The Cleveland Scholarship and Tutoring Program: Why Voucher Programs Do Not Violate the Establishment Clause

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The Cleveland Scholarship and Tutoring Program is a controversial school voucher program which allows families to apply state funds to sectarian schools. This Case Comment examines Simmons-Harris v. Goff, *in which an Ohio appellate court reversed a lower court decision and found the Program in violation of the Establishment Clause. This Case Comment reviews the U.S. Supreme Court precedents which have applied the traditional three-prong test established in* Lemon v. Kurtzman *to cases involving public aid to sectarian schools. This Case Comment concludes that the Program is constitutional because it neutrally provides scholarships to families of sectarian, nonsectarian, private, and public school children, without regard to the nature of the school benefited. The Program provides low-income families with the choice of equal educational opportunities already enjoyed by higher-income families.*

I. INTRODUCTION

An education revolution occurred in Cleveland, Ohio during the 1996–1997 school year. For the first time, low-income families sent their children to private sectarian schools paying for tuition with vouchers from the state government.[1] This school voucher program survived its first legal challenge in July of 1996,[2] but the Court of Appeals of Ohio for the Tenth District in *Simmons-Harris v. Goff* struck it down as unconstitutional on May 1, 1997.[3] The program will be allowed to operate again for the 1997–1998 school year as the Supreme Court of Ohio has stayed execution of the appellate court's judgment pending the appeal to the state's highest court.[4] While other states

* I want to thank my family for their constant love and support. Their faith has enabled me to *fly*.

[1] *See All Things Considered: Cleveland Parents Use Vouchers for the First Time* (National Public Radio broadcast, Aug. 28, 1996).

[2] *See* Gatton v. Goff, No. 96CVH-01-193, 1996 WL 466499, at *20 (Franklin County Ohio C.P. July 31, 1996), *rev'd sub nom.* Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583 (10th Dist. Ohio Ct. App. May 1, 1997).

[3] *See* Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583, at *16 (10th Dist. Ohio Ct. App. May 1, 1997).

[4] *See* Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583 (10th Dist. Ohio Ct. App. May 1, 1997), *motion to stay granted*, No. 97-1117 (Ohio July 24, 1997).

have debated the merits of publicly-funded voucher programs,[5] only Ohio and Wisconsin have successfully operated programs,[6] and only Ohio's voucher program allows sectarian schools to participate.[7]

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[5] Voucher initiatives have been placed on the ballot, but been defeated, in several states, including California, Oregon, Colorado, and Pennsylvania. *See* Peter W. Cookson, Jr., *There is No Escape Clause in the Social Contract: The Case Against School Vouchers*, *in* CHOOSING SCHOOLS: VOUCHERS AND AMERICAN EDUCATION 111, 118 (Rita Smith ed., 1996).

[6] The Wisconsin program, Milwaukee Parental Choice Program, was enacted in 1989. *See* WIS. STAT. ANN. § 119.23 (West Supp. 1996). The program was upheld by the Wisconsin Supreme Court in *Davis v. Grover*, 480 N.W.2d 460, 477 (Wis. 1992).

Along with the two existing publicly-funded programs, there are at least 30 privately-funded programs in 18 states. *See* Susan Lee & Christine Foster, *Trustbusters*, FORBES, June 2, 1997, at 146, 148.

[7] *See* OHIO REV. CODE ANN. § 3313.975 (Banks-Baldwin Supp. 1996). Attempts to include sectarian schools have been defeated in the courts in Wisconsin, *see* Jackson v. Benson, No. 95-CV-1982, at 50 (Dane County Wis. Cir. Ct. 1997) (mem.), and Puerto Rico, *see* Asociacion de Maestros de Puerto Rico v. Torres, No. AC-94-371, 1994 WL 780744, at *12 (P.R. Nov. 30, 1994). Interestingly, the initiative to expand the Milwaukee Parental Choice Program to include sectarian schools came not from the state administrators, but from the parents whose children did not receive the lottery-allocated vouchers. *See* MCGROARTY, BREAK THESE CHAINS 154 (1996). Some administrators feared that judicial battles over the expansion to sectarian schools could lead to the defeat of the entire program. *See id.* See Parts III and IV, *infra*, for a discussion of the constitutionality of applying vouchers to sectarian schools. It was only after parents filed suit, *see* Miller v. Benson, 878 F. Supp. 1209 (E.D. Wis. 1995), that the legislature amended the Milwaukee Parental Choice Program to allow participation of sectarian schools, *see* WIS. STAT. ANN. § 119.23 (West Supp. 1996). To date, however, the state courts have prevented the expansion by holding that the participation of sectarian schools violates the Wisconsin Constitution. *See Jackson*, No. 95-CV-1982, at 50. Interestingly, the court conceded that the U.S. Supreme Court would not treat the voucher plan as an unconstitutional direct aid to sectarian schools. *See id.* at 28. The Milwaukee Parental Choice Program, at this time, continues to involve only nonsectarian private schools.

In Puerto Rico, the legislature in 1993 created the Special Scholarship and Free Selection of Schools Program. *See* Jerome J. Hanus, *An Argument in Favor of School Vouchers*, *in* CHOOSING SCHOOLS: VOUCHERS AND AMERICAN EDUCATION 1, 87–88 (Rita Smith ed., 1996). The program provided vouchers to families earning $18,000 or less for children to change schools from public to public, private to public, or public to private. *See id.* at 87. Though the vast majority of the students participating used the vouchers to transfer from one public school to another (1186 students, as compared with the 311 students who transferred from public to private), the Puerto Rican Teachers Association filed suit against the program. *See id.* at 88. The Puerto Rico Supreme Court struck down the provision providing vouchers to students who transfer to private schools because of the Commonwealth Constitution prohibition against the use of public funds for the "support of schools or educational institutions other than those of the state." *Asociacion de Maestros*, 1994 WL 780744, at *7 (citing the P.R. CONST. art. II, § 5).

The creation of voucher programs is only one possible response to calls for school reform. Some proposed reforms are rather modest, such as reducing class size or creating mentoring or school-to-work programs.[8] Other more creative reforms have included the creation of single-sex classrooms[9] and language immersion programs.[10] Calls for reform have arisen from the perception, valid or not, that the public school system is failing a large portion of its constituency.[11] This Case Comment does not attempt to analyze the state of American public education. It does not seek to enter into the argument over the merits of public versus private education. At most, it advocates the right of parents to have a meaningful choice among a variety of educational options for their children. Educational choice should not be limited to families of above average means who can afford the high cost of private education. Voucher programs, and more specifically the Cleveland Scholarship and Tutoring Program, seek to extend meaningful choice to low-income families.

This Case Comment argues for upholding the constitutionality of the Cleveland Scholarship and Tutoring Program and similar voucher programs that give financial aid to students attending sectarian schools. Opponents of the Program charge that the Program violates the Establishment Clause of the U.S. Constitution by providing government aid to sectarian schools.[12] Part II of this Case Comment examines the Cleveland Scholarship and Tutoring Program in-depth, including why Cleveland was chosen as the pilot school district for the Program. Part III provides an overview of the Establishment Clause and

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[8] *See* QUENTIN L. QUADE, FINANCING EDUCATION: A STRUGGLE BETWEEN THE GOVERNMENTAL MONOPOLY AND PARENTAL CONTROL 27 (1996) (stating that these proposed reforms treat only the symptoms of the educational problem in the United States).

[9] *See* LynNell Hancock & Claudia Kalb, *A Room of Their Own*, NEWSWEEK, June 24, 1996 at 76, 76 (describing school districts' experiments with segregating the sexes in the classroom).

[10] *See* Robin M. Bennefield, *Creative Solutions: Cette école est publique*, U.S. NEWS & WORLD REP., Oct. 7, 1996 at 62, 62 (discussing a French immersion program in Massachusetts).

[11] *See, e.g.*, JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 1 (1990) (stating that common citizens, business leaders, public officials, and educators share a common criticism that schools are failing in their core academic mission to prepare children for the future); U.S. DEP'T OF EDUC., AMERICA 2000: AN EDUCATION STRATEGY 1 (1991) (creating a national strategy to turn around public education); Thomas Toch & Missy Daniel, *Schools That Work*, U.S. NEWS & WORLD REP., Oct. 7, 1996 at 58 (contrasting two different blueprints for school reform).

[12] *See* Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583, at *2 (10th Dist. Ohio Ct. App. May 1, 1997). The opponents also claim that it violates several provisions of the Ohio Constitution, including two religion clauses. *See id.* at *2–3. For a discussion of the state law claims, see *infra* note 83.

examines early cases involving aid to sectarian schools. It concludes with an analysis of the landmark decision, *Lemon v. Kurtzman*.[13]

Part IV argues that the Cleveland Scholarship and Tutoring Program is constitutional. First, the procedural history of *Simmons-Harris v. Goff* is examined. Then, the post-*Lemon* cases are analyzed by distinguishing between unconstitutional direct aid and constitutional indirect aid. The analysis concludes that under the most recent Supreme Court precedents, the Cleveland Scholarship and Tutoring Program is constitutional. The Case Comment finishes in Part V with a look toward the future of voucher litigation.

II. EXAMINATION OF THE CLEVELAND SCHOLARSHIP AND TUTORING PROGRAM

Ohio has adopted many different educational reform programs.[14] While some programs have the support of the public school establishment,[15] voucher proposals are stridently attacked by the public school establishment.[16]

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[13] 403 U.S. 602 (1971).

[14] Many districts in Ohio have created magnet schools to complement the more traditional ones. *See* OHIO REV. CODE ANN. § 3313.901 (Banks-Baldwin 1995) (calling for the development of magnet schools that focus on basic science, English language arts, mathematics, and technology skills). Further, the Ohio General Assembly has promoted interdistrict and intradistrict open enrollment. *See* OHIO REV. CODE ANN. § 3313.98 (Banks-Baldwin Supp. 1996) (calling for all Ohio school districts to pass a resolution by July 1, 1993 to either entirely prohibit the enrollment of students from other districts or to adopt a policy for such enrollment in accord with the mandates of the legislation).

