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Opening the Door to School Choice in Wisconsin: Is Agostini the Key?

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OPENING THE DOOR TO SCHOOL CHOICE IN WISCONSIN: IS *AGOSTINI V. FELTON* THE KEY?

I. INTRODUCTION

In his State of the State Address on January 28, 1997, Wisconsin Governor Tommy Thompson shared a vision of educational reform in Wisconsin that would meet the challenges of the next millennium.[1] This reform relied in part on the notion that parents should be empowered with more educational choices for their children.[2] In vowing to achieve this goal, the Governor proclaimed: "I will not give up the fight for the Milwaukee School Choice program. I will take this case to the highest court in the land. It is right and it will prevail."[3] With these words Governor Thompson pledged to battle for school choice[4] in Wisconsin.

While the governor of Wisconsin seeks a successful road to a constitutional school choice program, the United States Supreme Court has progressively dismantled the once rigid wall of separation between church and state. In a recent decision, *Agostini v. Felton*,[5] the Court overturned its prior decisions in *Aguilar v. Fel-*

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1. Tommy Thompson, State of the State Address (Jan. 28, 1997), *in Excerpts from Gov. Thompson's State of the State Address*, WIS. ST. J., Jan. 30, 1997, at A6.

2. *Id.* Governor Thompson's three other principles provided that (1) "Education must be relevant to workplace"; (2) "Schools must be held accountable for their performance"; and (3) "Technology must pervade every facet of education." *Id.*

3. *Id.*

4. "School choice" is a broad term that encompasses a variety of alternative school plans, all of which provide a parent, to varying degrees, the opportunity to choose a school for his or her child. *See* JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 206-18 (1990). A "voucher" system is one type of school choice program which provides governmental funding "directly to students in the form of vouchers, and students [may] use their vouchers to pay for education in the public or private school of their own choosing." *Id.* at 217. Because Milwaukee's current school choice program distributes funds payable to parents and permits a limited number of qualifying students to attend the private school of their choice, the program is a variation on the voucher system. *See* WIS. STAT. § 119.23 (1995-96) (amending WIS. STAT. § 119.23 (1989-90)). Due to the similarity between "voucher program" and "school choice program," I will interchange the two terms in my discussion.

5. 117 S. Ct. 1997 (1997).

ton[6] and *School District v. Ball*,[7] as it continued to relax its requirements for constitutional government assistance to public and nonpublic secondary and elementary schools.

In the case of Milwaukee's school choice program,[8] Wisconsin has broken new ground by permitting religious and nonreligious schools to participate in a school voucher program.[9] Given the opportunity for religious school participation under the current choice program, significant constitutional issues have arisen under the Establishment Clause of the United States Constitution.[10] In light of the Court's present Establishment Clause jurisprudence and the fact that its position on school choice appears more sympathetic to the acceptance of school choice than that of state courts,[11] it may not be long before the Court upholds a school choice program.[12] Indeed, Governor Thompson may even succeed in bringing the Milwaukee Parental Choice Program before the United States Supreme Court.[13]

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6. 473 U.S. 402 (1985).

7. 473 U.S. 373 (1985).

8. *See* WIS. STAT. § 119.23 (1995-96) (amending WIS. STAT. § 119.23 (1989-90).

9. *See, e.g.*, Carol Innerst, *School-Choice Pioneers Vying for Credit as Court Case Nears*, WASH. TIMES, Sept. 6, 1995, at A6, *available in* 1995 WL 2577137. This sentiment is further supported by Joseph P. Viteritti, who boldly stated that:

> [The Milwaukee school choice program] represents one of the most significant constitutional conundrums in American jurisprudence and is poised to make its way through the state and federal judiciaries at a time when the United States Supreme Court appears to be undertaking a thorough reexamination of the meaning of the First Amendment. It also signals a new chapter in legal and political discourse that will continue to unfold as school choice programs gain increasing support among governors, state legislators, and members of Congress.

Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 115 (1996).

10. The Establishment Clause provides that, "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

11. *See* Viteritti, *supra* note 9, at 158.

12. *See* Joe Price, Note, *Educational Reform: Making the Case for Choice*, 3 VA. J. SOC. POL'Y & L. 435 (1996) (arguing that a constitutional school choice program can be implemented under the Supreme Court's current Establishment Clause jurisprudence).

13. Although Wisconsin courts have recently invalidated the Milwaukee Parental Choice Program—relying primarily on state constitutional grounds, *see* Jackson v. Benson, No. 97-0270, 1997 WL 476290 (Wis. Ct. App. August 22, 1997), *aff'g*, No. 95-CV-1982, slip op. (Wis. Cir. Ct., Dane County, Branch 17, January 15, 1997)—the Supreme Court would have jurisdiction to hear this case if federal constitutional law were implicated. In *Michigan v. Long*, the Court held that it may exercise jurisdiction over a state court case when:

> [The] decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.... If a state court chooses

Paying particular attention to the Supreme Court's most recent decision in *Agostini*, this Comment examines the federal constitutional obstacles to the current Milwaukee Parental Choice Program ("Choice Program"). Part II sets forth a brief procedural history of the Choice Program as well as a discussion of the tenets of the original Choice Program and the legislative amendments of 1995. Part III evaluates the United States Supreme Court's First Amendment Establishment Clause jurisprudence, beginning with *Everson v. Board of Education* and ending with the Court's most recent decision in *Agostini*. Part IV illustrates the Court's traditional Establishment Clause scheme and demonstrates why the Milwaukee Parental Choice Program is constitutionally impermissible under that scheme. Finally, Part V provides an analysis supporting the conclusion that, in light of the Court's recent allowance of religious accommodations for religion in primary and secondary schools, Milwaukee's Choice Program would likely be found constitutionally permissible.

II. THE MILWAUKEE PARENTAL CHOICE PROGRAM

A. A Brief Procedural History

In 1989, upon the urging of Governor Thompson, the Wisconsin Legislature enacted the nation's first parental choice program involving the employment of private schools as an alternative to the public school system.[14] In 1991, numerous civil rights organizations and school administrative groups challenged the Choice Program as violating the state constitution.[15] In reviewing the Wisconsin Court of Appeals' invalidation of the Choice Program, the Wisconsin Supreme Court held the statute to be constitutional because it complied with the State's uni-

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> merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

463 U.S. 1032, 1040-41 (1983). Because the Supreme Court can only consider a case involving a state school choice program where federal law is at issue, this Comment will examine the federal constitutional obstacles to the Choice Program. For a discussion of the Wisconsin constitutional impediments to the Choice Program, see James B. Egle, Comment, *The Constitutional Implications of School Choice,* 1992 WIS. L. REV. 459, 499-509 (1992).

14. *See* Davis v. Grover, 166 Wis. 2d 501, 512 n.2, 480 N.W.2d 460, 462 n.2 (1992) (discussing Wisconsin's tradition of progressive education).

15. *Id.* at 501, 480 N.W.2d at 460. The challenge was brought by the National Association for the Advancement of Colored People, the Association of Wisconsin School Administrators, and the Milwaukee Teachers Education Association, among others. *See id.*

formity clause and public purpose doctrine.[16]

Three years after the Choice Program survived its first challenge, the Wisconsin Legislature expanded it by permitting sectarian schools to join nonsectarian schools as an alternative to the public school system.[17] Immediately following the enactment, the Milwaukee Teachers' Education Association and the American Civil Liberties Union joined forces to stop the new Choice Program.[18] The challengers sought to invalidate the Choice Program as a violation of the religion and establishment clauses of the United States and Wisconsin Constitutions.[19] In response to the challengers' claims, the Wisconsin Supreme Court issued a preliminary injunction withholding tuition payments to those religious schools expecting to enroll Choice Program students.[20] In addition, the injunction continued pending the court's final ruling on the legality of including religious schools in the Choice Program.[21]

In March 1996, the Wisconsin Supreme Court heard the Choice Program case on an expedited appeal.[22] In deciding the issue of the program's constitutionality, however, the court deadlocked three to three.[23] Subsequently, the case was sent back to the Dane County Circuit Court and the court's preliminary injunction continued, blocking the flow of state tax dollars to religious schools in Milwaukee.[24]

On January 16, 1997, Dane County Circuit Court Judge Paul Higginbotham heard the parties' arguments and struck down the 1995 amendment to the Choice Program as violative of the Wisconsin Constitution.[25] In a statement made following the decision, Judge Higginbotham declared that, although the city of Milwaukee may need assistance for its public school system, the Choice Program was unconstitutional because "it compel[led] Wisconsin citizens of varying religious faiths to support schools with their tax dollars that proselytize

16. *See infra* Part II.B.

