Constitutional Law—School Voucher Programs Providing Access to Private Religious Schools Do Not Violate The Establishment Clause—*Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)

The First Amendment to the United States Constitution prevents states from passing laws that purposefully advance or prohibit religion, thereby ensuring the separation of church and state.[1] In *Zelman v. Simmons-Harris*,[2] the Supreme Court considered whether a state instituted school voucher program (Program) in which the majority of students used their vouchers to attend private religious institutions unconstitutionally advanced religion.[3] The Court held that the Program does not violate the Establishment Clause because it permits individuals to choose public, secular or non-secular private institutions, and is therefore neutral to religious beliefs.[4]

In 1999, Ohio enacted a school voucher program for the benefit of Cleveland's low-income families in order to address the Cleveland School District's educational crisis.[5] The Program provides annual scholarships to qualified students for use at participating public, private, and parochial schools.[6] Of the fifty-six participating schools in 1999, forty-six were religiously affiliated.[7] The Program provides participating schools with

1. U.S. CONST. amend. I. The First Amendment provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." *Id.*

2. 536 U.S. 639 (2002).

3. *Id.* at 648 (noting respondents' challenges to Ohio's school voucher program based on constitutional grounds).

4. *Id.* at 662-63 (holding school voucher program constitutional under Establishment Clause). The Court emphasized that the Program afforded participants a meaningful and private choice. *Id.*

5. Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 836 (N.D. Ohio 1999) (detailing Ohio's reasoning behind enactment of school voucher program), *aff'd*, 234 F.3d 945 (6th Cir. 2000), *rev'd*, 536 U.S. 639 (2002). After conducting an educational study, the state auditor declared the Cleveland City School District among the worst performing public schools in the United States. 536 U.S. at 644. The United States District Court for the Northern District of Ohio declared the Cleveland School District in an educational crisis and took control of the school district. *Simmons-Harris*, 72 F. Supp. 2d at 836.

6. Simmons-Harris v. Zelman, 234 F.3d 945, 948-49 (6th Cir. 2000) (detailing specifics of Program), *rev'd*, 536 U.S. 639 (2002). The Ohio legislature approved the Program for any school district that a federal court placed under court control. *Id.* at 948. The Program provides scholarships up to $2500 or 90% of the tuition private schools charge for students from families with income less than 200% of the poverty line, and scholarships of up to $1875 or 75% of the tuition private schools charge for other families. *Id.* Area public and private schools voluntarily agree to participate in the Program. *Id.* at 948-49. Participating public schools receive a $2250 tuition grant per participating student in addition to the full amount of state funding per student. 536 U.S. at 645-46 n.1.

7. Simmons-Harris v. Zelman, 234 F.3d 945, 949 (6th Cir. 2000) (setting forth statistical data on school voucher program use), *rev'd*, 536 U.S. 639 (2002). Of the schools that volunteered to participate in the Program, 82% were church affiliated but of varying religious affiliation. *Id.* The Program also invited public schools in adjacent school districts to participate; however, to date none have chosen to join. *Id.*

unrestricted state funds, permitting schools to use the funds as desired.[8]

In 2000, several Ohio taxpayers challenged the Program arguing that it violated the Establishment Clause.[9] The district court granted the plaintiffs' motion for summary judgment, finding that the voucher program violated the Establishment Clause.[10] The district court noted that although the Program has a valid secular purpose, it unlawfully advances religion in violation of the First Amendment.[11] On appeal, Ohio argued that the Program was constitutional because it provides various options to parents, including the opportunity to send their children to community schools.[12] The court of appeals refused to consider the Program in conjunction with the community schools program, noting that the two programs were codified separately.[13] Calling the Program an "impermissible infringement," the court of appeals affirmed the district court's decision that the Program was unconstitutional under the Establishment Clause.[14]

The Supreme Court reversed the decisions of the district court and court of appeals, holding that the Program was constitutional under the Establishment Clause.[15] The Court characterized and considered the Program as a piece of a broader educational reform that included community and magnet school

8. Simmons-Harris v. Zelman, 234 F.3d 945, 949 (6th Cir. 2000) (noting lack of restrictions on use of funds by religious institutions), *rev'd*, 536 U.S. 639 (2002). If a student chooses to attend a private institution, the school district writes a check directly to the parent for the eligible amount of scholarship and the parent then endorses the check to the school. *Id.* at 948. The religious institutions may use the state scholarship funds for whatever purposes they deem appropriate, and therefore are not restricted from using such funds towards religious goals. *Id.* at 949.

9. Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 835-36 (N.D. Ohio 1999) (setting forth basis of lawsuit), *aff'd*, 234 F.3d 945 (6th Cir. 2000), *rev'd*, 536 U.S. 639 (2002).

10. Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 865 (N.D. Ohio 1999) (setting forth court's decision), *aff'd*, 234 F.3d 945 (6th Cir. 2000), *rev'd*, 536 U.S. 639 (2002).

11. Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 865 (N.D. Ohio 1999) (explicating court's reasoning), *aff'd*, 234 F.3d 945 (6th Cir. 2000), *rev'd*, 536 U.S. 639 (2002); *see infra* note 19 and accompanying text (explaining required elements to satisfy Establishment Clause). The court held that the Program was unconstitutional because it entangled the state with religious institutions thereby resulting in an advancement of religion accompanied by "an incentive to attend religious schools." *Simmons-Harris*, 72 F. Supp. 2d at 864.

12. Simmons-Harris v. Zelman, 234 F.3d 945, 958 (6th Cir. 2000) (arguing court should consider educational reforms in total), *rev'd*, 536 U.S. 639 (2002). The State of Ohio enacted the Program in conjunction with a complete educational reform program. *Id.* The Program gave students the option of attending community schools and magnet schools, however, the reforms were codified in different chapters. *Id.* Community schools are state-funded and accept students according to a lottery; however, community schools are not run by local school districts. 536 U.S. at 647; *see* OHIO REV. CODE ANN. §§ 3314.01(B), 3314.04 (West 2002). There were ten community schools in the Cleveland School District during the 1999-2000 school year. 536 U.S. at 647.

13. Simmons-Harris v. Zelman, 234 F.3d 945, 958 (6th Cir. 2000) (describing and rejecting defendants' argument for considering Program in broader context of all educational reforms), *rev'd*, 536 U.S. 639 (2002). The Program gave students the option of attending community schools and magnet schools, however, the reforms were codified in different chapters. *Id.*

14. Simmons-Harris v. Zelman, 234 F.3d 945, 963 (6th Cir. 2000) (affirming district court's decision), *rev'd*, 536 U.S. 639 (2002).

15. 536 U.S. at 662-63 (reversing decision of district court and court of appeals).

programs.[16] The Court held that the Program provides parents with an actual and meaningful choice, thus resulting in a constitutional, neutral to religion program.[17]

Although the First Amendment expressly prohibits states from entangling laws with religion, the Court has interpreted the Establishment Clause much more loosely than its drafters intended.[18] When faced with Establishment Clause challenges, the Court consistently applies the amended test set forth in *Lemon v. Kurtzman*.[19] The *Lemon* test requires the challenged law to have a valid secular purpose and neither advance nor inhibit religion.[20] Courts employ the *Lemon* test as the primary threshold test in suits challenging statutes regarding schools and education under the Establishment Clause.[21]

The Court has drawn a distinction between government programs that grant direct aid to religiously affiliated schools and those programs in which government aid indirectly flows to religious schools as a result of the true private choice of individuals.[22] The Court has noted, however, that neither is

16. *Id.* at 646-49, 655 (noting parents have wide array of choices at their disposal). Qualified parents could choose to send their children to fifty-six different public and private schools (forty-six of which were religiously affiliated), ten community schools, and twenty-three magnet schools. *Id.* at 647-48, 655.

17. *Id*. at 662-63 (holding Program constitutional under Establishment Clause).

18. *See supra* note 1 and accompanying text (defining First Amendment boundaries). In support of separating church and state, James Madison stated "[a] Government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any sect, nor suffering any Sect to invade those of another." James Madison, Memorial and Remonstrance, June 20, 1785, *reprinted in* THE ESSENTIAL BILL OF RIGHTS: ORIGINAL ARGUMENTS AND FUNDAMENTAL DOCUMENTS 228 (Gordon Lloyd & Maggie Lloyd eds., 1998). Thomas Jefferson intended the Establishment Clause to build "'a wall of separation' between church and state," a theory which the Court promulgated for a period of one hundred and ninety years. Jason S. Marks, *What Wall? School Vouchers and Church-State Separation After* Zelman v. Simmons-Harris, 58 J. MO. B. 354, 355 (2002). Both Madison and Jefferson encouraged a stern separation between religious beliefs and the states; however, the Court has found that line impossible to completely enforce. Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 746 (1976).

19. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (detailing requirements to find laws constitutional under Establishment Clause). The original test predated *Lemon*, but has become known as the *Lemon* test because the *Lemon* court expressly stated the three-prong test. *Id.* at 612-13. The original *Lemon* test required that statutes could not encourage "an excessive government entanglement with religion." *Id.* at 613 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). Over time, however, the Court amended the *Lemon* test by moving the entanglement test to its effects inquiry, rather than considering it at the outset. Agostini v. Felton, 521 U.S. 203, 233-34 (1997). The Court focused the entanglement theory by noting that a challenged statute is constitutional as long as "it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Agostini*, 521 U.S. at 234.

20. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (detailing *Lemon* test elements).