[15] *See* OHIO DEP'T OF EDUC., REPORT ON OPEN ENROLLMENT 1 (1993) (stating that the State Board of Education, the Ohio Education 2000 Commission, and the Gillmore Commission all recommended to the Ohio General Assembly that open enrollment be allowed).

[16] *See* MYRON LIEBERMAN, CATO INSTITUTION POLICY ANALYSIS NO. 75, MARKET SOLUTIONS TO THE EDUCATION CRISIS 1 (1986) (asserting that the National Education Association, the American Federation of Teachers, and their state and local affiliates have played a large role in blocking meaningful education reform). Lieberman criticizes teachers, saying that they are perhaps the most heavily unionized major occupation in the United States. *See id.* He states that the unions exist only to maximize teacher benefits and not to represent pupils or parents or the community. *See id.* The education establishment and other voucher opponents argue that vouchers will hurt the public school system. One charge is that vouchers will destroy neighborhood schools by encouraging parents to exit the system rather than work to improve the public schools. *See* Cookson, *supra* note 5, at 161. Public school advocates believe that public schools provide a valuable service to the nation by imparting a democratic culture on a heterogeneous population of students. *See* MCGROARTY, *supra* note 7, at xx. A second charge is that voucher programs take money away from the public school system. *See* Hanus, *supra* note 7, at 59; Kimberly McLarin, *Ohio Paying Some Tuition for Religious*

A. *The Legislation*

Ohio Governor George Voinivich led the call for comprehensive elementary and secondary school reform in Ohio, including the use of vouchers. He convened a special panel in 1992 to investigate school choice programs and the effects of their possible implementation in Ohio.[17] The Cleveland Scholarship and Tutoring Program, enacted by the Ohio General Assembly in 1995,[18] borrowed heavily from the ideas in the panel's proposal. Cleveland was chosen as the pilot district for reasons to be discussed below.[19]

School Students, N.Y. TIMES, Aug. 28, 1996, at B9. Any program which has the effect of taking pupils and funds from the public school system could result in teacher and administration cutbacks. Because the establishment maintains belief in these charges, it is natural for teachers' unions to seek to maintain the status quo and protect their jobs.

Teachers' unions have enthusiastically joined in the judicial battles to prevent the implementation of school choice and voucher proposals. The Ohio Federation of Teachers has joined as a plaintiff in *Simmons-Harris*, 1997 WL 217583, at *2. Similarly, the Association of Wisconsin School Administrators, Milwaukee Teachers Education Association, Wisconsin Congress of Parents & Teachers, Inc., Milwaukee Administration & Supervisors Council, Inc., and the Wisconsin Federation of Teachers all intervened in the Wisconsin case seeking to prevent the implementation of the Milwaukee Parental Choice Program. *See* Davis v. Grover, 480 N.W.2d 460, 465 (Wis. 1992).

[17] *See* THE GOVERNOR'S COMMISSION ON EDUCATIONAL CHOICE, THE OHIO SCHOLARSHIP PLAN: A PLAN FOR THE PARENTAL RIGHT TO CHOOSE SCHOOLS 5 (1992). The 28 members of the panel included business leaders, teachers, the former head of the Ohio PTA, school district superintendents, and school board members. *See id.* The panel was not convened to discuss the merits or disadvantages of voucher programs, but only to develop a plan to implement vouchers throughout Ohio. *See id.* The panel used the Akron School District as a model to assess the strength of a voucher plan. *See id.* at 23. The panel's proposal called for the creation of scholarships that students could apply to sectarian and nonsectarian schools. *See id.* at 7. One of the major premises upon which the panel created the voucher plans was that they be "substantially tilted in favor of low income parents and students." *Id.* at 10, 16. This was accomplished in part by reserving 20% of the vouchers, called scholarships in the Ohio plan, for low-income students. *See id.* at 11, 17. If the number of low-income applicants exceeded the number of reserved scholarships, winners were to be chosen by lot. *See id.* The participating private schools were not to be allowed to discriminate on the basis of race or gender. *See id.* at 12, 18. Further, participating sectarian schools could not use religious faith as a condition of acceptance. *See id.* Finally, though private schools could charge additional tuition over the scholarship amount, the additional tuition charged to low-income families could not exceed more than 10% of the amount of the scholarship. *See id.* at 13, 19.

[18] *See* OHIO REV. CODE ANN. §§ 3313.974–3313.979 (Banks-Baldwin 1996).

[19] The legislation calls for the pilot program to be in the city that "as of March 1995, was under a federal court order requiring supervision and operational management of the district by the state superintendent." *Id.* § 3313.975(A). In March 1995, Judge Krupansky of

The Program provides scholarships to students in grades kindergarten through third; however, every recipient student will be able to retain the scholarship through the eighth grade.[20] The Cleveland Scholarship and Tutoring Program offers scholarships of up to $2500[21] to students who attend participating private schools in the Cleveland School District[22] or participating public schools outside of the District.[23] It also offers a complementary tutorial assistance grant to students who choose to remain in the Cleveland public school system. The State Superintendent must provide tutorial assistance grants to the same number of students who receive scholarships.[24]

The Cleveland Scholarship and Tutoring Program is designed to benefit children from low-income families.[25] The amount of the scholarship is $2500 or the amount of tuition charged by the school the recipient attends, whichever is lower.[26] Once scholarship recipients from low-income families are accepted at a participating private school, any additional tuition charged to the student cannot exceed 10% of the amount of the scholarship.[27] The scholarship or grant amount is made payable to the parents of the qualifying students.[28] Students

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the United States District Court, Northern District of Ohio, issued an order for the State Superintendent to "assume immediate supervision and operational, fiscal and personnel management of the [Cleveland Public School] District." Reed v. Rhodes, 1:73-CV-1300, at 6 (N.D. Ohio 1995) (order).

The creation of a pilot school district was a compromise of sorts. School voucher supporters had wanted a state-wide program, while opponents fought against any program at all. *See* State's Reply Brief in Support of its Motion for Summary Judgment at 1, Gatton v. Goff, No. 96CVH-01-193, 1996 WL 466499 (Franklin County Ohio C.P. July 31, 1996).

[20] *See* OHIO REV. CODE ANN. § 3313.975(C)(1).

[21] *See id.* § 3313.978(C)(1).

[22] *See id.* § 3313.978(A)(2).

[23] *See id.* § 3313.978(A)(1).

[24] *See id.* § 3313.978(B).

[25] *See* Gatton v. Goff, No. 96CVH-01-193, 1996 WL 466499, at *14 (Franklin County Ohio C.P. July 31, 1996) (stating that parents who wish their child to participate in the Program must apply to the Superintendent to see if they fit the criteria for selection, with preference being given to low-income students), *rev'd sub nom.* Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583 (10th Dist. Ohio Ct. App. May 1, 1997).

[26] *See* OHIO REV. CODE ANN. § 3313.978(C)(1).

[27] *See id.* § 3313.976(A)(8).

[28] *See id.* § 3313.979. The Cleveland Scholarship and Tutoring Program legislation authorizes scholarships to be used both at private schools in Cleveland, *see id.* § 3313.978(A)(2), and public schools in neighboring school districts, *see id.* § 3313.978(A)(1). The payment of the scholarship amount is payable directly to the schools if the scholarship is being applied to a public school in another district. *See id.* § 3313.979. However, no public district around Cleveland applied for participation in the program for its pilot year, so the distinction is largely moot. *See* CLEVELAND SCHOLARSHIP AND TUTORING

whose family incomes are below 200% of the poverty line receive 90% of the scholarship; students whose family income meets or exceeds 200% of the poverty line receive 75% of the scholarship.[29]

B. *Why Cleveland?*

The Cleveland Public School District, the largest in the state, was a particularly appropriate choice for the pilot district of the Scholarship and Tutoring Program.[30] The turmoil of the District was well chronicled in the media[31] when a federal district court ordered the state to take over direct supervision and control of the District.[32] The district court found that the Cleveland School District had, by late February 1995, already virtually exhausted its operating budget for the fiscal year ending in June 1995 and was expecting a $29.5 million shortfall.[33] The fiscal crisis was so severe that it "totally [inhibited the District's] ability to provide even basic education."[34] Other chronicled signs of the crisis included a long-standing busing

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PROGRAM ENROLLMENT REPORT (Oct. 24, 1996).

The *Gatton* trial court noted that the check is mailed directly to the school. Parents must endorse the check at the school and sign a release. The court found, however, the school does not authorize control of the money until the transfer. This method of payment assures only that the money is used for its intended purpose. *See Gatton*, 1996 WL 466499, at *14.

[29] *See* OHIO REV. CODE ANN. § 3313.978(A). Students do not receive the full amount of the scholarship from state funds. *See id.* § 3313.978(C)(4). The scholarships and tutorial assistance grants are not to be disbursed until the State Superintendent determines that the remainder of the scholarship or grant will be furnished by another political entity, private entity, or person. *See id.*

[30] The School District's student population for funding purposes was 75,424 students in 1995. *See* JIM PETRO, AUDITOR OF STATE, STATE OF OHIO, CLEVELAND CITY SCHOOL DISTRICT PERFORMANCE AUDIT at 1-4 (1996). Of those 75,424 students, 78.8% are nonwhite, 72.5% are economically and academically disadvantaged, and 15.7% are diagnosed with a disability. *See id.*

The choice of a district with a substantial population of economically disadvantaged families is important to the constitutional analysis in Part IV, *infra*. Under traditional Establishment Clause analysis, a state program must have a secular legislative purpose to be consistitutional. *See infra* notes 58–64 and accompanying text. The secular purpose of the Cleveland Scholarship and Tutoring Program is to provide quality educational choice to all families, regardless of their financial status. *See infra* notes 87–89 and accompanying text.

