Raleigh Christian Academy's admission process requires parents to sign a "Doctrinal Agreement" that confirms parents are "in 100% agreement" with the church's doctrinal positions.[264] As to their doctrine, the school states that it is affiliated with a Baptist Church and:

> is open to all those of like-faith of doctrines held by the our church . . . we are not a church school for those in cults, i.e., Mormons, Jehovah Witness, Christian Science, Unification Church, Zen Buddhism, Unitarianism, and United Pentecostal.[265]

Moreover, while other religious non-public schools have admission policies that are less overt than Raleigh Christian Academy, they still maintain criteria that would allow discrimination based on religion. For example, Greensboro Islamic Academy maintains an admission policy that bars discrimination based on "sex, age, race, color, national or ethnic origin, or disability," but not religion.[266] Furthermore, other existing private religious non-public schools require an affirmation of religious faith as a condition of enrollment. For example, Freedom

263. *See supra* note 220 and accompanying text.

264. Exhibit 5, Hart v. State of North Carolina, (No. 13-CVS-16771) (on-file with author). Exhibit 5 contains pages printed from Raleigh Christian Academy's website, http://www.raleighchristian.com. For the purposes of footnotes 264–267, each of the exhibits cited were authenticated by Seonaid A. Rijo from the NC Justice Center. *See* Affidavit of Seonaid A. Rijo, Hart v. State of North Carolina, (No. 13-CVS-16771) (on file with author).

265. Exhibit 5, Hart v. State of North Carolina, (No. 13-CVS-16771) (on file with author) (alteration in original).

266. Exhibit 1, Hart v. State of North Carolina (No. 13-CVS-16771) (on file with author). Exhibit 1 contains pages printed from Greensboro Islamic Academy's website at http://www.giaschool.com.

Christian Academy, located in Fayetteville, North Carolina, states that admission criteria largely hinges on:

> An acceptance of Jesus Christ as Lord by the student and one of the parents (or legal guardian), are active in a local church or seeking a church home, or families who are open to the teachings of the gospel.[267]

Accordingly, the O.S.P. provides no bar for religious non-public schools to discriminate against non-believers or non-affiliated families unwilling to make an affirmation of faith. Therefore, North Carolina's current voucher regime likely falls short on the non-discrimination prong of the "true private choice" test.

The second component of the "true private choice" test is neutrality. In *Zelman*, the majority held that the Pilot Program, a state-spending program providing for the transfer of individual vouchers worth $2,250 per student per year, where 96% of the vouchers directed to private religious schools, was neutral to religion.[268] In the majority's opinion, because vouchers reached parents indirectly, only after the private choice of many individual parents, vouchers did not break with other "in-direct" aid cases validated by the Court.[269] Likewise, Justice O'Connor's concurrence noted that the $8.2 million dollar sticker price of the Pilot Program was not dispositive because the amount "paled" in comparison to other government subsidies conferred to religious entities outside of the educational context.[270]

The *Zelman* dissent reached the opposite conclusion, holding that the Pilot Program was an unconstitutional departure from the basic premise of *Everson*.[271] The dissenters argued that the value of the aid approved in the principle cases relied on by the majority, *Mueller*, *Witters*, and *Zobrest*, related only to small personal payments to

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267. Exhibit 4, Hart v. State of North Carolina (No. 13-CVS-16771) (on file with author). Exhibit 4 contains pages printed from Freedom Christian Academy's website at http://www.fcapatriots.org.

268. *See supra* notes 148–152 and accompanying text.

269. *See supra* notes 148–152 and accompanying text.

270. *See supra* note 151.

271. *See supra* note 161 and accompanying text.

"individuals" whereas a voucher program required a coordinated and systematic transfer of millions of dollars to hundreds of private individuals.[272] Furthermore, the dissenters believed that the majority's rule would open the floodgates to the state coffers, noting at the time *Zelman* was decided, Ohio already had preliminary plans to expand the Pilot Program in subsequent fiscal years.[273]

In North Carolina, as Justice Souter predicted in his *Zelman* dissent, "the money has barely begun to flow."[274] First, in year one of the O.S.P. the General Assembly provides for a $10 million dollar spending program and individual vouchers worth $4200, nearly double the amount approved in *Zelman*.[275] Second, like the Ohio legislators in *Zelman*, the North Carolina General Assembly also has existing plans to increase aggregate funding for the O.S.P. and loosen eligibility requirements during subsequent fiscal years.[276] By 2017 the O.S.P. will be funded at $40 million per year, individual vouchers will be worth $5500 per student and vouchers will be available to most middle class families.[277] When these factors are taken into account, the primary purpose of the Pilot Program in *Zelman* and the stated purpose of the O.S.P.—enhanced educational choice for low-income families in underperforming schools—is eviscerated.

