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# The Crumbling Wall and Free Competitions: Formula for Success in America's Schools

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# THE CRUMBLING WALL AND FREE COMPETITION: FORMULA FOR SUCCESS IN AMERICA'S SCHOOLS*

ALLEN M. BRABENDER**

## I. INTRODUCTION

Free competition has produced tremendous results in the American economy. Yet, Americans traditionally have been reluctant to embrace free competition when choosing which elementary or secondary schools to send their children.[1] In the student education industry, state and local governments control an overwhelming eighty-nine percent of the market.[2] In fact, one could say that the government monopolizes the market.[3] Schools operated by the government enjoy tremendous advantages over non-government operated schools. For instance, government schools are completely subsidized by tax dollars, and thus, their customers (students) are provided with free service. The prospect of free service is something any rational consumer cannot resist. In contrast, non-government operated schools are either not subsidized or only partially subsidized by tax dollars.

A characteristic of monopolies, and one of the reasons the Sherman Act[4] was enacted to combat them, is that they are inefficient and unresponsive to consumer demands. Many have argued that the monopolistic

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1. THOMAS L. GOOD & JENNIFER S. BRADEN, THE GREAT SCHOOL DEBATE 90 (2000) (stating that the school choice proposal advocated by Milton Friedman originally "fell flat because it lacked political support"). In the 1970s, an overwhelming majority of Americans opposed voucher plans. *Id.* at 95. Furthermore, politicians viewed support for voucher programs as a political liability because of the teacher unions' steadfast opposition. *Id.*

2. *Id.* at 100.

3. *See* BLACK'S LAW DICTIONARY 1023 (7th ed. 1999) (defining monopoly as control or advantage obtained by one supplier or producer over the commercial market in a given region). "[Ninety-nine percent] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent is enough; and certainly thirty-three percent is not." *Id.* (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945)).

4. Sherman Act, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (2000)).

government schools embody these undesirable characteristics.[5] The idea of free competition and choice in education has been gaining popularity because of the government schools' substandard ability to educate America's young.[6] School voucher programs have emerged as one method to promote free competition and choice in education. However, implementing school voucher programs has been complicated by the constitutionally mandated separation between church and state because a substantial number of non-government (private) schools are religiously affiliated.[7]

This article discusses the constitutionality of school voucher programs in light of recent United States Supreme Court decisions, but the scope is limited to the programs' constitutionality in the context of the Establishment Clause.[8] Section II provides the history and political support of voucher programs in the United States. Section III then explores court decisions relevant to a legal analysis of the constitutionality of voucher programs. Section IV applies the legal analysis to voucher programs, and section V addresses the public policy reasons for enacting voucher programs. This article concludes by arguing that most school voucher programs are constitutional, and instrumental to reform ailing inner-city public schools.

## II. EDUCATIONAL VOUCHER PROGRAMS: A BRIEF HISTORY

According to authors Austin Swanson and Richard King, "An educational voucher is an entitlement extended to an individual by a government permitting that individual to receive educational services up to the maximum dollar amount specified. The holder can normally redeem the voucher according to preference at any institution or enterprise approved by the granting agency."[9] What King and Swanson label as an "educational voucher" is less controversial in 2003 as President George W. Bush, and many state governments, have proposed voucher programs even though educational vouchers have not always been accepted by our nation's leaders.[10]

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5. *See, e.g.*, Michael W. McConnell, *Governments, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847, 849 (1999) (citing generally JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1990)).

6. GOOD & BRADEN, *supra* note 1, at 95. In the 1980s, opposition to voucher programs began to erode because of the trend toward privatization and anti-bureaucratic thinking. *Id.*

7. *Id.* at 100. Approximately eighty-five percent of private schools are religiously affiliated. *Id.*

8. U.S. CONST. amend. I. Constitutional arguments can also be made in the context of the Equal Protection Clause and state constitutions.

9. AUSTIN D. SWANSON & RICHARD A. KING, SCHOOL FINANCE: ITS POLITICS AND ECONOMICS 414 (2d ed. 1997); *see also* GOOD & BRADEN, *supra* note 1, at 90-91.

10. The Christian Science Monitor, *George W. Bush: The First 100 Days*, *available at* http://www.csmonitor.com/atcsmonitor/specials/100days/education.html (last visited Feb. 19, 2003).

In 1955, economist Milton Friedman introduced the concept of school choice to America.[11] Friedman proposed an education finance system in which families would be given a voucher to pay tuition at a public or private school of their choice.[12] This system would expose children of all income levels to a variety of educational opportunities.[13] In addition, Friedman expected that a voucher program would motivate schools to raise achievement levels and increase efficiency in order to compete effectively for students.[14]

Initially, the public dismissed Friedman's proposal.[15] His critics argued that the market theories did not apply to education because the government provided it for the public good, similar to national defense.[16] The emergence of the Civil Rights Movement also played a role in the early rejection of Friedman's voucher theory.[17] The term "voucher" became synonymous with segregation because Southern states projected voucher programs as a means to allow white families to send their children to segregated private schools.[18] Thus, the public was concerned with the effect educational vouchers would have on school integration.[19]

### A. THE 1970S

In 1970, the United States Office of Economic Opportunity (OEO) resurrected the school voucher movement.[20] The OEO proposed a five- to eight-year demonstration to test the effectiveness of school vouchers.[21] However, because of the proposal's radical nature, the OEO only found one school district in the United States that agreed to actually take part in the experimental program.[22] The school district in Alum Rock, California, only agreed to participate in the experiment under a number of restrictions.[23] Ultimately, the OEO deemed the Alum Rock experiment a success, but the

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11. Milton Friedman, *The Role of Government in Education*, *in* ECONOMICS AND THE PUBLIC INTEREST 123 (Robert A. Solo ed. 1955).