[31] *See, e.g.*, Mark Skertic, *Ohio's Largest School District in Chaos*, CIN. ENQUIRER, Mar. 19, 1995, at A1.

[32] *See* Reed v. Rhodes, 1:73-CV-1300, at 6 (N.D. Ohio 1995).

[33] *See id.* at 2–3.

[34] JIM PETRO, AUDITOR OF STATE, STATE OF OHIO, CLEVELAND CITY SCHOOL DISTRICT PERFORMANCE AUDIT at 1-1 (1996).

controversy, the failure of the District to eliminate segregated schools, buildings in need of major repair, and proficiency test scores in the bottom ten percent of school districts across the nation.[35] The lack of public confidence in the School District, prior to the choice of Cleveland for the pilot program, was evidenced by the city's passage of only one school operating levy in the previous twenty-five years.[36] Further, as the *Gatton* trial court noted, many parents who had the financial means to do so had chosen to take their children out of the Cleveland public school system.[37]

C. *Implementation in the Pilot Year*

The Cleveland School District faced these serious problems when it was chosen by the Ohio General Assembly to become the pilot district for the Scholarship and Tutoring Program. While it is too early to measure the success of the Program,[38] the Program has struck a responsive chord in many parents and children. Over 6000 applications were received for scholarships for the 1996-1997 school year.[39] Scholarship recipients had to be determined by lottery.[40] Pilot year statistics demonstrate that the Cleveland Scholarship and Tutoring Program has benefited children from low-income families. Of the 2684 applicant families with verified incomes, 2015 live at 100% of the poverty level, and 670 live with incomes between 100%-200% of the poverty level.[41]

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[35] *See* Skertic, *supra* note 31, at A1.

[36] *See* Scott Stephens, *Survey: 60% Favor a City School Levy*, CLEV. PLAIN DEALER, Sept. 12, 1996, at 4B. Interestingly, in November 1996 the city did pass a $13.5-mill levy that will generate $67,000,000 in the first year. *See Just Over Half of Local School Issues Pass in Ohio*, CAPITAL MARKETS REPORT, Nov. 6, 1996, *available in* WESTLAW, Ohio News Database.

[37] *See* Gatton v. Goff, No. 96CVH-01-193, 1996 WL 466499, at *1 (Franklin County Ohio C.P. July 31, 1996), *rev'd sub nom.* Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583 (10th Dist. Ohio Ct. App. May 1, 1997).

[38] Before success can be measured, educators, parents, and students must come to a consensus on what constitutes the measure of success. Is it improved student test scores? Is it the creation of more schools, thus creating greater choice for parents and children? Is it improvement in the existing public school system as spurred on by the private school competition? This Case Comment would argue that success is merely the providing of meaningful educational choice for all parents, regardless of financial status.

[39] Of the 6000 applications, the mandatory verified income information was received for approximately one-half of the families. *See* CLEVELAND SCHOLARSHIP AND TUTORING PROGRAM ENROLLMENT REPORT (Oct. 24, 1996).

[40] *See* McLarin, *supra* note 16, at B9.

[41] *See* CLEVELAND SCHOLARSHIP AND TUTORING PROGRAM ENROLLMENT REPORT (Oct. 24, 1996). One news story stated that the mean income of people receiving scholarships was approximately $6600 plus food stamps. *See All Things Considered: Cleveland Parents*

The scholarship recipients applied their scholarships at the fifty-three private schools across Cleveland who participated in the Program.[42] Though a majority of the student recipients were new enrollees to the private school to which they applied the scholarship, approximately 21% had previously attended the school to which they applied the scholarship.[43]

The Cleveland Scholarship and Tutoring Program is not unique in its use of vouchers.[44] What makes the Cleveland Scholarship and Tutoring Program unique is the participation of sectarian schools, including those of the Christian, Islamic, and Jewish faiths. The inclusion of sectarian schools not only makes the Cleveland Scholarship and Tutoring Program unique, it also has generated great controversy.[45] Program opponents charge that vouchers take desperately needed money away from the public schools[46] and that giving public funds to sectarian schools violates the Establishment Clause of the First Amendment.[47] The plaintiffs in *Simmons-Harris v. Goff* charged that the Cleveland Scholarship and Tutoring Program violates the Establishment Clause by providing state scholarship money to fund religious activities at schools that teach religious

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Use Vouchers for the First Time (National Public Radio broadcast, Aug. 28, 1996).

According to the 1994 Federal Poverty Guidelines, for a family of two, 100% of the poverty level is $9661 and 200% of the poverty level is $19,322. For a family of four, 100% of the poverty level is $15,141 and 200% of the poverty level is $30,282. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 473 (116th ed. 1996).

[42] *See* CLEVELAND SCHOLARSHIP AND TUTORING PROGRAM ENROLLMENT REPORT (Oct. 24, 1996).

[43] *See id.*

[44] *See supra* note 6 and accompanying text.

[45] The most concrete example of the controversy is the litigation which is the focus of this Case Comment. The debate over vouchers in general, and Ohio in particular, has spread beyond the courtroom in Ohio and has been the focus of a great deal of attention from the national media. *See* McLarin, *supra* note 16, at B9 (providing background to the Cleveland Scholarship and Tutoring Program and covering the first day of classes); *All Things Considered: Cleveland Parents Use Vouchers for the First Time* (National Public Radio broadcast, Aug. 28, 1996) (featuring brief comments from proponents and opponents of the Cleveland Scholarship and Tutoring Program on the first day of classes); *Today: Interview with Jeanne Allen* (NBC television broadcast, Sept. 24, 1996) (featuring an interview with Jeanne Allen, the President of the Center for Education Reform, on the use of public money for parochial schools).

[46] The Ohio Federation of Teachers charges that the Program will drain the best students from Cleveland's public schools without providing a way to improve the public school system. "'It allows them to escape the problem, but it doesn't solve the problem for 70,000 other kids.'" McLarin, *supra* note 16, at B9 (quoting Ron Merec, the President of the Ohio Federation of Teachers).

[47] *See id.*

doctrine as part of their curriculum.[48] The discussion in the next two Parts of this Case Comment will examine why this constitutional argument does not have merit.

III. AN OVERVIEW OF THE RELIGION CLAUSES AND AID TO SECTARIAN SCHOOLS

A. *Setting the Boundaries of the Establishment Clause: Pre-*Lemon *Cases*

The First Amendment to the Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[49] These few words have generated fierce debate and litigation in the area of governmental programs of financial assistance to sectarian schools.[50] The Supreme Court stated in the landmark 1971 decision, *Lemon v. Kurtzman*, that the Court could "only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[51]

The Supreme Court established some early boundaries of what is acceptable under the First Amendment in cases leading up to *Lemon*. In *Everson v. Board of Education*, where the Court held that a school district could pay for the busing of children to parochial schools,[52] the Court defined the scope of the Establishment Clause:

> 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.[53]

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[48] *See* Gatton v. Goff, No. 96CVH-01-193, 1996 WL 466499, at *4 (Franklin County Ohio C.P. July 31, 1996), *rev'd sub nom.* Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583 (10th Dist. Ohio Ct. App. May 1, 1997).

[49] U.S. CONST. amend. I. Note that the First Amendment does not create a "wall of separation between church and State." Reynolds v. United States, 98 U.S. 145, 164 (1878). This theory of the First Amendment was espoused by Thomas Jefferson in a reply to an address to him by the committee of the Danbury Baptist Association. *See id.*

[50] *See* Mueller v. Allen, 463 U.S. 388, 393 (1983) (stating that it is not easy to apply the Court's decisions interpreting the Establishment Clause to cases involving the funding of sectarian schools and parents of children who attend those schools).

[51] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[52] *See* Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

[53] *Id.* at 15–16. The Court also proscribed the following:

Turning to the statute at issue, the Court found the transportation of children to school to be general welfare legislation similar to providing police and fire protection.[54] The Court held that the Establishment Clause did not prevent the state from extending the benefits of state laws to all citizens regardless of their religious affiliation.[55]

The Supreme Court upheld a number of programs that benefited sectarian schools during the next twenty-three years.[56] Much of the Court's analysis in these cases will be important to the argument in Part IV that the Cleveland Scholarship and Tutoring Program is constitutional. One theme of these early cases was that the Establishment Clause is based on a theory of neutrality. The Court stated that the purpose of the First Amendment was to require every state "to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[57] To avoid a violation of the Establishment Clause, a law must have a "secular legislative purpose and a primary effect that neither advances nor inhibits religion."[58] For example, in upholding a program in which the public school districts lent books to students attending sectarian schools, the Court found that the secular purpose was to further educational opportunities for the young and that the primary beneficiaries of the program were parents and students, not the schools.[59] The

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> Neither [a state nor the Federal Government] can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance . . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.
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> *Id.*

[54] *See id.* at 17–18.

[55] *See id.* This rationale has been called the "child benefit or public purpose theory" of the Establishment Clause. Hanus, *supra* note 7, at 44. Hanus asserts that to be constitutional, the "aid must be designated by the child (that is, the parent or guardian) and not the school as an institution." *Id.*

[56] *See* Walz v. Tax Comm'n, 397 U.S. 664, 680 (1970) (granting property tax exemptions for religious organizations using property solely for religious worship); Board of Educ. v. Allen, 392 U.S. 236, 238 (1968) (allowing New York local school authorities to lend textbooks free of charge to all students in grades seven through twelve, including those in private schools); Zorach v. Clauson, 343 U.S. 306, 315 (1952) (upholding New York's program allowing students in public schools to be released during the day so they could receive religious instruction off of school property).

[57] *Everson*, 330 U.S. at 18.

[58] *Allen*, 392 U.S. at 243 (citing School Dist. v. Schempp, 374 U.S. 203, 205 (1963)) (holding that public schools could not mandate that Bible passages be read at the beginning of every school day).

