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Scaling the Wall Between Church and State: An Analysis of the Constitutionality of School Vouchers

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Scaling the Wall
Between Church and State:
An Analysis of the Constitutionality of School Vouchers

BY ALLISON M. OLCZAK*

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INTRODUCTION

An issue gaining controversial momentum is that of the school choice voucher. Under a typical voucher program, the state gives parents vouchers to use at a public or parochial school of their choice, instead of paying tuition. The school redeems the vouchers to the government in exchange for funds. School vouchers provide an interesting dichotomy for analysis because of the contrast of two fundamental traditions upon which our society is based: freedom of choice and separation of church and state. Proponents of vouchers believe that “school choice, facilitated through school voucher legislation, can revitalize America’s schools.” Most school choice voucher proposals, however, include parochial schools as an option, thus creating potential Establishment Clause concerns. Thomas Jefferson referred to the Establishment Clause as “building a wall between church and State.” As more cities and states attempt to create voucher programs which will survive constitutional

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1 See Peter J. Weishaar, Comment, School Choice Vouchers and the Establishment Clause, 58 ALB. L. REV. 543, 543 (1994).
3 See generally Brown v. Bd. of Educ., 347 U.S. 483 (1954). It is not true that people have a “right” to an education, although the importance of an education has an estimable history in the United States.
6 Reynolds v. United States, 98 U.S. 145, 162 (1879) (citing Jefferson’s reply to an address by the Danbury Baptist Association).
scrutiny and as political candidates continue to use vouchers as campaign platforms, analysis of this issue remains a timely consideration.

Part I of this Note discusses the evolution of the school voucher theory and provides important background regarding underlying policies of the theory. Part II provides the constitutional framework relevant to this analysis. Part III discusses relevant case precedent. Part IV illustrates specific voucher programs and the resulting controversies. Part V analyzes the relevant factors in creating a constitutionally permissible voucher program and forecasts how the current Supreme Court would handle a school voucher case. The Note concludes that school vouchers are potentially constitutionally permissible.

I. EVOLUTION OF THE SCHOOL VOUCHER

A. Background: A Theory of Choice

To gain a perspective regarding both the growing support for and opposition against vouchers, it is necessary to examine the theoretical underpinnings and goals of voucher systems and what they seek to accomplish. Competition is one of the general principles underlying vouchers.\(^7\) If parents choose which school their children will attend, schools will have a greater incentive to improve in order to compete for students.\(^8\) While schools will continue to receive government funding, it will not be automatic.\(^9\) Funds will be determined by the parents' decisions, not government allocation.\(^10\) Schools will have to appeal to the parents to receive funding from the vouchers.\(^11\) Schools receiving inadequate funds will be forced to make improvements in order to attract students. This creates an "educational marketplace."\(^12\)

The critical concepts behind school vouchers have existed for centuries.\(^13\) The first known voucher idea was articulated by John Stuart Mill.\(^14\) Mill theorized:

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\(^7\) See Nasstrom, supra note 4, at 1067.
\(^8\) See id.
\(^9\) Id. at 1067 n.7.
\(^11\) See id. at 127.
\(^12\) Id.
\(^13\) See Nasstrom, supra note 4, at 1070.
\(^14\) Jasperson, supra note 10, at 127.
If the government would . . . require for every child a good education . . . it might leave to parents to obtain the education where and how they pleased, and content itself with helping to pay the school fees of the poorer classes of children, and defraying the entire school expenses of those who have no one else to pay for them.\textsuperscript{15}

Mill further alleged that teachers’ salaries resulted in stagnate progress and that their salaries should be correlative of their abilities.\textsuperscript{16} In his opinion, this would create the necessary motivation to improve the quality of schools.\textsuperscript{17}

Adam Smith used a similar analysis in \textit{Wealth of Nations} by introducing “consumer sovereignty.”\textsuperscript{18} Smith theorized that students were like consumers.\textsuperscript{19} Students would only choose the best teachers.\textsuperscript{20} Therefore, inadequate teachers would be phased out because they would receive no compensation.\textsuperscript{21}

Thomas Paine argued for tax programs that would grant disadvantaged parents revenue from taxes to use toward choosing their children’s schools.\textsuperscript{22} Paine’s idea illustrates that providing parents with economic aid to increase their children’s educational opportunities has roots grounded in the nineteenth century.\textsuperscript{23} This economic ideology is the foundation for modern educational reform through vouchers.

Milton Friedman, a University of Chicago professor, is often referred to as the “Father of Modern Educational Vouchers.”\textsuperscript{24} He expanded Smith’s “consumer sovereignty” to include the educational voucher in the 1950s.\textsuperscript{25} He analogized schools to monopolies.\textsuperscript{26} With only a limited amount of vouchers available, both private and public schools would have to “outdo”

\textsuperscript{15} Id. at 127 n.1 (quoting \textsc{John Stuart Mill}, \textit{On Liberty} 104 (Elizabeth Rapaport ed., Hackett Publ’g Co. 1978) (1859)).

\textsuperscript{16} See Nasstrom, supra note 4, at 1070 n.21 (citing John Stuart Mill, \textit{Educational Endowments, in Essays on Equality, Law, and Education} 207, 209 (John Robinson ed., 1984)).

\textsuperscript{17} See id.

\textsuperscript{18} Jasperson, supra note 10, at 127.

\textsuperscript{19} Id.

\textsuperscript{20} Nasstrom, supra note 4, at 1070.

\textsuperscript{21} Id.

\textsuperscript{22} Id.

\textsuperscript{23} See id.

\textsuperscript{24} Jasperson, supra note 10, at 127.

\textsuperscript{25} Id.

\textsuperscript{26} Nasstrom, supra note 4, at 1071.
one another to obtain funds. The government would not simply distribute funds arbitrarily—parents would determine allocation based on merit. At first, Friedman’s voucher plan received little attention. But growing dissatisfaction with school systems inspired a resurgence in the voucher theory. Furthermore, reports in the 1980s created a fear that American schools were in danger of being surpassed by other nations. Vouchers emerged as a potential solution to a growing concern.

B. Policy Considerations

Vouchers have been controversial from the outset for reasons other than constitutional challenges. A review of the arguments for and against vouchers illustrates the underlying issues.

Opponents argue that vouchers will not ameliorate the problems schools are facing, but rather will upset the balance of community representation in education and government spending. One of the primary arguments is that vouchers will further segregate the educational communities. If this segregation does occur, vouchers would be unconstitutional. If students are allowed to choose which school they attend, stratification will occur and schools will lack equal representation of the whole community. Opponents do not suggest that the problems schools are facing should be ignored, but they do not view vouchers as a “cure-all.” Voucher opponents focus on reformation of the current system. Allowing students to leave a school decreases its aid because aid is usually contingent upon the total number of students. This, in turn, lowers the educational opportunities offered. The children of parents who do not utilize the voucher program therefore suffer. Voucher opponents argue that reform should be in support of the “best public good, not the best individual good.”