12. *Id.*

13. *Id.*

14. *Id.*

15. GOOD & BRADEN, *supra* note 1, at 90.

16. *Id.* at 92.

17. Michael J. Stick, *Educational Vouchers: A Constitutional Analysis*, 28 COLUM. J. L. & SOC. PROBS. 423, 428 (1995).

18. *Id.* at 427.

19. *Id.*

20. DAVID W. KIRKPATRICK, CHOICE IN SCHOOLING 63 (1990).

21. *Id.* at 63-64.

22. *Id.* The proposal provided more money to some students than others because the voucher system was based on the special needs of individual students. *Id.*

23. *Id.* at 65-66.

restrictions placed on the program led many school voucher commentators to proclaim that it was not a "real" voucher program.[24]

The Alum Rock experiment stirred up a hornet's nest of protest from teacher unions.[25] The teacher unions' firm opposition to school choice programs contributed to low public approval of voucher programs.[26] The teacher unions advanced several arguments supporting their position that vouchers were undesirable. The teacher unions argued that there was no evidence vouchers work and that vouchers would drain much needed funding from public schools.[27] The teacher unions also contended that even if vouchers were effective, private schools do not have enough capacity to accept all students, and besides that, profit in education is bad and vouchers are unconstitutional.[28] Using these arguments, the teacher unions and other critics were able to defeat most attempts to enact educational voucher programs.

### B. THE 1980S

In the 1980s, public approval for voucher programs began to rise as more and more people began to see vouchers as a means to privatize education, thus making it more efficient and effective.[29] As a result of the increasing public support, elected officials began to publicly support voucher programs.[30] The Reagan Administration tried to take advantage of the rising public and political support for school choice by proposing national voucher legislation.[31] However, these proposals died an early death, as the legislation never reached the floor of Congress.[32]

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24. *Id.* at 92. An example of a restriction was that no staff members could lose their job, thus the staff as a whole "became more sensitive to the inadequacies of their peers." *Id.*

25. *Id.* at 77.

26. *See* GOOD & BRADEN, *supra* note 1, at 95 (discussing political opposition to voucher programs in the 1970s).

27. *Id.* at 94; *see* Matthew Miller, *A Bold Experiment to Fix City Schools*, ATLANTIC MONTHLY, July 1999, at 15-16, 18, 26-28, 30-31.

28. GOOD & BRADEN, *supra* note 1, at 94; *see* Miller, *supra* note 27, at 15-16, 18, 26-28, 30-31.

29. KIRKPATRICK, *supra* note 20, at 144-45. In 1983, a Gallup poll revealed that fifty-one percent of the public favored voucher plans, including sixty percent of those between the ages of eighteen and twenty-nine. *Id.*

30. *Id.* Early supporters included President Ronald Reagan, Tennessee Governor Lamar Alexander, Utah Senator Orrin Hatch, and Florida Senator Jack Gordon. *Id.* at 144, 146.

31. JOHN F. WITTE, THE MARKET APPROACH TO EDUCATION 35 (2000).

32. *Id.*

Another reason for the rise in public approval was the change in opinion among African-Americans.[33] Even without voucher programs, the public schools presumably remained de facto segregated, with minority-populated schools receiving an inferior amount of resources.[34] The inferior amount of resources that inner-city schools were receiving led many African-Americans to support school vouchers programs as a means to better educate their children.[35] The opinion of many African-Americans was further swayed by reasoning that segregation could be prohibited in voucher programs because it was prohibited in schools.[36]

### C. THE 1990S

In the 1990s, political support for vouchers remained strong, but many attempts at establishing educational voucher programs failed. Following the Republican Revolution of 1994, Congress tried to implement several nationwide voucher programs.[37] All of the proposed plans targeted low-income families, and all of the programs permitted families to choose religious schools.[38] However, the Republican-controlled Congress was unable to muster enough political support to enact the voucher programs.[39]

Educational voucher programs did not have much more success at the state level. Voters soundly rejected voucher plans in statewide referendums.[40] Several state legislators proposed voucher programs, but most proposals never made it to floor votes, and most that did were defeated.[41] However, some states did manage to enact voucher programs that encouraged reform in ailing inner-city school districts.[42] In 1995, Wisconsin became the first state to enact a voucher program that included religious

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33. KIRKPATRICK, *supra* note 20, at 78. In 1983, a Gallup poll revealed that fifty-one percent of African-Americans favored voucher plans. *Id.* This percentage dropped to forty-six percent in 1986. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. WITTE, *supra* note 31, at 35. In 1996, the Republicans attempted to add a voucher program to the Religious Restoration and Freedom Act and to a tax reduction plan, but both attempts were defeated. *Id.* In 1997, the Republican's $1 billion educational voucher plan (American Community Renewal Act) was passed by the House, but was stalled in the Senate by a Democratic filibuster. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 35-36. Voters in Oregon, Colorado, California, and Washington rejected educational vouchers by an almost two-to-one margin. *Id.* at 35.

