

SIMMONS-HARRIS V. ZELMAN

234 F.3D 945 (6TH CIR. 2000)

INTRODUCTION

As the nation turns to God for solace and comfort in this time of uncertainty and terrorism,¹ the Supreme Court will enter the great debate involving God in the classroom when they determine if school vouchers violate the Establishment Clause of the First Amendment.² On September 25, 2001 the U. S. Supreme Court granted certiorari to *Simmons-Harris v. Zelman*.³ Plaintiffs argued that the Ohio Pilot Voucher Program⁴ violated the Establishment Clause of the First Amendment and the district court agreed.⁵ Defendants appealed to the circuit court where Judge Clay affirmed the district court's ruling which held that the statutory scheme constituted an "impermissible infringement under the Establishment Clause."⁶ The three-judge panel on the circuit court was divided by a strong dissent.⁷ Thus, with a solid number of Supreme Court Justices favoring statutes with a

1. See Joseph Kahn, *A Day of Terror: The Background; A Trend Toward Attacks That Emphasize Deaths*, N.Y. TIMES, Sept. 12, 2001, at A18 (discussing the Sept. 11, 2001 attacks, the most destructive terrorist attacks of the last quarter-century).

2. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people.").

3. See 234 F.3d 945 (6th Cir. 2000), *cert. granted*, 122 S. Ct. 23 (2001) (combining three cases involving the constitutionality of the school voucher program in Cleveland, Ohio).

4. See OHIO REV. CODE ANN. § 3313.975 (Banks-Baldwin 2001) (allowing the superintendent of public instruction to establish a pilot project scholarship program that provides students residing in any district to receive scholarships to attend alternative schools or to receive tutorial assistance grants while attending public school in any such district).

5. See *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 949 (N.D. Ohio 1999) (granting plaintiffs' motion to enjoin the voucher program).

6. *Simmons-Harris*, 234 F.3d at 963 (holding that the Ohio voucher program violated the Establishment Clause).

7. See *id.* at 963 (Ryan, J., concurring in part, dissenting in part) (indicating that Ohio's voucher program is constitutional).

secular purpose and effect,⁸ the Supreme Court may uphold Ohio's school voucher program.

I. BACKGROUND

A. *The Establishment Clause*

The First Amendment to the U.S. Constitution begins with strong language prohibiting the U.S. Congress from establishing a religion.⁹ In the past, different doctrines and tests have emerged from Supreme Court decisions to balance this prohibition and the realities of religion in culture.¹⁰ The *Lemon Doctrine*, established by Chief Justice Burger in 1971, proclaimed that a statute challenged under the Establishment Clause must satisfy three criteria to pass Constitutional muster.¹¹ To be Constitutionally valid "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . [and] finally, the statute must not foster 'an excessive government entanglement with religion.'"¹²

Without overturning *Lemon*, the Court adjusted the standard for determining if government aid to schools violates the Establishment Clause. For example, in *Agostini v. Felton*,¹³ the Supreme Court held that a court must still inquire as to "whether the government acted with the purpose of advancing or inhibiting religion . . . [and] whether the aid has the 'effect' of advancing or inhibiting religion."¹⁴ The Court assigned three different criteria to the "effect" portion of the test to determine the constitutionality of a statute.¹⁵ In addition,

8. See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (Justices Thomas, Rehnquist, Scalia and Kennedy asserting that a federal school aid program was constitutional because of its neutrality and private choice).

9. See U.S. CONST. amend. I.

10. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (explaining the three-step test the Court employs to determine whether government aid to schools is unconstitutional); see also *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997) (evaluating whether government aid violates the Establishment Clause by determining if the government acted with the purpose of promoting religion); *Mitchell*, 530 U.S. at 844-45 (adopting the *Agostini* test and asking whether the aid had the effect of promoting religion).

11. See *Lemon*, 403 U.S. at 612-13 (holding that a Rhode Island statute violated the Establishment Clause when it provided state aid to church affiliated schools).

12. *Id.* at 612-13.

13. 521 U.S. 203 (1997).

14. 521 U.S. 203, 222-23 (1997).