The counter-position is that traditional public schools need drastic changes and that school vouchers both encourage cultural diversity and
level the economic playing field by allowing children to attend schools outside of their neighborhoods.\textsuperscript{36} With the help of vouchers, parents in the inner cities would be able to send their children to schools in suburban areas, exposing them to new opportunities and better facilities.\textsuperscript{37}

If vouchers are implemented, supplementation becomes an issue.\textsuperscript{38} Some voucher supporters believe in "unrestricted vouchers."\textsuperscript{39} Schools can set tuition costs and families can supplement vouchers based on their income.\textsuperscript{40} Some people, however, cannot afford to supplement vouchers. Voucher opponents believe supplementation will contribute to segregation, leaving some children at a serious disadvantage. For these parents, their inability to supplement the voucher leaves them fewer options.

As a compromise, Professors John Coons and Stephen Sugarman have proposed a "family power equalizing" scheme.\textsuperscript{41} Under such a model, parents would evaluate the costs and benefits of their educational choices and, "at least theoretically, poor families could afford the high-priced schools as easily as the rich."\textsuperscript{42}

Opponents of vouchers are also concerned with accountability.\textsuperscript{43} In a voucher system, government oversight would be eliminated, placing a great deal of policing in the hands of parents and students. Voucher supporters hope that parents and teachers will effectively communicate to establish a system of accountability.\textsuperscript{44} Allowing parents to directly control their children's education assumes that they will make informed, wise decisions. Leaving the education system checked only by market factors may result in disadvantages to a number of children.

\section*{II. CONSTITUTIONAL FRAMEWORK}

Education holds an esteemed place in this country. \textit{Brown v. Board of Education}\textsuperscript{45} stands as one of the primary cases affirming the importance of education. There, the U.S. Supreme Court observed:

\begin{itemize}
\item \textsuperscript{36} See Nasstrom, \textit{supra} note 4, at 1072.
\item \textsuperscript{37} See Jasperson, \textit{supra} note 10, at 138.
\item \textsuperscript{38} See Stick, \textit{supra} note 30, at 428.
\item \textsuperscript{39} \textit{Id.} at 428-29.
\item \textsuperscript{40} \textit{Id.} at 429.
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} See Jasperson, \textit{supra} note 10, at 140.
\item \textsuperscript{44} See \textit{id.}
\item \textsuperscript{45} \textit{Brown v. Bd. of Educ.}, 347 U.S. 483 (1954).
\end{itemize}
Today, education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.46

The Framers of the Constitution, however, did not consider education as a constitutional right.47 Education is not expressly stated in the Constitution, or in any of its amendments.48 This background provides an interesting analysis for school vouchers. A program with the goal of improving education would be looked upon favorably, but not at the expense of a constitutional right.

In addition, the Constitution prohibits laws respecting an establishment of religion.49 The Framers were explicit in their intent to separate church and state under the Establishment Clause.50 "While the Framers were strict in their opposition to the church’s involvement in government, they were equally vehement in their opposition to government’s involvement in the church."51 This framework presents the question: Do school vouchers pass constitutional scrutiny?

III. CASE PRECEDENT

True voucher theory generally includes both public and private schools.52 Problems regarding separation of church and state arise when government funding is given to parochial schools. Establishment Clause interpretations generally fall under one of two polar positions: "strict neutrality" or "strict separation."53 "Strict neutrality" is the more lenient form of interpretation.54 This perspective takes the view that the Establishment Clause "prohibits government from using religious classifications
either to confer benefits or impose burdens.\textsuperscript{55} Government programs can aid religion, as long as one religion is not preferred over another.\textsuperscript{56} By contrast, analysis from a "strict separation" perspective takes a different approach. Under this view, no government aid of any kind is to be used for religious purposes.\textsuperscript{57} The Court has struggled to determine where to draw the line between these two doctrines in interpreting the Establishment Clause.

Consideration of the constitutionality of school vouchers requires a brief survey of Establishment Clause jurisprudence. Not all of the cited cases specifically involve school vouchers, but all involve situations where the government was accused of violating the Establishment Clause through some type of endorsement of religion.\textsuperscript{58}

\section*{A. Everson v. Board of Education}

\textit{Everson v. Board of Education}\textsuperscript{59} is the first in a long line of relevant Establishment Clause cases. In \textit{Everson}, a New Jersey statute allowing local school districts to reimburse parents for the expense of providing public bus transportation to school was challenged by a school district taxpayer.\textsuperscript{60} The program included parents of children who attended both parochial and public schools.\textsuperscript{61} The Supreme Court held that the First Amendment allows states to spend tax funds "as a part of a general program under which it pays the fares of pupils attending public and other schools."\textsuperscript{62} In upholding the program, the Court pointed to two factors it deemed significant. First, no money was directly given to the schools.\textsuperscript{63} Second, the program's primary purpose was to aid in safely transporting children to and from school.\textsuperscript{64} The Court compared the program to police and fire department services provided for sectarian schools for the general welfare of the students.\textsuperscript{65}

\begin{footnotes}
\item[55] Id.
\item[56] See Weishaar, \textit{supra} note 1, at 545.
\item[57] Stick, \textit{supra} note 30, at 433.
\item[58] See infra Parts IIIA-C.
\item[60] Id. at 3.
\item[61] Id.
\item[62] Id. at 17.
\item[63] Id. at 18.
\item[64] Id.
\item[65] See id. at 17-18.
\end{footnotes}
B. Lemon v. Kurtzman

*Lemon v. Kurtzman* was the first case in which the Court unequivocally declared aid to parochial schools to be a violation of the Establishment Clause. Although *Everson* seemed to set precedent for Establishment Clause challenges, *Lemon* was more specific in articulating the relevant factors. In *Lemon*, the Court decided whether or not Rhode Island and Pennsylvania statutes authorizing direct payment of salaries to teachers of secular subjects violated the Establishment Clause. The Court developed a three-pronged test to analyze whether statutes authorizing public funds to sectarian interests are constitutional. First, the "statute must have a secular legislative purpose." Second, its "principal or primary effect must be one that neither advances, nor inhibits religion." Third, the statute must not foster "an excessive government entanglement with religion." If any of the prongs are not satisfied, the statute is unconstitutional. Despite some apparent disgruntlement with *Lemon*, a similar test will likely be the standard under which school vouchers are evaluated.

1. *The First Prong: Secular or Sectarian Interest*

The secular or sectarian interest prong has lost significance when dealing with the issue of aid to parochial schools because "the Court has easily found an adequate secular purpose in all such cases." The Court will only find that a secular purpose is unconstitutional if the statute's alleged secular purpose is in truth merely a camouflaged means of promoting religion. Only extreme situations fail to meet the requirements of this prong.