[59] *See Allen*, 392 U.S. at 243–44.

one clear admonishment of the Court was that a state may not "finance religious groups nor undertake religious instruction."[60]

B. *The* Lemon *Test*

In *Lemon v. Kurtzman*,[61] the Supreme Court sought to give concrete structure to these vague neutrality guidelines. Statutes from Pennsylvania and Rhode Island were challenged as violative of the Establishment Clause. The Pennsylvania statute authorized the state to directly reimburse private elementary and secondary schools the cost of teachers' salaries, textbooks, and instructional materials for specified secular subjects.[62] The Rhode Island statute authorized the state to directly pay teachers of secular subjects in private schools a fifteen percent supplement to their annual salary.[63]

The Court used the opportunity to establish a three-prong test, drawn from the previous Establishment Clause cases, for determining the constitutionality of government action. The first prong requires a statute to have a secular legislative purpose.[64] The *Lemon* Court found that the legislative intent in Pennsylvania and Rhode Island was to enhance the quality of secular education in all schools, not to advance religion. The Court ruled that where nothing undermines the stated legislative intent, the legislature must be accorded appropriate deference.[65] The second prong requires that the principal or primary effect of a statute must neither advance nor inhibit religion.[66] The Court again deferred to the judgments of the state legislatures in finding that the secular and religious education components were identifiable and separable. Therefore, paying expenses of secular books and salaries for teachers of secular subjects did not have the primary effect of advancing or inhibiting religion.[67]

The third prong of the test states that the statute must not foster excessive government entanglement with religion.[68] It was based on this prong of the test that the Court held that the Pennsylvania and Rhode Island statutes were unconstitutional.[69] The Court found that there would be excessive entanglement between the state and the religious schools because the state would have to inspect and evaluate the schools' programs to ensure that the money received

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[60] *Zorach*, 343 U.S. at 309.

[61] 403 U.S. 602 (1971).

[62] *See id.* at 606–07.

[63] *See id.* at 607.

[64] *See id.* at 612.

[65] *See id.* at 613.

[66] *See id.* at 612 (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

[67] *See id.* at 613.

[68] *See id.* (citing Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

[69] *See id.* at 607.

was being used only for secular purposes.[70]

The *Lemon* Court aimed to produce a clear roadmap for judicial decisionmaking in the area of the Religion Clauses.[71] Unfortunately, the Court failed.[72] It seems easy to malign a body of judicial decisions filled with so many apparent inconsistencies. The Court disallowed a tax credit for tuition expenses incurred in sending children to private schools in a 1973 decision, *Committee for Public Education and Religious Liberty v. Nyquist*,[73] but ten years later upheld a tax deduction for a very similar purpose in *Mueller v. Allen*.[74] In *Meek v. Pittenger*, the Supreme Court upheld the loaning of textbooks to children attending private schools, based on the *Allen* precedent,[75] but struck down the loaning of educational materials directly to schools.[76] Finally, the Court allowed busing of children to sectarian schools in *Everson v. Board of Education*,[77] but in *Wolman v. Walter* would not allow those same sectarian school children to be bused for educational field trips with state money.[78]

Of course, these apparently contradictory decisions can be at least partially

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[70] *See id.* at 620–21.

[71] *Cf.* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 761 (1973). Justice Powell states that the constitutional standards for the Religion Clauses "have become firmly rooted and the broad contours of our inquiry are now well defined." *Id.*

[72] *See* Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CAL. L. REV. 5, 6 (1987). Choper calls the subsequent decisions "a conceptual disaster area." *Id.* Other commentators have voiced similar disdainful remarks. *See also* Hanus, *supra* note 7, at 41 (stating that the kindest thing that can be said about the law in this area is that it is a mess); Michael J. Stick, *Educational Vouchers: A Constitutional Analysis*, 28 COLUM. J.L. & SOC. PROBS. 423, 423 (1995) (calling Supreme Court decisions after *Lemon* inconsistent).

[73] 413 U.S. 756, 769 (1973).

[74] 463 U.S. 388, 391 (1983). In fairness to the Court, valid distinctions are made between the two versions of tax relief. First, in *Nyquist* the tax relief was given only to parents of private school children, while in *Mueller* the deduction was available to all parents for tuition, transportation, and textbook expenses incurred at any school. *See id.* at 398. Further, the tax deduction for education expenses is only one of many similar deductions offered to Minnesota taxpayers. *See id.* at 396.

[75] *See* Meek v. Pittenger, 421 U.S. 349, 361–62 (1975).

[76] *See id.* at 362–63. As will be discussed further in Part IV, *infra*, this distinction between the indirect benefit of books to schools through the loan to schools and the direct loan of educational materials to schools supports the argument for the constitutionality of the Cleveland Scholarship and Tutoring Program. In the Cleveland Scholarship and Tutoring Program the voucher is payable directly to the parents. It is only through the personal choice of parents for their children to attend a private school that the school receives any benefit. *See infra* Part IV.C.

[77] 330 U.S. 1 (1947).

[78] *See* Wolman v. Walter, 433 U.S. 229, 254 (1977).

reconciled in every instance. The answer lies in such distinctions as direct aid versus indirect aid. Further, some programs benefit only private schools while others give benefits neutrally, regardless of the nature of the school. Part IV is dedicated to explaining, through the lens of the Cleveland Scholarship and Tutoring Program decisions, where the Supreme Court is headed on the Establishment Clause and why providing vouchers to sectarian school children is constitutional.

IV. CLEVELAND SCHOLARSHIP AND TUTORING PROGRAM IS CONSTITUTIONAL

A. *Procedural History of* Simmons-Harris v. Goff

Simmons-Harris v. Goff is the consolidated appeal of two cases filed in the Franklin County, Ohio Common Pleas Court.[79] The "Gatton" plaintiffs included eight individuals, suing in their capacity as taxpayers, and the Ohio Federation of Teachers. The "Simmons-Harris" plaintiffs included three individuals suing in their capacity as taxpayers.[80] The plaintiffs sought a declaratory judgment that the Cleveland Scholarship and Tutoring Program is unconstitutional and an injunction preventing the implementation of the Program during the 1996–1997 school year.[81] The defendants were John M. Goff, being sued in his capacity as Superintendent of Schools for the State of Ohio, and the State of Ohio. Intervening defendants included a number of existing private schools who sought to participate in the Program, two organizations that opened private schools in order to participate in the Program, two parents who wished for their children to participate in the Program, and one parent whose child had been selected to receive a scholarship.[82]

Though the plaintiffs brought claims on several grounds, not all of which were granted relief,[83] this Case Comment only focuses on the claim that the

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[79] *See Simmons-Harris v. Goff*, No. 96APE08-982, 1997 WL 217583, at *2 (10th Dist. Ohio Ct. App. May 1, 1997).

[80] *See id.* That the teachers' union would join as a plaintiff in opposing the Cleveland Scholarship and Tutoring Program is consistent with actions of teachers' unions across the country in leading the fight against all school voucher initiatives. *See supra* note 16 and accompanying text.

[81] *See Simmons-Harris*, 1997 WL 217583, at *2.

[82] *See id.*

[83] First, the plaintiffs claimed that the program violates two religious provisions of the Ohio Constitution: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent." OHIO CONST. art. I, § 7. "[N]o religious or other sect, or sects, shall ever have any

exclusive right to, or control of, any part of the school funds of this state." OHIO CONST. art. VI, § 2. Ohio courts have not found that either of these provisions gives broader constitutional protection than the First Amendment of the U.S. Constitution. *See* South Ridge Baptist Church v. Industrial Comm'n, 676 F. Supp. 799, 808 (S.D. Ohio 1987) (stating that Ohio courts have not indicated that they would interpret Article I of the Ohio Constitution more strictly than the Supreme Court has interpreted the First Amendment); Honohan v. Holt, 244 N.E.2d 537, 544 (Franklin County Ohio C.P. 1968) (rejecting the argument that the Ohio Constitution provisions are more restrictive than the First Amendment). The *Simmons-Harris* appellate court ruled that the Ohio Constitution's protection from state funding of sectarian institutions is essentially coextensive with that of the Establishment Clause of the First Amendment. *See Simmons-Harris*, 1997 WL 217583, at *11. Therefore, the Cleveland Scholarship and Tutoring Program was found to violate the religious provisions of the Ohio Constitution for the same reasons it violated the United States Constitution. *See id.* at *11–12.

Second, the plaintiffs claimed that the Cleveland Scholarship and Tutoring Program violates the constitutional provision that "[a]ll laws, of a general nature, shall have a uniform operation throughout the State." OHIO CONST. art. II, § 26. The *Gatton* trial court rejected this argument on the grounds that the provision means only that the law must be uniform upon those who fit the law's operative scheme. *See* Gatton v. Goff, No. 96CVH-01-193, 1996 WL 466499, at *16 (Franklin County Ohio C.P. July 31, 1996) (citing State *ex rel.* Stanton v. Powell, 142 N.E. 401, 401 (Ohio 1924)), *rev'd sub nom.* Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583 (10th Dist. Ohio Ct. App. May 1, 1997). The classifications of the operative scheme must be reasonable, and the General Assembly's choice to establish a pilot program was reasonable. *See id.* at *17. The appellate court disagreed with this interpretation. *See Simmons-Harris*, 1997 WL 217583, at *14. It warned against conceptually blurring the Uniformity Clause with the Equal Protection and Benefit Clauses. *See id.* The appellate court held that the Scholarship Program violated the Uniformity Clause because it operated only in Cleveland and not in similarly situated school districts throughout Ohio. *See id.*

Third, the "Simmons-Harris" plaintiffs alone claimed that the Cleveland Scholarship and Tutoring Program violated the constitutional provision that "[t]he general assembly . . . will secure a thorough and efficient system of common schools throughout the State." OHIO CONST. art. VI, § 2. The appellate court rejected this claim on the grounds that the mandate to fund a common school system did not restrict state educational funding to that purpose alone. *See Simmons-Harris*, 1997 WL 217583, at *12–13. Even if the state was establishing a state-funded private school system, that would not violate the Thorough and Efficient provision. *See id.* at *13.