17. *See* WIS. STAT. § 119.23 (1995-96) (amending WIS. STAT. § 119.23 (1989-90)).

18. Steven Walters, *Governor Wants Choice Ruling*, MILWAUKEE J. SENTINEL, Aug. 11, 1995, at B1, *available in* 1995 WL 2991283.

19. State *ex rel.* Thompson v. Jackson, 199 Wis. 2d 714, 546 N.W.2d 140 (1996).

20. *Wisconsin Court Bars Parochial Vouchers*, MINN. STAR-TRIB., Aug. 26, 1995, at 9A, *available in* 1995 WL 3676297.

21. *Id.*

22. *Thompson*, 199 Wis. 2d at 714, 546 N.W.2d at 140.

23. *Id. See also Court Deals Governor Setbacks on DPI, Choice Split Keeps Religious Schools out of Choice Plan, For Now*, MILWAUKEE J. SENTINEL, Mar. 30, 1996, at 1.

24. *Thompson*, 199 Wis. 2d at 720, 546 N.W.2d at 142.

25. Jackson v. Benson, No. 95-CV-1982, slip op. at 13 (Wis. Cir. Ct., Dane County, Branch 17, Jan. 15, 1997).

students and attempt to inculcate them with beliefs contrary to their own."[26]

On August 22, 1997, the Wisconsin Court of Appeals, District IV, affirmed the trial court's decision on the grounds that the amended Choice Program violated the religious benefit clause of the Wisconsin Constitution.[27] More recently, on March 4, 1998, the Wisconsin Supreme Court heard arguments addressing the Choice Program's constitutionality.[28]

B. The Original Program

When the Wisconsin Legislature enacted the Milwaukee Parental Choice Program in 1990, it was the only government-funded voucher program of its kind in the country.[29] The Choice Program that was

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26. Carol Innerst, *Setback for School Choice Program Expansion Ruled Unconstitutional*, WASH. TIMES, Jan. 16, 1997, at A1, *available in* 1997 WL 3661143.

27. Jackson v. Benson, No. 97-0270, 1997 WL 476290, at *1 (Wis. Ct. App. Aug. 22, 1997). *See also* Matt Pommer, Appeals Court Nixes Religious School Choice, CAP. TIMES, Aug. 22, 1997, at 1A, *available in* 1997 WL 12258872.

28. Carol Innerst, *Court Battles over School Choice Loom in Wisconsin and Vermont*, WASH. TIMES, Mar. 4, 1998, at A4, *available in* 1998 WL 3441431.

In addition to court action within the state, members of the state senate have introduced a bill that would amend Section 119.23(2)(a) by eliminating sectarian school participation in the Choice Program, but leaving the remaining amendments unchanged. Wis. S.B. 28 (1997-98 Sess.). Additionally, state representative Polly Williams, (D-Milwaukee), introduced a bill that would not only eliminate participation of sectarian private schools, but would reduce the percentage of Milwaukee Public School students who could enroll in the Choice Program. Wis. A.B. 183 (1997-98 Sess.).

29. Although Milwaukee's Choice Program was the first of its kind, other states, such as Vermont and Ohio, have adopted voucher programs of their own. In 1991, the Vermont legislature passed an amendment that authorized state public schools to allow for school choice by requiring local school districts without high schools to pay tuition for students to attend either an approved private school or a public high school of choice in another district up to an amount equal to the state average of per pupil spending. *See* VT. STAT. ANN. tit. 16, § 822 (1991). In 1994, the Vermont Supreme Court ruled that tuition reimbursement for a child to attend a sectarian school of choice outside the state did not violate either the state or the Federal Constitution. Campbell v. Manchester Bd. of Sch. Dirs., 641 A.2d 352 (Vt. 1994). In August 1996, a local school board sued the Vermont Department of Education when the Department refused to reimburse the board for tuition paid at a local Catholic high school. *See* Mark Walsh, *Vermont District Provides Latest Test in Battle over Religious Vouchers*, EDUC. WEEK, Sept. 18, 1996, at 16. At the present time, the case is before the state supreme court. *See School Choice Showdowns*, WALL ST. J., Mar. 10, 1998, at A22, *available in* 1998 WL-WSJ 3485616.

In 1995, Ohio enacted a voucher program very similar to Milwaukee's program. The Pilot Project Scholarship Program ("Pilot Program") provides "for a number of students residing in such district to receive scholarships to attend alternative schools, and for an equal number of students to receive tutorial assistance grants while attending public school in such district." OHIO REV. CODE ANN. § 3313.975, (A) (Banks-Baldwin 1995). The $5.5 million

originally enacted allowed as many as 1,000 students from low-income families in Milwaukee to receive tuition vouchers of $2,500 for use at nonsectarian private schools.[30] To participate in the Choice Program, a student's family income could not exceed 1.75 times the federal poverty level.[31] Furthermore, no more than 49% of a private school's total enrollment could consist of pupils attending under the Choice Program.[32] That percentage was increased to 65% in 1993.[33] If a participating school received applications from more eligible students than it was permitted to accept, the school was required to randomly select students for the program.[34]

Under the original Choice Program, the Superintendent of Public Instruction made payments directly to participating private schools, and the amount was equal to the per-pupil student aid provided to the Milwaukee public schools.[35] Moreover, the funds disbursed under the Choice Program were appropriated from general purpose revenues,[36]

Pilot Program awards 1,500 students in Cleveland up to $2,500 each toward tuition at one of 53 participating schools charging no more than 10% above the amount. *See* Christopher Davey, *Voucher Plan Faces Suit Group Alleges Church-State Violation*, CINCINNATI ENQUIRER, Jan. 11, 1996, at B1, *available in* 1996 WL 2226286. Currently, the fate of the Pilot Program lies with the state supreme court, which will review the state court of appeals' decision that the program violates the State and Federal Constitution. *See* Catherine Candisky, *Voucher Money Being Wasted, Audit Reveals,* COLUMBUS DISPATCH, Apr. 1, 1998, at 2B, *available in* 1998 WL 5693331; *see also* Margaret A. Nero, Comment, *The Cleveland Scholarship and Tutoring Program: Why Voucher Programs Do No Violate the Establishment Clause*, 58 OHIO ST. L.J. 1103 (1997) (arguing that the Ohio court of appeals erred in ruling that the Pilot Program violated federal constitutional precepts).

In addition to Wisconsin's, Ohio's, and Vermont's publicly funded voucher programs, several privately funded school choice programs currently exist, including programs in Milwaukee—the Partners Advancing Values in Education (PAVE); New York—the Student/Sponsor Program (SSP); Indianapolis—Golden Rule; and in San Antonio—Children's Educational Opportunity (CEO). *See* Paul E. Peterson, *Vouching for a Religious Education*, WALL ST. J., Dec. 28, 1995, at A6, *available in* 1995 WL-WSJ 9913315.

30. WIS. STAT. § 119.23 (1989-90). Because the Milwaukee public school system has an enrollment of approximately 100,000, the number of students who could participate in the program is capped at 1,000 by Section 119.23(2)(b)(1), which allows a maximum of 1% of the school district's students to participate. For the 1994-95 school year, that percentage was raised to 1.5%—approximately 1,460 students. *See* WIS. STAT. § 119.23(2)(b)(1) (1993-94).