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67 *See Stick*, supra note 30, at 434.
69 *See DeShano*, supra note 50, at 750.
70 *Lemon*, 403 U.S. at 606.
71 *See id.* at 612-13.
72 *Id.* at 612.
73 *Id.* (quoting Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).
74 *Id.* at 613 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
75 *See Nasstrom*, supra note 4, at 1082.
76 *See id.* Various Supreme Court Justices have attacked *Lemon* for its alleged misunderstanding of the Establishment Clause. *Id.*
77 *See id.*
78 *Stick*, supra note 30, at 434.
79 *See Nasstrom*, supra note 4, at 1083.
80 *Id.*
2. **The Second Prong: Primary Effects**

The second prong of the *Lemon* test establishes that government programs which “neutrally provide benefits to a broad class of citizens defined without reference to religion” are immune from Establishment Clause challenges.81 Basically, the government cannot “grant aid to a religious school . . . where the effect of the aid is ‘that of a direct subsidy to the religious school’ from the state.”82 Problems arise when applying this prong because there seems to be no clear standard.83 Case law suggests that this so-called “effects” prong is of utmost significance, yet difficult to categorize.84 The result is “inconsistent decisions and curious distinctions.”85 Because this prong predominates the Court’s analysis, a more detailed examination of the case law is warranted.

a. Committee for Public Education & Religious Liberty v. Nyquist

At issue in *Committee for Public Education & Religious Liberty v. Nyquist*86 were amendments to New York’s tax laws designed “to ensure the health, welfare and safety of enrolled pupils” in low-income urban areas.87 Several programs established by the amendments were challenged as violations of the Establishment Clause.88 The first statutory provision supplied funds to schools directly to help with maintenance and school upkeep.89 The second section provided tuition reimbursements to the parents of underprivileged children attending non-public schools.90 The remaining provisions were tax deductions for parents not qualifying for the tuition reimbursements.91 The Court ultimately struck down each New York tax provision as violative of the Establishment Clause.92

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83 See *Stick*, *supra* note 30, at 435.
84 See *Nasstrom*, *supra* note 4, at 1084.
85 *Stick*, *supra* note 30, at 435.
87 Id. at 762.
88 See id. at 759.
89 See id. at 762-63.
90 See id. at 764.
91 See id. at 765-66.
92 See id. at 798.
The thrust of the Court’s reasoning was that the effect of this aid was
to directly promote religious purposes.\textsuperscript{93} There was no oversight to assure
that the money was used for secular, non-religious purposes.\textsuperscript{94} In the
“maintenance and repair” provision the aid was given directly to the
schools—many of them sectarian—thereby advancing religion.\textsuperscript{95} Likewise,
the tuition reimbursement provision also promoted religion because parents
were indemnified by government grants for sending their children to
sectarian schools.\textsuperscript{96} The Court deemed the fact that the money was given
to parents and not to schools “only one among many factors to be
considered”\textsuperscript{97} and not significant enough to make the provision constitu-
tional per se.\textsuperscript{98} The Court applied the same logic when striking down the
tax deductions.\textsuperscript{99} Despite the benefits such programs may confer, the
overall effect of the aid was to provide funding to non-public, sectarian
schools.\textsuperscript{100}

\textit{b. Mueller v. Allen}

Another tax-deduction scheme was challenged on similar grounds in
\textit{Mueller v. Allen}.\textsuperscript{101} The controversy there centered on a Minnesota statute
that allowed state taxpayers to deduct expenses for tuition, supplies, and
transportation.\textsuperscript{102} This time, however, the outcome was different. The
Supreme Court distinguished \textit{Mueller} from \textit{Nyquist} and found the program
constitutional.\textsuperscript{103} Justice Rehnquist found similarities between the \textit{Mueller}
tax deduction and those for charity and medical expenses.\textsuperscript{104} In addition, the
Minnesota tax-deduction program applied to all parents, not just to those
whose children attended private schools.\textsuperscript{105} Sectarian schools were

\textsuperscript{93} See Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
\textsuperscript{94} See Nasstrom, supra note 4, at 1084-85.
\textsuperscript{95} \textit{Nyquist}, 413 U.S. at 774.
\textsuperscript{96} \textit{Id.} at 783.
\textsuperscript{97} \textit{Id.} at 781.
\textsuperscript{98} Nasstrom, supra note 4, at 1085.
\textsuperscript{99} See \textit{Nyquist}, 413 U.S. at 791.
\textsuperscript{100} See \textit{id.} at 794.
\textsuperscript{102} See \textit{id.} at 390.
\textsuperscript{103} See Stick, supra note 30, at 444-45 (discussing Chief Justice Rehnquist’s
attempts to distinguish \textit{Nyquist}).
\textsuperscript{104} See \textit{Mueller}, 463 U.S. at 396.
\textsuperscript{105} See \textit{id.} at 397.
receiving an "attenuated financial benefit," but it was the result of "numerous private choices" of parents that triggered the funding, not a direct subsidy from the state.

_Mueller_ is problematic because the key factors that separated _Mueller_ from _Nyquist_ were format variations. The constitutional standard became blurred because the practical effect of _Mueller_ was that sectarian, non-public schools benefitted from the program. Parents of children who attended Minnesota public schools did not deduct the cost of books, tuition, and transportation because these costs were already covered by the district. Therefore, the parents of students who attended sectarian schools predominantly benefitted from the tax deduction. The Court noted that it would be "loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." Although the Court's reasoning was rational, the distinction between _Nyquist_ and _Mueller_ was marginal. The contrasting holdings demonstrate the difficulty in articulating an Establishment Clause standard and reflect the confusion inherent in applying the "effects" prong of _Lemon_.

c. Witters v. Washington Department of Services for the Blind

_Witters v. Washington Department of Services for the Blind_ involved the constitutionality of a program that provided state aid to facilitate special education or training for visually handicapped students. The structure of the statute was similar to the one in _Mueller_. The Establishment Clause question surfaced because a student was denied aid to attend a private Bible college where he was "studying the Bible, ethics, speech, and church administration in order to equip himself for a career as a pastor, missionary, or youth director." The Supreme Court upheld the statute on the grounds

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106 Id. at 400.
107 Id. at 399.
108 See id. at 399-400.
109 See Nasstrom, supra note 4, at 1087.
110 See _Mueller_, 463 U.S. at 401.
111 See id.
112 See id.
113 Id.
115 See id. at 483.
116 See id. at 490-92 (Powell, J., concurring).
117 Id. at 483.
that it did not have the "effect" of promoting religion.\textsuperscript{118} There was no specific benefit for enrolling in a sectarian college because the same benefit would have been available if the student had chosen a public university.\textsuperscript{119} The Court emphasized that any aid that may flow to religious institutions would do so only as a result of a student's personal decision.\textsuperscript{120} From the Court's perspective, then, the government funds were not advancing religion.\textsuperscript{121}

Viewed broadly, \textit{Witters} highlights the structural factors that must be met for a statute to satisfy the "effects" prong of \textit{Lemon}: independent choice and neutrality.\textsuperscript{122} These dual factors played a pivotal role in subsequent Establishment Clause cases.