Therefore, the real neutrality question for a future court becomes this: at what point does the sheer amount of money conferred by vouchers become an Establishment Clause issue? While both the majority and dissent in *Zelman* made compelling arguments to this point, ultimately *Zelman* was a close case and the context and substance of the O.S.P. manifest all of the trepidation predicted by the *Zelman* dissent and dismissed by the majority. Thus, a pragmatic future court could be persuaded to favor Justice Souter's rationale and hold that the O.S.P. fails the neutrality prong, especially in light of where the money is "actually" flowing in North Carolina.[278]

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272. *See supra* notes 164–168 and accompanying text.

273. *See supra* note 169 and accompanying text.

274. Zelman v. Simmons-Harris, 536 U.S. 639, 714 (2002) (Souter, J., dissenting).

275. *See supra* note 191 and accompanying text.

276. *See supra* notes 209–213 and accompanying text.

277. *See id.*

278. *See supra* notes 275–285 and accompanying text.

Finally, the most critical component in *Zelman's* "true private choice" test is whether or not a voucher recipient has a "genuine and independent" choice among "adequate non-religious" public or private educational alternatives.[279] In *Zelman*, the Court held that parents accepting vouchers under the Ohio Pilot Program had a "genuine" choice when they were presented with a myriad of "non-religious" educational options to Cleveland public schools.[280] Parents could accept tuition aid and enroll their child in a public community or magnet school within their existing district.[281] Alternatively, parents could accept "tuition aid" and send their child to a public school in an adjacent school district or a private religious or non-religious school of their choice.[282] Unsurprisingly, the Court found these options more than "adequate" and trumpeted Ohio's approach for what it was: a multifaceted effort to improve the quality of education in a demonstrably failing school district.

Unlike *Zelman*, North Carolina's O.S.P. limits parents to two options: (1) accept voucher funds for use at a "non-public" school, or (2) remain enrolled in their current public school without financial assistance.[283] In North Carolina, non-public schools are defined by statute, and like *Zelman*, include both religious and non-religious private options.[284] However, for all practical purposes the "non-religious" option is mostly unavailable to North Carolina parents. For example, in many

279. *See supra* notes 148–152 and accompanying text.

280. *See Zelman*, 536 U.S. at 653, 662 (stating that "[t]he program permits the participation of *all* schools within the district, religious or nonreligious" and "[i]t permits such individuals to exercise genuine choice among options public and private, secular and religious."); *supra* notes 147–152 and accompanying text.

281. *Zelman*, 536 U.S. at 653, 662.

282. *Id.*

283. *See supra* Parts IV.A–B (explaining the legislative history and mechanics of North Carolina's voucher legislation). It is important to note that the O.S.A.'s Fiscal Note provides tentative plans to pass along any "cost savings" from the O.S.P. to certain public school programs. O.S.A. Fiscal Note, *supra* note 210, at 15 ("Section 6 of the bill states the General Assembly's intent to appropriate funds to public schools for assistance to at-risk students and to community organizations serving the educational needs of at-risk students still enrolled in public schools beginning in FY 2014-15 in an amount equal to the cost savings created by the award of opportunity scholarship grants.").

284. *See supra* Parts IV.A–B (explaining the legislative history and mechanics of North Carolina's voucher legislation).

rural districts the only alternative to a public education is a private religious school and in many cases there may be only one such institution to choose from in that locality.[285]

Inversely, in larger metropolitan districts, where incomes are higher and educational options are enhanced, North Carolina's voucher law suffers from the same "cost" fallacy Justice Souter illustrated in his dissent.[286] In North Carolina, vouchers are worth $4,200 per year and the average cost of a "non-public" education is $6,690 per year.[287] Recent studies by the Children's Law Clinic at Duke University's Law School indicate that a voucher will cover full tuition in around 38 percent of non-public schools and "[o]f those schools whose tuition could be met with a voucher payment, 92 percent are religious."[288] Moreover, in *Zelman* the effects of the cost fallacy were largely dismissed by the majority for a good reason: parents who were priced out of private non-religious schools could still rely on at least five other educational alternatives.[289] In North Carolina, when logistical or economic barriers remove the practicality of non-religious private schools, the "Hobsonian" effect is all but guaranteed and the "choice" rationale collapses. Therefore, a good argument can be made that North Carolina is not providing "adequate non-religious" options in their voucher program and the "genuine and independent" prong of the "true private choice" test is unfulfilled.