21. *See supra* note 1 and accompanying text (defining Establishment Clause); *see also* Bd. of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 695 (1994) (noting courts automatic application of *Lemon* test in regards to schools and education).

22. Mitchell v. Helms, 530 U.S. 793, 810-14 (2000) (noting unconstitutionality of granting special favors to religious institutions not accompanied by private choice); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10-11 (1993) (holding governmental sign language interpreters in religious schools constitutional due to neutrality of program); Witters v. Wash. Dep't. of Servs. for Blind, 474 U.S. 481, 487 (1986) (holding governmental aid granted to religious institutions resulting from private choice constitutional); Mueller v. Allen, 463 U.S. 388, 397 (1983) (holding constitutional private school deductible due to parental choice to send

prima facie unconstitutional.[23] The key issue is not the flow of the governmental funds, but rather the neutrality of the program and the choices of private individuals.[24] When private individual choice exists, the Court generally holds statutes constitutional under the Establishment Clause unless the statutes fail to serve a secular purpose.[25]

The Court has expanded the reach of governmental funds over recent years by consistently upholding neutral programs that indirectly aid religious organizations.[26] Although the Court rejected a statute granting financial assistance to parents whose children attended private secular and non-secular schools in *Committee for Public Education and Religious Liberty v. Nyquist*,[27] the majority stressed its decision turned on the program's favoring of private school parents.[28] The Court has routinely held that a program is constitutional if it is neutral, available to the common populace, and entails funds paid to parents instead of the schools.[29] Despite the Court's past consistent rulings, however, legislatures across the country were reluctant to pass school voucher programs because the Court's decisions were unclear as to how to constitutionally structure them.[30]

In *Zelman v. Simmons-Harris*, the Supreme Court again considered the constitutionality of school voucher programs where parents may decide to use

child to private school).

23. Agostini v. Felton, 521 U.S. 203, 225-27 (1997) (noting Court no longer adheres to notion all governmental aid paid to religious schools unconstitutional).

24. Mueller v. Allen, 463 U.S. 388, 398-99 (1983) (noting importance of program's availability to all parents whether children attended public or private schools).

25. Mueller v. Allen, 463 U.S. 388, 398-99 n.8 (1983) (noting importance of program's availability to all of society resulting in private individual choices). A statute will pass the secular purpose test when it promotes a legitimate state interest. *Id.* at 395. Any statute that promotes an educated populace passes the secular purpose test because an educated society benefits the entire society. *Id.* The Court stressed that a statute's constitutionality oftentimes is based on whether the funds are paid directly to the schools or to the parents, where direct payments to parents will most likely pass constitutional muster. *Id.* at 399.

26. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 12 (1993) (holding state-funded sign-language interpreters for deaf children constitutional in all schools); Witters v. Wash. Dep't of Servs. for Blind, 474 U.S. 481, 489 (1986) (holding aid for vocational programs including study at religious institutions to become pastor constitutional); Mueller v. Allen, 463 U.S. 388, 399 (1983) (holding tax deductions for private school expenses constitutional because considered indirect aid to religious organizations).

27. 413 U.S. 756 (1973).

28. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973) (noting statute's advancement of religion renders it unconstitutional). The majority emphasized that the program lacked neutrality towards all parents by favoring the private school parents. *Id.*

29. *See supra* note 25 and accompanying text (setting forth reasoning of *Mueller* Court as example for other cases); *see also supra* note 19 and accompanying text (detailing elements of *Lemon* test).

30. Terry Frieden, *Supreme Court Affirms School Voucher Program* (June 27, 2002) (discussing *Zelman* decision and expected impact on similar programs), *at* http://www.cnn.com/2002/LAW/06/27/scotus.school.vouchers. Due to the Court's approval of Cleveland's voucher program, many political theorists expect voucher programs to become key issues in future political campaigns. *Id.* Additionally, voucher proponents now believe some states will see the introduction of federally-funded voucher programs. *Id.* President Bush heralded the decision, stating that the Program "clears the way for other innovative school choice programs, so that no child in America will be left behind." *Id.*

the vouchers for religious schools.[31] Reaffirming the application of the *Lemon* test to Establishment Clause challenges, the Court noted the possibility that religious institutions may receive state funds without unlawfully advancing religion.[32] Holding the Program constitutional against a vehement dissent, the Court stressed that it would not declare a state program unconstitutional if it was available to an entire community, had a valid secular purpose, and was accompanied by private parental choice.[33]

The *Zelman* Court's decision clarified a gray area of law that caused confusion among state legislatures and caused many to strike down proposed school voucher programs fearing possible unconstitutionality.[34] Although the Court had consistently struck down Establishment Clause challenges, it had never established guidelines upon which legislatures could rely to ensure the constitutionality of their voucher programs.[35] The Court's holding limits the reach of the Establishment Clause and clearly articulates that the Court will permit a certain degree of intermingling between the government and religious institutions.[36]

Opponents of school voucher programs argue that such programs destroy the meaning of separation of church and state.[37] Additionally, critics find it troubling that the state funds religious schools without restricting the use of the funds.[38] Many believe that the Court has interpreted the Establishment Clause

31. 536 U.S. at 648 (noting constitutional challenges to voucher Program).

