“FULLY PARTICIPATING” VOUCHER PROGRAMS AND THE WISCONSIN TEMPLATE: A BRICK OR A BREACH IN THE WALL OF CHURCH-STATE SEPARATION?

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I. INTRODUCTION

The state of the nation’s public school system is one of the most challenging issues facing America at the beginning of the new millennium. Americans have been inundated with media coverage detailing the appalling conditions of American public schools,¹ the inefficiency of spending and management in large segments of the public school system, and the effect of a deficient educational system on children in the system.² School reform programs across the nation have grappled with the issue of declining schools in a variety of ways.³ One of the most popular yet

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² “[T]he current inefficiency of spending on public schools is well documented. The United States already spends large sums per student relative to other... countries, yet average test results for mathematics and science are poor...” ORGANIZATION FOR ECON. COOPERATION & DEV., O.E.C.D. ECONOMIC SURVEYS: UNITED STATES 81 (1993).

³ See Mark J. Beutler, Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications, 2 GEO. MASON INDEP. L. REV. 7, 14-16 (1993) (noting various plans that states have used in school reform to provide aid to sectarian schools); see also Benjamin Akando, Six Ways to Save Our Schools: It’s Time to Set a National Goal-Oriented Education Agenda to Improve Students'
controversial suggestions involves states and localities introducing school choice programs. Such programs either directly or indirectly provide state aid to parents via the use of vouchers in order to send pupils to private schools of their choosing. When these programs include sectarian schools (by definition religiously-organized schools), thus becoming “fully participating” voucher programs, they implicate the evolving constitutional debate concerning the parameters of the separation of church and state as asserted by the Constitution. Although the Supreme Court has grappled with this issue a number of times, its jurisprudence continues to develop.

On November 9, 1998, the United States Supreme Court sent shockwaves through decades of Establishment Clause jurisprudence when it denied certiorari to an appeal from a Wisconsin Supreme Court decision upholding The Milwaukee Parental Choice Program (“MPCP”) which in part included sectarian schools in a state-subsidized voucher program. Both supporters and opponents of school choice had hoped the Court might formulate a clear standard by which to analyze the constitutionality of school choice plans that include sectarian schools, something that has continued to elude the Court during its recent shift from the strict Lemon test toward a more accommodationist position.

Following Wisconsin’s lead of including sectarian schools in its school choice plan, a number of states have enacted or are considering enacting similar voucher programs. Thus, while the United States Supreme Court

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4 “School choice” implicates a wide variety of programs beyond school vouchers, including market-oriented public choice and intra- and inter-district public choice, as well as private school choice that in turn may include sectarian and non-sectarian private choice. See Peter J. Weishaar, Comment, School Choice Vouchers and the Establishment Clause, 58 ALA. L REV. 543, 543 n.8 (1994). This Comment focuses on school voucher programs that include sectarian schools—“fully participating voucher programs.”

5 See Weishaar, supra note 4, at 543.

6 See U.S. CONST. amend. I. The Establishment Clause and Free Exercise Clause provide that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” Id.

7 The U.S. Supreme Court has ruled on the constitutionality of governmental support for religious schooling on a number of occasions. See infra Part III.

8 See Wis. STAT. ANN. § 119.23 (West Supp. 1997) (amending Wis. STAT. ANN. § 119.23 (West 1990) which had established a voucher system by which parents could choose which public or private non-sectarian schools their children could attend, by adding sectarian schools to the state-supported voucher program already in existence for selected public and non-sectarian private schools in Milwaukee).


11 See infra Part III.B (demonstrating the recent shift of the Supreme Court toward a more accommodationist position on the subject of state aid to sectarian schools).

12 See Kristen K. Waggoner, The Milwaukee Parental Choice Program: The First Voucher System to Include Religious Schools, 7 REGENT U. L. REV. 165, 166 nn.7 & 10 (1996) (noting that Pennsylvania, New York, New Jersey, Connecticut, California, Washington, and Florida have considered or are currently considering adopting school choice programs which would include sectarian
has avoided the issue of school choice for now, it is only a matter of time before the Court must stake out a position as to whether state-supported voucher systems may include sectarian schools.

This Comment will analyze the constitutionality of the Wisconsin program specifically, as well as school choice plans more generally, while examining the development of the Court's First Amendment Establishment Clause jurisprudence in relation to school choice. Further, this Comment examines the Milwaukee Parental Choice Program as a prototype for a "fully participating" voucher program, or a state-subsidized voucher system that includes sectarian schools. Part II explores the recent history of school choice and focuses on the structure and legislative development of the Wisconsin school choice program. Part III evaluates the development of Supreme Court Establishment Clause case law involving state aid to sectarian schools, including the evolution and subsequent erosion of the Lemon Test. In Part IV the focus shifts to possible future avenues for the Supreme Court in considering voucher schemes, using the Wisconsin scheme as a template to determine the constitutionality of similarly-constructed voucher programs. This analysis supports the conclusion that, in light of the Court's seeming willingness to accommodate a limited relationship between the government and religion in education, carefully tailored future school choice programs such as the Milwaukee plan that are broadly applied in a neutral fashion while allowing parents real choices between public, private secular, and private sectarian schools are likely to survive constitutional scrutiny.

II. VOUCHER LEGISLATION

A variety of voucher programs have been touted as possible options for the U.S. educational system. Various states have attempted to implement different voucher proposals, with varying degrees of success in surviving constitutional scrutiny. The Wisconsin scheme, a voucher system which includes sectarian schools as permissible choices for low-income parents to enroll their children, is the first of its kind in the nation, and its fate has national significance.

A. Roots and Expansion

School voucher programs, one of a variety of school choice programs, facilitate parents' ability to choose which schools their children will attend. Under such plans, parents would receive a voucher from the
government, which would then be redeemable at schools that qualify under the voucher program, in order to fund the cost of their child’s education. The value of the voucher would usually be fixed, and the state would also establish a list of schools participating in the program, including neighborhood public schools, public charter schools, private non-sectarian schools, and/or private sectarian schools. The voucher would cover the full cost of the child’s education at public school, but additional payments by parents would be required for attendance at a private school if the cost of the private school amounts to more than the cost of the public school.

A “fully participating” voucher program would allow parents to use the voucher at any school participating in the program, including sectarian private schools, while a “school choice/voucher program” would limit participation to public and non-sectarian private schools.

The battle over voucher-based school choice programs is not peculiar to the recent concern over the state of the nation’s schools. Economist Milton Friedman first popularized the concept of school vouchers in 1962. Using economic theory, supporters of voucher plans assert that if private and sectarian schools are allowed to compete with public school systems, healthy competition between the schools in the form of a free market economy will develop. This would then result in schools that are “more diverse, efficient, and effective than schools operating under the current financing structure.”

Vouchers funded by the government would be distributed to students in order to attend sectarian schools, thus implicating constitutionality under the Establishment Clause.

Vermont was the first state to institute a school choice program. Its program provides tuition to students in towns that do not have a high school, so that those students may attend a public or private school outside the district. The program contains no specific bar against funding tuition for attendance at religious schools; however, a recent attempt to apply the tuition grants to students attending a parochial school resulted in a court from the Lemon Test, 70 ST. JOHN’S L. REV. 273, 280 (1996) (stating that vouchers are funding devices giving parents the choice of schools for their children); id. at 280 n.22 (“[P]arents could take this voucher to any school which agreed to abide by the rules of the voucher system.”) (quoting Judith Areen & Christopher Jencks, Education Vouchers: A Proposal for Diversity and Choice, in EDUCATIONAL VOUCHERS: CONCEPTS AND CONTROVERSIES 49, 51 (George R. La Noue ed., 1972)).

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challenge and the suspension of the program for those students seeking to attend the parochial school with state support.\textsuperscript{26}

The Vermont plan is illustrative of existing school choice plans prior to the Wisconsin scheme, which allowed parents flexibility in choosing which public schools or secular private schools their children should attend. Such plans typically either ignore religious schools altogether by being written to comply with "the law,"\textsuperscript{27} or specifically exclude sectarian schools from their voucher schemes.\textsuperscript{28} The Wisconsin program was to become the first voucher-based school choice program in the country to include sectarian schools as one of the choices qualifying families would be able to select.