d. \textit{Zobrest v. Catalina Foothills School District}

In \textit{Zobrest v. Catalina Foothills School District},\textsuperscript{123} the issue was whether a student could use a state-provided interpreter to help him hear while attending a Roman Catholic high school.\textsuperscript{124} The Supreme Court was again influenced by \textit{Mueller}.\textsuperscript{125} The Court noted, however, that there were two distinguishing factors: the purpose of the statute was to aid handicapped persons and independent decisions created the link to sectarian schools.\textsuperscript{126} The Court focused on the "effects" prong of the \textit{Lemon} test, but found that children and their education were the primary benefactors of the government money—religion was simply a side effect.\textsuperscript{127} The Court placed emphasis on the fact that the Individuals with Disabilities Education Act ("IDEA") was a neutral government program dispensing aid, not to public or private schools, but to individual children with disabilities.\textsuperscript{128} The purpose of the Act was to assist states in providing education for handi-

\begin{itemize}
\item \textsuperscript{118} See id. at 488-89.
\item \textsuperscript{119} See id. at 488.
\item \textsuperscript{120} Id. at 487.
\item \textsuperscript{121} See id. at 489.
\item \textsuperscript{122} Id. at 487. See also Nasstrom, \textit{supra} note 4, at 1088 (discussing available aid that flows to religious institutions only after an independent choice has been made to attend a religiously-affiliated school).
\item \textsuperscript{123} \textit{Zobrest v. Catalina Foothills Sch. Dist.}, 509 U.S. 1 (1993).
\item \textsuperscript{124} Id. at 3.
\item \textsuperscript{125} See id. at 2.
\item \textsuperscript{126} See id. at 10.
\item \textsuperscript{127} See id. at 12. See also Nasstrom, \textit{supra} note 4, at 1089.
\item \textsuperscript{128} See Zobrest, 509 U.S. at 2.
\end{itemize}
capped children;\textsuperscript{129} whether the children had religious preferences was irrelevant under \textit{Lemon}'s "effects" prong.\textsuperscript{130} \textit{Zobrest} represented a new approach in analyzing Establishment Clause challenges since neither the majority nor the dissent applied the \textit{Lemon} test in reaching their conclusion.\textsuperscript{131} \textit{Zobrest} also indicated that some Justices were dissatisfied with a strict application of the \textit{Lemon} test.\textsuperscript{132}

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

Courts recognize two forms of excessive entanglement: administrative entanglement\textsuperscript{133} and political divisiveness.\textsuperscript{134} Administrative entanglement exists between church and state if a statute incorporates "comprehensive, discriminating, and continuing state surveillance."\textsuperscript{135} \textit{Lemon} provides an illustration of administrative entanglement.\textsuperscript{136} Under the statute at issue, per-pupil expenditures of sectarian schools receiving the supplement could not exceed the average per-pupil expenditure of public schools.\textsuperscript{137} To determine if the figures were adequate, the government was forced to compare the amount spent on secular education to the portion of the funds spent on religious education.\textsuperscript{138} The Supreme Court held that this examination procedure was "fraught with the sort of entanglement the Constitution forbids."\textsuperscript{139}

The other form of entanglement occurs when a statute promotes political divisiveness.\textsuperscript{140} Political divisiveness occurs when the government is so closely involved in religion that it disrupts religious sects.\textsuperscript{141} Political divisiveness is difficult to define. Basically, the government cannot formulate programs that require constituents to take sides based on

\begin{itemize}
\item \textsuperscript{129} \textit{Id.} at 5.
\item \textsuperscript{131} \textit{Id.} at 825.
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} Stick, supra note 30, at 450. See infra notes 134-39 and accompanying text.
\item \textsuperscript{134} Stick, supra note 30, at 450. See infra notes 140-44 and accompanying text.
\item \textsuperscript{135} \textit{Lemon} v. Kurtzman, 403 U.S. 602, 619 (1971).
\item \textsuperscript{136} See \textit{id.} at 609.
\item \textsuperscript{137} \textit{id.} at 620.
\item \textsuperscript{138} See \textit{id.}
\item \textsuperscript{139} \textit{Id.}
\item \textsuperscript{140} \textit{id.} at 622.
\item \textsuperscript{141} See Nasstrom, supra note 4, at 1089.
\end{itemize}
religion.\textsuperscript{142} Political divisiveness alone will not be enough to strike down a statute.\textsuperscript{143} The Court illustrated this point in \textit{Lemon} by noting that “[t]he history of many countries attests to the hazards of religion’s intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.”\textsuperscript{144}

\section*{C. Agostini v. Felton}

The Supreme Court’s decision in \textit{Agostini v. Felton}\textsuperscript{145} has fueled speculation as to how the voucher issue will be treated by the Court.\textsuperscript{146} At issue in \textit{Agostini} was a challenge to an injunction which had been issued pursuant to the Court’s decision in \textit{Aguilar v. Felton}.\textsuperscript{147} In \textit{Aguilar}, the Supreme Court analyzed the Elementary and Secondary Education Act of 1965, which provided federal funding for remedial instruction by government employees on the premises of sectarian schools.\textsuperscript{148} The Court held that the funding did violate the Establishment Clause and that the Board of Education had to restructure the program such that aid was administered without implicating sectarian schools.\textsuperscript{149} Twelve years later, in the \textit{Agostini} case, the Board and parents of sectarian school students petitioned to lift the injunction, arguing that \textit{Aguilar} “ha[d] . . . been undermined by subsequent Establishment Clause decisions.”\textsuperscript{150} The Court reviewed the case again and reversed, holding that the New York City program was constitutional and that the remedial programs could be conducted on sectarian-school premises.\textsuperscript{151} Commentators predict that the \textit{Agostini} decision will have far-reaching effects on school vouchers.\textsuperscript{152} Supporters of school vouchers suggest that

\begin{footnotes}
\footnotesize
\item[142] See id. at 1091.
\item[144] \textit{Lemon}, 403 U.S. at 623.
\item[145] \textit{Agostini} v. Felton, 521 U.S. 203 (1997).
\item[146] See \textit{McJunkins}, supra note 130, at 831.
\item[147] \textit{Agostini}, 521 U.S. at 214.
\item[149] \textit{Aguilar}, 473 U.S. at 408. See also \textit{School Dist. of Grand Rapids v. Ball}, 473 U.S. 373 (1985). Both cases were overruled by \textit{Agostini}.
\item[150] \textit{Agostini}, 521 U.S. at 214-16.
\item[151] See id. at 214.
\item[152] See, e.g., \textit{McJunkins}, supra note 130, at 831.
\end{footnotes}
the Court’s reasoning can be interpreted as a “green light” for vouchers.\textsuperscript{153} Since \textit{Agostini} allowed government funds to be used to provide services to both public and sectarian schools, it has been argued that the structure of the funding will be a model for the drafting of school voucher legislation.\textsuperscript{154} Advocates of vouchers argue that, with careful drafting, these basic premises can be followed to create a constitutionally-permissible voucher program.

\textit{Agostini} is relevant to the future of school vouchers because the Court relied on the “entanglement” prong of the \textit{Lemon} test in deciding the case.\textsuperscript{155} The \textit{Lemon} test, which had been criticized in recent Court decisions, was resurrected in \textit{Agostini}.\textsuperscript{156} If the Court does grant certiorari to settle the debate concerning whether vouchers violate the Establishment Clause, the Court will most likely apply \textit{Lemon}. Arguably, the test will not be a pure application of \textit{Lemon}, but more of a hybrid of the test and other approaches articulated in recent cases.\textsuperscript{157} The result is “\textit{Lemon} with a twist,”\textsuperscript{158} or an altered test that would allow voucher programs to withstand Establishment Clause scrutiny.