31. WIS. STAT. § 119.23(2)(a)(1) (1993-94).

32. WIS. STAT. § 119.23(2)(b)(2) (1989-90).

33. 1993 WIS. ACT 16, § 2300.

34. WIS. STAT. § 119.23(3).

35. WIS. STAT. § 119.23(4) (1993-94); $2,500 received by a private school therefore represented the amount that the Milwaukee School District received per student in state funding.

36. *Id.* §§ 20.005(3), 119.23(4).

which consist primarily of general taxes collected by the state.[37]

Prior to the 1995 amendments, the Choice Program faced two constitutional challenges. The first, in *Davis v. Grover*,[38] alleged that the Choice Program violated Wisconsin's constitutional requirement of "uniformity" in the school system,[39] as well as the state's public purpose doctrine.[40] In upholding the Choice Program, the Wisconsin Supreme Court determined that the limited scope and experimental nature of the Choice Program precluded it from violating either the uniformity clause or the public purpose doctrine.[41]

The second challenge, in *Miller v. Benson*,[42] contended that the Choice Program's exclusion of religious schools denied the plaintiffs "equal access to an available government benefit based upon their religious beliefs," and, therefore, violated the plaintiffs' First Amendment right to free exercise of religion and their Fourteenth Amendment right to equal protection.[43] In rejecting the plaintiffs' demand that the Choice Program encompass religious private schools as well as nonreligious ones, the District Court for the Eastern District of Wisconsin held that the direct method of payment to the participating schools would violate of the Establishment Clause.[44]

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37. *Id.* § 20.001.

38. 480 N.W.2d 460 (Wis. 1992).

39. Article 10, section 3, of the Wisconsin Constitution requires that "[t]he legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable."

40. Although the public purpose doctrine is not constitutionally prescribed, the Wisconsin Supreme Court has consistently applied the doctrine to determine whether public expenditures are used for a public purpose. *See* Davis v. Grover, 166 Wis. 2d 501, 540, 480 N.W.2d 460, 474 (1992).

41. The court held that, "[s]ufficient safeguards are included in the program to ensure that participating private schools are under adequate governmental supervision reasonably necessary under the circumstances to attain the public purpose of improving educational quality." *Id.* at 513, 480 N.W.2d at 463. *See also* Egle, *supra* note 13, at 501-09 (discussing the state's uniformity clause in *Davis v. Grover*).

42. 878 F. Supp. 1209 (E.D. Wis. 1995), *vacated*, 68 F.3d 163 (7th Cir. 1995).

43. *Id.* at 1212.

44. The court reasoned that permitting religious private schools to participate in the Choice Program would closely resemble the reimbursement program stricken in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). *See Miller*, 878 F. Supp. at 1215-16. The *Miller* court ruled: "The present state of First Amendment law compels this court to hold that the plaintiffs' request to expand the current Choice Program to make tuition reimbursements directly payable to religious private schools who admit eligible Choice Program school children would violate the Establishment Clause." *Id.* at 1216.

C. The Amended Program

In July of 1995, the Wisconsin Legislature amended the Choice Program to permit qualifying religious private schools to participate.[45] The revised statute provided that "any pupil in grades kindergarten to 12 who resides within the city [of Milwaukee] may attend, at no charge, any private school located in the city."[46]

In addition to eliminating the restriction against religious schools, the legislature changed the method by which the funds would be disbursed to the participating private schools. Instead of paying the private schools directly, a check would be payable to the parent of the student.[47] The check, however, would be sent to the private school, and, in order to redeem the funds, the parent would be required to "restrictively endorse the check for the use of the private school."[48]

Under the Choice Program provisions, the funds payable to the parent were determined to be:

> [A]n amount equal to the total amount to which the school district is entitled under § 121.08 divided by the school district membership [i.e., the per-pupil state aid], or an amount equal to the private school's operating and debt service cost per pupil that is related to educational programming, as determined by the department, whichever is less.[49]

For the 1995-96 school year, the per-pupil state aid provided to the Milwaukee Public Schools was approximately $3,667, and for the 1996-97 school year, the amount was $4,400.[50] The tuition charged by most of the participating private schools in the Choice Program, however, was less than either of these figures.[51] Because of this fact, the participating private schools would obtain more funds from the state for each Choice Program student than the schools would receive for each non-Choice Program student who pays tuition.[52]

Under the amended Choice Program, the legislature also included a

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45. *See* 1995-96 Budget Act, 1995 WIS. ACT 27 § 4002.

46. WIS. STAT. § 119.23(2)(a) (1995-96).

47. *Id.* § 119.23(4).

48. *Id.*

49. *Id.*

50. Jackson v. Benson, No. 95-CV-1982, slip op. at 13 (Wis. Cir. Ct., Dane County, Branch 17, Jan. 15, 1997).

51. *Id.*

52. *Id.*

provision that allowed Choice Program students to opt out of any "religious activity" for which the student's parent has submitted a written request for such an exemption.[53] Finally, the new Choice Program increased the number of students who would be permitted to participate in the program from the original 1% of the city's school district student population to 7% during the 1995-96 school year and 15% during the 1996-97 school year.[54] The amended version also lifted the restriction on the percentage of Choice Program students who could enroll in a private school.[55]

Since the adoption of the amended Choice Program, 122 private schools participated during the 1995-96 school year.[56] Of the 122 private schools, 89 were sectarian and 33 were non-sectarian.[57] In addition, nearly 84% of students who attended private schools in Milwaukee during the 1994-95 school year attended religiously-affiliated schools.[58]

III. ESTABLISHMENT CLAUSE

A. Everson v. Board of Education*: Endorsing Neutrality*

Since the 1940s, the nation's highest court has struggled to balance individual rights regarding the free exercise of religion with the prohibition against any state establishment of religion in the context of religious schools.[59] In the seminal case, *Everson v. Board of Education*,[60] the United States Supreme Court endorsed Thomas Jefferson's call for "a

53. The exemption provision states: "A private school may not require a pupil attending the private school under this section to participate in any religious activity if the pupil's parent or guardian submits to the pupil's teacher or the private school's principal a written request that the pupil be exempt from such activities." WIS. STAT. § 119.23(7)(c) (1995-96).

54. *Id.* § 119.23(2)(b).

55. Under the original Choice Program, only 49% of a participating private school's enrollment could consist of Choice Program students. *Id.* § 119.23(2)(B)(2) (1989-90). In 1993, the percentage was enlarged to 65%. 1993 WIS. ACT 16, § 2300.

56. *Jackson*, No. 95-CV-1982, slip op. at 10.

57. Jackson v. Benson, No. 95-CV-1982, slip. op. at 10 (Wis. Cir. Ct., Dane County, Branch 17, Jan. 15, 1997).

58. *Id.* According to the National Center for Educational Statistics, 79% of the nation's private schools are religious (of which 32% are Catholic) and 85% of the students attending private schools attend religious schools (of which 60% are Catholic (Catholic religious students account for 50% of the nation's private school students)). *See* U.S. NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION, *Digest of Education Statistics* (1995), *reprinted in* STATISTICAL ABSTRACT OF THE UNITED STATES 1996, THE NATIONAL DATA BOOK (116th ed. 1996).

59. The Supreme Court's first decision involving financial assistance to religious institutions was *Gradfield v. Roberts*, 175 U.S. 291 (1899).