\textbf{B. A Wisconsin Experiment}

Milwaukee, like many American cities, possesses a public school system perforated with many of the problems commonly besetting other inner-city school systems.\textsuperscript{29} Milwaukee public schools serve a large number of poverty-stricken minority students who perform below both their national and state classmates.\textsuperscript{30} These conditions convinced Wisconsin Governor Tommy G. Thompson and Wisconsin State Representative Annette "Polly" Williams to introduce the "Milwaukee Parental Choice Program."\textsuperscript{31} The MPCP, enacted on April 27, 1990, became the first school choice program in the United States to allow parents to choose private schools over competing local public schools.\textsuperscript{32}

The original MPCP focused primarily on the educational needs of low-income children.\textsuperscript{33} The program limited eligibility to a maximum of 1,000 students with family incomes of less than or equal to 1.75 times the federal poverty level.\textsuperscript{34} These children received tuition vouchers of up to $2,500

\textsuperscript{26} See Chittenden Town Sch. Dist. v. Department of Educ., 738 A.2d 539 (Vt. 1999). The challenge resulted when the local school board approved the tuition grants, which were subsequently declared invalid and unconstitutional by the state department of education. See id. at 541-42. The local school board then instituted the suit to obtain the tuition money from the state for the students attending the parochial school. See id. at 544.

\textsuperscript{27} See, e.g., VT. STAT. ANN. tit. 16, § 822 (a) (1) (1989) (providing for tuition for students "in accordance with law").

\textsuperscript{28} See Waggoner, supra note 12, at 171 nn.29-30 and accompanying text (noting that the original Wisconsin school choice program was limited and experimental, allowing only qualified low-income Milwaukee residents to choose among neighborhood public schools, public magnet schools, and nonsectarian private schools, thus excluding sectarian private schools).

\textsuperscript{29} See id. at 165 (citing Davis v. Grover, 480 N.W.2d 460, 470 (Wis. 1992) (noting that "the Milwaukee Public Schools serve a largely impoverished minority population of students who consistently perform well below their counterparts in other areas of Wisconsin," a problem similarly facing most urban public school systems)).

\textsuperscript{30} Id.

\textsuperscript{31} WIS. STAT. ANN. § 119.23 (West 1991), amended by WIS. STAT. ANN. § 119.23 (West Supp. 1997) (establishing a parental choice program that allowed parents to choose neighborhood public schools, public magnet schools, or non-sectarian private schools as their children's schools under the state voucher program).

\textsuperscript{32} See Waggoner, supra note 12, at 171 n.29.

\textsuperscript{33} See Davis v. Grover, 480 N.W.2d 460, 462 (Wis. 1992) (noting the purpose of the MPCP).

\textsuperscript{34} WIS. STAT. ANN. § 119.23 (2) (a) (1) (West 1991), amended by WISC. STAT. ANN. § 119.23 (West Supp. 1997).
for use at non-sectarian private or public schools. No more than 15 percent of the school district's membership could attend private schools under the program. Further, no more than 51 percent of a participating school's total enrollment could consist of students in the MPCP program, a number that was increased to 65 percent in 1993. If a participating school received applications from more students than allotted to it under the MPCP, the school had to select students randomly.

Prior to the 1995 amendments expanding the program to sectarian schools, the MPCP was constitutionally challenged twice. In Davis v. Grover, a number of civil rights groups and teachers unions charged that the program violated both the state constitutional requirements of uniformity within the school system and the public purpose doctrine. The state supreme court upheld the program, determining that the limited and experimental scope of the program kept it from violating either the uniformity clause or the public purpose doctrine.

The second challenge was filed by parents alleging that the MPCP's exclusion of sectarian schools violated their First Amendment right to the free exercise of religion and their Fourteenth Amendment right to equal protection by denying them a government service based on the parent's religious beliefs. A federal district court rejected this claim, holding that the direct method of payment to sectarian schools would violate the Establishment Clause. The court asserted that if the MPCP included sectarian schools, it would be similar to the program struck down as unconstitutional by the U.S. Supreme Court in Committee for Public Education & Religious Liberty v. Nyquist.

In 1995, the Wisconsin legislature revised the school choice statute in a

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35 See id.
37 See Waggoner, supra note 12, at 172 n.37.
39 480 N.W.2d 460 (Wis. 1992).
40 Wis. Const. art. 10, § 3 (establishing that "the legislature shall provide by law for the establishment of district schools which shall be as nearly uniform as practicable").
41 The Supreme Court of Wisconsin has formulated and applied the public purpose doctrine in deciding whether or not public expenditures are being used for a public purpose. The standard requires that "public funds may be expended for only public purposes. An expenditure of public funds for other than a public purpose would be abhorrent to the constitution of Wisconsin." See Jackson v. Benson, 578 N.W.2d 602, 628 (Wis. 1998) (quoting Warren v. Nusbaum, 208 N.W.2d 780, 795 (Wis. 1973)).
42 Davis, 480 N.W.2d at 474-77.
43 See Miller v. Benson, 878 F. Supp. 1209 (E.D.), vacated, 68 F.3d 163 (7th Cir. 1995).
44 See id. at 1215-16; supra note 6 and accompanying text.
45 413 U.S. 756 (1973); see Miller, 878 F. Supp. at 1215-16. This Comment does not address competing Free Exercise claims that parents have asserted in arguing that they have a constitutional right to state support for the religious education of their children. In this Comment, I attempt only to address the negative aspects of the religious clauses: that is, what types of governmental support to religious institutions (in this case, educational institutions) are permissible under, rather than mandated by, the Constitution.
number of ways.65 Most significantly, the amendments opened the program to the participation of private sectarian schools.66 In order to survive constitutional scrutiny, the amendments significantly modified the method by which funds were to be disbursed to the private schools, in particular sectarian private schools.67 Rather than having the state pay private schools directly, state checks would now be made payable to the parents of students participating in the program.68 Parents could only redeem the tuition by restrictively endorsing the check for the sole use of the private school.69 The new scheme also required that participants be able to opt out of religious activities at the sectarian schools with parental permission,70 and increased the eligibility of Milwaukee students from 1 percent to 7 percent during the 1995-96 school year and 15 percent during the 1996-97 school year.71

The amendments to the Wisconsin voucher program elicited a predictable response: the traditional opponents of school choice schemes, the American Civil Liberties Union, the National Association for the Advancement of Colored People, and several teachers unions immediately challenged the program in court.72 The school choice opponents' suit alleged that the MPCP violated the state and federal constitutions, specifically Article I, Section 18 of the Wisconsin constitution,73 and the Establishment Clause of the United States Constitution.74 Following a petition by Wisconsin Governor Thompson, the case was removed to the Wisconsin Supreme Court,75 which issued a preliminary injunction preventing 2,600 students from attending sectarian schools while it determined the constitutionality of the program.76 In response, businesses and private donors raised over $1.8 million dollars to pay the tuition of the displaced students, thus allowing them to remain in the schools of their choice.77 Subsequently, the Wisconsin Supreme Court deadlocked, and the

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66 See id.
67 See id.
69 See id.
72 See Waggoner, supra note 12, at 182 (citing Jackson v. Benson, No. 95-CV-1982, slip op. (Wis. Cir.Ct., Dane County, Branch 17, Jan. 15, 1997)).
73 See Wis. Const. art. I, § 18 ("Nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.").
74 See U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").
75 See Waggoner, supra note 12, at 182-83.
77 See Bodemer, supra note 13, at 283 n.48.
case was sent back to the circuit court, where the program was found to violate the Wisconsin Constitution. A state appellate court affirmed the trial court decision, and the state supreme court again heard arguments addressing the plan's constitutionality. On June 19, 1998, the Wisconsin Supreme Court upheld the voucher plan, holding that the MPCP violated neither the Establishment Clause of the United States Constitution nor the establishment, procedural requirements, uniformity, or public purposes clauses and/or doctrines of the Wisconsin Constitution.

Following the Wisconsin Supreme Court's decision, the opponents of the plan appealed to the U.S. Supreme Court. However, the Court denied certiorari. This move may have national significance as both constitutional precedent and as an indication of the development of the Court's Establishment Clause jurisprudence.

C. Resolving the Constitutionality of Wisconsin's Voucher Program: National Significance

The significance of the constitutionality of Wisconsin's voucher program is two-tiered. First, it became the first voucher plan in the United States to specifically include sectarian schools in its funding scheme. Secondly, the precedential value of the plan may be far-reaching. Following quickly on the heels of Wisconsin's experiment, Ohio and Vermont instituted programs of their own which are similar in scope and design.