Thus, on balance, a future court forced to examine the Establishment Clause issues presented in Parts V.B.1–2(a) *supra*, lacking any binding case law interpreting *Zelman,* would likely find that North Carolina's O.S.P. has a valid secular purpose but that facts exist to bring the transfer of voucher funds, "non-discrimination," "neutrality," as well as the "genuine and independent" prongs of the "true private choice" test into question. As a result, as Part V.B.2.b discusses, a future court would

285. *See* Report, *supra* note 193, at 3. The Children's Law Clinic at Duke University Law School also reports that there are 13 North Carolina counties with no private schools and "18 counties with just one private school." *Id.* Moreover, "in those 18 counties, the single private school is religious." *Id.*

286. Zelman v. Simmons-Harris, 536 U.S. 639, 699–714 (2002) (Souter, J., dissenting); *see also supra* note 157 and accompanying text.

287. *See* Report, *supra* note 193, at 3.

288. *See* Report, *supra* note 193, at 3.

289. *Zelman*, 536 U.S. at 699–714 (2002) (Souter, J., dissenting); *see also supra* notes 112–118 and accompanying text.

likely not be able to escape a deeper analysis of "entanglement" issues presented by the O.S.P., that were not at issue in *Zelman*, but are reticent in North Carolina's voucher law.[290]

b. "Excessive Entanglement:" Forgotten Element of the "Effects" Test?

In *Agostini* the Court blended *Lemon's* "excessive entanglement" prong into a broader analysis of a government program's "effect;" it did not abandon the prong altogether.[291] Rather, the *Agostini* Court held that a government aid program might have "excessive entanglement" with religion if the program required: (1) pervasive monitoring, (2) administrative cooperation, or (3) resulted in political divisiveness.[292] However, most of the contemporary confusion surrounding "excessive entanglement" originates from the Court's holding in *Zobrest v. Catalina Foothills School District*, a case that did not even turn on an entanglement issue but was heavily relied on by the *Agostini* Court.[293]

In *Zobrest*, the Court held that the presence of a government-funded sign language interpreter, employed to assist in the instructional needs of a hearing impaired student attending a private religious school, did not advance religion because the interpreter would "neither add to nor subtract"[294] from the educational environment and the presence of an interpreter was "different from that of a teacher or guidance counselor."[295]

Subsequently, in *Agostini*, the Court overturned *Aguilar*, abandoning its presumption that public employees would naturally inculcate religion, as a matter of law, largely based on the Court's tolerance of the interpreter in *Zobrest*.[296] Thus, the Court recognized that implementation of New York's Title I program posed no greater risk

290. *See infra* Part V.B.2.b.

291. *See supra* notes 93–99 and accompanying text.

292. *See supra* notes 94–95 and accompanying text. In essence, *Agostini* did not turn on either the second or third prongs of "excessive entanglement" —only the "pervasive monitoring" consideration. *See* Agostini v. Felton, 521 U.S. 203, 206 (1997).

293. *Agostini*, 521 U.S. at 223–32; Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13 (1993).

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

295. *Id.*

296. *See supra* note 93 and accompanying text.

than the risk posed by the interpreter in *Zobrest* and determined that "pervasive monitoring" was unnecessary for a Title I program filled by part-time instructors, teaching secular subjects, with conduct enforced through "unannounced monthly visits"[297] by administrators, where no issues had ever been reported.[298]

Furthermore, "excessive entanglement" arguments were not raised in *Helms* because the government program required educational aid, mostly multi-media content, to be "secular, neutral, and nonideological"[299] dissolving any need for a "pervasive monitoring" scheme. Likewise, "pervasive monitoring" was unnecessary in *Zelman* because of the Pilot Program's onerous "anti-discrimination" and "non-hatred" clauses, which were essentially self-policing.[300] However, North Carolina's O.S.P. does not necessarily fit the same rationale as *Zobrest*, *Agostini*, *Helms*, or *Zelman*, and if the "true private choice" test fails, a deeper "entanglement" analysis should be undertaken.[301]

First, as the plaintiffs in *Hart* articulated, non-public schools in North Carolina have vastly different standards of accountability than ordinary public schools.[302] For example, non-public schools are not required to be accredited "by the State Board of Education or any other state or national institution."[303] Likewise, non-public schoolteachers are not required to have "any particular credentials, degrees, experience, or expertise in education,"[304] although they are largely full-time employees charged with the primary instruction of children. Non-public schools are also not "required to monitor, evaluate, or measure the performance of their teachers in any way."[305] In fact, the O.S.P. does not even require

297. *Agostini*, 521 U.S. at 234.

298. *Id.* at 226–27.

299. Mitchell v. Helms, 530 U.S. 793, 796 (2000).

300. *See supra* Part III.D.1.