Finally, the "Simmons-Harris" plaintiffs alone claimed that the Cleveland Scholarship and Tutoring Program violated the constitutional provision stating that "[n]o bill shall contain more than one subject, which shall be clearly expressed in its title." OHIO CONST. art. II, § 15(D). The appellate court also rejected this argument. *See Simmons-Harris*, 1997 WL 217583, at *15. It stated that the purpose of the provision was to prevent "riders" from being attached to unrelated bills. The Cleveland Scholarship and Tutoring Program was created in an appropriations bill. *See id.* The court held that "it is well-settled that a bill may establish a program and make an appropriation for that program without violating the one-subject rule." *Id.* (citing Dix v. Celeste, 464 N.E.2d 153, 159 (Ohio 1984)).

Cleveland Scholarship and Tutoring Program violates the Establishment Clause of the United States Constitution. There have been many significant Establishment Clause decisions in the area of aid to sectarian schools since *Lemon v. Kurtzman*,[84] and each will be examined in turn below.

B. *Constitutional Analysis of Establishment Clause Cases Involving Aid to Sectarian Schools*

1. Lemon *Test: First and Third Prongs*

The appellate court began with the traditional focus on the *Lemon* three-prong test.[85] Only the "Simmons-Harris" plaintiffs challenged the Scholarship Program on the third prong, excessive entanglement. The *Simmons-Harris* appellate court dismissed this challenge in a footnote stating that "nothing in the scholarship program, or the Pilot Program as a whole, calls for the sort of 'comprehensive, discriminating and continuing state surveillance,' necessary to foster an excessive government entanglement with religion."[86] Similarly, the court did not examine the secular purpose prong because the parties had not put

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[84] 403 U.S. 602 (1971).

[85] *See supra* notes 64–70 and accompanying text (discussing the *Lemon* three-prong test). The Court has stated that *Lemon* is to be particularly relied upon in the "sensitive relationship between government and religion in the education of our children . . . [because t]he government's activities can have a magnified impact on impressionable young minds." School Dist. v. Ball, 473 U.S. 373, 383 (1985).

[86] *Simmons-Harris*, 1997 WL 217583, at *10 n.4 (citing Mueller v. Allen, 463 U.S. 388, 403 (1983)). This prong has long been the subject of strong criticism from the Court. Justice Rehnquist has called it an "'insoluble paradox' in school aid cases: we have required aid to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement." Wallace v. Jaffree, 472 U.S. 38, 109 (1985) (Rehnquist, C.J., dissenting) (citing Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736, 768–69 (1976) (White, J., concurring)); *see also* Bowen v. Kendrick, 487 U.S. 589, 615 (1988) (referring to the entanglement prong as a "Catch-22" situation); Aguilar v. Felton, 473 U.S. 402, 430 (1985) (O'Connor, J., dissenting) (citation omitted) (stating that the Court's anomalous results in this area are due in large part to the entanglement prong).

Rehnquist calls for restricting the political divisiveness inquiries to situations where direct financial subsidies are paid to parochial schools or to teachers in parochial schools. *See* Mueller v. Allen, 463 U.S. 388, 403 n.11 (1983). O'Connor would fold it into the effects prong of the *Lemon* test. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14-11, at 1228 (2d ed. 1988). *But see* School Dist. v. Ball, 473 U.S. 373, 383 (1985) (stating that the *Lemon* test is appropriate in governing the relationship between government and religion in the education of children because of the strong opportunity for divisive rifts along religious lines in the political process).

it at issue.[87] However, the court did state that the purpose of the Cleveland Scholarship and Tutoring Program was to provide low-income parents the opportunity to educate their children outside of the embattled Cleveland Public School System, and not to advance religion.[88] To say that the secular purpose is to provide *all* families with the opportunity for quality educational choice is consistent with the aims of the Program's proponents[89] and with the purposes upheld in other school aid cases.[90]

2. Lemon *Test: Second Prong*

Having dispensed of the first and third prong of the *Lemon* test, the *Simmons-Harris* appellate court turned its attention to the second prong, the effects test.[91] The appellate court examined Supreme Court precedents and stated that the highest court focuses on two factors to determine whether a

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[87] *See Simmons-Harris*, 1997 WL 217583, at *4.

[88] *See id.*

[89] The Program's sponsors emphasize the educational benefits to the children, more than the financial benefit to parents. Speaking about the Program, Ohio Governor George Voinivich has stated that "it will provide children from poor- and middle-income families with increased educational opportunities which they might not have otherwise enjoyed." *Suit Filed to Block Vouchers*, UPI, Jan. 11, 1996, *available in* LEXIS, Nexis Library, UPI File. William Mellor, the President of the Institute for Justice, has stated that "[t]he sole purpose of Ohio's voucher program is to help get poor kids a quality education, period." Carol Innerst, *Rights Groups, Teachers Join Suit to Block Vouchers*, WASH. TIMES, Feb. 1, 1996, at A6. Polly Williams, a community activist and voucher proponent in Milwaukee has been quoted as giving this memorable description: "Bill Clinton and Hillary Clinton should not be the only people in America who live in public housing who get to send their kid to private school." Clint Bolick of the Institute for Justice, School Voucher Debate at the Ohio State University College of Law (Nov. 21, 1996).

[90] *See, e.g.*, Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 485–86 (1986) (stating that the secular purpose in allowing Witters to take advantage of vocational rehabilitation services while he attended a Bible college was to promote the well-being of the visually handicapped); Meek v. Pittenger, 421 U.S. 349, 363 (1975) (stating that the secular purpose of allowing direct loans of educational materials to private schools would be to ensure ample opportunity for schoolchildren to develop their intellectual capacities); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (stating that the secular purpose of statutes that provide funds to pay the salaries of teachers of secular subjects in private schools is to enhance the quality of secular education in all of the state's schools).

[91] *See Simmons-Harris*, 1997 WL 217583, at *4. One commentator examining the post-*Lemon* cases has broken down the effects prong into three factors. First, are the benefits neutrally provided? Second, are the benefits conferred upon religious institutions incidental and attenuated? Third, what is the form of the aid? *See* Peter J. Weishaar, Comment, *School Choice Vouchers and the Establishment Clause*, 58 ALB. L. REV. 543, 561 (1994).

program has the primary effect of promoting religion. First, is the program neutral towards religion? Second, is the profferred aid direct and substantial or indirect and incidental?[92]

a. *Unconstitutional Direct Aid to Schools*

In its earlier decisions, the Supreme Court struck down programs that it believed gave direct aid to sectarian schools.[93] In *Committee for Public Education and Religious Liberty v. Nyquist*,[94] the Supreme Court struck down direct aid to private schools for the maintenance and repair of buildings,[95] tuition reimbursement to low-income families,[96] and tax deduction for tuition expenses of private schools.[97] Though the Court struck down all three provisions,[98] the tuition reimbursement is most relevant here. The *Nyquist* Court stated that there is a distinction between direct and indirect aid to sectarian schools, but called the disbursement to parents only one factor to be considered.[99] The Court concluded that the reimbursement to parents acted as direct aid to schools when "the grants are offered as an incentive to parents to send their children to sectarian schools."[100] That conclusion does not foreclose the finding that the Cleveland Scholarship and Tutoring Program is

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[92] *See Simmons-Harris*, 1997 WL 217583, at *4 (citations omitted).

[93] In its recent decision in *Agostini v. Felton*, the Supreme Court stated that it has departed from the rule that "all governmental aid that directly aids the educational function of the religious schools is invalid." 117 S. Ct. 1997, 2011 (1997). The Court's new focus seems to be on two things: first, whether the aid is made generally available without regard to the sectarian-nonsectarian, or public-nonpublic nature of the school benefited; second, if aid that ultimately flowed to the sectarian school did so because of the independent and private choices of individuals. *See id.*

[94] 413 U.S. 756 (1973).

[95] *See id.* at 762, 769.

[96] *See id.* at 764, 769.

[97] *See id.* at 765, 769.

[98] The Court struck down the grants for maintenance and repair of schools because of its inevitable effect of freeing money for the sectarian school to spend on religious activity. *See id.* at 779–80. The Court's reasoning for rejecting the tax deduction provision is instructive. First, the Court noted the "practical similarity" between the tax deduction and the tuition reimbursement provision. *Id.* at 794. The Court then distinguished the tax deduction in *Nyquist* from the allowable tax exemption in *Walz v. Tax Commission*. *See id.* at 792–94. The *Nyquist* Court pointed to the universal historical approval of tax exemptions for church property, not present with a tax deduction for sectarian school tuition, and to the fact that the tax exemption for church property tends to reinforce the separation between church and state. *See id.* at 792–93.

[99] *See id.* at 781.

[100] *Id.* at 786.

constitutional, however, because "the *Nyquist* Court explicitly declined to apply its decision to a 'case involving some form of public assistance (e.g. scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.'"[101]

Meek v. Pittenger[102] presented the Supreme Court with a more apparent form of direct aid. Though the Court upheld the direct loan of books to students for use in sectarian schools on the basis of *Board of Education of Central School District v. Allen*,[103] the Court rejected a provision to allow the direct loan of instructional materials to schools.[104] The Court believed that the loan resulted in aid to the sectarian institution as a whole.[105]

As it had in *Nyquist*, the Supreme Court once again blurred the line between direct and indirect aid in *Wolman v. Walter*.[106] In *Wolman*, the Supreme Court found that the loan of educational materials to students to be unconstitutional direct aid to schools. The *Wolman* program would have resulted in financial savings to the schools, allowing them to use the saved money to support their religious function. To call such aid to sectarian schools indirect aid, the *Wolman* Court said, would be to "exalt form over substance."[107] Finally, in *School District v. Ball*, the Supreme Court held that a Michigan program financing public school teachers to teach secular subjects to sectarian students in sectarian schools was unconstitutional direct aid.[108] The Court found that the program violated the Establishment Clause in three ways: first, the inability to guarantee that teachers would not inculcate religious values to their students; second, the risk of creating a symbolic link between the government and the church; and third, the state funding for the program allowed the sectarian schools more money to devote to their religious functions.[109]

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[101] Gatton v. Goff, No. 96CVH-01-193, 1996 WL 466499, at *9 (Franklin County Ohio C.P. July 31, 1996) (quoting *Nyquist*, 413 U.S. at 782 n.38), *rev'd sub nom.* Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583 (10th Dist. Ohio Ct. App. May 1, 1997).