In 1994, the Vermont Supreme Court ruled that tuition reimbursement for a student to attend a sectarian school out-of-state did not violate the Vermont or U.S. Constitutions. As previously discussed, one school district sued the State Department of Education to force the program to fund the tuition of students attending a Catholic school. Appearing to retreat from its 1994 decision, Vermont's high court struck down the program.

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59 See State ex rel. Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996). Three justices would have held that the amended MPCP violated the state constitution, while the remaining justices would have ruled that the opponents of the school choice scheme had not met their burden to prove beyond a reasonable doubt that the MPCP violated the state or federal constitutions. Thus, under state law the case was sent back to the circuit court. See id.
60 See Peter M. Kimball, Opening the Door to School Choice in Wisconsin: Is Agostini v. Felton the Key?, 81 Marq. L. Rev. 843, 846 n.25 (1998) (citing Jackson v. Benson, No. 95-CV-1982, slip op. at 13 (Wis. Cir. Ct., Dane County, Branch 17, Jan. 15, 1997)).
62 See Kimball, supra note 60, at 845-47 (noting that Wisconsin created the first voucher scheme to specifically include private sectarian schools).
63 See Jackson v. Benson, 578 N.W.2d 602, 632 (Wis. 1998).
64 See id., cert. denied 525 U.S. 997 (1998) (refusing to review the decision of the Wisconsin supreme court upholding the MPCP).
65 See Kimball, supra note 62, at 847 (stating that "it was the only government-funded voucher program of its kind in the country").
66 See id. at 847 n.29 (discussing the Ohio and Vermont voucher programs).
program as a violation of the state constitution.\textsuperscript{69}

Ohio has adopted a voucher program almost identical to the amended Wisconsin scheme. Known as the "Pilot Project Scholarship Program," it awards 3,700 students in Cleveland, nearly 51 percent of public school children, up to $2,250 in scholarships toward tuition at a number of participating schools,\textsuperscript{70} including sectarian schools.\textsuperscript{71} The scheme was upheld at the trial level on state and federal grounds,\textsuperscript{72} but was struck down on appeal as a violation of the Establishment Clause.\textsuperscript{73} On further appeal, the Ohio Supreme Court, while invalidating the Ohio school choice program on state constitutional grounds,\textsuperscript{74} held that the core of the voucher program did not violate the federal Establishment Clause.\textsuperscript{75} The majority applied the \textit{Lemon} test,\textsuperscript{76} finding that the program had a secular legislative purpose, did not either advance or inhibit religion, and further, did not excessively entangle religion and government.\textsuperscript{77}

Clearly, the legal outcome of any challenges to the Wisconsin voucher program will have wide repercussions for these programs, and for those in other states.\textsuperscript{78} Such litigation would have the potential to alter the Supreme Court's Establishment Clause jurisprudence. The decision to deny certiorari in the case of the MPCP, however, has resulted in an even more complex and confusing Establishment Clause analysis for the Court as it continues to grapple with church-state issues.

\textsuperscript{69} See \textit{id.} (holding that Vermont's school choice program violated the state constitution by authorizing tuition reimbursements to sectarian schools).


\textsuperscript{71} 1991 \textit{Ohio Rev. Code Ann.} § 3313.975 (A) (Anderson) (including sectarian schools in the Ohio school choice program).

\textsuperscript{72} See Viteritti, \textit{supra} note 12, at 691 n.162 (citing Gatton v. Goff, Nos. 96CVH-01-193 & 96CVH-01-721 (Ohio Ct. Common Pleas, Franklin County July 31, 1996)).

\textsuperscript{73} See Simmons-Harris v. Goff, Nos. 96APE08-982 & 96APE08-991, 1997 WL 217583 (Ohio Ct. App., May 1, 1997).

\textsuperscript{74} The Ohio supreme court struck down the Ohio program using the Ohio constitution's one-subject rule, as delineated by Section 15(d), Article II of the Ohio Constitution, which states: "[n]o bill shall contain more than one subject, which shall be clearly expressed in its title." This rule, which in effect invalidated legislation containing various unrelated topics, had no impact on the unrelated federal religious clauses issues which the scheme also engaged. See Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999).

\textsuperscript{75} See \textit{id.} at 211. The court did, however, find that the selection criteria which gave priority to parents belonging to a religious group supporting a sectarian school violated the Establishment Clause. See \textit{id.} at 210. Nevertheless, a majority found that the selection criteria was severable from the voucher scheme as a whole, thus allowing the program to survive Establishment Clause scrutiny. See \textit{id.} at 210-11.

\textsuperscript{76} Under the \textit{Lemon} test the court must consider "the character and purposes of the institution that are benefited, the nature of the aid the state provides, and the resulting relationship between the government and religious authority..." \textit{Lemon} v. \textit{Kurtzman}, 403 U.S. 602, 615 (1971).

\textsuperscript{77} See \textit{id.} at 211.

\textsuperscript{78} See Waggoner, \textit{supra} note 12, at 166 n.7 (noting that Pennsylvania, New York, New Jersey, Connecticut, California, and Washington have considered, or are currently considering, adopting school choice programs which would include sectarian schools, and that Ohio and Puerto Rico have instituted programs currently held up by litigation). See generally Viteritti, \textit{supra} note 12 (discussing the school choice programs, including sectarian schools in Vermont, Ohio, and Wisconsin, which have faced or will face legal challenges).
D. Certiorari Denied: Strategic Response or Muddled Move?

A cursory examination of the Court’s denial of certiorari to the legal challenge to the MPCP reveals very little, as generally “a denial of certiorari does not have any precedential value.” The Supreme Court may deny certiorari for many reasons besides signaling its agreement with the decision below, such as “the unimportance of the issue, the unusual character of the particular facts, the desire to see the issue ‘percolate’ in the lower courts, the controversial character of the problem, or the wish to allow the political process time to consider the problem before an authoritative resolution is obtained.” Stone and his colleagues assert that the Court’s inaction on an issue when it denies certiorari “operate[s] as a necessary means of mediating between the two (competing) ideas at work in U.S. government: electoral accountability and governance according to principle.”

Inaction by the Court guarantees that governance by constitutional principle will not destroy electoral accountability by “permitting the Court to defer to the political process without resolving the issue either way.”

On one hand, there may indeed exist strong arguments that the Court denied certiorari in Jackson for less strategic reasons. In particular, the Court’s case law in the area of state aid to sectarian schools is extremely muddled. Further, the Court may have believed that the facts of Jackson were configured in such a way that it should wait for a clearer case in which to develop a standard for the constitutional analysis of vouchers. Moreover, the Justices who voted to deny certiorari may also have done so in deference to the electoral accountability of the legislators who enacted the voucher plan, particularly in the face of confusing Establishment Clause jurisprudence. Such deference allows legislation “to be tested in the actual workings of our society.” Put more simply, the Justices, armed only with a complex and confusing array of conflicting and overlapping decisions, may have decided to wait and see how the emerging school choice schemes perform within both the educational and constitutional systems before passing constitutional judgment once again.

Nevertheless, an analysis attempting to determine what the Justices were thinking when they denied certiorari is no more than conjecture. Advocates and opponents of school choice will have to wait until the Court decides to grant certiorari in a future challenge to a voucher scheme. Therefore, the historical reasoning of the Court on the permissibility of

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78 Id. at 145.
79 Id. at 89 (citing A. BICKEL, THE LEAST DANGEROUS BRANCH 132-33 (1962)).
80 Id. at 90.
81 See infra Part III.
82 The fact that the program is limited in scope and applies to only a small segment of a single school district, as well as the indication that the drafters of the scheme may have designed the scheme specifically to “fit” between the gaps created by the Court’s muddled and confusing case law, are both factors which may have caused the Court to back away from granting certiorari.
83 STONE, supra note 79, at 89 (quoting BICKEL, supra note 81).
state aid to sectarian educational institutions remains vitally important in attempting to divine whether the Court will continue to become more accommodationist or pull back toward a more separationist position on the issue of school vouchers.