15. See *id.* at 223-24 (holding that a government-aid program will impermissibly advance a religion if the aid results in governmental indoctrination; if the aid program defines its recipients by reference to religion; and if the aid creates an

the Court “noted that the same criteria could be reviewed to determine whether a government-aid program constitutes an endorsement of religion.”¹⁶ Therefore, the excessive entanglement prong of the *Lemon Doctrine* has been re-characterized to assist in determining the effect that a secular statute may have on promoting or inhibiting a religion.¹⁷

In *Mitchell v. Helms*,¹⁸ the most recent case involving government-aid to religiously affiliated educational facilities, the Supreme Court used the modified *Lemon Doctrine* or *Agostini*’s “purpose and effect test” to uphold the federal funding of educational materials used in public and private schools.¹⁹ The Court determined that a federal aid program that distributed funds to state and local agencies which then lent educational materials and equipment to public, private, and religiously affiliated private schools did not violate the Establishment Clause.²⁰ The Court noted that many restrictions applied to the aid given to private schools under the federal aid program.²¹ In addition, the Court noted that private schools do not acquire control of government funds or title to any property it receives from the program.²² Instead, all materials and equipment are acquired through an application process that requires the school to provide an explanation of intended use.²³ Then the local educational agency purchases the item and lends the equipment to the school.²⁴

The judgment in *Mitchell* used the *Agostini* “purpose and effect test.”²⁵ The decision rested on the notion that because the statute has a secular purpose, there is no excessive entanglement.²⁶

excessive entanglement between government and religion).

16. *Mitchell v. Helms*, 530 U.S. 793, 845 (2000) (citing *Agostini v. Helms*, 521 U.S. 203, 235 (1997)).

17. See *Simmons-Harris v. Zelman*, 234 F.3d 945, 952 (6th Cir. 2000), cert. granted, 122 S. Ct. 23 (2001) (noting that “the entanglement prong could be considered as an aspect of the effects inquiry.”).

18. 530 U.S. 793 (2000).

19. See *Mitchell*, 530 U.S. at 808.

20. See *id.* at 801.

21. See *id.* at 802 (noting that “‘services, materials, and equipment’ provided to private schools must be ‘secular, neutral, and non-ideological.’”) (citation omitted).

22. See *id.* at 802-03 (demonstrating the tenuous link between government aid to schools and violations of the Establishment Clause).

23. See *id.* at 803 (citing the application process for acquiring school equipment in both private and public schools).

24. See *Mitchell*, 530 U.S. at 803 (demonstrating that the funds for equipment are not sent directly to a private school).

25. See *id.* at 808.

26. See *id.* (finding that the statute does not further a religious affiliation, and, therefore, does not violate the separation of church and state).

Therefore, the statute did not result in a religious indoctrination by the government, nor did the statute define its recipients by religion.²⁷ The Court determined that the issue surrounding indoctrination is “ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to government action.”²⁸ To safeguard against governmental indoctrination, the aid must be offered neutrally to a “broad range of groups or persons without regard to their religion.”²⁹ In *Mitchell*, the students were guarded against governmental indoctrination of religion because federal aid was available to all schools.³⁰ Children at religious schools benefited only because of their parents’ choice to send them to those schools, not because of selective government aid.³¹ As Justice O’Connor stated in her concurrence “the plurality’s rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content.”³² Ultimately, *Mitchell v. Helms* is the most relevant case in reviewing the constitutionality of school vouchers.³³ *Mitchell* lays the ground work for upholding a statute with a secular purpose, such as providing educational opportunities, when there is a neutral and private choice to participate in the program.³⁴

B. Simmons-Harris v. Zelman

In 1995, the Ohio Pilot Project Scholarship Program was established in response to a court order placing the Cleveland School District under the direct supervision of the State Superintendent of Public Instruction.³⁵ The program was designed to give vouchers to

27. See *id.* (stating that the government does not advance religion through government aid because there is no reference to the beneficiaries’ religious affiliation).

28. See *id.* at 809 (indicating that aid which is offered to a variety of people regardless of religious affiliation has been a hallmark in determining whether there has been a violation of the Establishment Clause).

29. See *Mitchell*, 530 U.S. at 809 (preventing governmental indoctrination requires that government aid be blindly distributed without regard to a particular religion).

30. See *id.* at 810 (availing all schools of government aid prevented the program from violating the Establishment Clause).

31. See *id.* (suggesting that the students benefited from religious schools rather than the aid available to those schools).

32. See *id.* at 837.

33. See *id.* (O’Connor, J., concurring) (expressing the magnitude and importance of upholding school vouchers based on an evaluation of the Establishment Clause).

34. See *id.* at 809 (finding the statute constitutional because everyone had an opportunity to receive government aid under its reading).