60. 330 U.S. 1 (1947).

wall of separation between church and state," as well as the principle that a state may pass no laws that "aid one religion, aid all religions, or prefer one religion over another."[61] The Court nevertheless carved out an exception for certain state aid to religious primary and secondary educational institutions.[62]

At issue in *Everson* was a New Jersey statute that allowed school districts to make rules providing for the transportation of children to and from public and nonpublic schools.[63] Pursuant to state law, a local school board authorized reimbursement for money spent by parents of children who were being transported on school buses.[64] Because the parents of Roman Catholic school students were reimbursed for their children's bus expenses, the law was challenged on grounds that it violated the Establishment Clause.[65]

In upholding the aid program, the Supreme Court determined that the program was neutral because it paid the bus fares of parochial students as a part of a "general program" under which student expenses for public and private schools were reimbursed.[66] The state, therefore,

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61. *Id.* at 15-16.

62. Since *Everson*, the Supreme Court has upheld aid to religious primary and secondary schools in the following cases: *Rosenberger v. Rector & Visitors of the Univ. of Virginia* 115 S. Ct. 2510 (1995) (holding that a state university may not refuse to pay printing costs of a student publication otherwise eligible to receive printing costs because the publication has a Christian perspective, when the payments are made directly to the printer pursuant to a religiously neutral program); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (ruling that school districts must provide, pursuant to the Individuals with Disabilities Education Act, a sign-language interpreter to accompany a deaf child to classes at a Catholic high school); *Mueller v. Allen*, 463 U.S. 388 (1983) (holding that a state may allow tax deductions for tuition, textbooks, and transportation expenses for parents of all schoolchildren, including children attending religious schools); *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646 (1980) (upholding a state program that permitted reimbursement of private schools for the expenses of compiling state required data, such as student attendance records, or administering and grading standardized state educational achievement tests); *Wolman v. Walter*, 433 U.S. 229 (1977) (ruling that a state may provide religious school students with books, standardized testing and scoring, hearing and speech diagnostic testing); *Hunt v. McNair*, 413 U.S. 734 (1973) (holding that state aid may be used for construction grants to religious colleges to construct facilities used for secular purposes). In the context of post-secondary schools, aid has been upheld in *Tilton v. Richardson*, 403 U.S. 673 (1971) (holding that the federal government may provide construction grants to religious-related colleges and universities to construct facilities used for nonreligious purposes); *Board of Education v. Allen*, 392 U.S. 236 (1968) (holding that a state program providing state-approved textbooks to all students was permissible). Most of these cases will be considered in this discussion.

63. *See Everson*, 330 U.S. at 3.

64. *Id.*

65. *Id.* at 5.

66. 330 U.S. 1, 17 (1947).

was "neutral in it relations with groups of religious believers and non-believers."[67] Thus, by allowing aid to pass to religious institutions, the Supreme Court recognized an underlying principle for Establishment Clause jurisprudence: the government action must be neutral toward religious and nonreligious groups.[68]

B. Formulation of the Lemon *Test*

In the two decades that followed the *Everson* decision, the Supreme Court was virtually silent on matters involving aid to sectarian schools. In 1968, however, the Court heard the case of *Board of Education v. Allen*, which involved a New York law requiring public school boards to purchase textbooks and lend them without charge to public and private schools.[69] In acknowledging the *Everson* precedent, the Court adopted the principle of neutrality, but it also supplemented its analysis with an earlier test from the case of *School District v. Schempp*.[70] In ascertaining what aid to religious schools was permissible and what aid was proscribed, the Court considered the purpose and the primary effect of the enactment.[71] Applying this two-part test, the Court determined that the New York statute had the secular purpose of attempting to advance educational opportunities for students.[72] The primary effect, moreover, was permissible because the benefit to religion was as insubstantial as the benefit provided in *Everson*.[73]

Three years after the *Allen* decision, the Court in *Lemon v. Kurtzman*[74] considered the appropriation of state funds for reimbursing expenses and supplementing salaries of teachers in nonpublic schools.[75] In *Lemon*, two statutes were at issue. The first was a Pennsylvania law authorizing the reimbursement of expenditures for teachers' salaries, textbooks, and instructional materials used exclusively for secular subjects; the second was a Rhode Island law providing a 15% salary increase to teachers of secular subjects in non-public elementary schools.[76]

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67. *Id.* at 18.
68. *See id.* at 18.
69. 392 U.S. 236, 239 (1968).
70. 374 U.S. 203 (1963) (holding that required Bible readings and recitation of the Lord's prayer at public schools violated the Establishment Clause).
71. *Id.* at 222.
72. 392 U.S. at 243.
73. *See id.* at 243-44.
74. 403 U.S. 602 (1971).
75. *See id.* at 607-10.
76. *See id.* at 607-11.

Of the students attending non-public schools in Pennsylvania and Rhode Island, over 95% attended religious schools, most of which were affiliated with the Roman Catholic church.[77]

Expounding upon the two-part test in *Allen*, the *Lemon* Court considered an additional factor: the extent of entanglement between government and religious institutions.[78] By adding a third element to its analysis, the Court created what later became known as the *Lemon* test. This test has subsequently been considered the standard for an Establishment Clause analysis.[79] In essence, the *Lemon* test consists of three prongs: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."[80]

In applying this test, the Court first found each state's legislative history to evince a secular purpose of improving the quality of secular education in public and non-public schools.[81] After analyzing the first prong, however, the Court jumped to the third prong and determined that the program invalidated the Pennsylvania and the Rhode Island statutes on grounds of impermissible entanglement of church and state.[82] The Court held that entanglement was prevalent because the program presented potential for political division along religious lines between the supporters and the opponents of the aid program.[83] Thus, in relying on the third prong to nullify the state action, the *Lemon* Court ultimately required only one of the three factors to fail in order to invalidate a governmental program.

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77. *Id.* at 608, 610.

78. *Id.* at 613 (citing Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (holding that an exemption from property taxation for real or personal property used exclusively for religious, education, or charitable purposes did not violate the Establishment Clause)).

79. Supreme Court cases that have relied on the three-part *Lemon* test include: *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Aguilar v. Felton*, 473 U.S. 402 (1985); *School Dist. v. Ball*, 473 U.S. 373 (1985); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Mueller v. Allen*, 463 U.S. 388 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

80. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

81. *Id.* at 613. The first prong of *Lemon* has rarely invalidated a state action; however, one notable exception is *Edwards v. Aguillard*, 482 U.S. 578 (1987).

82. *Lemon*, 403 U.S. at 614.

83. *Id.* at 622.

C. Committee for Public Education & Religious Liberty v. Nyquist: *An Analogue for the Choice Program*

In 1973, the Court decided *Committee for Public Education and Religious Liberty v. Nyquist*, a case involving a tuition reimbursement program remarkably similar to the Milwaukee Choice Program.[84] *Nyquist* involved a New York statute that provided public aid exclusively for non-public schools.[85] The first of the statute's three aid programs provided for direct grants to private schools for the purpose of maintaining and repairing equipment and facilities "to ensure the students' health, welfare and safety."[86] The annual grant provided $30 to $40 per student, not to exceed 50% of the average per-student cost for equivalent services in the public schools.[87] The second of the programs authorized tuition reimbursements of $50 to $100, not to exceed 50% of tuition paid, for low-income parents of children attending private elementary or secondary schools.[88] The final program provided tax relief to those parents who failed to qualify for tuition grants.[89]

Examining the first program, which provided for the maintenance and repair of non-public schools, the Court noted that the funds were paid directly to the schools, almost all of which were affiliated with the Roman Catholic Church.[90] The money was also distributed without restriction on usage, so long as the expenses did not exceed 50% of comparable expenditures in the public school system.[91] Based on these facts, the Court concluded that, without any restriction on the use of the funds, "it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools."[92] The Court further noted that had the funds offered "an indirect and incidental effect beneficial to religious institutions," such aid would have been deemed permissible.[93]

Upon consideration of the second program, which provided tuition

84. 413 U.S. 756 (1973).
85. *Id.* at 761-62.
86. *Id.* at 762.
87. *Id.* at 763.
88. *Id.* at 764.
89. *Id.* at 765.
90. Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973).
91. *Id.*
92. *Id.*
93. *Id.* at 775.