III. ESTABLISHMENT CLAUSE JURISPRUDENCE: THE FRAMERS AND THE SUPREME COURT GRAPPLE WITH SCHOOL CHOICE

There has been a heated and long-running debate over the role of the state in supporting religious education within the context of the constitutional interpretation of the Religion Clauses of the U.S. Constitution. Paul Horwitz asserts that the ferocious and continuing nature of the conflict is such that "it seems safe to say only that the more attention that is devoted to the topic, the less certainty there is about the proper way to read the intentions of the framers of the Constitution with respect to freedom of religion." Thomas Curry notes that "[t]he opposing sides have tangled in heated engagements, but have now settled into a kind of trench warfare." The debate has been further constrained and intensified by the lack of attention to the second clause, the Free Exercise Clause, and the almost unanimous focus on the first Religion Clause, the Establishment Clause, as well as the familiar metaphor of the "'wall of separation' between church and state," which maintains "a powerful grip on the judicial and historical imagination ...." This metaphor was developed by two Framers of the Constitution and the Bill of Rights: Roger Williams and Thomas Jefferson. Williams used the wall of separation concept to demonstrate his "dread of the worldly corruptions which might consume the churches if sturdy fences against the wilderness were not maintained," or his belief that the church, rather than the state, needed to be protected against encroachment by the other. Jefferson, on the other hand, coined the metaphor to stress his belief in the importance of preventing religious influence over the state. These two views were to

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86 The Religious Clauses of the U.S. Constitution state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." U.S. Const. amend. I.
87 Paul Horwitz, The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond, 54 U. TORONTO. FAC. L. REV. 1, 16 (1996) (noting that the length, intensity, and attention paid to the interpretation of the Religion Clauses of the U.S. Constitution only add to the lack of clarity as to the appropriate boundaries between church and state).
89 See U.S. Const. amend. I. ("Congress shall make no law ... prohibiting the free exercise [of religion]."). This Comment does not expand on the absence of Free Exercise analysis in Religious Clauses analysis, but rather focuses on the development of Establishment Clause precedent.
90 See id. ("Congress shall make no law respecting an establishment of religion ....").
91 See Horwitz, supra note 87, at 16.
92 Id.
93 See id. at 17.
94 Id. at 17.
95 See id.
96 Id. Jefferson asserted, "I contemplate with sovereign reverence that act of the whole
become the two "polar opposite[]" positions which were to characterize interpretations of the Religion Clauses, and subsequently, the debate over the constitutionality of state aid to sectarian educational institutions until the present day. The Jeffersonian view, which I will label the strict separationist position, holds that the Religion Clauses were designed to guard against any religious influence over the secular affairs of state. Conversely, the Williams view, which I will label the accommodationist position, asserts that the Clauses guard against intrusion by the state into the religious affairs of the nation in order to protect religious pluralism and the establishment of a national religion. These two interpretations have been adopted by different factions of the Supreme Court within the line of cases dealing with government aid to sectarian schools, and more generally, church and state issues. Each interpretation has dominated different eras of the Court's recent history.

In trying to determine where the Supreme Court may be moving on Establishment Clause issues, it is useful to divide modern Supreme Court Establishment Clause jurisprudence into two distinct eras. Each era demonstrates the differing interpretations of the Establishment Clause traceable all the way back to the framing of the Constitution. First, the period of case law ranging from the middle of the twentieth century to the early 1980s evidences a strong trend toward strict enforcement of the separation between Church and State. Changes in the make-up of the Supreme Court during the early 1980s resulted in a significant shift in the Supreme Court's approach to the Establishment Clause. This second era has evidenced a move toward a more accommodationist position on state aid to sectarian schools.

A. Pre-1980 Case Law: Trending Toward A Strictly Enforced Establishment Clause

The First Amendment of the United States Constitution states that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Since World War II, the United States Supreme Court has grappled with the sometimes competing interests of protecting the rights of Americans to exercise freely the religious faith of their choosing, and prohibiting the state from establishing religion, particularly in the context of state support for sectarian schools.

American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and state." Id. at 17 n.70 (citing M.D. Howe, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 1 (1965)).

See id.

See id.

See id.

See id.

See Kimball, supra note 62, at 851 (citing the "seminal case" of Everson v. Board of Educ., 330 U.S. 1 (1947)).
In *Everson v. Board of Education*, the Court, led by Justice Black, traced the history and intent of the First Amendment, and embraced Jefferson’s view that there should exist a wall of separation between church and state. The *Everson* opinion elevated the Establishment Clause to a “new height” and “balance[d] the requirements of the Establishment and Free Exercise Clauses in favor of the latter.” The *Everson* Court upheld a New Jersey program that reimbursed parents for the costs of transportation of their children to and from school, including the costs of parents of parochial school pupils, thus “carving out an exception for certain state aid,” while tipping the scales toward stronger Establishment Clause enforcement. The Court determined that the program was neutral in its relation to believers and non-believers because it paid the transportation costs of sectarian school children as part of a general state program that reimbursed the parents of all children in all schools in New Jersey. This neutrality standard was to become the basis for much of the Court’s later Establishment Clause case law. Thus, the Court laid the foundation for a long-standing struggle to determine a balance of interaction between the Establishment and Free Exercise Clauses.

The Court remained silent on the issue of state aid to sectarian schools until 1968, when it upheld a New York law requiring public school boards to purchase textbooks and freely lend them to both public and private schools for no charge. In *Board of Education v. Allen*, the Court embraced *Everson* as precedent and once again adopted a neutrality

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103 *330 U.S. 1 (1947).*
104 *See id. In *Everson*, Justice Black wrote:* The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or 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 disbelief, for church attendance or non-attendance. 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. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and state.”

*Id.* at 15-16.

105 *See Everson, 330 U.S. at 1.*
106 *Kimball, supra note 62, at 852.*
107 *See Viteritti, Choosing Equality, supra note 104, at 129.*
108 *See Everson, 330 U.S. at 17.*
110 *See Everson, 330 U.S. at 13.*
111 *Allen, 392 U.S. at 238 (“A law of the State of New York requires local public school authorities to lend textbooks free of charge to all students in grades seven through 12; students attending private schools are included”).*
standard with which to judge state aid to sectarian schools. The Court also incorporated parts of an earlier test from a case that held prayer in public schools to be unconstitutional. Using this additional test, the Court examined the purpose and primary effect of the statute. The Court applied this two-part test and found that the New York statute had a secular purpose of advancing the education of students, and a permissible primary effect as tenuous as that in Everson. This was the embryonic stage of an Establishment Clause test that the courts would apply unevenly for the next thirty-five years.

Eight years later, in Lemon v. Kurtzman, the Court considered a program that allocated state funds in order to reimburse the expenses of and supplement the salaries of private school teachers in Pennsylvania and Rhode Island, respectively. The Court synthesized a new test in applying the Establishment Clause to state aid to religious schools. This three-part test expanded the two-prong approach in Allen by forbidding not only any governmental action that (1) has no secular purpose or (2) has a primary effect of advancing religion; but also action that (3) cultivates excessive entanglement between church and state. This test, conventionally known as the "Lemon test," has "subsequently been considered the standard for an Establishment Clause analysis."

Though holding that the purpose of the statutes—improving secular education—was sufficient to survive the first prong of the test, the Lemon Court struck down both programs by applying the third prong of the test. The Court concluded that the programs created excessive entanglement because they presented the potential for administrative entanglement between state and religious institutions, and political divisiveness along religious lines.

112 See id. at 241-42 ("Everson v. Board of Education, 330 U.S. 1 (1947), is the case decided by this Court that is most nearly in point for today's problem").
114 See Lemon, 403 U.S. at 222 ("The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment [exceeds the Constitution's grant of legislative power]").
115 See Allen, 392 U.S. at 243 ("The express purpose of § 701 was stated . . . to be [the] furtherance of the educational opportunities available to the young. Appellants have shown us nothing . . . [that contradicts] its stated purpose.").
116 See id. at 244 ("Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in Everson.").
117 403 U.S. 602 (1971).
118 See id.
119 Id. at 615 ("[B]oth statutes foster an impermissible degree of entanglement."). These prongs of the Lemon test will be expanded upon later in the Comment. See infra Part IV.A.
120 Kimball, supra note 62, at 854.
121 See Lemon, 403 U.S. at 615 (discussing the need to examine the "resulting relationship between the government and the religious activity").
122 See Lemon, 403 U.S. at 614-25 (discussing the issue of administrative entanglement engendered by state aid to religious schools, as well as the possibility for political polarization along religious lines).
The Court reached its high-water mark of stringent application of the Establishment Clause in *Committee for Public Education and Religious Liberty v. Nyquist*, in which the Court invalidated a tuition reimbursement program very similar in structure to that at issue in Wisconsin. The program authorized a number of direct payments to private schools and parents, including: payments to schools for the purpose of maintaining and repairing equipment and facilities to protect students' health, welfare and safety; reimbursements to low income parents for the purpose of aiding them in paying their children's tuition at private schools; and tax relief to parents who did not qualify for the reimbursements.