In \textit{Agostini}, the Court collapsed the “effects” and “entanglement” prongs of the \textit{Lemon} test.\textsuperscript{159} The Court noted that “the factors we use to assess whether an entanglement is ‘excessive’ are similar to the factors we use to examine ‘effect.’”\textsuperscript{160} Among those factors are the: (1) type of institution receiving aid; (2) nature of that aid; and (3) connection between the institution receiving aid and the government.\textsuperscript{161} Since the same factors were used to make both determinations, the Court found that “it [was] simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute’s effect.”\textsuperscript{162} Critically, the Court found that a statute has the primary effect of advancing religion only if it results in government indoctrination, defines recipients by reference to religion,
and creates excessive entanglement.\textsuperscript{163} Since the program did none of these things, the Court found the program constitutional.\textsuperscript{164}

In \textit{Aguilar}, the Court found excessive entanglement because the Court "presumed that full-time public employees on parochial school grounds would be tempted to inculcate religion,"\textsuperscript{165} which could be prevented only by pervasive state monitoring.\textsuperscript{166} Since, in subsequent cases, the Court abandoned the assumption that public employees are likely to inculcate religion,\textsuperscript{167} the \textit{Agostini} Court did not assume that the program would require monitoring.\textsuperscript{168} Accordingly, there were no grounds for finding that the program would lead to excessive entanglement.\textsuperscript{169} Additionally, it is possible that the Court sought to retain as much of the original three-pronged \textit{Lemon} test as possible, but applied it less stringently to accommodate the coexistence of public funding and religious institutions.

In sum, \textit{Agostini} is a turning point between a strict separationist view of church and state and a more liberal interpretation.\textsuperscript{170} Its importance is manifest because it is relied on heavily in the most recent Establishment Clause cases.\textsuperscript{171}

\textbf{D. Additional Tests for Establishment Clause Challenges}

Several Justices have expressed dissatisfaction with the \textit{Lemon} test as the sole means of evaluating Establishment Clause cases.\textsuperscript{172} \textit{Lemon} has not been overruled, but additional ways of analyzing these issues may be pertinent to a voucher analysis.

1. \textit{The Endorsement Test}

In a concurring opinion in \textit{Lynch v. Donnelly},\textsuperscript{173} Justice O'Connor suggested a new approach for analyzing Establishment Clause cases.

\begin{itemize}
  \item \textsuperscript{163} \textit{Id.} at 234.
  \item \textsuperscript{164} \textit{Id.} at 234-35.
  \item \textsuperscript{165} \textit{Id.} at 234.
  \item \textsuperscript{166} \textit{Id.}
  \item \textsuperscript{167} \textit{Id.}
  \item \textsuperscript{168} \textit{Id.}
  \item \textsuperscript{169} \textit{See id.}
  \item \textsuperscript{170} \textit{See McGuninas, supra} note 130, at 813.
  \item \textsuperscript{171} \textit{See infra} Part III.E.
  \item \textsuperscript{172} \textit{See Nasstrom, supra} note 4, at 1082.
\end{itemize}
O’Connor suggested that the crux of the analysis should be whether the governmental actions convey a message of “endorsement or disapproval of religion.”

*Lynch* was an Establishment Clause challenge to the town of Pawtucket, Rhode Island’s practice of maintaining a nativity scene, or creche, during the holiday season. The nativity scene was part of a display located in the city’s shopping district that also included a Santa Claus house, a Christmas tree, candy canes, reindeer, colored lights and a banner reading “SEASONS GREETINGS.” The three prongs of the *Lemon* test were applied but the seeds of a new approach were planted. The Court recognized that complete separation of church and state was inconceivable because “no institution [in society] can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government.”

The Court held that (1) the display of the creche furthered the secular purpose of celebrating and explaining the origins of the holiday; (2) the creche did not have the primary effect of furthering religion and that any advancement of religion was merely “indirect, remote, and incidental”; and (3) there was no excessive entanglement between government and religion because the city owned the creche. Justice O’Connor reasoned that a nativity scene should pass constitutional muster because it serves the secular purpose of “celebrating a public holiday with traditional symbols” and, hence, “cannot fairly be understood to convey a message of government endorsement of religion.”

The Court held that the government’s use of religious symbolism is only unconstitutional if, taken in context, it has the effect of *endorsing* a religious belief. Because “the overall holiday setting changes what viewers may fairly understand to be the purpose of the

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174 Id. at 688.
175 See id. at 671.
176 Id.
177 See id. at 679-85.
178 Id. at 673.
179 Id. at 681. The city argued that additional secular purposes for the display included “attract[ing] people to the downtown area in order to promote pre-Christmas retail sales” and “engender[ing] the spirit of goodwill and neighborliness commonly associated with the Christmas season.” Id. at 699 (Brennan, J., dissenting).
180 Id. at 683.
181 Id. at 684.
182 Id. at 693.
183 See id. at 690.
display,” the Court found that the reasonable viewer was not likely to understand the creche as an endorsement of religion. The location of the creche and the fact that it was surrounded by many other holiday symbols also factored into the conclusion that the creche display did not endorse religion.

Justice O’Connor’s test is looked upon favorably by some scholars, but it is not without its critics. The test seems to work well with communicative government acts but does not offer as credible an assessment when applied to government aid that is noncommunicative in nature. Additionally, using the perceptions of society as a standard for determining if a government act endorses religion may “unacceptably rely on the religious viewpoint of the majority while discounting the perspective of minorities.” Finally, Justice Kennedy has argued that the endorsement test only applies to specific fact patterns and does not apply generally because the Court cannot serve as a “national theology board.” The endorsement test has been influential and provides another angle under which to analyze Establishment Clause challenges.

2. The Coercion Test

Under the coercion test, the government cannot influence citizens to either support or reject religion. Justice Kennedy employed this test in Lee v. Weisman, where the Supreme Court held that an invocation and convocation during a high school graduation ceremony were unconstitutional. The Court looked at the nature of the activity and the practical effect the government action had on the individuals involved. The Court reasoned that because “[e]veryone knows that in our society and in our culture high school graduation is one of life’s most significant occasions . . . a student is not free to absent herself from the graduation exercise in

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184 Id. at 692.
185 See id. at 692-93.
186 See Stick, supra note 30, at 457.
187 Id.
188 Id. at 458.
190 See Nasstrom, supra note 4, at 1099.
192 See id. at 577.
193 See id. at 593.
any real sense of the term ‘voluntary.’”

The coercion test remains primarily the brainchild of Justice Kennedy, however. Several other Justices have questioned its scope and effectiveness in different types of church and state cases.

Regardless of whether the coercion test becomes generally accepted, it is clear that the current Justices disagree as to what constitutes “coercion” for the purposes of Establishment Clause analysis. Justice Kennedy, for example, advances a broad definition of “coercion” that includes both social and psychological pressure. Under Justice Kennedy’s analysis, psychological coercion, “though subtle and indirect, can be as real as any overt compulsion.” Expecting students to stand or maintain respectful silence during a public prayer, for example, “may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.” Justices Scalia, Rehnquist, and Thomas, on the other hand, advocate a narrower definition of “coercion” that focuses on that which is tangible and direct.

An example of such narrow coercion is the imposition of civil or criminal penalties on those who refuse to participate in a state approved religious ceremony. Both viewpoints regarding the definition of coercion surface in modern cases.

E. The Latest Word

In the June 2000 term, the Supreme Court decided two Establishment Clause cases that add to the expansive precedent. As the debate about school vouchers continues, the most recent cases offer the best indication of each Justice’s viewpoint on the wall between church and state.