[102] 421 U.S. 349 (1975).

[103] 392 U.S. 236 (1968).

[104] *See Meek*, 421 U.S. at 361–63. Instructional materials were defined to include "periodicals, photographs, maps, charts, sound recordings" or other material of a similar nature. *Id.* at 355.

[105] *See id.* at 366.

[106] 433 U.S. 229 (1977).

[107] *Id.* at 250.

[108] *See* School Dist. v. Ball, 473 U.S. 373, 381 (1985).

[109] *See* Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997) (explaining *Ball*).

b. *Constitutional Indirect Aid to Schools*

Cases since *Wolman v. Walter* have shaken up Establishment Clause jurisprudence and paved the way for the Supreme Court to hold that school vouchers like the ones offered in the Cleveland Scholarship and Tutoring Program are constitutional. The first of these, *Mueller v. Allen*, upheld the constitutionality of tax deductions for expenses incurred for the tuition, transportation, and textbooks of children attending primary and secondary schools.[110] The *Mueller* Court explained the significant distinguishing feature of the Minnesota plan from the tax deduction struck down in *Nyquist*. The tax deduction at issue in *Nyquist* was only available to those who sent their children to private schools, whereas the deduction in Minnesota was available without regard to whether the school was public, sectarian, or nonsectarian.[111] The Court stated that "a program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."[112] Also important was that the tax deduction became available only from the "numerous, private choices of individual parents of school-age children."[113]

The second significant ruling from *Mueller* was that a statistical analysis showing that students of sectarian schools disproportionately benefit from a facially neutral statute is not sufficient to invalidate that statute.[114] In *Mueller*, the plaintiffs contended that because most parents of public school children have no tuition expense, and because transportation and textbook expenses are minimal, the tax deduction served to benefit primarily religious institutions.[115] The Court rejected this argument. The Court was hesitant to overturn a facially neutral statute on the basis of statistics from any one year for fear that such an approach would lead to uncertainty in the law.[116] Further, the plaintiffs' reasoning did not take account of other special benefits of parochial schools

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[110] *See* Mueller v. Allen, 463 U.S. 388, 390–91 (1983).

[111] *See id.* at 398.

[112] *Id.* at 398–99. The Court also stated that the broad spectrum of recipients "is an important index of secular effect." *Id.* at 397 (citing Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that a state university that has a policy allowing student groups to use its facilities cannot prevent religious student groups from using the facilities for religious purposes)).

[113] *Mueller*, 463 U.S. at 399.

[114] *See* Gatton v. Goff, No. 96CVH-01-193, 1996 WL 466499, at *11 (Franklin County Ohio C.P. July 31, 1996), *rev'd sub nom.* Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583 (10th Dist. Ohio Ct. App. May 1, 1997).

[115] *See Mueller*, 463 U.S. at 401.

[116] *See id.* Uncertainty in that a program that disproportionately benefits students from sectarian schools one year may disproportionately benefit a different group the next year.

noted by the Court: private schools provide an educational alternative to millions of students; they provide a healthy competition for the public schools; finally, they lessen the district's tax burden by eliminating the expense of educating private school children in public schools.[117]

The second significant case, *Witters v. Washington Department of Services for the Blind*,[118] involved a statute providing for vocational rehabilitative services to the blind. Witters, who was blind, sought to take advantage of the services during his religious training at the sectarian Inland Empire School of the Bible.[119] The Supreme Court, in a unanimous decision, held that providing aid to Witters was not a violation of the Establishment Clause.[120] Like in *Mueller*, the Court found that any money that flowed to a religious institution was the result of "genuinely independent and private choices of aid recipients."[121] Further, unlike the tuition reimbursement and tax deduction plans struck down in *Nyquist*, the vocational assistance in *Witters* was made available without regard to the nature of the institution benefited.[122] Finally, unlike the *Nyquist* plan which gave incentive for parents to send their children to private schools,[123] the Court found that the *Witters* program did "not tend to provide greater or broader benefits for recipients who apply their aid to religious education."[124]

In *Zobrest v. Catalina Foothills School District*, the Supreme Court followed the reasoning established in *Witters* and *Mueller* when they required an Arizona school district to provide a sign language interpreter to a deaf student attending a sectarian high school.[125] The Court held that the handicap assistance program neutrally distributed benefits without regard to the religious nature of the school, that the interpreter was only at the sectarian school as a result of the private choice of the parents, and that the program did not provide any financial incentive to choose a sectarian school.[126] Further, the Court distinguished *Zobrest* from *Meek* and *Ball* stating that in those cases, but not in *Zobrest*, the school was being relieved of a cost of educating its students that it would have otherwise had to bear.[127]

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[117] *See id.* at 401–02 (citation omitted).

[118] 474 U.S. 481 (1986).

[119] *See id.* at 483.

[120] *See id.* at 489.

[121] *Id.* at 488.

[122] *See id.* at 488.

[123] *See supra* note 99 and accompanying text.

[124] *Witters*, 474 U.S. at 488.

[125] *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 9–10 (1993).

[126] *See id.* at 10 (citations omitted).

[127] *See id.* at 13. The Court also distinguished between the role of a teacher who may inculcate religious beliefs in students through their teaching and the role of an interpreter who

Finally, in *Agostini v. Felton*, the Supreme Court repudiated its earlier logic in *Ball* and in *Aguilar v. Felton*,[128] by reversing its decision in the latter case.[129] In *Agostini*, the Court ruled that the Establishment Clause did not bar public school teachers in New York City from teaching remedial education to disadvantaged students in sectarian schools.[130] The Court stated that *Ball* and *Aguilar* rested on assumptions upon which the Supreme Court no longer relies in its Establishment Clause jurisprudence. First, the Court stated that it has abandoned the premise that the presence of public employees in sectarian schools inevitably has the impermissable result of state-sponsored indoctrination or creates a symbolic union between church and government.[131] Secondly, the Court reinforced the doctrine that aid is constitutional 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."[132]

C. *Refuting the Appellate Court's Establishment Clause Argument*

The *Simmons-Harris* appellate court's decision that the Scholarship Program violated the Establishment Clause proceeded in two parts. First, it held that the Program, considered as a whole, was not facially neutral.[133] Second, it held that the Program gave direct and substantial aid to sectarian schools. As such, the Program had the constitutionally impermissable effect of advancing religion.[134] This section refutes those two arguments in turn and demonstrates that the Scholarship Program does not have the primary purpose of advancing religion.

Contrary to the plaintiffs' argument and the appellate court's decision that the Scholarship Program is not neutral,[135] careful scrutiny of *Mueller v. Allen*[136] reveals that the Scholarship Program neutrally provided benefits to families of sectarian, nonsectarian, private, and public school children. The Cleveland Scholarship and Tutoring Program fell within the explicit reservation set aside in *Nyquist* for scholarships made available without regard to the

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is merely supposed to transmit everything in the way it was originally intended. *See id.*

[128] 473 U.S. 402 (1985).

[129] *See* Agostini v. Felton, 117 S. Ct. 1997 (1997).

[130] *See id.* at 2016.

[131] *See id.* at 2010.

[132] *Id.* at 2014.

[133] *See* Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583, at *9 (10th Dist. Ohio Ct. App. May 1, 1997).

[134] *See id.*

[135] *See id.* at *7.

[136] 463 U.S. 388 (1983).

sectarian or nonsectarian nature of the school benefited.[137] The statute was designed to provide scholarships to private school students in Cleveland, public school students in adjoining districts, or tutorial assistance grants to public school students in Cleveland.[138] The Ohio appellate court decided that the Scholarship Program is not neutral for two reasons: first, no eligible public school districts outside of Cleveland chose to join the Program in its pilot year; second, the scholarship amount awarded to families of private school children is greater than the amount of tutorial assistance given to children attending Cleveland public schools.[139] The appellate court insisted on comparing the relative values of the scholarship and tutoring grants both qualitatively and quantitatively to determine if the Program is facially neutral.[140]

This construction twists the logic of *Mueller*. While it is true that public school districts surrounding Cleveland did not join the Program in its pilot year, the Ohio appellate court completely failed to acknowledge and give weight to the fact that scholarships were awarded to students attending both sectarian and nonsectarian private schools.[141] Also, voucher programs are intended to

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[137] *See* Gatton v. Goff, No. 96CVH-01-193, 1996 WL 466499, at *13 (Franklin County Ohio C.P. July 31, 1996) (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782 n.38 (1973)), *rev'd sub nom.* Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583 (10th Dist. Ohio Ct. App. May 1, 1997). The Supreme Court stated in *Nyquist* that it "need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Nyquist*, 413 U.S. at 782 n.38. This logic was reinforced most recently in *Agostini*. *See Agostini*, 117 S. Ct. at 2014 (citation omitted). Constitutional scholar Laurence Tribe has written that "[t]he establishment clause probably would not stand as an obstacle to a purely neutral program, at least one with a broad enough class of beneficiary schools and one that channeled aid through parents and children rather than directly to schools." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1410 at 1223 (2d ed. 1988) (citation omitted); *see also* Jonathan B. Cleveland, *School Choice: American Elementary and Secondary Education Enter the "Adapt or Die" Environment of a Competitive Marketplace*, 29 J. MARSHALL L. REV. 75, 139 (1995) (citation omitted) (stating that a properly crafted voucher plan can include religious schools and be constitutional).