The Court first found that, because the payments were directly made to private schools (most of which were affiliated with the Roman Catholic Church) without restrictions on usage, the payments had the primary effect of advancing religion. The Court used similar reasoning to invalidate the reimbursement scheme, noting that New York could not guarantee that the funds would be used for secular and neutral purposes. A key element of the Court's analysis was the Justices' assertion that while the payment scheme was an important factor in determining the constitutionality of the scheme, it was not the only factor. Instead, the Court focused on the overall effect of the program, noting that the tuition grants were being offered as incentives to encourage parents to send their children to religious schools by facilitating their ability to afford such schools. The Court therefore held that the Constitution had been violated, regardless of whether state aid was ever used for religious purposes or whether parents were free to spend the money as they wished. The Court also invalidated the third program, noting that the program in effect created the same incentive as the reimbursements for sending a child to a sectarian school. Thus, in *Nyquist*, it appeared that the Court had foreclosed any state-funded voucher program from surviving constitutional scrutiny if it provided an incentive for parents to enroll their children in religious schools.

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123 Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) ("Each [ provision], as written, has a primary effect that advances religion and offends the constitutional prohibition against laws respecting an establishment of religion.") (internal quotation marks omitted).
124 See id. at 762.
125 See id. at 764.
126 See id. at 765.
127 See id. at 774.
128 See id.
130 See id.
131 See id. at 773-74.
132 See id. at 785-86. The Court held that the incentive, albeit indirect and unable to make sectarian schools as affordable to parents as public schools (i.e. free), was a strong enough effect to constitute encouraging religion, and thus violated the Constitution. See id.
133 See id. at 786.
134 See id.
135 See Kimball, supra note 62, at 857.
B. Post-1980: The Tide Turns Toward Accommodation

The Supreme Court's strict enforcement of the Establishment Clause started to erode at the beginning of the 1980's. The make-up of the Court drifted toward the conservative end of the ideological spectrum following the elections of Presidents Ronald Reagan and George Bush, both conservative Republicans, in 1980 and 1988, respectively. Buoyed by social conservatives, whose agenda included securing state support for religious schools, the Reagan and Bush administrations appointed justices whom many Court-watchers perceived as supporting a less restrictive Establishment Clause interpretation. The "high wall of separation began to fall" as early as 1980, when in Committee for Public Education and Religious Liberty v. Regan, a bare majority of Justices upheld a New York law which distributed funds to private schools, including religious schools, in order to administer state examinations and collect enrollment and attendance data. The Court relied on its reasoning in its 1968 case Board of Education v. Allen to infer that it was both possible and necessary to isolate secular activities from the religious environment of sectarian schools in order to survive constitutional scrutiny.

This trend continued with Mueller v. Allen, a decision that proved to be a landmark shift in Establishment Clause jurisprudence. The Minnesota law at issue granted tax breaks to parents for the costs of tuition, textbooks, and transportation, regardless of whether their children were enrolled in public, private, or sectarian schools. The Court distinguished the Minnesota tax relief scheme from that in Nyquist by noting that the Minnesota scheme provided the tax benefit to all parents, regardless of whether their children were in private schools, thus making public funds available to schools based on the private choices of parents. The Court readily admitted that the program provided the same financial benefit to sectarian schools as would direct aid, but asserted that because the parents were making "numerous, private choices" as to where to apply the aid, the State was not establishing or approving of religion. Thus the Court

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137 Viteritti, Choosing Equality, supra note 104, at 135-36.


139 See id. at 657.

140 See Viteritti, Choosing Equality, supra note 104, at 136.


142 See Viteritti, Choosing Equality, supra note 104, at 136.

143 See Mueller, 463 U.S. at 390 n.1.

144 See id. at 399 (drawing a distinction between the aid schemes at issue in Nyquist and the Minnesota tax relief package).

145 Id.
implicitly declined to overrule Nyquist by concluding that the Minnesota scheme did not have the effect of advancing religion.\textsuperscript{146}

Justice Rehnquist, writing for the majority, called the *Lemon* test into doubt for the first time, stating that while Establishment Clause questions have been "guided . . . by the three-part test," the *Lemon* test was merely a "helpful signpost in dealing with Establishment Clause challenges."\textsuperscript{147} The Court also refused to engage in an empirical analysis of the program in question, which would have shown that parochial school parents were using the vast majority of tax benefits.\textsuperscript{148} Thus the Court appeared to abandon the proscription against grants or tax benefits which created incentives for parents to send their children to sectarian schools by facilitating the financial ability of parents to enroll their children in such schools.\textsuperscript{149} The Court achieved this by ignoring evidence demonstrating a strong incentive on the part of parents in Minnesota to do just that.\textsuperscript{150} In the wake of *Mueller*, the Court began to apply the *Lemon* test as a "mere formality rather than as an effective tool in assessing the constitutionality of state aid to schools."\textsuperscript{151}

The next significant Establishment Clause case decided by the Supreme Court was *Witters v. Washington Department of Services for the Blind*.\textsuperscript{152} The Court upheld a Washington state program that paid vocational educational grants to blind students so they could attend post-secondary educational institutions, including public, private secular, and private sectarian schools.\textsuperscript{153} The Court embraced the incentive standard it had abandoned in *Mueller*, determining that the program did not provide a financial incentive for students to choose sectarian educational institutions, and that it did not bestow additional benefits on students who chose to attend sectarian institutions.\textsuperscript{154} Further, the Court stressed that the same ingredient present in *Mueller*, that the aid was disbursed to sectarian institutions only as a result of "genuine and private choices of aid recipients," was also present in *Witters*.\textsuperscript{155} The Court ultimately applied the *Lemon* test in finding that the aid would not be used to promote religion, but instead to aid disabled students.\textsuperscript{156} This iteration of the *Lemon* test was far less rigorous than that applied in *Nyquist*, or even in *Lemon* itself.

The Court further eroded the *Lemon* test in *Zobrest v. Catalina*

\textsuperscript{146} See id. at 402. In fact, Rehnquist, writing for the majority, suggested that the "primary effect" prong of the *Lemon* test was in fact being relaxed. See Viteritti, *Choosing Equality, supra* note 104, at 136. But see Kimball, *supra* note 60, at 860 n.135 (noting that *Mueller* "effectively reversed" Nyquist).

\textsuperscript{147} *Mueller*, 463 U.S. at 394 (internal quotation marks and alterations omitted).

\textsuperscript{148} See id. at 402.

\textsuperscript{149} See *Mueller*, supra note 62, at 860.

\textsuperscript{150} See id.

\textsuperscript{151} Id.

\textsuperscript{152} 474 U.S. 481 (1986).

\textsuperscript{153} See id. at 483. In this particular case, the post-secondary educational institution the student chose was a Bible college.

\textsuperscript{154} See id. at 488.

\textsuperscript{155} Id. at 487.

\textsuperscript{156} See id. at 488.
Foothills School District,” where the justices upheld the use of state funds to supply sign-language interpreters to students in sectarian schools. The Court “all but ignored” the three-prong test, instead relying on Witters and Mueller. In finding that the program was neutral, the Court revived the neutrality standard first applied in Allen, noting that because the program neutrally provided a benefit to “a broad class of citizens without reference to religion,” it was not readily subject to an Establishment Clause challenge. The Court also reaffirmed the validity of aid that is disbursed to sectarian schools via “genuinely independent and private choices.” The Justices further held that since the program included both public and private schools, including sectarian schools, it provided no financial incentive for parents to send their children to sectarian schools. The Court continued to formally cling to the Lemon test, however, refusing to overrule it outright.