35. See *Simmons-Harris v. Zelman*, 234 F.3d 945, 948 (6th Cir. 2000), *cert. granted*, 122 S. Ct. 23 (2001) (noting that because of mismanagement by the local school

students who wished to attend a private school, with preference given to students from low-income families.³⁶ In addition, the private schools were required to cap the tuition at \$2,500 per student per year.³⁷ Once the school and student were in compliance with the statute, a scholarship check was mailed directly to the school of the parent's choice, and the parent subsequently endorsed the check to pay the tuition.³⁸ Furthermore, the voucher program permits schools to use the funds without restriction.³⁹

While the voucher program was open to private schools and public schools adjacent to the district implementing the program, the vast majority of participating students ended up in religiously affiliated schools.⁴⁰ The court noted that 96% of the students were enrolled in sectarian schools for the 1999-2000 school year.⁴¹ In addition, forty-six (82%) of the schools participating in the program that year were church-affiliated.⁴² The sectarian schools affiliated with the program varied in their religious affiliation and approaches, but they shared an integration of the standard curriculum.⁴³

Given the confusion and murky nature of the different standards in an Establishment Clause challenge, the circuit court initially attempted to apply the *Lemon Doctrine*,⁴⁴ Justice O'Connor's endorsement test,⁴⁵ Justice Kennedy's coercion test,⁴⁶ *Agostini's* test,⁴⁷ and *Mitchell's* application of these tests.⁴⁸ The court determined,

board the supervision was transferred).

36. *See id.* (stating that sixty percent of the children are from families at or below the poverty level).

37. *See id.*

38. *See id.* (providing a direct disbursement of government funds to the private school of the parent's choice).

39. *See id.* at 949 (describing the lack of restrictions on participating schools' use of the voucher money).

40. *See id.*

41. *See Simmons-Harris*, 234 F.3d at 949.

42. *See id.* (noting that no public schools have registered for this program).

43. *See id.* ("interweaving religious beliefs with secular subjects.").

44. *See id.* at 951; *see also* *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (providing a three part test for evaluating establishment clause challenges).

45. *See Simmons-Harris*, 234 F.3d at 952 (stating that the "Establishment Clause is violated when: 1) government is excessively entangled with religion; or 2) government endorses or disapproves of religion.").

46. *See id.* (asserting that "1) [the] government may not coerce participation in religion, and 2) government may not directly benefit religion").

47. *See id.* (discussing how *Agostini* redefined the importance of the *Lemon* test and developed flexibility under the *Lemon* test).

48. *See id.* at 956-57 (recognizing the importance of the *Mitchell* decision in the Circuit Court's analysis of the Ohio voucher program).

however, that *Committee for Public Education v. Nyquist*⁴⁹ is factually similar and “on point with the matter” of Ohio’s school vouchers.⁵⁰ In *Nyquist*, plaintiffs challenged a New York statute creating a tuition grant program which partially reimbursed low-income families who sent their children to private schools.⁵¹ Similar to Ohio, the New York program involved both sectarian and non-sectarian private schools.⁵² In *Nyquist*, the Court determined that the statute violated the Establishment Clause because it failed the second and third prongs of the *Lemon* test.⁵³ Since *Nyquist* and *Lemon*, the Supreme Court’s analysis of the Establishment Clause in light of education has undergone tremendous change.⁵⁴ Therefore, the majority in *Simmons-Harris* was met with strong opposition from the dissent, which distinguished the Ohio program from *Nyquist*⁵⁵ and relied heavily on recent Supreme Court decisions, such as *Agostini* and *Mitchell*, focusing on their holdings for private choice.⁵⁶

In his dissent, Judge Ryan argued that Ohio’s voucher program is constitutional because it passes the *Lemon* criteria and *Agostini*’s “impermissible effects” test.⁵⁷ First, Ryan stated that the “sole purpose for the voucher program is to save Cleveland’s mostly poor, mostly minority, public school children from . . . the failed Cleveland schools.”⁵⁸ The secular nature of this purpose forced the court to decide “whether the voucher program has a forbidden ‘primary effect’ of advancing religion.”⁵⁹ The reasoning that Judge Ryan used to determine whether the voucher program violates the

49. See 413 U.S. 765 (1973).

50. See *Simmons-Harris*, 234 F.3d at 953.

51. See *id.* at 953 (citing *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 761-70 (1973)).

52. See *id.* at 953 (noting eighty five percent of the schools in the New York program were sectarian in nature and required religious instruction in the curriculum).

53. See *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 798 (1973) (holding that the provisions have “a primary effect that advances religion and offends the constitutional prohibitions against “ laws respecting an establishment of religion.”).