[138] *See* OHIO REV. CODE ANN. § 3313.975(A) (Banks-Baldwin 1996). Plaintiffs object that this is not an accurate description of the Program because the dollar value of the tutorial assistance grants is limited to 20% of the value of the scholarships. *See* Motion of Plaintiffs Doris Simmons-Harris, et al., For Summary Judgment at 8, Gatton v. Goff, No. 96CVH-01-193, 1996 WL 466499 (Franklin County Ohio C.P. July 31, 1996) (citing OHIO REV. CODE ANN. § 3313.978(C)).

[139] *See Simmons-Harris*, 1997 WL 217583, at *7-9.

[140] *See id.* at *9.

[141] In its summary of the factual setting, the appellate court stated that approximately

encourage the creation of new schools, and it is possible that the proportion of sectarian to nonsectarian school participation will shift dramatically in future years.[142] It is also true that individual scholarship values can be up to five times greater the amount of tutorial assistance.[143] However, that the appellate court is looking for a sort of mathematical equality here is ironic when *Mueller* itself found facially neutral a tax deduction that would not provide *any* significant benefit to families of public school children.[144] The Cleveland Scholarship and Tutoring Program did provide benefits to public school children. Public school students had the benefit of the tutorial assistance grants in the pilot year. Further, had public school districts surrounding Cleveland opted to join the Program, students at those public schools would have benefited as well.

After deciding that the Scholarship Program is not facially neutral, the *Simmons-Harris* appellate court made a second mistake in determining that the aid to sectarian schools was direct and substantial. To determine whether the aid to the school is direct or indirect, the court correctly identified the issue to be whether the aid flowed to sectarian institutions only as the result of "'genuinely independent and private choices of aid recipients.'"[145] The appellate court dismissed as "meaningless" the choice of parents who elected to enroll their children in either private sectarian or nonsectarian schools because of the lack of public school participation and the high percentage of

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80% of the participating schools were sectarian and approximately 20% were nonsectarian. *See id.* at *2.

The appellate court also implied that under a recent school funding decision, *see* DeRolph v. Ohio, 677 N.E.2d 733 (Ohio 1997), the General Assembly had the responsibility and the power to compel the school districts surrounding Cleveland to join in the Program. *See Simmons-Harris*, 1997 WL 217583, at *8. I posit that the General Assembly would not have accepted that it had such power before *DeRolph* was decided; further, by striking down the Program the General Assembly is being denied the opportunity to compel such expansion if it is warranted.

[142] *See* Affidavit of Mary Ann Jackson, Gatton v. Goff, No. 96CVH-01-193, 1996 WL 466499 (Franklin County Ohio C.P. July 31, 1996) (stating that the goals of the educational organization, HOPE, include encouraging participation in the Scholarship Program and assisting in the creation of new schools); Memorandum of Amici Curiae In Support of Defendant's Motion for Summary Judgment at 4, Gatton v. Goff, No. 96CVH-01-193, 1996 WL 466499 (Franklin County Ohio C.P. July 31, 1996) (stating that there is a likelihood that new nonreligious private schools will come into existence as a result of the Scholarship Program because the private schools will be able to better compete with public schools); Innerst, *supra* note 89, at A6 (stating that twelve private schools had planned to open in Cleveland with the start of the voucher program).

[143] *See* OHIO REV. CODE ANN. § 3313.978(C)(3) (Banks-Baldwin Supp. 1996).

[144] *See supra* notes 114–17 and accompanying text.

[145] *Simmons-Harris*, 1997 WL 217583, at *9 (quoting Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986)).

participating sectarian schools.[146] The court revealed its error when it stated that the "real choice available to most parents is between sending their child to a sectarian school and having their child remain in the troubled Cleveland City School District."[147] Once again the court ignored the important fact that twenty percent of the participating schools are nonsectarian.[148] And it ignored the important fact that despite the impressive support of the Scholarship Program from some parents, the vast majority of families chose not to even apply for the scholarships.

Parents who chose to participate in the Scholarship Program made the genuine and independent choice to do so. It is only as a result of their choices that the sectarian and nonsectarian private schools receive indirect benefit. The students' applications for scholarships from the state and their applications to be enrolled in participating private schools were independent of one another. The students applied to the Superintendent of Schools for the scholarships. The Superintendent determined if students qualified for the Program, allocated the scholarships (giving preference to students from low-income families), and then determined the amount of scholarship for which the students were eligible. The application to enroll in the participating school was done by parents alone, independent of the state. The state and sectarian schools only interacted when the schools notified the Superintendent that they had enrolled a scholarship winner.[149] In no way did this limited interaction negate from the fact that the schools only indirectly received state aid as a result of the genuinely independent choice of parents.

This conclusion is strengthened by the Supreme Court's decision in *Rosenberger v. Rector*.[150] The Court held in *Rosenberger* that the Establishment Clause did not prohibit the University of Virginia from funding a religious campus organization newsletter in the same way it funded newsletters for other campus organizations. The Court wrote that "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[151] The dissent conceded that the issue was not the payment, or form of payment, but "whether there is 'a third party standing between the government and the ultimate

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[146] *Id.* at *10.

[147] *Id.*

[148] *See supra* note 141.

[149] *See* Gatton v. Goff, No. 96CVH-01-193, 1996 WL 466499, at *14 (Franklin County Ohio C.P. July 31, 1996), *rev'd sub nom.* Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583 (10th Dist. Ohio Ct. App. May 1, 1997).

[150] 115 S. Ct. 2510 (1995).

[151] *Id.* at 2521.

religious beneficiary to break the circuit by its independent decision to put state money to religious use.'"[152] In the Cleveland Scholarship and Tutoring Program the parents are the third party that breaks the circuit.

Finally, the *Simmons-Harris* appellate court placed too much emphasis on "substantial" aid flowing to sectarian schools.[153] The court distinguished *Mueller v. Allen*,[154] *Zobrest v. Catalina Foothills School District*,[155] and *Witters v. Washington Department of Services for the Blind*[156] on the basis that a smaller portion of the total aid in those programs flowed to sectarian schools, thus making the aid incidental.[157] This conclusion overlooks other key features of those Supreme Court decisions. In *Mueller*, where only parents whose children attended private schools could truly benefit from the tax deduction, it was estimated that over ninety percent of the aid went to children in private schools.[158] Additionally, in *Agostini* the Court stated that it was not "willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid."[159]

Further, in both *Witters* and *Zobrest* the Supreme Court made clear that it was concerned with whether the money expended created financial incentive for the students to attend sectarian schools,[160] not with the total expenditure. The Cleveland Scholarship and Tutoring Program did not differentiate between students attending sectarian and nonsectarian schools in awarding its scholarships. It also gave financial aid to students attending public schools through its tutorial assistance grants. Finally, despite the scholarship aid, it remains quite possible that the cost of attending the sectarian school will still be

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[152] State's Reply Brief in Support of its Motion for Summary Judgment at 12, Gatton v. Goff, No. 96CVH-01-193, 1996 WL 466499 (Franklin County Ohio C.P. July 31, 1996) (quoting *Rosenberger*, 115 S. Ct. at 2545 (Souter, J., dissenting)).

The plaintiffs try to use *Rosenberger* to argue against school vouchers saying that the Court distinguished funding a campus publication from "'a tax levied for the direct support of a church or group of churches'" where Establishment Clause dangers were inherent. Motion of Plaintiffs Sue Gatton, et al., for Summary Judgment at 46, Gatton v. Goff, No. 96CVH-01-193, 1996 WL 466499 (Franklin County Ohio C.P. July 31, 1996) (quoting *Rosenberger*, 115 S. Ct. at 2522–23). This reasoning is not dispositive here because only students benefit directly from vouchers and any benefit to religious schools is the indirect result of the independent choice of parents.

[153] *See Simmons-Harris*, 1997 WL 217583, at *10.

[154] 463 U.S. 388 (1983).

[155] 509 U.S. 1 (1993).

[156] 474 U.S. 481 (1986).

[157] *See Simmons-Harris*, 1997 WL 217583, at *10.

[158] *See Mueller*, 463 U.S. at 401.

[159] Agostini v. Felton, 117 S. Ct. 1997, 2013 (1997).

[160] *See Zobrest*, 509 U.S. at 9–10 (citing *Witters*, 474 U.S. at 488).

greater than attending a public school when incidental costs such as uniforms and transportation are factored in. Such factors belie any argument that the Scholarship Program gives incentive to choose sectarian schools.

D. *Additional Arguments Supporting the Constitutionality of the Cleveland Scholarship and Tutoring Program*

Additional arguments can be made defending the constitutionality of the Scholarship Program using traditional *Lemon* test analysis and alternative Establishment Clause tests.

1. *Following in the Footsteps of* Zobrest *and* Mueller

Two arguments supporting the constitutionality of the Program come from the Supreme Court's reasoning in *Zobrest v. Catalina Foothills School District*.[161] In *Zobrest*, the Court distinguished its decision mandating that the school district provide an interpreter for a deaf student attending a sectarian high school, from its decisions in *Meek v. Pittenger*[162] and *School District v. Ball*.[163] In *Meek*, the sectarian school was relieved of the cost of purchasing educational materials and in *Ball*, from the cost of teacher salaries and education materials.[164] The Cleveland Scholarship and Tutoring Program does not relieve participating schools of any costs. The schools will receive, at most, the regular amount of tuition from both scholarship and non-scholarship students. Further, because participating schools cannot charge scholarship students more than ten percent of the amount of the scholarship in additional tuition,[165] schools charging higher tuition may end up bearing additional cost in educating scholarship students.