reimbursement for low-income parents, the Court held that this provision also failed the primary effects prong.[94] The Court initially observed that tuition grants clearly could not be given directly to religious schools because the State could not guarantee that the financial assistance would be "used exclusively for secular, neutral, and nonideological purposes."[95] Although New York's program, in fact, disbursed funds to parents instead of to private schools, the Court, nonetheless, determined that the method of payment, whether as a reimbursement, subsidy, or reward, was only one of many factors to be addressed.[96]

Rather than focusing solely on the method of disbursement, the Court considered the overall effect of the program.[97] The Court held that because the tuition grants are "offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions."[98] Furthermore, the Court noted that it was of no significance that the State allotted the funds as a reimbursement which, the State argued, meant that the parent was "absolutely free to spend the money he receives in any manner he wishes."[99]

In examining the third program, the Court rejected the provision granting income tax benefits to parents of private school children.[100] In comparing the tax deduction with the tuition grant in the second program, the Court noted, "[t]he only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State."[101] Thus, the Court concluded, "[t]he qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools."[102]

In short, the *Nyquist* Court condemned all funds distributed to sectarian schools that could be used without restriction. Additionally, the Court proscribed all tuition grants and tax deductions for parents in which the state program provided an "incentive" for parents to enroll

94. *See id.* at 780.
95. *Id.*
96. *Id.* at 774.
97. *See id.* at 785-76.
98. *Id.* at 786.
99. *Id.*
100. *Id.* at 791.
101. *Id.*
102. *Id.*

their children in a private religious school.[103]

In 1975, two years after *Nyquist*, the Court in *Meek v. Pittenger*[104] considered the constitutionality of a Pennsylvania statute that authorized the state to lend textbooks, equipment, instructional materials, and auxiliary services without charge to both public and nonpublic schools.[105] Finding the textbook loan program to be identical to that in *Board of Education v. Allen*, the Court upheld the validity of the textbook loan provisions.[106] The Court, however, rejected the provisions authorizing instructional material and equipment—as well as auxiliary aid—because such assistance primarily benefited non-public schools, the majority of which were sectarian in nature.[107] In utilizing the *Lemon* test, the Court ultimately held that all but the textbook provisions had the primary effect of advancing religion.[108]

In the wake of *Lemon*, *Nyquist*, and *Meek*, the Supreme Court permitted only the slightest exceptions to the general rule that state aid could not permissibly flow to elementary and secondary parochial schools. In addition, after *Nyquist* the Court seemingly eliminated any chance of a state-funded voucher program. With the subsequent changes in the make-up of the Court, however, the possibility of a constitutional school voucher program has remained.[109]

D. Departures from Lemon

Given the breadth of constitutional analysis in the *Lemon* decision, the three-pronged inquiry offered an appealing structure for an Establishment Clause analysis. The *Lemon* test, however, also had its limitations.[110] Although most of the cases decided within a decade after *Lemon* applied the Court's three-part analysis,[111] a few decisions ventured beyond this analysis. The 1973 case of *Hunt v. McNair*[112] is but one example.

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103. In *Sloan v. Lemon*, 413 U.S. 825 (1973), a companion case to *Nyquist*, the Court, for similar reasons in *Nyquist*, struck down a Pennsylvania tuition reimbursement program that provided funds to parents of nonpublic school students.

104. 421 U.S. 349 (1975).

105. *Id.* at 351-55.

106. *Id.* at 360-62.

107. *Id.* at 364-371.

108. *Id.* at 364-73.

109. In 1981, Sandra Day O'Connor was appointed as Justice, followed by Antonin Scalia in 1986 and Anthony Kennedy in 1988.

110. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 605 (1992) (Scalia, J., dissenting).

111. *See* cases cited *supra* note 79.

112. 413 U.S. 734 (1973).

At issue in *Hunt* was a South Carolina statute that authorized construction grants to religiously-affiliated colleges in order to construct facilities for nonreligious purposes.[113] With respect to the second prong of the *Lemon* test, the Court noted that aid will ordinarily "have a primary effect of advancing religion when it flows to an institution in which religion is *so pervasive* that a substantial portion of its functions are [sic] subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting."[114] Relying on these two considerations—pervasiveness of religion and funding of religious activity in a secular setting—the Court held that the state program in *Hunt* did not have the primary effect of advancing religion.[115] In looking at the religious functions and activities of a grant-receiving school, the court applied a more exacting analysis by examining the actual nature of the religious institutions involved.[116] The Court's deviation from the *Lemon* test compelled it to state that the *Lemon* test provided "no more than [a] helpful signpost [in Establishment Clause jurisprudence]."[117]

Ten years later in 1983, the Court in *Mueller v. Allen*[118] upheld a Minnesota law enabling taxpayers to deduct from their state income tax expenditures incurred in sending their children to primary and secondary schools. Under the program, parents could deduct expenses necessary for their child's tuition, transportation, and textbooks at a public or a nonpublic school.[119]

In considering the primary effects prong of the *Lemon* test, Justice Rehnquist, writing for the majority, sought to distinguish *Mueller* from *Nyquist*.[120] In *Nyquist*, public assistance in the form of tuition grants and tax deductions was provided only to parents of children in non-public schools.[121] The Minnesota law, however, permitted all parents—whether their children attended a public or non-public school—to deduct a portion of their children's educational costs.[122] The Court, therefore, determined that a program that "neutrally provide[d] state assis-

113. *See id.* at 734.
114. *Id.* at 743 (emphasis added).
115. *See id.*
116. *See id.*
117. *Id.* at 741.
118. Mueller v. Allen, 463 U.S. 388 (1983).
119. *See id.* at 391.
120. *Id.* at 395-98.
121. *Nyquist*, 413 U.S. at 756.
122. *See Mueller*, 463 U.S. at 390-91.

tance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." [123]

In addition to examining the type of aid provided, the Court considered Minnesota's method of distributing financial assistance.[124] According to the Court, under the state's plan, public funds became available through the choice of individual parents.[125] The Court admitted, however, that aid to parents "ultimately ha[d] an economic effect comparable to that of aid given directly to the schools attended by their children."[126] Nonetheless, because the parents were making "numerous, private choices," the Court maintained that the State was not stamping its approval on religion.[127] The Court, in addition, acknowledged the fact that the *Nyquist* Court held state aid to be unconstitutional, but found that *Nyquist* was distinguishable on other grounds.[128] Despite *Mueller*'s similarity to *Nyquist*, the Court chose not to question the *Nyquist* decision, ultimately concluding that Minnesota's deductions did not have the primary effect of advancing religion.[129]

It should be noted that in ascertaining the primary effect under *Lemon*, the *Mueller* Court refused to engage in a statistical or empirical analysis of the recipients of the tax benefits.[130] Under the state statute in *Mueller*, the expenditures for public school transportation, textbooks, and tuition were shown to be of only negligible value.[131] Therefore, the petitioners argued, the vast majority of the tax deductions went to parents of nonpublic school children.[132] Furthermore, the facts demonstrated that 96% of the children attending nonpublic schools attended religiously-affiliated institutions.[133] Thus, the petitioners contended that an empirical analysis would have shown that, despite the statute's intention to include "all parents," the vast majority of the tax benefits were realized by parents of parochial school children.[134] These arguments, however, were ignored by the Court.

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123. *Id.* at 398-99.
124. *Id.* at 399.
125. *Id.*
126. *Id.*
127. *Id.*
128. *See id.*
129. *Id.* at 402.
130. *See id.*
131. *Id.*
132. *See id.* at 401.
133. *Id.*
134. *Id.*

Although the *Mueller* Court found grounds on which to distinguish the Minnesota tax deduction plan from the tuition and tax deduction programs in *Nyquist*, the Court, apparently abandoned one of the tenets upon which *Nyquist* stood.[135] In *Nyquist*, the Court proscribed all tuition grants and tax deductions for parents in which the program provided an "incentive" for parents to enroll their children in a private religious school.[136] The *Mueller* Court, however, disregarded this factor. Placing form over substance, the Court ignored the petitioner's evidence showing that the Minnesota tax plan did in fact provide a significant incentive for parents to send their children to private schools.