54. See *supra* Part I.A.

55. See *Simmons-Harris*, 234 F.3d at 964 (Ryan, J., concurring in part, dissenting in part) (stating “[t]he Ohio voucher program . . . could not be more unlike the New York statute both in its purpose and . . . application.”).

56. See *id.* at 973 (Ryan, J., concurring in part, dissenting in part) (criticizing the majority’s use of *Nyquist* because of its factual differences and dated law).

57. See *id.* at 967-68 (Ryan, J., concurring in part, dissenting in part) (outlining the various tests the Supreme Court has used in determining whether any given school voucher program violates the Establishment Clause).

58. *Id.* at 967 (Ryan, J., concurring in part, dissenting in part).

59. *Simmons-Harris*, 234 F.3d at 968 (Ryan, J., concurring in part, dissenting in part).

Establishment Clause repeatedly referred to the notion of the “genuinely independent and private choices of [the] aid recipients.”⁶⁰ He argued that recent precedent established that any flow of money deposited into a private religious school does not violate the Establishment Clause if the funds arrive because of the private choice of the parents to send their children to that school.⁶¹ In addition, he noted that the government must provide various choices in an effort to remain neutral.⁶² Finally, Judge Ryan contended that the statute does not violate the Establishment Clause because there is a genuine choice for the parents to make when deciding where to send their children to school.⁶³

The dissent outlined the variety of choices available to parents including permitting their child to stay in the public school system, attending a non-religious private school, or attending a religious private school.⁶⁴ Ultimately, Judge Ryan believed that current Supreme Court law on the Establishment Clause holds that “a true private-choice program does not result in ‘governmental indoctrination’ so long as the path of the government aid is determined by the ‘genuinely independent and private choice’ of the aid recipients.”⁶⁵

II. ANALYSIS

With both Judges Clay and Ryan of the Sixth Circuit citing precedent in an attempt to form an argument that will be adopted by the Supreme Court, the ultimate Supreme Court decision may depend on Justice O'Connor's vote. If Justice O'Connor believes that an objective observer feels that the statute has created the opportunity for a government to endorse a religion or religious

60. *Id.* at 966 (Ryan, J., concurring in part, dissenting in part) (citing *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), where a state-funded program was found constitutional even though it provided assistance to a blind student attending a Christian College and studying to become a pastor).

61. *See id.* at 967 (Ryan, J., concurring in part, dissenting in part) (emphasizing *Witters*, *Agostini*, and *Mitchell* as important recent cases that mirrored facts similar to the Ohio voucher program).

62. *See id.* at 968 (Ryan, J., concurring in part, dissenting in part) (concluding that a range of education alternatives will indicate governmental neutrality).

63. *See id.* (emphasizing the presence of a genuine choice in Ohio's voucher program).

64. *See id.* (listing other alternatives including: accepting the voucher for a child to obtain special tutorial help in Cleveland schools, or accepting the voucher to attend a school in an adjacent district even though adjacent schools have not opted into this program).

65. *Simmons-Harris*, 234 F.3d at 973 (Ryan, J., concurring in part, dissenting in part) (citing *Mitchell v. Helms*, 530 U.S. 793, 810 (2000)).

practice, then the Ohio voucher program will likely offend the Establishment Clause.⁶⁶ School aid programs are a particular problem because of the intersection of facially neutral statutes that are supposed to refrain from promoting or inhibiting religion.⁶⁷ In the context of a religious school, however, its teachings will most likely involve religious doctrine and a religious message in all subject areas.⁶⁸ Throughout the development of schools and Establishment Clause cases, Justice O'Connor has been consistent with her regard for endorsement,⁶⁹ respect for precedent,⁷⁰ and concern for the facts of each case.⁷¹ In *Mitchell*, for example, Justice O'Connor explained in her concurring opinion that when determining whether a school aid program offends the Establishment Clause, the Court must make distinctions based on the facts of each case.⁷² Therefore, the facts surrounding the Ohio school voucher program may determine whether Justice O'Connor views this statute as an endorsement of religion.

In *Mitchell*, O'Connor clearly stated that "when government aid supports a school's religious mission *only because of independent decisions made by numerous individuals to guide their secular aid to that school*, '[n]o reasonable observer is likely to draw from the facts . . . that the State itself is endorsing a religious practice or belief.'" ⁷³ The statute at issue in *Simmons-Harris* provides for private parental choice in deciding where to send one's children to school.⁷⁴ Any resulting

66. See *Mitchell*, 530 U.S. at 843 (recognizing violations of the Establishment Clause when government aid is given to secular educational institutions).