32. 536 U.S. at 651-52 (detailing circumstances under which religious schools may receive state funds constitutionally); *supra* note 19 and accompanying text (setting forth requirements to satisfy *Lemon* test and therefore Establishment Clause).

33. *See* 536 U.S. at 662-63 (setting forth Court's holding and reasoning); Martha M. McCarthy, Zelman v. Simmons-Harris*: A Victory for School Vouchers*, 171 WEST'S EDUC. L. REP. 1, 1 (2003) (noting voucher programs provide options to low-income families previously available only to wealthy families). *But see* 536 U.S. at 685 (Stevens, J., dissenting) (arguing Court should have focused on permissibility of governmentally funded religious indoctrination).

34. *Supra* note 30 and accompanying text (noting former legislative apprehension in enactment of voucher programs seems to give way under *Zelman*).

35. *See supra* note 22 and accompanying text (holding constitutional various state funded religious programs since 1983). Although the Court consistently struck down an Establishment Clause challenge in recent years, they had never set forth a complete set of guidelines, instead leaving the legislatures to sort through the various cases in an effort to gleam what comprises a constitutional program. *See* Mitchell v. Helms, 530 U.S. 793, 810-14 (2000) (requiring individual private choice); Agostini v. Felton, 521 U.S. 203, 225-27 (1997) (granting state aid to religious schools not prima facie unconstitutional); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993) (stating requirement of program's neutrality); Mueller v. Allen, 463 U.S. 388, 399 (1983) (noting importance of parental choice).

36. *See supra* notes 1, 18 and accompanying text (noting Court's interpretation of Establishment Clause looser than framers intended); *see also supra* note 32 and accompanying text (setting forth circumstances under which religious institutions may receive state funds).

37. 536 U.S. at 685-86 (Stevens, J., dissenting) (disagreeing with Court's interpretation of Establishment Clause). Justice Stevens noted "[w]henever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy." *Id.* at 686.

38. *See supra* note 8 and accompanying text (noting lack of restrictions placed on state funds granted to religious institutions); *see also* 536 U.S. at 726 (Breyer, J., dissenting) (noting state funding directed to church's role of teaching religious beliefs to impressionable children).

too loosely and should return to the meaning the framers originally intended.[39]

Despite strong opposition from critics, the Court's opinion in *Zelman* opens the door to the enactment of school voucher programs across the country.[40] Although the separation of church and state is one of the founding principles of the United States, past interpretation of the Establishment Clause penalized parents for choosing private schools.[41] The Court's opinion regarding private schools clearly allows states to provide indirect assistance to other private institutions just as it does to private schools.[42] Due to its specificity, *Zelman* provides states with much-awaited guidelines for the drafting of constitutional school voucher programs, therefore reducing the likelihood of future challenges.[43]

In *Zelman v. Simmons-Harris*, the Supreme Court held as constitutional school voucher programs where parents may use the vouchers for religious schools as long as the program is available to the general public, provides for a truly private choice, and advances a secular purpose. Parents finally have a real choice in choosing what school their child attends without having to struggle to pay private school tuition. When a district does not provide adequate public educational resources for children, parents should have the opportunity to use their tax dollars to obtain a better education for their child at an alternative school, whether it be secular or non-secular in affiliation.

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39. *See supra* notes 1, 18 and accompanying text (setting forth framers' interpretation of Establishment Clause); *see also* 536 U.S. at 728 (Breyer, J., dissenting) (noting Court rejected recent Establishment Clause interpretation more than fifty years ago).

40. *See supra* note 9 and accompanying text (setting forth plaintiffs' alleged basis for constitutionality claim); *see also supra* note 33 and accompanying text (holding program constitutional against vehement dissent); *supra* note 37 and accompanying text (describing Justice Stevens dissenting opinion). *But see supra* note 30 and accompanying text (predicting impact of Court's decision on future enactment of similar voucher programs).

41. *See supra* notes 1, 18 and accompanying text (establishing intent of founding fathers when constructing Establishment Clause); *see also supra* notes 5-7 and accompanying text (detailing Cleveland's educational crisis and noting low-income status makes private school tuition unaffordable).

42. *See supra* notes 19, 32 and accompanying text (establishing circumstances under which religious institutions may permissibly receive state funds).

43. *See supra* note 33 and accompanying text (setting forth Court's new guidelines for voucher program challenges).