1. Santa Fe Independent School District v. Doe

In Santa Fe Independent School District v. Doe, a named student chaplain delivered a prayer before home football games. Mormon and

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194 Id. at 595.
195 Nasstrom, supra note 4, at 1100.
196 See Stick, supra note 30, at 454-55.
197 Id. at 454.
198 Weisman, 505 U.S. at 593.
199 Id. at 592.
200 See id. at 640-41 (Scalia, J., dissenting).
201 See id.
202 See infra notes 203-39 and accompanying text.
Catholic students and alumni filed suit challenging this practice under the Establishment Clause. While the suit was pending, the school adopted a new policy that permitted but did not require prayer. The Supreme Court struck down the policy permitting student-led prayer as a violation of the Establishment Clause.

The Court looked to Lee v. Weisman as the guideline for its analysis. The Court held that, "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith.'"

After recognizing that student-led prayer was public speech, the Court found that the Santa Fe School District policy ensured that "minority candidates will never prevail and that their views will be effectively silenced." Since the student election determined whether the invocation would be permitted, a sizeable minority of students was subjected to the religious opinions of the majority. The Court also looked at the reality of the situation, finding that the "situation plainly reveal[ed] that [the district's] policy involve[d] both perceived and actual endorsement of religion." The school's involvement in the methods of implementing the invocation was too direct and was necessarily understood as advancing religion.

Furthermore, the Court was unpersuaded by the argument that football games were distinguishable from graduation by virtue of the fact that students were not forced to attend the former. Students might choose not to attend football games because they were offended by the invocation. Further, the Court noted that "divisiveness along religious lines in a public school setting . . . [is] at odds with the Establishment Clause." Certain

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204 Id. at 294.
205 Id. The policy authorized two student elections. The first election determined whether an invocation should be delivered before the game. The second election selected the spokesperson to deliver the invocation. See id. at 296-97.
206 See id. at 301.
207 Id. at 301-02.
208 Id. at 302 (quoting Lee v. Weisman, 505 U.S. 577, 587 (1992)).
209 Id. at 304.
210 See id. at 305.
211 Id.
212 See id. at 305-07.
213 See id. at 311-12.
214 Id. at 311.
extracurricular school activities were not optional to students—band members, cheerleaders, and the football team were forced to attend football games, and were not to be subjected to religious messages.\textsuperscript{215} The Court held that allowing prayers before school football games created too much crossover between church and state.\textsuperscript{216}

An emphatic dissent was filed by Chief Justice Rehnquist, with Justices Scalia and Thomas joining.\textsuperscript{217} The dissenting opinion argued that the majority opinion set a negative tone and "bristled with hostility to all things religious in public life."\textsuperscript{218} The dissent accused the majority of misinterpreting the Establishment Clause and of applying the most rigid version of the controversial \textit{Lemon} test.\textsuperscript{219} The 6-3 split of the Court in such starkly divergent opinions illustrates the Court’s heightened judicial sensitivity to church and state issues.


At issue in \textit{Mitchell v. Helms}\textsuperscript{220} was the school aid program known as Chapter 2 of the Education Consolidation and Improvement Act of 1981.\textsuperscript{221} The aid program channeled federal funds through state educational agencies ("SEA’s") to local educational agencies ("LEA’s"), which would then lend educational materials and equipment such as library and media materials, computers, software, and other curricular materials to create programs for children in both public and private elementary and secondary schools.\textsuperscript{222} The number of children enrolled in the school determined the amount of aid.\textsuperscript{223}

Although by statute, LEA’s and SEA’s had to offer aid to both public and private schools, several restrictions applied to funds given to private schools.\textsuperscript{224} The "services, materials, and equipment" that private schools received were required to be "secular, neutral, and nonideological."\textsuperscript{225} Also,
private schools could not acquire Chapter 2 materials, equipment, or property directly. A request had to be submitted and approved by the LEA, who would then purchase the items from the school’s general allocation fund, and the items would then be lent to particular schools. These statutorily required safeguards ensured that the funds were used for secular purposes.

Mitchell exemplified the changes in fifty years of Establishment Clause jurisprudence and the difficulties courts have had in “apply[ing] these simple words in the context of governmental aid to religious schools.” The Court relied heavily on Agostini v. Felton, recognizing the decision’s importance in reformulating the Lemon test. The Court framed the issue by looking at the two prongs reformulated in Agostini: 1) whether Chapter 2 resulted in government indoctrination, and 2) whether the statute defined its recipients by reference to religion or whether it has other impermissible content.

Government indoctrination is present where “any religious indoctrination that occurs in . . . schools could reasonably be attributed to government action.” Neutrality is the criterion that the Court considered central in determining if the indoctrination is caused by the state. A program is more likely to be considered neutral if aid is given to a religious school through the private choices of individuals rather than by government will. No indoctrination occurs “if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose.” The Court held that Chapter 2 does not result in governmental indoctrination.

The Court, in addressing the second issue, held that Chapter 2 does not have the effect of advancing religion. The Court found that Chapter 2 provided aid which was allocated on the basis of neutral and secular

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226 Id.
227 Id.
228 See id.
229 Id. at 2540.
230 See id. See infra notes 145-71 and accompanying text.
231 See Mitchell, 120 S. Ct. at 2540.
232 Id. at 2541.
233 See id.
234 See id.
235 Id.
236 Id. at 2555.
237 Id. at 2552.
This aid was available to both religious and secular beneficiaries.

IV. SPECIFIC VOUCHER PROGRAMS

Constitutional concerns notwithstanding, school voucher programs have been adopted in several cities and states. These programs have been challenged as violating provisions of state constitutions. The U.S. Supreme Court has yet to decide a case concerning whether a school voucher program violates the Establishment Clause. Recently, the Court decided not to grant certiorari to such a case. Nevertheless, examining adopted school voucher programs could lend a deeper perspective in determining which types of programs can survive constitutional challenge.

A. Milwaukee, Wisconsin

Milwaukee’s voucher plan, the Milwaukee Parental Choice Plan ("MPCP"), was originally enacted in 1992. Despite several revisions, the fundamental goal of the program remains the same, to provide financial assistance for disadvantaged children to attend private schools if they so desire. Participation in the original MPCP was minimal because the program only included nonsectarian private schools. The program could enroll no more than 1.5% of all Milwaukee Public School students. The nonsectarian schools participating were also required to comply with stringent reporting and accountability measures. These restrictions

238 Id.
239 Id.
240 See Kemerer, supra note 5, at 138-40.
241 See id. at 140-42.
243 See David Schimmel, Commentary, Wisconsin Supreme Court Approves Vouchers for Parochial Schools: An Analysis of Jackson v. Benson, 130 ED. LAW REP. 373, 374 (1999) (discussing the changes made in the voucher program since it was upheld in state court under Jackson). The MPCP was amended and altered several times before the Jackson decision.
244 Id.
245 See Kemerer, supra note 5, at 138.
246 Schimmel, supra note 243, at 374.
247 See id.
greatly limited the ability of the program to accomplish its goal of offering educational options to disadvantaged children.\textsuperscript{248}

Advocates of the voucher, including Republican Governor Tommy Thompson, pushed for amendments to the MPCP to expand participation in the program for both students and schools.\textsuperscript{249} The amendments were implemented in 1995.\textsuperscript{250} The amendments brought about the following changes: 1) the cap on the number of Milwaukee public school students who could participate in the program was increased from 1.5 to 15\%,\textsuperscript{251} 2) participating schools were permitted to be sectarian as well as nonsectarian,\textsuperscript{252} 3) annual performance reviews were no longer required,\textsuperscript{253} 4) checks were issued to parents instead of to schools directly,\textsuperscript{254} and 5) constraints on how schools could spend the money were lifted.\textsuperscript{255} The amendments greatly expanded the reach of the MPCP.\textsuperscript{256}