In the aftermath of *Mueller*, the Court appeared more willing to regard the *Lemon* test as a mere formality rather than as an effective tool in assessing the constitutionality of state aid to schools.[137] As the *Mueller* decision demonstrated, other factors became necessary to the Court's Establishment Clause analysis. One such factor was a facial determination of the neutrality or general scope of the state action. The second factor considered by the Court was the extent to which the parents receiving the aid were in fact making private and independent choices.

Following the *Mueller* decision, the Court in *Witters v. Washington Dept. of Services for the Blind*[138] upheld the payment of vocational educational assistance funds to a blind student attending a Bible college. Under the funding program, financial assistance was available to students attending both public and private schools.[139] The Court determined that the funding provided "no financial incentive for students to undertake sectarian education" and did not give greater benefits for recipients who attended religious schools.[140] Interestingly, by considering whether the state program created a financial incentive to attend a religious school, the majority opinion, written by Justice Marshall, revived the "incentive" factor which the *Mueller* court had previously abandoned.

In addition to its reliance on *Nyquist*, the Court also applied one of

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135. According to one commentator, if one compared the *Mueller* decision with *Nyquist*, one would find "the distinctions asserted are nothing more than pretextual arguments indicating an effective reversal of *Nyquist*." Price, *supra* note 12, at 475.

136. *See supra* Part III.C.

137. The *Mueller* Court adhered to the sentiment expressed in *Hunt* that *Lemon* provided "no more than [a] helpful signpost." *See Mueller*, 463 U.S. at 394.

138. 474 U.S. 481 (1986).

139. *See id.* at 483.

140. *Id.* at 488.

the factors considered in *Mueller*.[141] The Court noted that the aid flowing to religious institutions did so only as a consequence of the "genuinely independent and private choices of aid recipients."[142]

Ultimately, the *Witters* Court found no evidence suggesting that the aid would be used to promote religious education.[143] Thus, in concluding that the primary effect was to aid disabled students, and not to provide a religious education, the program was upheld under the Establishment Clause.[144]

*E. Post-*Lemon *Era*

A decade after the *Mueller* decision, the Court in *Zobrest v. Catalina Foothills School District*[145] addressed the issue of whether the use of government-funded sign-language interpreters in religious schools violated the Establishment Clause.[146] In a decision that all but ignored the three-pronged *Lemon* test,[147] Chief Justice Rehnquist, writing for the majority, relied upon precedent established in *Mueller* and *Witters*. First, the Court reiterated the principle that aid programs that "neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge."[148] Because the Individuals with Disabilities Education Act did not distinguish between public schools and private sectarian and nonsectarian institutions, the Court concluded that the statute was neutral.[149] Second, the Court determined that the aid offered "no financial incentive" for parents to send their children to religious institutions.[150] Finally, in validating the state aid at issue, the Court reaffirmed the tenet that government financial assistance that "ultimately flows to" religious schools as a result of "genuinely independent and private choices" of the recipients is permissible under the Establishment

141. *Id.*
142. *Id.* at 487.
143. *Id.* at 488.
144. *Id.* at 488-89.
145. 509 U.S. 1 (1993).
146. *Id.* at 9.
147. *Cf.* Lisa S. Pierce, Note, *Making Aid Without Lemon?: Zobrest v. Catalina Foothills School District*, 63 U. CIN. L. REV. 565, 599-600, 605 (1994) (arguing that although the majority in *Zobrest* did not expressly rely on the *Lemon* test, its "basic guidelines" were utilized by the Court).
148. *Id.* at 8-9.
149. *Id.* at 10.
150. *Id.* at 9-10.

Clause.[151]

In 1995, the Supreme Court in *Rosenberger v. Rector and Visitors of the University of Virginia*[152] considered a state university funding program that authorized payments to outside contractors for the printing costs of publications of student groups.[153] Following the University's denial of funds to a Christian student journal, the student group, Wide Awake Productions, challenged the action on the grounds that it violated the Free Speech and Establishment Clauses of the First Amendment.[154] In overturning the University's action, Chief Justice Rehnquist, considered two central tenets under the Establishment Clause: (1) whether the government action was neutral, and (2) whether the benefits to religion were incidental and insubstantial.[155]

Under the first tenet, the Court determined that the University program was neutral because the purpose of the funding scheme was to support the diversity and creativity of the students.[156] According to the Court, "the neutrality of the program distinguishes the student fees from a tax levied for the direct support of a church."[157] While a general tax that provided direct funds to a church would be unconstitutional, the student fee assessment in *Rosenberger* was used specifically for student programs, and the funds, in the case of the Christian journal, went directly to the printer.[158] This use of student fees, the Court concluded, was "a far cry from a general public assessment designed and effected to provide financial support for a church."[159] Finally, in considering the second tenet, the Court determined the benefits of religion to be incidental and insubstantial because the central use of the funds was for secular activities, such as printing.[160]

In the wake of the Court's pronouncements in *Zobrest* and *Rosenberger*, the Court, without explicitly abandoning *Lemon*, apparently made a clear departure from the once-obligatory *Lemon* test. In the place of the three-pronged analysis is something of an *ad hoc* approach in which the Court weighs several factors of its choosing. Although

151. *Id.* at 9.
152. 515 U.S. 819 (1995).
153. *Id.* at 822.
154. *Id.* at 822-23.
155. *Id.* at 839, 843-44.
156. *Id.* at 840.
157. *Id.*
158. *Id.* at 841.
159. *Id.*
160. *Id.* at 843-44.

these factors have not been applied consistently, three of these considerations stand out. First, the Court will consider whether the statute, on its face, provides neutral benefits to a broad class of citizens. Second, the Court will determine who the recipients of the aid are, whether such aid directly or indirectly benefits a religious group, and the extent to which any benefit obtained resulted from a purely individual and personal choices. Third, the Court will examine the statute to determine whether any provision offers an individual a financial incentive to attend, enroll, or otherwise participate in a religious organization.

F. Agostini v. Felton

In *Agostini v. Felton*, the most recent decision involving government aid to non-public schools, the Court addressed New York City's Title I program, which offered financial assistance to disadvantaged children.[161] At issue in *Agostini* was the constitutionality of a permanent injunction ordered by the District Court for the Eastern District of New York following the Court's decision in *Aguilar v. Felton*.[162] *Aguilar* held unconstitutional New York's use of federal funds under Title I of the Elementary and Secondary Education Act of 1965 to compensate public teachers who taught children from low-income families in parochial schools.[163] The *Agostini* Court, in a five to four majority opinion, determined that *Aguilar* and its companion case, *School District of Grand Rapids v. Ball*,[164] were no longer good law because the assumptions upon which they were based had been rejected by the Court's recent First Amendment jurisprudence.[165]

Under the Title I program, Congress sought to "provid[e] full educational opportunity to every child regardless of economic background."[165] The program functioned through "local educational agencies," or LEA's, which worked to improve public and non-public students' performance standards as well as to provide "'counseling, mentoring, and other pupil services.'"[167] Additionally, the services were required to be provided by public employees and only for those stu-

161. 117 S. Ct. 1997 (1997).

162. *Id.* at 2003.

163. Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 117 S. Ct. 1997 (1997).

164. 473 U.S. 373 (1985).

165. *See Agostini*, 117 S. Ct. at 2010.

166. *Id.* at 2003 (citation omitted).