The second argument in *Zobrest* that supports the constitutionality of school vouchers comes from Justice Blackmun's dissent. Blackmun sought to distinguish the aid provided to sectarian schools that was upheld in *Witters v. Washington Department of Services for the Blind*[166] and *Mueller v. Allen*[167] from the providing of the sign language interpreter in *Zobrest*. Blackmun said that *Witters* and *Mueller* involved the payment of cash or a tax deduction "where the governmental involvement ended with the disbursement of funds or

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[161] 509 U.S. 1 (1993).
[162] 421 U.S. 349 (1975).
[163] 473 U.S. 373 (1985).
[164] *See Zobrest*, 509 U.S. at 12.
[165] *See* OHIO REV. CODE ANN. § 3313.976(A)(8) (Banks-Baldwin 1996).
[166] 474 U.S. 481 (1986).
[167] 463 U.S. 388 (1983).

lessening of tax."[168] Blackmun contrasted that one-time payment with the "ongoing, daily, and intimate governmental participation in the teaching and propagation of religious doctrine"[169] involved in providing a sign-language interpreter. Under Blackmun's analysis, the Cleveland Scholarship and Tutoring Program is clearly more analogous to *Mueller* and *Witters*. Involvement between the state and the sectarian schools is limited. First, the sectarian school notifies the state of the recipient students it will enroll. Second, the state sends checks payable to parents of scholarship students to the school. There is not ongoing governmental participation in the teaching of religion, or any other subject, through the issuing of scholarship checks.

A social justice argument springing from the *Mueller* decision also argues in favor of school vouchers for low-income families. *Mueller* allowed a tax deduction to parents for the expense of sending children to private schools.[170] Like the benefits of the Cleveland Scholarship and Tutoring Program, the deduction in *Mueller* was available regardless of the sectarian nature of the school attended. Vouchers and tax deductions can both have the same result of eliminating the financial cost of sending children to private schools. However, tax deductions benefit only the wealthy whose itemized deductions exceed the standard deduction. Vouchers benefit low-income families that could never qualify for the tax deduction.[171]

2. *Alternative Establishment Clause Tests*

Because the *Lemon* test has been the subject of intense criticism, it is important to examine the constitutionality of the Cleveland Scholarship and Tutoring Program under other advocated Establishment Clause tests.[172] Justice O'Connor defined a new test for the Establishment Clause in her concurring opinion in *Lynch v. Donnelly*,[173] a case concerning a creche erected by the City of Pawtucket. Her endorsement test changed the focus of the purpose and effects prongs of the *Lemon* test.[174] The correct focus of the purpose prong, she wrote, "is whether the government intends to convey a message of endorsement

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168 *Zobrest*, 509 U.S. at 22 (Blackmun, J., dissenting).

169 *Id.*

170 *See Mueller*, 463 U.S. at 391.

171 *See* Cleveland, *supra* note 137, at 138 (footnotes omitted).

172 *See* Stick, *supra* note 72, at 453 (stating that it is important to examine other tests because *Lemon* has been critiqued and its future is uncertain); Weishaar, *supra* note 91, at 561 (calling for analysis under other tests because of the possibility for modification of *Lemon*); *supra* notes 71–78 and accompanying text.

173 465 U.S. 668 (1984) (O'Connor, J., concurring).

174 O'Connor stated that "[f]ocusing on . . . endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device." *Id.* at 689 (O'Connor, J., concurring).

or approval of religion."[175] The correct focus of the effects prong, she believed, should be "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[176] This endorsement test covers more government activity than just direct efforts at funding religious indoctrination programs: "[g]overnment promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines."[177] Such governmental endorsement creates a "symbolic union" between church and state.[178] Commentators have suggested using this endorsement test for vouchers because they deal with impressionable young children who are most likely to be affected by this symbolic union.[179]

School voucher programs, like those in the Cleveland Scholarship and Tutoring Program, are constitutional under O'Connor's endorsement test.[180] Ohio is not endorsing religion through its implementation of the Program. The Program was designed to benefit students regardless of the nature of the school they attend by offering scholarships to be used at participating sectarian private schools, nonsectarian private schools, and public schools outside of Cleveland, as well as tutorial assistance grants for public school students in the Cleveland District.[181] In this way the state is not endorsing religion, but rather remaining neutral towards religion.[182] O'Connor has stated that "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."[183] A plan that allowed the participation of all schools except those with a sectarian nature would show state disapproval of religion.

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[175] *Id.* at 691 (O'Connor, J., concurring).

[176] *Id.* at 690 (O'Connor, J., concurring).

[177] School Dist. v. Ball, 473 U.S. 373, 389 (1985).

[178] *Id.* at 390.

[179] *See id.* (stating that children are most likely to be influenced by the symbolic union because their experience is limited and their beliefs are more easily affected by their environment); Weishaar, *supra* note 91 (stating that Establishment Clause cases involving young children need a higher level of scrutiny because of the impressionable nature of young children).

[180] *See* Cleveland, *supra* note 136, at 138. *But see* Weishaar, *supra* note 90, at 543 (stating that voucher proposals would have a greater difficulty passing O'Connor's endorsement test than the traditional *Lemon* test).

[181] *See supra* note 24 and accompanying text.

[182] *But see* Weishaar, *supra* note 91, at 571 (stating that because sectarian schools may be perceived as the better schools, students will have little choice but to attend them and, therefore, government is endorsing religion).

[183] Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

Further, in determining if the Program has the effect of promoting religion, "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement" of sectarian schools.[184] As has been stated earlier, the purpose of the Cleveland Scholarship and Tutoring Program is to provide real educational choices to students regardless of the financial situation of their parents. Any message that is communicated regarding religion is incidental.[185] The message is incidental because in this Program, the choice to send students to sectarian schools using state-provided scholarships is made by the parents. It is the parents who are voicing their endorsement of the sectarian schools, not the state.[186] The state makes the funds available, but the parents make the choice of schools. Parents make the choice to expose their children to religious schooling.

Cases that have failed the endorsement test have involved the use of public space to convey a religious message. For example, in *School District v. Ball*, the Supreme Court concluded that a program where public school teachers went into sectarian classrooms to teach secular subjects conveyed a powerful message of endorsement when those classrooms were used for religious instruction at other times during the day.[187] This conclusion was specifically abandoned in *Agostini v. Felton* when the Supreme Court rejected the presumption that "the placement of public employees on parochial school grounds inevitably results in the impermissable effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."[188] The Cleveland Scholarship and Tutoring Program does not involve the use of public facilities or a public forum to convey a religious message. Scholarship students are not exposed to religious beliefs without

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[184] Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring). At least one commentator has critiqued O'Connor's modification of her test stating that the fictitious objective observer tends to fold the effects prong into the purpose prong. *See* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 286–91 (1987). This occurs because "[a]n objective observer who knows what the legislature intended will only perceive endorsement when she concludes that there was actual intent to endorse." Stick, *supra* note 72, at 458.

[185] *See* Stick, *supra* note 72, at 457.

[186] *See All Things Considered*, *supra* note 41; McLarin, *supra* note 16, at B9 (stating that one family sends their children to a sectarian school because they like the values, rules, discipline, and attention that their child receives).

[187] *See* School Dist. v. Ball, 473 U.S. 373, 392 (1985); *see also* Lee v. Weisman, 505 U.S. 577, 609 (1992) (Blackmun, J., dissenting) (declaring that an invocation or benediction in the form of prayer at public school graduation was an impermissible endorsement of religion).

[188] Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997).

parents making the voluntary choice of sending their child to a sectarian school.[189] Just as O'Connor stated in terms of applying vocational assistance to a Bible college, "The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief."[190]

After concluding that the Cleveland Scholarship and Tutoring Program does not violate Justice O'Connor's endorsement test, it is easy to conclude that the Program does not violate the coercion test proposed by Justice Kennedy in *Lee v. Weisman*.[191] Writing for the Court, Justice Kennedy held in *Weisman* that a Providence, Rhode Island program allowing clergy to offer nonsectarian benedictions at public middle schools and high schools violated the Establishment Clause.[192] The case is significant for spelling out Kennedy's concern "with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[193] He feared that even nonsectarian benedictions offered "in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."[194] Such fear would be misplaced in the context of a voucher program. When parents choose a sectarian school for their child to attend, the machinery of the state is not being used to inculcate religion. Parents choose how much, if any, religious exposure their children will encounter in school.

V. CONCLUSION

The appellate court decision in *Simmons-Harris v. Goff* will not be the final

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[189] *Cf.* Cleveland, *supra* note 137, at 138 (stating that although indoctrination may generally apply where religious symbols are thrust on students in public schools, the indoctrinal causal chain is broken when parents make the choice to send their children to sectarian schools).

[190] Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring). The reasonableness of the observer is a factor to be considered. O'Connor's endorsement test is based on perception, but to be a valid test that perception should be based on valid assumptions for "mistaken public perceptions about whether something is religious . . . should not determine the outcome of cases." Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 795 n.166 (1984).

[191] 505 U.S. 577 (1992).

[192] *See id.* at 580–81.

[193] *Id.* at 592 (citations omitted).

[194] *Id.* In fact, the coercion test advocated by Justice Kennedy appears to be better suited to cases of religious coercion in public schools than to situations where parents voluntarily send their children to sectarian schools with public funds.

word on the constitutionality of school vouchers or even of the Cleveland Scholarship and Tutoring Program. The Supreme Court of Ohio has accepted the writ of certiorari to the State's appeal. The state's highest court undoubtedly will be influenced by the U.S. Supreme Court decision, *Agostini v. Felton*,[195] which came down after the appellate decision. The *Agostini* decision and its non-alarmist position on the presence of government in sectarian schools signals that the Court is ready to recognize the constitutionality of voucher programs. Where the government merely provides low-income families with the opportunity to choose to send their children to sectarian schools the same opportunity middle- and upper-class families already enjoy the government is not establishing, favoring, or endorsing religion.

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[195] 117 S. Ct. 1997 (1997).