The trend of erosion of the Lemon test continued with the Supreme Court’s decision in Rosenberger v. Rector & Visitors of the University of Virginia. This case examined the constitutionality of a state university funding scheme that distributed payments to outside contractors for student group publications, but which denied a Christian student group publication support. The Court overturned the denial of publication funds using a different analysis than that of the Lemon test. Although the central controversy of the case was over free speech and viewpoint discrimination, Justice Kennedy nevertheless developed this new approach to Establishment Clause analysis. He applied two standards in his analysis: (1) the traditional neutrality standard, examining whether the government action was neutral; and (2) whether any benefits to religious institutions were contingent and negligible. The Court determined that the funding scheme was neutral because it had a secular purpose of supporting “various student enterprises ... in recognition of the diversity and creativity of student life.” Further, the benefits to religious institutions were negligible and contingent, as the use of the financial support was for purely secular actions, which included funding printed materials for a student group.

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153 See id.
159 Kimball, supra note 62, at 860.
160 Zobrest, 509 U.S. at 9.
161 Id.
162 See id. at 9-10.
163 See Kimball, supra note 62, at 862.
166 See id. at 822.
167 See id. at 822-23.
168 See id. at 823.
169 See id. at 839, 843-44.
170 See Kimball, supra note 62, at 862.
171 Kimball, supra note 62, at 860.
172 Id.
173 Id. at 822.
175 See id. at 822.
176 See id. at 822-23.
177 See id. at 823.
178 See id. at 839, 843-44.
179 See id. at 840. The Court noted that “[p]rinting is a routine, secular, and recurring attribute of student life.” Id. at 844.
180 See id. at 843-44. Kennedy argued that “[a]ny benefit to religion [under the funding schemes] is incidental to the government’s provision of secular services for secular purposes on a religion-neutral
The most recent case involving state aid to private sectarian schools, *Agostini v. Felton*, also provides the strongest support for the constitutionality of voucher programs. The Court determined that New York City's Title I program, which disbursed funding to disadvantaged children via the compensation of public teachers who taught disadvantaged children in sectarian schools, was in fact constitutional. In *Agostini*, the Court declared that an injunction against the program, which was originally upheld by the Supreme Court, had in fact been upheld by an analysis that was no longer good law. The Court's analysis in *Aguilar v. Felton* was based on strict use of the *Lemon* test. In *Aguilar*, the Court applied *Lemon* in finding that the Title I program created excessive government entanglement because public employees would have to be closely monitored by the state in order to guarantee that they did not teach or approve religion. Overturning *Aguilar* is the closest the Court has come to directly overruling the *Lemon* test.

In *Agostini*, the Court focused on its analysis in *Witters* and *Nyquist* to determine what types of direct government aid were permissible. The Court compared the challenged program to the use of a government employee's paycheck, a situation in which the employee could sign over part or all of the paycheck to a religious cause or group, but "only as a result of the genuinely independent and private choices of individuals." The Court reaffirmed several standards of analysis from previous opinions, further finding that: the aid in question was not in the form of direct grants; that an empirical analysis of the numbers or percentages of religious school students receiving neutral aid was not relevant; and that the program did not create any financial incentive for parents to send their children to sectarian schools, because it was disbursed to sectarian and secular school pupils on a neutral, secular basis.

This holding represents the first time that the Court has overruled a separationist decision. It is the strongest signal to date that the Supreme Court continues to shift toward a more accommodationist position concerning state aid to sectarian schools. The Court's Establishment Clause jurisprudence remains muddled, however, due to its denial of certiorari to the challenge to Wisconsin's voucher scheme.

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171 See id. at 240 (finding that the program "is perfectly consistent with the Establishment Clause").
172 See id. at 234 (stating that "pervasive monitoring would be required").
173 *See* id. at 235.
174 See id. at 236 (citing *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481, 487 (1986)).
175 See id. at 231-32. "The services are available to all children who met the Act's eligibility requirement, no matter what their religious beliefs or where they go to school." *Id.* at 232.
IV. ESTABLISHMENT CLAUSE JURISPRUDENCE IN A POST-LEMON ERA: WILL VOUCHERS FOR SECTARIAN SCHOOL PUPILS SURVIVE SCRUTINY?

Because the Supreme Court has declined specifically to overrule Lemon, inconsistency and confusion characterize its current Establishment Clause jurisprudence. The Court has expressed significant frustration in trying to grapple with Establishment Clause cases. Further, scholars and Supreme Court justices alike have pointed out that at least five justices on the current Court have "personally driven pencils through the [Lemon test's] heart." Thus it was predicted the Court might grant certiorari to Jackson v. Benson in order to establish a clear standard.

The Wisconsin voucher program represents a suitable template with which to examine the constitutionality of voucher programs because it was specifically designed to overcome the hurdles the Supreme Court has placed in the way of state aid to sectarian schools. When applied to the various competing standards of constitutionality under the Establishment

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179 See Bodemer, supra note 13, at 298-99; Viteriti, Choosing Equality, supra note 104, at 141; Waggoner, supra note 12, at 188 (noting that "perhaps no other constitutional provision has engendered as much confusion and controversy as the Establishment Clause" (quoting Eric J. Segall, Parochial School Aid Revisited: The Lemon Test, the Endorsement Test and Religious Uber

180 Justice Scalia has asserted:

The secret of the Lemon test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it... when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs "no more than useful signposts." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 503 U.S. 384, 399 (1993) (Scalia, J., concurring) (internal citations omitted). Chief Justice Rehnquist has also assailed the contradictory and arbitrary nature of the Court's Establishment Clause jurisprudence, noting that under existing Supreme Court jurisprudence:

[A] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial schools to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the school may release students during the day for religious classes elsewhere, and may enforce attendance at those classes with its truancy laws.


181 Bodemer, supra note 13, at 299 n.127 (quoting Justice Scalia in Lamb's Chapel, 503 U.S. at 393).

182 See Waggoner, supra note 12, at 167.
Clause, it demonstrates a strong likelihood of surviving constitutional scrutiny. This analysis in turn may be applied more generally to similarly constructed voucher programs.

A. Vouchers Under the Lemon Test: A Necessary Formality?

Although recent Supreme Court decisions have cast doubt on the Lemon test as the controlling standard in Establishment Clause challenges to state aid to sectarian schools, the Court has not expressly overruled the test. Thus, the Lemon test remains the most well-defined test the Supreme Court has embraced to date, and is helpful in adding context to possible competing analyses of Establishment Clause challenges. Although the Lemon test has begun to erode, a voucher program that survives Lemon’s scrutiny, would, a fortiori, survive the less stringent scrutiny recently suggested by some justices. Therefore, the Lemon test represents a suitable standard with which to analyze the most recent program of state aid to sectarian schools to come before the Supreme Court, the Wisconsin MPCP.

1. The First Prong: Secular Legislative Purpose

The first prong of the Lemon test requires that the challenged statute have a secular legislative purpose. This is the test’s easiest hurdle, as legislation may easily be drafted to conform to this requirement.

The Wisconsin plan has three specific goals: (1) low-income families should have at least some of the options available to better off families; (2) low-income pupils may have a better chance of enhanced performance in private schools; and (3) giving parents this choice would strengthen public schools by forcing them to concentrate on satisfying parents and students. The MPCP, as amended in 1995, was “intended to provide a greater array of educational options and increase the number of students who can participate in the program.” Moreover, the Supreme Court has recognized that “[a] State’s decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable.” The Wisconsin Supreme Court echoed this reasoning when it upheld the program, affirming that “[t]he propriety of providing educational opportunities for children of poor families... goes without question... [and] evidences a purpose that is both secular and understandable.” Therefore, the Wisconsin program easily passes the

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183 See Kimball, supra note 62, at 866 (noting that the Lemon test may be eroding, but the components of the test are useful in structuring a general analysis of voucher programs).
185 See Kimball, supra note 62, at 866 (citing HOWARD I. FULLER & SAMMIS B. WHITE, WISCONSIN POLICY RESEARCH INSTITUTE, EXPANDED SCHOOL CHOICE IN MILWAUKEE: A PROFILE OF ELIGIBLE STUDENTS AND SCHOOLS 3 (1995)).
186 Id. at 866 (stating that this satisfies the first prong of the Lemon test).
188 Jackson v. Benson, 578 N.W.2d 602, 612 (Wis. 1998).
2. The Second Prong: Primary Effect

The second prong of the Lemon test, that the challenged statute’s primary effect must be one that “neither enhances nor inhibits religion,” is more difficult for state aid programs to overcome. At the outset, it is important to note that the Court, in recent iterations of the Lemon test, has refused to play the numbers game by way of empirical analysis of the amount of aid that actually ends up going to private schools. Instead, recent decisions have focused on the funding mechanism by examining whether state aid flows to the sectarian school directly or indirectly, and the neutrality principle by analyzing whether the benefit is a neutral one applied to a broad class of people not defined by religion. Indeed, the Wisconsin high court again recognized this when it noted that: “[a]lthough the lines with which the Court has sketched the broad contours of this inquiry are fine and not absolutely straight, the Court’s decisions generally can be distilled to establish an underlying theory based on neutrality and indirection...”