67. See *id.* at 844 (O'Connor, J., concurring) (observing that school tuition aid presents a special problem because it is not easy to categorize).

68. See *Simmons-Harris*, 234 F.3d at 949 (recognizing the religious goals of the sectarian schools in Cleveland, such as the St. Vincent de Paul School, which requires that "all learning take place in the atmosphere of religious ideals.").

69. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring) (stating her "endorsement test does not preclude government from acknowledging religion . . . it does preclude government from conveying . . . a message that religion or a particular religious belief is favored . . .").

70. See *Mitchell*, 530 U.S. at 839 (O'Connor, J., concurring) ("[W]e have never held that a government-aid program passes constitutional muster *solely* because of neutral criteria.") (emphasis in original).

71. See *id.* at 844 (O'Connor, J., concurring) (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995) (emphasis added)).

72. See *id.* at 844 (O'Connor, J., concurring) (illustrating the difficulty of judging whether a school voucher program violates the Establishment Clause based on the particular facts of each case).

73. *Id.* at 843 (O'Connor, J., concurring) (citing *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 493 (1986)).

74. See *Simmons-Harris*, 234 F.3d at 948 (stating the parents select schools and then endorse the checks over to the schools).

endorsement of religious institutions may merely be a reflection of such private decision, free from any State endorsement altogether. For example, Justice O'Connor posits that an objective observer would see Ohio's project as the "endorsement of the religious message . . . reasonably attributed to the individuals who select the path of the aid."⁷⁵ Justice O'Connor seems, however, very concerned with the public's perception of the government giving aid directly to schools.⁷⁶

In *Mitchell*, O'Connor stated that if government aid is given directly to students who use the aid for religious schooling and the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement.⁷⁷ As previously stated, in the Ohio program, the government aid is sent directly to the school chosen by the parent and the use of these monies is without restriction.⁷⁸ Given the nature of the private religious schools in the Ohio program that encourage the "interweaving of Christian doctrines with science and language arts classes,"⁷⁹ this direct aid could be viewed as a state endorsement of religion or religious schooling.⁸⁰

Currently, any government aid program which results in religious indoctrination creates an excessive entanglement between government and religion, or defines its recipients by reference to a religion, has the effect of advancing, inhibiting or endorsing religion.⁸¹ In *Agostini*, the Supreme Court stated that "government inculcation of religious beliefs has the impermissible effect of advancing religion."⁸²

The opinion goes on to state that the criteria by which a government aid program identifies its beneficiaries might itself have

75. See *Mitchell*, 530 U.S. at 844 (O'Connor, J., concurring).

76. See *id.* at 843 (distinguishing between the public's perception of a government program of direct aid to religious schools and providing aid directly to the student beneficiary).

77. See *id.* at 843 (finding legal distinctions between direct and indirect government aid to students going to non-secular schools by creating a differentiation between a government program of direct aid to religious schools and providing aid directly to the student beneficiary).

78. See *Simmons-Harris*, 234 F.3d at 948-49 (explaining that "the voucher program does not place restrictions of the use of funds made available under the program").

79. *Id.* at 949.

80. See, e.g., *id.* at 959 (noting that providing aid to religious schools that interject Christian principles in the teaching of the arts and sciences may suggest state support of religious schooling).

81. See *supra* notes 14, 73-75.

82. *Agostini v. Felton*, 521 U.S. 203, 223 (1997).

an effect of “advancing [a] religion by creating a financial incentive to undertake a religious indoctrination.”⁸³ Former Supreme Court cases have held that there was no financial incentive where government aid is dispersed based on neutral and secular criteria that do not favor religion.⁸⁴ In the present case, the Sixth Circuit concluded that the Ohio program is designed to attract religious institutions thereby choosing these beneficiaries of governmental aid in a non-neutral manner.⁸⁵

The Sixth Circuit based this conclusion on the design of the school voucher program.⁸⁶ The court stated that the voucher program is not neutral because it discourages the participation of non-religious schools and it limits the institutions for which a parent can use the voucher funds to those within its program.⁸⁷ This conclusion is based on the premise that non-religious schools are discouraged or unable to participate in this program because of the tuition restrictions placed within the statute.⁸⁸ The court notes that “religious schools often have lower overhead costs, supplemental income from private donations, and consequently, lower tuition needs.”⁸⁹ In addition, the court recognizes that the sectarian schools in the program are larger and have more spaces available for children in the voucher program.⁹⁰ Moreover, there are no public schools outside of the Cleveland school district registered for this program.⁹¹ As a result, the voucher may not be used for community or magnet schools, schools outside of the Cleveland school district, or any other private school that has not registered with the program within the Cleveland

83. *Id.* at 231.