301. *See supra* Part V.B (explaining the logical sequence of events in the Establishment Clause analysis if a voucher program were to fail the "true private choice" test).

302. *See* Hart Complaint, *supra* note 214, at ¶¶ 44–62.

303. *See* Hart Complaint, *supra* note 214, at ¶45.

304. *See* Hart Complaint, *supra* note 214, at ¶47.

305. *See* Hart Complaint, *supra* note 214, at ¶47.

non-public schools to conduct a "criminal background check" prior to hiring *any* "teacher or employee."[306]

Moreover, textbooks circulated in some private religious non-public schools raise additional "entanglement" questions outside the scope of *Zelman*. For example, the Social Studies textbook, *UNITED STATES HISTORY IN CHRISTIAN PERSPECTIVE*,[307] is widely used in North Carolina religious schools[308] and includes a section entitled "The Rise of Cults."[309] In this section, the author examines the "rise of religious cults," or as the textbook described it: "counterfeit church groups that operate under the guise of Christianity."[310] Among the "cults" listed in *CHRISTIAN PERSPECTIVE* are "Mormonism, Jehovah's Witnesses and Christian Science."[311] Another section of *CHRISTIAN PERSPECTIVE* is entitled "Cultural Decay" which implies that the "increased acceptance of homosexuality"[312] and tolerance of "alternative lifestyles"[313] have eroded American society.

In sum, the lack of accountability under North Carolina's voucher scheme is in stark contrast to the Pilot Program in *Zelman*. Moreover, unlike the limited risks of indoctrination or entanglement stemming from the single sign-language interpreter placed in a private religious school in *Zobrest*,[314] the administration of a part-time, "supplemental" Title I services in *Agostini*,[315] or the placement of non-secular multi-media equipment in *Helms*,[316] without additional statutory

306. *See* Hart Complaint, *supra* note 214, at ¶49. It is also important to note that non-public schools are required to conduct a background check for "staff members with the highest decision-making authority." *See* Hart Complaint, *supra* note 214, at ¶49.

307. MICHAEL R. LOWMAN, UNITED STATES HISTORY IN CHRISTIAN PERSPECTIVE (3rd ed. 2012) (on file with author).

308. Frances Patterson, *Teaching Religious Intolerance*, RETHINKING SCHOOLS (Winter 2001–2002) *available at* http://www.rethinkingschools.org/special_reports/voucher_report/v_into162.shtml (identifying A Beka Books as one of the three major U.S. Protestant textbooks publishers).

309. Lowman, *supra* note 307, at 185.

310. *Id.*

311. *Id.*

312. *See id.* at 557.

313. *See id.*

314. *See supra* notes 82–87 and accompanying text.

315. *See supra* notes 88–99.

316. *See supra* notes 105–108 and accompanying text.

assurances like the "non-hatred"[317] clause in *Zelman*, "pervasive monitoring" of the O.S.P. may in fact be necessary to prevent the "excessive entanglement" of religion and curtail impermissible advancement of religion at the taxpayer's expense.

V. CONCLUSION

"The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."[318] Although the Court has chosen to erect a low wall in the context of school vouchers, it has still erected a wall nonetheless. As Parts II and III explained, in the context of aid to religious schools, the Supreme Court has departed tremendously from the original principle set forth in *Everson*.[319] But, during the preceding fifty years, expansion was always incremental, and until the sympathetic facts of *Zelman*, never in a context that threatened the integrity of the doctrine.[320] However, as Part IV illustrated, North Carolina's O.S.P. was adopted against fundamentally different educational and political realities than the Pilot Program in *Zelman*. Accordingly, as Part V argued, the substance of the O.S.P is distinguishable from the Pilot Program in *Zelman* and validation of the O.S.P. under the "true private choice" rationale pushes the proposition to its logical extreme.

Notwithstanding the concerns raised in this paper, the Court has yet to grant certiorari in another voucher case to correct, clarify, or solidify their position in *Zelman* and there is no cause to suspect that they have any immediate interest in filling the void. Moreover, even if the O.S.P. were to reach the Supreme Court, it is unclear whether the Court would rigidly follow the "true private choice," test, default to the broader *Agostini* test, or fashion a new remedy altogether. For now, "*Zelman* joins an infamous class of decisions that includes *Plessy v. Ferguson* and *Lochner v. New York*. Perhaps, as with *Plessy* and *Lochner, Zelman* one day will be overturned."[321]

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317. *See supra* note 100.

318. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

319. *See supra* Part III.

320. *See supra* Part III.

321. Jason S. Marks, *What Wall? School Vouchers and Church-State Separation After Zelman v. Simmons-Harris*, 58 J. MO. B. 354, 362 (2002).