The Court has attempted to apply a principle of neutrality that asks whether the funding from the state primarily advances or inhibits religion. Scholars point out that this inquiry becomes difficult when the Court attempts to determine “which of a statute’s many effects is primary and which is secondary.” The Court has relied on three major requirements to determine whether a statute’s effect is primary: (1) whether the state funding can be separated from the school’s religious mission; (2) whether the class benefiting from the program includes a broad number of persons who will use the benefits for secular purposes; and (3) whether sectarian schools are disbursed funds directly from the state or receive “an attenuated benefit from funds distributed to parents or students attending the religious school.”

The Court, however, has rejected the separability requirement as a criterion in recent cases utilizing the Lemon test. Its latest Establishment Clause cases have upheld a variety of programs of state aid to sectarian schools without “ensuring that the aid was completely separate from the

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190 See Bodemer, supra note 13, at 295 (stating that “evaluating legislation under the second prong of the Lemon test” is more difficult).
191 See Agostini v. Felton, 521 U.S. 203, 228-29 (1997); see generally Mueller, 463 U.S. at 388.
192 See, e.g., Bodemer, supra note 13, at 295.
194 Jackson v. Benson, 578 N.W.2d 602, 613 (Wis. 1998).
196 Waggoner, supra note 12, at 194.
197 Waggoner, supra note 12, at 194-95.
religious function of that educational institution."° The other two criteria, however, represent the heart of the eroding Lemon test still being utilized by the Court.

The requirement that the state aid be a neutral benefit distributed in a non-discriminatory fashion to a broad class of people not defined by religion was originally laid out in Nyquist.°° In Zobrest, the Court further clarified its position on the constitutionality of "neutral" state benefits by upholding a program of state aid that was made available to all individuals, regardless of whether or not they attended public or sectarian schools, on a non-discriminatory basis.°°° The Wisconsin program clearly meets this requirement, as it applies to parents of a broad class of students (children of low income families),°°°° whether or not they attend public, private secular, or private sectarian schools, and does not discriminate against pupils on the basis of religion (the program provides for random selection of those who apply for the program,°°°°° and allows pupils to waive involvement in the religious activities of the school).

The third requirement for neutrality, whether or not sectarian schools receive aid directly from the state or as a result of genuine private choices by the beneficiaries of the aid, is identical to the twin branch of the larger primary effect analysis, whether or not the state aid flows to the sectarian school directly. As a result, they can be analyzed together.

Nyquist represents the strongest case supporting the assertion that the Wisconsin plan violates the primary effect prong of Lemon.°°°° Nyquist struck down a New York statute that gave parents of sectarian school students income tax relief.°°°°° The Court noted that while the state aid at issue in Nyquist was in fact distributed to the parents directly, this indirect funding was only one factor to be considered.°°°°°° The key to the constitutional violation in Nyquist was not only that the state aid had the indirect effect of funding religious education,°°°°°° but that the only parents eligible for the tax breaks or grants under the scheme were those sending their children to private schools, most of which were sectarian.°°°°°°° Thus the

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°° Waggoner, supra note 12, at 196.


°°° See Zobrest, 509 U.S. at 8.

°°°° See Wis. STAT. ANN. § 119.23 (2) (a) (1) (West 1991), amended by Wis. STAT. ANN. § 119.23 (West Supp. 1997).

°°°°° See Wis. STAT. ANN. § 119.23 (3) (West 1991), amended by Wis. STAT. ANN. § 119.23 (West Supp. 1997).

°°°°°° See Wis. STAT. ANN. § 119.23 (7)(c) (West Supp. 1997) (amending Wis. STAT. ANN. § 119.23 (West 1991)).

°°°°°° See Waggoner, supra note 12, at 199; see generally Nyquist, 413 U.S. at 756.

°°°°°°° See Nyquist, 413 U.S. at 756.

°°°°°°°° See id. at 780-89 (noting that simply because the reimbursements are delivered to the parents rather than the schools does not compel a contrary result, as the effect of the aid is unmistakably to provide financial support for nonpublic, sectarian institutions).

°°°°°°°°° See id. at 768.

°°°°°°°°°° See id. at 762-64.
program provided a strong incentive for parents to send their children to private, sectarian schools by reducing the cost of sectarian education for parents desiring such an education for their children.\textsuperscript{210}

The Wisconsin plan appears to survive scrutiny, even under \textit{Nyquist}. Not only does the Wisconsin plan mandate that the state aid be disbursed to parents,\textsuperscript{211} but all low-income parents qualify for the aid, regardless of whether or not their children attend public or private schools.\textsuperscript{212} Aid only reaches private sectarian schools as a result of genuine private choices on the part of parents as to whether they wish to send their children to public or private school, a permissible scheme inferred by \textit{Nyquist} and expressly affirmed in \textit{Mueller v. Allen} and its progeny.\textsuperscript{213} Because under the Wisconsin plan parents do not have improper incentives to send their children to sectarian schools, and the plan has an indirect funding structure, the third criteria for neutrality and the second branch of the primary effect prong of the \textit{Lemon} test are met. Thus the Wisconsin program, and similarly constructed voucher programs, are likely to survive the second prong of the \textit{Lemon} test.

3. \textbf{The Third Prong: Excessive Entanglement}

The third prong of the \textit{Lemon} test requires the Court to strike down any provision which will result in "excessive government entanglement with religion".\textsuperscript{214} There has been little guidance by the Court as to the parameters of this prong,\textsuperscript{215} and it has been criticized as an "'insoluble paradox', 'catch-22', 'curious and mystifying', 'redundant', 'superfluous', and without 'constitutional foundation.'"\textsuperscript{216} Additionally, the Court in \textit{Witters} expressly refused to use the entanglement prong in its analysis when it upheld the Washington statute at issue.\textsuperscript{217} Thus, even if a statute violates the third prong of the \textit{Lemon} test, there is some debate as to whether the statute would be rendered unconstitutional. Nevertheless, because the Court has not expressly rejected the third prong of the \textit{Lemon} test, analysis of voucher programs under this prong is instructive.

There are two types of entanglement under the \textit{Lemon} analysis:

\textsuperscript{210} See id. at 785-86.
\textsuperscript{212} See id.
\textsuperscript{215} See Weishaar, supra note 4, at 568.
\textsuperscript{217} See Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 481 (1986).
For a plan to engender administrative entanglement, the plan must cause "comprehensive, discriminating, and continuing state surveillance." Upon a cursory examination of the Wisconsin plan, there appears to be a significant degree of entanglement between religious schools and the government. The state is required under the scheme to ensure that students eligible for the program are chosen randomly, to develop uniform financial accounting standards, and to accept independent financial audits from each participating school every year, as well as to conduct performance and financial evaluative audits for official submission. At least one scholar argues that these requirements amount to excessive entanglement between church and state. Other analysts, however, point out that these requirements "do little more than ensure that private schools meet the minimal standards required of all schools in the state." Because minimal performance and auditing requirements are within the bounds of the State's power to regulate state accredited schools, including private and sectarian schools, the Wisconsin scheme probably does not amount to administrative entanglement.

The Court has frequently acknowledged that the overlapping of church and state may create emotional issues which may in turn cause political division along emotional lines, thus implicating the second branch of the excessive entanglement prong. The Court's concern is that a long-term voucher program would, over time, become entrenched and increase in cost, thus necessitating increased funding and in turn, "generating their own aggressive constituencies." In a context as "deeply emotional [as]... Church-State relationships, the potential for seriously divisive political consequences needs no elaboration." The Court has applied the political division branch of excessive entanglement in a somewhat restrictive fashion. The Court in Mueller restricted the political division branch of excessive entanglement to state aid schemes involving direct payments to sectarian schools or teachers in sectarian schools. Additionally, the Court in Nyquist refused to allow the prospect of political divisiveness alone to determine the constitutionality of a state aid scheme. Further, in Agostini v. Felton, the Court's latest
pronouncement concerning the third prong of the Lemon test, the Court held that neither administrative entanglement nor the danger of political divisiveness were sufficient in themselves to create an excessive entanglement. This pronouncement by the Court has further weakened the third prong of the Lemon test.