84. *See id.* (citing *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 488 (1986), which upheld a program that was neutrally available because it did not establish financial incentives for children to undertake a sectarian education).

85. *See Simmons-Harris v. Zelman*, 234 F.3d 945, 960-61 (6th Cir. 2000) (stating that in order to pass constitutional muster the State program must be neutral and not provide any incentive to choose a religious school over a non-religious school).

86. *See id.* at 959 (explaining facial neutrality itself does not align a program with the First Amendment), *cert. granted*, 122 S. Ct. 23 (2001).

87. *See id.* (discussing defendants’ admission that there are more incentives for non-religious private schools to participate in other non-voucher programs).

88. *See id.* at 948 (requiring participating schools to cap tuition at \$2500 per student per year).

89. *Id.* at 959.

90. *See id.* (noting the high number of available spots for students in sectarian schools and the fact that “close to 96% of the students enrolled in the program for the 1999-2000 school year attended sectarian institutions”).

91. *See id.* at 959 (explaining that the cost to educate a student in public funding is \$7097 per school year, which makes it too expensive for area public schools to participate in the voucher program).

school district.⁹² Under this set of facts, the statute itself severely limits the parental choice by limiting the possible secular beneficiaries of the pilot program.⁹³ Therefore, given that the statute may actually have the purpose of promoting religious schools, while certainly having the effect of advancing the religion taught in the sectarian schools, the statute may be a vehicle for the State to endorse religion, ultimately offending the Establishment Clause of the First Amendment.⁹⁴

The Supreme Court, however, may hold that the statute has a secular purpose in improving educational opportunities while having no effect on advancing religion. The Court may also hold that the Ohio program is neutral because the aid directed to the religious institution under the program is solely the result of the private choice of the parent.⁹⁵ Ultimately, the existence of neutrality and private choice prevents religious indoctrination and precludes the statute from violating the Establishment Clause because the State is not establishing, promoting, backing or endorsing religion.⁹⁶

In anticipation of a future challenge to school vouchers, Justice Thomas wrote in *Mitchell* that the reduction in cost of securing a religious education is not an incentive for parents to choose this education for a child.⁹⁷ It is not the fact, however, that these religious institutions in Ohio are receiving a benefit that had not been previously afforded them.⁹⁸ On the contrary, a constitutional violation occurs because the State, through its legislature, has limited the amount of tuition for schools registered in the program to \$2500 per student per year, thereby disproportionately limiting the type of school that can participate in the voucher program to mostly

92. See OHIO REV. CODE ANN. § 3313.976(A) (Banks-Baldwin 2001) (providing that in order to participate in the program, private schools within the boundaries of the pilot project school district and public schools adjacent to the Cleveland school district must register).

93. See *supra* notes 86-90.

94. See *Agnostini v. Felton*, 521 U.S. 203, 222-23 (1997) (providing that a violation of the Establishment Clause is found where the government has acted with the purpose of advancing or inhibiting religion).

95. See *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (stating the private choice of the parents instead of the will of the government must “determine what schools ultimately benefit from the governmental aid.”).

96. See *id.*

97. See *id.* at 814 (believing that any aid will have this same effect).

98. See *id.* (“[S]imply because an aid program offers private schools, and thus religious schools, a benefit that they did not previously receive does not mean that the program, by reducing the cost of securing a religious education, creates . . . an ‘incentive’ for parents to choose such an education.”).

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religious institutions.⁹⁹ In addition, this factor seriously reduces the “genuine” choice for parents attempting to send their child to a school within the program.¹⁰⁰

CONCLUSION

The decision of *Simmons-Harris v. Zelman* will affect all educational institutions, local school boards, religious institutions and the value of the Establishment Clause in the realm of education. The Ohio statute may be read many different ways, and with four Justices establishing the precedent for neutral private choice in *Mitchell*, the other five will have to decide if the Ohio school voucher program, or any government aid to religious institutions, violates the Establishment Clause of the First Amendment.¹⁰¹

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99. See *supra* notes 86-89.

100. See *supra* notes 83, 88.

101. See *Mitchell v. Helms*, 530 U.S. 793, 844 (2000) (O'Connor, J., concurring) (writing separately because under the plurality judgment, “participating religious organizations (including churches) could use that aid to support religious indoctrination”).