The response to these changes was mixed. The Milwaukee Teachers Association filed suit alleging that the MPCP violated both the state and federal constitutions.\textsuperscript{257} A number of national organizations supporting and opposing vouchers joined in the litigation.\textsuperscript{258} Ultimately, the litigation culminated in \textit{Jackson v. Benson},\textsuperscript{259} where the Wisconsin Supreme Court

\begin{itemize}
\item \textsuperscript{248} Kemerer, \textit{supra} note 5, at 138. "During the 1995-96 school year, about 1,600 students attended 17 nonsectarian private schools under the original MPCP." Schimmel, \textit{supra} note 243, at 374.
\item \textsuperscript{249} Kemerer, \textit{supra} note 5, at 138.
\item \textsuperscript{250} \textit{Id.}
\item \textsuperscript{251} Schimmel, \textit{supra} note 243, at 374.
\item \textsuperscript{252} \textit{Id.}
\item \textsuperscript{253} \textit{Id.}
\item \textsuperscript{254} \textit{Id.}
\item \textsuperscript{255} Kemerer, \textit{supra} note 5, at 139.
\item \textsuperscript{256} \textit{Id.} at 138.
\item \textsuperscript{257} Schimmel, \textit{supra} note 243, at 374. A school voucher can be challenged under either the federal Constitution or a state constitution. A challenge under the latter can be substantially different than an Establishment Clause challenge. \textit{Id.}
\item \textsuperscript{258} \textit{Id.} at 374-75. The following organizations filed briefs in opposition to the school voucher program: the National Education Association, the American Civil Liberties Union, People for the American Way, Americans United for Separation of Church and State, and the National Association for the Advancement of Colored People ("NAACP"). Voucher proponents filing briefs included Parents for School Choice, the Christian Defense Fund, CEO America, the National Association of Evangelicals, and the Family Research Council. \textit{Id.}
\item \textsuperscript{259} \textit{Jackson v. Benson}, 578 N.W.2d 602 (Wis.), \textit{cert. denied}, 525 U.S. 997 (1998).
\end{itemize}
held that the amended MPCP was constitutional under both the state and federal constitutions.\footnote{See id.}

In \textit{Jackson}, the Wisconsin Supreme Court looked to the framework outlined in prior cases where government aid to religious schools was at issue. The cases of \textit{Everson}, \textit{Mueller}, \textit{Witters}, \textit{Zobrest}, and \textit{Agostini} were all examined.\footnote{See supra Part III and accompanying notes.} The court considered the neutrality of the program, the independent decision of parents, and the wide array of schools from which to choose.\footnote{See \textit{id. at 602}.} The \textit{Lemon} test was also used in reaching the decision.\footnote{See \textit{Jackson}, 578 N.W.2d at 602.} The court was persuaded by the underlying purpose of the MPCP, which was to provide disadvantaged children with better educational opportunities, and was convinced the program did so in a manner that did not violate the Constitution.\footnote{See \textit{id.}.}

The decision has promulgated strong reactions by both voucher supporters and opponents.\footnote{See \textit{id. at 628}.} Perhaps more important than the public outcry to \textit{Jackson} are the implications the decision has on the future of school voucher legislation. Many states seeking to implement voucher legislation may look to the MPCP for direction. In addition, the decision may serve as an indication of how the Court will treat an Establishment Clause challenge to voucher legislation.

\subsection*{B. Cleveland, Ohio}

In 1996, Cleveland adopted a voucher program under the direction of Republican Governor George V. Voinovich.\footnote{See \textit{Schimmel}, supra note 243, at 374.} The program was tested on a trial basis through the Ohio Pilot Scholarship Programs, which "allow[ed] parents with children in grades kindergarten through three to select private schools within the Cleveland City School District and public schools located in adjacent school districts."\footnote{See \textit{Kemerer}, supra note 5, at 139.} Although the program included both adjacent public school districts and sectarian and nonsectarian private schools, the overwhelming response was from the private schools.\footnote{Id.} The Cleveland program operated by lottery, selecting recipients from a pool of

\begin{itemize}
\item \footnote{See \textit{id.}}
\item \footnote{See \textit{id.}.}
\end{itemize}
eligible applicants for a maximum grant of $2500 per student. Under the Cleveland program, if a child elects to attend a private school, "the scholarship check is payable to the parent but transmitted directly to the school where the parent then endorses it over to the school. If the child attends an out-of-district public school, the money goes directly to the school."

The program has not been implemented without incident. The Cleveland program allowing scholarships for public school children to attend religious or secular private schools has been struck down as unconstitutional by the Sixth Circuit Court of Appeals. The crux of the 2-1 decision was that the program’s design used federal tax money to favor religious schools. Most of the fifty-six schools receiving money in the form of vouchers had a religious affiliation. The fact that parents had a choice of where to send their children was clouded because no suburban Cleveland public schools enrolled in the program. Accordingly, the court reasoned that "[t]o approve [the] program would [be to] approve the actual diversion of government aid to religious institutions in endorsement of religious education, something 'in tension' with the precedents of the Supreme Court." The dissent argued that the majority incorrectly interpreted recent Establishment Clause cases and was influenced by "anti-voucher mantra [arguing] that such programs [amount to] no more than a scheme to funnel public funds into religious schools." Both voucher advocates and opponents believe that the Supreme Court will grant certiorari to consider the case.

V. ANALYSIS: WILL MODERN SCHOOL VOUCHERS MEET CONSTITUTIONAL STANDARDS?

"The Supreme Court, beginning its new term, declined to review a case involving the politically charged issue of school vouchers." Although the

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269 Id.
270 Id. at 139-40.
272 See id. at 961.
273 See id. at 949.
274 See id.
275 Id. at 960.
276 Id. at 963.
Court seems reluctant to directly decide a voucher case, it is inevitable that it will be forced to put an end to this controversy.

This section offers no ultimate conclusion as to the constitutionality of vouchers. Rather, it is an attempt to point out the factors the Court will consider relevant to the decision and how voucher programs will have to be structured to withstand Establishment Clause challenges. This section addresses particular Justices' attitudes toward the issue of vouchers.

Despite the lack of a unifying philosophy among the Justices, Establishment Clause precedents offer some guidance in speculating how the Court will handle a school voucher program. As one scholar noted, the Court has "evinc[ed] a schizoid approach to Establishment Clause cases, moving erratically between the strict separationist standard promulgated in Everson and the accomodat[ing] theor[ies]."

A. Relevant Factors

If a school voucher program is to survive constitutional scrutiny, there are several design characteristics that will be influential. A perfect combination cannot be articulated, but the following are factors which have been singled out as critical in previous Establishment Clause cases.