Because Wisconsin's voucher program does not directly pay sectarian schools or teachers, the political divisiveness analysis becomes irrelevant to the scheme's constitutionality. Further, since the plan implicates neither the administrative entanglement nor the political divisiveness arms of the excessive entanglement prong, it appears to survive the third prong of the Lemon test, and thus the Lemon test itself, provided the Court continues to use the Lemon test in its Establishment Clause jurisprudence.

B. Alternatives to the Lemon test

Certain Justices, while concurring in judgments based on the Lemon test itself or some iteration thereof, or while determining the constitutionality of other statutes under the Establishment Clause unrelated to school aid, have formulated alternative standards with which to review Establishment Clause claims. In particular, standards formulated by Justices O'Connor and Kennedy have received some scholarly attention as possible emerging approaches to First Amendment litigation applicable to school choice and voucher cases.

1. The Endorsement Test

Although there is plenty of room for interpretation within the Lemon test itself, scholars have identified the endorsement test as a possible revision to the Lemon test. Although no member of the Court has applied this new test to school funding cases, Justice O'Connor introduced the theory in her concurrence in Lynch v. Donnelly, an Establishment Clause case regarding religious symbols on display in a public forum. She further enunciated the theory in her concurrence in Wallace v. Jaffree, where the Court invalidated a statute enacted to provide a period of silence in public schools for voluntary prayer or meditation.

separatist schools or their teachers, it would violate the second prong of the Lemon test anyway. See Waggoner, supra note 12, at 194.

23 See infra Part IV.B.1 (discussing the development of Justice O'Connor's endorsement test).
23 See infra Part IV.B.2 (discussing the development of Justice Kennedy's coercion test).
23 See Bodemer, supra note 13, at 298-99.
23 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) (writing separately "to suggest a clarification of our Establishment Clause doctrine").
23 See id. at 611 (deciding whether the Establishment Clause of the First Amendment prohibits a municipality from including a nativity scene in its annual Christmas display).
23 472 U.S. 38, 67 (1985) (O'Connor, J., concurring) (agreeing with the Court that the Alabama statute at issue violates the Establishment Clause of the First Amendment).
23 See id. at 60 (concluding that the Alabama statute was enacted "for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each
Justice O’Connor reformulated Lemon into the endorsement test in both of her concurrences by first collapsing the secular purpose and primary effect prongs of the Lemon test into a single purpose requirement. This requirement forbade the government from purposefully supporting or criticizing religion. The Court, meanwhile, applied a deferential and limited review of legislative intent. Critics of vouchers argue that this reformulated prong would be unconstitutional given the Court’s protectiveness of young children against impression by state-supported religion. Such critics argue that because students would have no choice but to attend the better-performing private schools, the state is endorsing sectarian schools through the voucher system. Scrutiny of the Wisconsin program, however, demonstrates that this is simply not the case. All low-income families in Milwaukee are eligible for the program, and the scheme includes religious and secular private schools. Aid to religious schools occurs only after individual choices on the part of low-income families, who have a wide variety of private secular, sectarian, and public educational institutions from which to choose.

The second prong of Justice O’Connor’s endorsement test is a reformulation of the excessive entanglement provision of the Lemon test. The endorsement test would focus on administrative entanglement, abandoning the already limited examination of political divisiveness. As previously indicated, voucher programs like Wisconsin’s are likely to survive the administrative entanglement hurdle.

Five current Supreme Court Justices appear to have embraced some form of the endorsement test as it relates to public displays of religious symbols. This analysis was echoed by the Court in its Rosenberger Establishment Clause analysis. A plurality of the Court noted in Capitol...
Square Review and Advisory Board v. Pinette that "[i]t has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may—*even reasonably*—confuse an incidental benefit to religion with state endorsement." No member of the Court has ever applied the endorsement test to school aid cases. If the Court should adopt this standard for school choice cases, however, vouchers such as the Wisconsin scheme are likely to survive scrutiny under the test, as they meet both prongs of the endorsement test.

2. The Coercion Test

Another alternative to the Lemon test that has received some critical scholarly attention is the coercion test. Like the endorsement test, the coercion test has been applied narrowly to a limited portion of Establishment Clause case law that does not include school choice and aid provisions.

The Court applied this test for the first time in *Lee v. Weismans* and invalidated the use of nonsectarian prayer at public school graduation ceremonies on the grounds that it violated the Establishment Clause. The Court determined that students were coerced into participating in the prayer because the graduation ceremonies, which included prayer, were controlled and directed by the state, and students were compelled to attend them.

At least one critic of vouchers charges that MPCP-style voucher programs violate the coercion test by compelling students either to attend sectarian schools or forfeit their chance of a better education. Underlying such an application of the coercion test is the assumption that "students under a voucher plan would have no real choice but to attend the ‘better’ private sectarian schools," and that public schools would be left underfunded and thus deficient. This analysis ignores two important characteristics about voucher plans. First, there is no evidence that sectarian school students outperform their public school and secular private school counterparts. It is misleading to argue that giving parents the
choice of where to send their children to school via a voucher program in any way amounts to coercion—that there is simply no evidence that parents would feel coerced to choose a sectarian over a private secular school. Second, the program statutorily protects children from direct coercion by religious authorities to become involved in religious activities by means of an opt-out provision. In short, the MPCP falls within the category of voucher programs that would survive constitutional scrutiny under such an analysis. Thus the coercion test, should the Court ever choose to apply it to school aid provisions, is not likely to invalidate voucher programs that include sectarian schools.

V. CONCLUSION

As the debate over education reform has intensified, school voucher proposals have grown in popularity. Early school aid case law under the Establishment Clause restricted the types of state aid that could be permissibly granted to sectarian schools. The Lemon test was formulated and strictly enforced against state aid to religious schools. With the rise of the Rehnquist Court, however, the Lemon test has begun to significantly erode, thus creating wider gaps in the wall of separation between church and state. Additionally, two new Establishment Clause tests, the endorsement and coercion tests, have become the focus of speculation as to whether either might replace the Lemon test. A voucher system that indirectly funnels aid to public, sectarian, and private secular schools via parents’ individual private choices, and which applies to all children, regardless of which schools they attend, is likely to survive scrutiny under any of these tests. Wisconsin’s Milwaukee Parental Choice Program is such a program.

Wisconsin’s voucher program avoids a violation of the Lemon test by having a secular purpose, having a primary effect that neither benefits nor inhibits religion, and avoiding excessive government entanglement, whether administrative or politically divisive. The Wisconsin scheme and similarly constructed voucher programs also would survive scrutiny under the endorsement and coercion tests should the Court decide to apply them to future school aid cases. Thus, while the Court has avoided ruling on the validity of the MPCP, such an analysis is a helpful predictor of what the Supreme Court is likely to do should it change its mind and grant certiorari to cases challenging other school choice programs, such as those in Ohio or Vermont.

Probs. 423, 454 (1995); see also Waggoner, supra note 12, at 205.

See Waggoner, supra note 12, at 205 (labeling as “absurd” the argument that “giving citizens the means to improve themselves equates to coercion”).

See id. This is not to suggest that the main purpose behind voucher programs is to promote religious education, but rather that MPCP-style programs might attract parents to sectarian schools for other non-academic, albeit secular, reasons, such as school safety, discipline, or the general social and ethical environment and community of a particular sectarian school or class of schools.

Although the Supreme Court has declined to decide directly the constitutionality of the Wisconsin program, the failure of the Court to strike down the MPCP may indicate a continuing accommodation of a less rigid relationship between church and state. Regardless, the Court appears to be toiling toward an Establishment Clause jurisprudence for school vouchers that is centered on neutrality.\footnote{See Waggoner, supra note 12, at 219.} Without wading into the policy arguments for or against vouchers for sectarian schools, this Comment demonstrates that such programs are constitutional and can be added to the government arsenal as one more option for states and localities pursuing educational reform, as they struggle to reverse the decay and disorder of their public school systems.