167. *Id.* (quoting 20 U.S.C. §§ 6315(c)(1)(A), (E)).

dents eligible for aid.[168] Furthermore, the Title I services themselves had to be "'secular, neutral, and nonideological,'" and "must 'supplement, and in no case supplant, the level of services' already provided by the private school.'"[169] Similar to the program in *Aguilar*, the "Shared Time" program in *Ball* provided remedial and "enrichment classes" and were held at non-public schools for eligible students.[170]

The Court's analysis in *Aguilar* and *Ball* utilized upon the *Lemon* test. In *Aguilar*, the Court found the program "necessitated an excessive government entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion."[171]

In *Ball*, the Court determined that the Shared Time program created the impermissible effect of advancing religion.[172] According to the *Agostini* Court, the effects prong in *Ball* relied upon three assumptions:

> (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; (iii) any and all public aid that directly aids the education function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking.[173]

After dismissing the first two premises, the Court rejected the third, stating that government aid that provided direct assistance to the educational function of a sectarian school is not necessarily impermissible.[174]

The Court's evaluation of the significance of direct government aid to religious schools relied on *Witters* and *Nyquist*, in which tuition grants were "'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.'"[175] The funds were provided directly to eligible students, who then used the proceeds to pay for tuition at the school of their choice.[176]

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168. *Id.* at 2004.

169. *Id.* (quoting 20 U.S.C. § 6321(a)(2) and 34 C.F.R. § 200.12(a) (1996)).

170. *Id.* at 2008.

171. *Id.* at 2010.

172. *Id.*

173. *Id.*

174. *Id.* at 2011.

175. *Id.* (quoting Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481, 487 (1986) (quoting Committee for Public Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 782-83, n.38 (1973))).

176. Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997).

According to the Court,

> [T]his transaction was no different from a State's issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution. In both situations, any money that ultimately went to religious institutions did so "only as a result of the genuinely independent and private choices of individuals."[177]

In addition, the Court found the Title I program to be indistinguishable from *Zobrest*, which provided sign-language interpreters to students under the IDEA.[178] Under both programs, the Court determined that aid was only available for students who met certain requirements, but that it could be used at any school which the student attended.[179] Additionally, the Court found the services under both programs to be supplemental and, thus, did not "'reliev[e] sectarian schools of costs they otherwise would have borne in educating their students.'"[180] Moreover, the Court held that (1) Title I funds distributed to LEA's and then to the students were not direct grants to participating schools,[181] (2) the number of sectarian school students who receive "otherwise neutral aid" was not determinative,[182] and (3) Title I funds did not create a financial incentive because "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[183]

Ultimately, *Agostini* stands for several propositions. First, government aid that provides direct assistance to the educational function of a sectarian school is permissible. Second, aid that merely supplements a school is acceptable as long as it does not relieve the school of costs it otherwise would have borne in educating its students. Third, funds that are not distributed directly to participating schools are more likely to be

177. *Id.* at 2011-12 (quoting *Witters*, 474 U.S. at 487).

178. *Id.* at 2012.

179. *Id.* at 2012-13.

180. *Id.* at 2013 (quoting Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 12 (1996)).

181. *Id.*

182. *Id.*

183. *Id.* at 2014. In his dissenting opinion, Justice Souter argued that "nothing since *Ball* and *Aguilar* and before this case has eroded the distinction between 'direct and substantial' and 'indirect and incidental' [government aid]." *Id.* at 2025. The majority's result, Souter concluded, "is to repudiate the very reasonable line drawn in *Aguilar* and *Ball*, and to authorize direct state aid to religious institutions on an unparalleled scale, in violation of the Establishment Clause's central prohibition against religious subsidies by the government." *Id.* at 2019.

constitutionally valid. Fourth, the percentage of sectarian students who receive aid is not determinative of the program's constitutionality. Finally, an assistance program will not create a financial incentive when the aid is allocated on the basis of neutral, secular criteria and is equally available to both religious and secular beneficiaries.

IV. THE CHOICE PROGRAM UNDER THE TRADITIONAL *LEMON* TEST

Although the Supreme Court is currently applying new standards under the Establishment Clause, it will be helpful first to undertake a *Lemon* analysis of the Choice Program. Under the traditional three-pronged *Lemon* test, the first requirement is that the government action have a secular legislative purpose. Like most state actions considered under the purpose prong, the Choice Program clearly has such a legitimate secular purpose. According to the program's history, "'School Choice' emerged in the 1980s as a policy option which . . . would increase educational opportunity and improve learning."[184] More specifically, the goals of the Choice Program were threefold:

> (1) [O]ut of fairness, low-income families should have at least some of the choices available to families with greater income; (2) students from low-income families would have a greater chance of succeeding in non-public schools; and (3) choice would strengthen public schools by causing them to focus on satisfying parents and students.[185]

In considering the 1995 amendments to the Choice Program, the expanded Choice Program was intended to provide a greater array of educational options as well as increase the number of students who can participate in the program.[186] *Lemon*'s first prong, therefore, is clearly satisfied.

Under the second prong, the principal or primary effect of the government action must neither be to advance nor be to inhibit religion. Although the Court refused to engage in an empirical analysis in ascertaining the primary effect in *Mueller v. Allen*,[187] such an inquiry may nonetheless be revealing. Using an empirical evaluation, this Comment will consider where the majority of students and funds end up in order

184. HOWARD L. FULLER & SAMMIS B. WHITE, WISCONSIN POLICY RESEARCH INSTITUTE, EXPANDED SCHOOL CHOICE IN MILWAUKEE: A PROFILE OF ELIGIBLE STUDENTS AND SCHOOLS 3 (1995).

185. *Id.* at 4.

186. *See* Jackson v. Benson, No. 95-CV-1982 slip op. at 6-8 (Wis. Cir. Ct., Dane County, Branch 17, January 15, 1997).

187. *See supra* Part III.D.

to pinpoint the primary effect.

Under the Choice Program, of the 122 eligible private schools, only 27% are nonsectarian.[188] It has been estimated that of the 22,000 students enrolled in the participating private schools, over 20,000 were enrolled in private religious schools.[189] Furthermore, the Milwaukee School District estimated that as many as 7,000 students could have participated in the 1995-96 Choice Program.[190] Therefore, because fewer than 2,000 students attend nonsectarian private schools *in toto*, it stands to reason that the vast majority of the children who would be attending private schools through the new Choice Program would be attending religious schools. This fact, along with the fact that the financial assistance is paid on a per-pupil basis, suggests that most of the funds and the students would be going to religious schools. Therefore, in terms of the recipients of the aid and the amount of money awarded, the Choice Program would "primarily" assist students attending religious schools. Whether the "primary effect" of the funds is to advance religion, however, is not evident from this purely empirical approach.

Besides an empirical analysis, it may also be helpful to determine precisely how the state funds would be spent. Under the amended Choice Program, the State does not indicate how the funds should be spent. In *Nyquist*, the Court determined that without any restriction on the use of the funds, "it simply cannot be denied that [the aid] has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools."[191] According to *Nyquist*, because the Choice Program funds have no restriction, the primary effect of the program would be to advance religion. Thus, due to the similarity between the choice program and the funding scheme in *Nyquist*, the Choice Program would likely fail under the primary effect prong.

The *Lemon* test's last consideration is whether there is an excessive entanglement between church and state. In assessing the existence of an entanglement, attention should be drawn to "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority."[192] In particular, excessive entanglement will

188. *See Jackson*, No. 95-CV-1982, slip op. at 7.

189. *See* Plaintiff's Brief in Support of Preliminary Injunction, Jackson v. Benson, No. 95-CV-1982 (Wis. Cir. Ct., Dane County, Branch 17, January 15, 1997).

190. *See Jackson*, No. 95-CV-1982, slip op. at 7.

191. 413 U.S. 756, 774 (1973).

192. Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).

focus on the presence of (1) "pervasive monitoring by public authorities"; (2) "administrative cooperation" between parochial schools and the state superintendent of education; and (3) an increased likelihood that the program will cause "political divisiveness."[193]

In the case of the Choice Program, the state superintendent oversees a school's random selection of participating students,[194] pays the parent or guardian of the selected student a determined amount,[195] monitors the participating students' performance,[196] and conducts financial audits of program.[197] Although the statue superintendent is involved in several vital aspects of the Choice Program, the superintendent's monitoring does not, on its face, appear to be pervasive. Second, administrative cooperation between the schools and the state exists but is not excessive under section 119.23 of the Wisconsin Statutes. Finally, unlike in *Lemon*, the facts of the Choice Program do not indicate that the program will result in political divisiveness from a continuing demand for appropriations.[198]

Having employed the *Lemon* test under the Court's traditional approach, the Choice Program will likely fail under the primary effects inquiry. Just as the funding scheme in *Nyquist* was determined to be constitutionally impermissible under the traditional approach, so too would the Choice Program.

V. THE CHOICE PROGRAM UNDER THE MODERN SCHEME

Although the traditional test under *Lemon* would likely invalidate the Choice Program, the Supreme Court, under its current line of inquiry for cases involving aid to religious institutions, allows room for a school choice program like the Choice Program.[199]

A. Neutrality

One of the primary factors the Court has considered from *Everson* to *Agostini* is the extent to which the statute is neutral or general in scope. In *Mueller*, state assistance was neutral because it was allocated

193. Aguilar v. Felton, 473 U.S. 402, 413-14 (1985) (overruled on other grounds by Agostini v. Felton, 117 S. Ct. 1997 (1997)).

194. *See* WIS. STAT. § 119.23(3)(a) (1995-96).

195. *Id.* § 119.23(4).

196. *Id.* § 119.23(7)(b).

197. *Id.* § 119.23(9).

198. *See Lemon*, 403 U.S. at 622.

199. *See* Price, *supra* note 12, at 485-89.

to a "broad spectrum of citizens."[200] The *Mueller* Court recognized the Minnesota tax deduction program was available to "all parents" of public and non-public school students.[201] Due to this neutrality, the program was upheld despite the fact that the majority of the tax benefits went to parents of parochial school children.

Similarly, under the Choice Program, the terms of the assistance appear to be neutral because the aid is directed at "any pupil" who may attend "any private school."[202] Although the funds assist only those parents whose children are randomly selected to attend a private school, the program itself is initially available to parents of students who have been "enrolled in [a public] school district," "attending a private school," or "not enrolled in school."[203]

B. Genuinely Independent and Private Choices

In *Mueller* and *Witters,* the Court upheld government aid flowing to religious institutions that resulted from "genuinely independent and private choices of aid recipients."[204] In *Mueller*, for instance, the parents of private and public school students were permitted to take tax deductions for certain school expenses.[205] Likewise, any assistance received under the Choice Program requires independent actions and private choices of the parents of eligible children. The parents are instructed to submit an application for admission. In addition, once funds are disbursed to the parents, they must endorse the check for use by the school.[206] It would appear, therefore, that the Choice Program's scheme allows for private, independent choices.

C. Financial Incentive

In *Witters*, the Court held that state funding provided "no financial incentive for students to undertake sectarian education" because the money offered no greater benefits for recipients who attended religious schools.[207] Similarly, the government-funded sign-language interpreters in *Zobrest* offered no financial incentive because it was a "neutral serv-

200. Mueller v. Allen, 463 U.S. 388, 398-99 (1983).

201. *Id.* at 390-91.

202. WIS. STAT. § 119.23 (2)(a) (1995-96).

203. *Id.* § 119.23 (2)(a)(2).

204. *Mueller*, 463 U.S. at 399; Witters v. Washington Dep't of Servs. for Blind, 474 U.S. 481, 488 (1986).

205. *Mueller*, 463 U.S. at 391.

206. WIS. STAT. §§ 119.23(3)(a), (4).

207. *Witters*, 474 U.S. at 488.

ice" that did not distinguish between sectarian and non-sectarian schools.[208]

Under the Choice Program, the tuition for participating students is paid for through funds from the state.[209] The service provided by the participating private school, however, is the same service the public school would have otherwise furnished. If a student chooses to stay in a public school, the state will distribute that student's share to the public school. If, however, the student enrolls in a private school under the Choice Program, the student's share is disbursed to that participating private school. In either case, neither the parents nor the students receive a financial benefit from the program.

D. Agostini v. Felton

Under the most recent Establishment Clause scheme from *Agostini*, the Supreme Court has allowed more flexibility in its analysis of permissible state aid to schools. First, the Court held that government aid that provides direct assistance to the educational function of a sectarian school is permissible.[210] This proposition undermines the conclusion from *Nyquist* that unrestricted funds have a primary effect of advancing religion because they directly subsidize the religious activities of the sectarian schools.[211] Even though the "education function" of many sectarian schools includes the inculcation of religious teachings, *Agostini* would permit such assistance. Following this line of reasoning, the Choice Program would be permissible even if the funds utilized for the "education function" of the participating sectarian school applied wholly or in part to foster religious education.

The second proposition from *Agostini* provides that aid that merely supplements a school is acceptable as long as it does not relieve the school of costs it otherwise would have borne in educating its students. Under the School Choice program, the aid disbursed to the participating schools is used to cover the tuition of the School Choice children. In addition, "[n]o more than 49% of a private school's enrollment may consist of pupils attending the private school under [the Choice Program]."[212] Because the aid will never exceed 50% of the tuition received, the funding would, arguably, not be regarded as supplanting, but

208. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 9-10 (1996).
209. *See* generally Wis. STAT. § 119.23 (1995-96).
210. *See* Agostini v. Felton, 117 S. Ct. 1997, 2011 (1997).
211. *See* Committee for Public Educ. & Religious Liberty, 413 U.S. 756, 774 (1973).
212. WIS. STAT. § 119.25(2)(b)(2) (1995-96).

merely supplementing, a school's budget. Moreover, the funding would not relieve the school of costs it otherwise would have borne in educating its students. Rather, the funds would be used to cover costs of new students entering under the Choice Program.

The third proposition under *Agostini* states that funds not distributed directly to participating schools are more likely to be valid. This tenet is met by the Choice Program because the funds, although sent to the participating schools, are disbursed to the parents who endorse the checks for the schools.[213]

Finally, *Agostini* establishes that the proportion of sectarian students who receive aid does not determine the program's constitutionality. This proposition, supported by the Court in *Mueller*,[214] would render inapposite any empirical evidence showing that the students who benefited from the Choice Program were primarily enrolled in private, religious schools.

Based on the precedent established by *Agostini*, it is apparent that the Choice Program now has as strong a case as ever under the Supreme Court's Establishment Clause jurisprudence. Justice O'Connor, however, admonished other courts from finding an implicit reversal of precedent established in other school aid cases.[215] It is only a matter of time, therefore, before the Court takes a school choice case, such as Wisconsin's, and determines the fate of voucher programs.

VI. CONCLUSION

Under the Supreme Court's traditional approach for determining the constitutionality of state aid to private schools, the *Lemon* test would likely hold Wisconsin's Choice Program unconstitutional because of the program's resemblance to the state assistance that was rejected in *Nyquist*. Recently, however, the Court has adopted new tenets upon which it will consider such grant programs. In *Agostini v. Felton* the Court overruled its prior holdings in *Aguilar v. Felton* and *School District of Grand Rapids v. Ball*, and abandoned many of the assumptions upon which an Establishment Clause analysis has traditionally relied. Although the Court insisted that *Agostini* should not be read as a rever-

213. *See* WIS. STAT. § 119.23(4) (1995-96).

214. The Court in *Mueller* disregarded the fact that the vast majority of parents benefiting from the tax deductions were parents of private school students. *See* Mueller v. Allen, 463 U.S. 388, 401 (1983).

215. *See Agostini*, 117 S. Ct. at 2017.

sal of other school aid cases,[216] it appears the Court is on the road to overturning the tenets of *Nyquist* and opening the door to school choice in the United States.

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216. *See id.*