First, the voucher program must be examined in its entirety. One component alone cannot make the complete program constitutional. The most obvious way a voucher could bypass a constitutional problem is to exclude religious schools from the program. However, the likelihood of a religious school exclusion is slim since the majority of private schools have some religious affiliation. In order for voucher programs to accomplish the reforms for which their supporters clamor, the programs need to be implemented on a wide scale. Removing sectarian schools from the equation lessens the impact of vouchers by decreasing the available choices for potential voucher candidates. Furthermore, a practical implication for a religious school exclusion is that with less schools from

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279 Weishaar, supra note 1, at 546 n.30 (quoting Roald Y. Mykkelvedt, Sourcing on Lemon: The Supreme Court's Establishment Clause Doctrine in Transition, 44 MERCER L. REV. 881, 883 (1993)).
280 See supra Part III.B.
281 The first MPCP gave vouchers to parents for use in public and nonsectarian private schools only. See Kemerer, supra note 5, at 138. This raises the possibility of religious discrimination charges and may not be effective unless all private schools are removed.
282 Jasperson, supra note 10, at 139.
283 See supra notes 36-37 and accompanying text.
which to choose, fewer students will be able to participate in the program. Voucher advocates will find alternative ways to structure their voucher programs to be constitutional before they allow a religious school exclusion.

Second, school vouchers should have no problem fulfilling a non-sectarian purpose requirement because their primary goal is to improve the public school systems and provide the best possible education for students. While no one wants to frustrate this worthy purpose, it must be accomplished within the context of the Constitution. Since most sectarian schools include religious teaching in their curriculum, providing an education is not their sole motive. If the two purposes become closely intermingled, there may be an Establishment Clause violation and the question becomes whether the voucher program has the effect of advancing religion or whether the religious motives are just a "side effect."

Third, the nature of the aid has been an important consideration for the Court. The Court is more likely to uphold a school voucher program that provides aid to parents as opposed to providing aid directly to a school. When funding is channeled to parents, potential support of sectarian schools is indirect and a result of choice. If parents decide where their children will attend school, the result is an intervening act between the government funding and the religious teaching in sectarian schools. In addition, an array of public, private, and parochial schools could be included in a voucher program as a means to withstand any challenges of favoritism to a particular religion. Practically, however, there may not be any real choice. The choice of schools is heavily dependent upon the schools that are included in the voucher programs. The lack of public schools participating in the program can upset the balance and have the effect of the government advancing religion. Even when voucher programs include both public and private schools, questions may arise if only sectarian schools capitalize on the voucher programs. Voucher programs cannot be upheld as constitutional if they show preferences for private schools.

Courts have also scrutinized the character of aid. If aid is distributed in the form of a tax incentive it is more likely to be upheld than if the government is paying for a portion of a private school tuition.

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284 See supra notes 78-80 and accompanying text.
285 See supra Part III.B.
286 See supra notes 243-64 and accompanying text.
287 See supra notes 140-44 and accompanying text.
288 See supra notes 101-08 and accompanying text.
Finally, the Court may view aid more favorably if some type of monitoring system is implemented to oversee spending. For example, the Court could require that records be regularly submitted or random audits be conducted to evaluate how funds are expended. If funds are used for general educational purposes, such as textbooks or sports teams (rather than to build chapels or pay for religious instruction), the purpose is non-secular and there is no constitutional violation. An effective monitoring system could trace expenditures and ensure that the government is not conveying the message of supporting religion. Monitoring is more readily accomplished in cases where funding is provided directly to schools as opposed to where school vouchers are distributed to parents. Restrictions on how voucher aid can be used may seem like a solution, but if government oversight is necessary such restrictions can create additional problems. The main problem is that if the government is too closely connected with religious institutions, this may create an Establishment Clause violation due to excessive entanglement.\textsuperscript{289}

While precedent has revealed the factors that will determine whether school voucher legislation is constitutional, ultimately the decision will turn on how the nine Supreme Court Justices apply these factors.\textsuperscript{290}

**B. What Will the Supreme Court Do?**

Scholars have suggested that the Supreme Court has evolved in its treatment of Establishment Clause cases.\textsuperscript{291} There is no dispute that there have been changes in the methods under which the Court analyzes Establishment Clause cases.\textsuperscript{292} There is conflict among the Justices about the proper standard for drawing the line between beneficial government funding and unconstitutional integration of church and state.\textsuperscript{293}

Due to the MPCP's success, it is likely that voucher programs will attempt to imitate the structure of the MPCP. For this reason, it is beneficial to consider how today's Court would rule on a program such as the MPCP.

\textsuperscript{289} Jasperson, supra note 10, at 139.
\textsuperscript{290} See infra notes 291-302 and accompanying text.
\textsuperscript{291} See McCunckins, supra note 130, at 832. A school voucher case could possibly withstand an Establishment Clause challenge because the Supreme Court has adopted a more relaxed approach in evaluating separation of church and state. \textit{Id.}
\textsuperscript{292} See supra Part III.
\textsuperscript{293} See supra Part III.
Predicting each Justice’s opinion on the school voucher issue is difficult because there are many factors to assess and several approaches that could potentially be employed. On one side, Justices Scalia, Rehnquist and Thomas have consistently taken a more relaxed view toward separation of church and state. These justices have followed the “hard coercion” standard. Justices O’Connor and Kennedy are not as predictable as Scalia, Rehnquist, and Thomas, but would probably vote to uphold a voucher program akin to the MPCP. O’Connor and Kennedy have each formulated their own test for Establishment Clause cases. O’Connor, who often files separate opinions, might test the constitutionality of the voucher by asking if it “endorses” religion. However, she might use a different approach, as she did in Agostini, using the Lemon test and focusing on the neutrality and character of funding. Justices O’Connor, Kennedy, Scalia, Rehnquist, and Thomas all voted to uphold the government aid in Agostini. If these Justices apply the same logic they would constitute a majority and thus the voucher program would be upheld.

Justices Souter, Stevens, Ginsberg and Breyer have attempted to keep the wall between church and state high. Justice Souter argued for total separation between church and state and generally has adopted the most radical approach. Justices Breyer and Ginsberg are the most recent appointees to the Supreme Court, so we do not have the benefit of reviewing their positions on as many past Establishment Clause cases. However, if their decisions are based on their political ideologies, these Justices will counter Rehnquist, Scalia, and Thomas.

The constitutionality of vouchers is far from settled. Many of the Establishment Clause cases were close votes. The nature of the factors evaluated are subjective and are sensitive to specific circumstances of cases. Therefore, even if the Court grants certiorari to a school voucher case, the outcome of the decision would be difficult to forecast.

294 See supra notes 200-01 and accompanying text.
295 See supra notes 173-89 and accompanying text.
297 See id. at 2559.
298 See Schimmel, supra note 243, at 385.
301 See id.
CONCLUSION

The primary constitutional consideration in school voucher cases is reconciling the mandates of the Establishment Clause with the growing need to improve local school systems and education. Simply stating that school vouchers will pass Establishment Clause challenge would be overly optimistic. However, school vouchers are now being designed carefully in attempts to satisfy the relevant factors that the Court has relied upon in its extensive line of Establishment Clause cases. The Justices of the Court are deeply divided on these cases and a prediction is difficult. Despite the uncertainty, guidance from the Court has become necessary. As states, cities, and perhaps even the Bush Administration continue to implement voucher programs, these challenges will intensify. Whatever the ultimate answer to the school voucher question, the burgeoning popularity of such programs assures that the issue shall remain an intriguing aspect of Establishment Clause jurisprudence.