41. *Id.* at 36. The legislatures of Pennsylvania, Ohio, Connecticut, Michigan, Florida, Minnesota, and Texas rejected voucher programs. *Id.*

42. *Id.*

schools in its efforts to help reform the Milwaukee public schools.[43] Ohio and Florida soon followed Wisconsin's lead.[44]

The legal challenges began almost as soon as the state legislatures of Wisconsin, Ohio, and Florida enacted the programs.[45] Voucher opponents objected to the inclusion of religious schools, arguing that the Constitution prevented the government from subsidizing religious schools through the use of educational vouchers. [46]

## III. ESTABLISHMENT CLAUSE JURISPRUDENCE

The First Amendment to the United States Constitution declares, "Congress shall make no law respecting the establishment of religion."[47] This provision, known as the Establishment Clause, provides a basis for voucher opponents to challenge the constitutionality of voucher programs.[48] Therefore, an examination into the Establishment Clause's complex and controversial history is necessary to a discussion regarding the constitutionality of voucher programs.

### A. SEPARATIONIST THEORY: BUILDING A WALL OF SEPARATION BETWEEN CHURCH AND STATE

The Supreme Court's first major decision involving an Establishment Clause challenge in the context of education was in 1947 with the case *Everson v. Board of Education of Ewing Township*.[49] In *Everson*, a taxpayer challenged the Ewing Board of Education's policy to reimburse the money expended by parents of parochial school students for bus transportation.[50] The Court found this reimbursement program constitutional because it was a neutral, general program of social benefit

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43. *Id.*

44. *See* FLA. STAT. § 229.0537 (Supp. 2003); OHIO REV. CODE ANN. §§ 3313.975-79 (Anderson 2002); WIS. STAT. § 119.23 (1999 & Supp. 2002).

45. *See generally* Bush v. Holmes, 767 So. 2d 668 (Fla. Dist. Ct. App. 2000); Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999); Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998).

46. *See generally Bush*, 767 So. 2d 668; *Jackson*, 578 N.W.2d 602.

47. U.S. CONST. amend. I. The Fourteenth Amendment has been interpreted to make the First Amendment's restrictions on government applicable to the states. Cantwell v. Connecticut, 310 U.S. 296, 304-05 (1940).

48. *See, e.g.*, Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2463 (2002).

49. 330 U.S. 1 (1947). Before *Everson*, the Court only discussed the Establishment Clause in regard to religious schools indirectly, *see, e.g.*, Vidal v. Girard's Executors, 43 U.S. (2 How.) 126 (1844); Quick Bear v. Luepp, 210 U.S. 50, 81 (1908), or evaluated aid to religious schools under different provisions of the Constitution, *see* Cochran v. Louisiana Board of Education, 281 U.S. 370, 374-75 (1930).

50. *Everson*, 330 U.S. at 3.

provided to all students.[51] The Court analogized the policy to police and fire protection and stated that the government could not deny busing to some children just because they attended private religious schools.[52]

The Court elaborated on the minimal boundaries of the protection and guarantees provided by the Establishment Clause.[53] It quoted Thomas Jefferson's famous words that the Framers intended the Establishment Clause "to erect a wall of separation between Church and State."[54] Jefferson's "wall of separation" metaphor has often been used to describe Supreme Court rulings after *Everson*.[55] The Supreme Court erected a "wall of separation" between church and state by strictly interpreting the Establishment Clause.[56] For thirty years after *Everson*, the Court kept the wall "high and impregnable."[57]

### B. THE *LEMON* TEST: MAINTAINING A WALL OF SEPARATION BETWEEN CHURCH AND STATE

#### 1. *Lemon v. Kurtzman*

In 1971, the Supreme Court developed a test in *Lemon v. Kurtzman*[58] to determine the constitutionality of a state law being challenged under the

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51. *Id.* at 17.

52. *Id.*

53. *Id.* at 15. According to the Court in *Everson*,

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state, nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against the establishment of religion by law was intended to erect 'a wall of separation between Church and State.'

*Id.* at 15-16 (citation omitted).

54. *Id.* at 16.

55. *See* Martha McCarthy, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 125-26 (2000).

56. *See, e.g.*, Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 210 (1948) (invalidating a public school program that permitted religious instructors to enter public schools and instruct students who had requested religious instruction); Engel v. Vitale, 370 U.S. 421, 425 (1962) (holding that a nondenominational prayer written by school board administrators and recited daily in a public school violated the Establishment Clause); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963) (striking down a state statute that required voluntary bible readings at the beginning of each school day).

57. *See* McCarthy, *supra* note 55, at 125 (quoting *McCollum*, 333 U.S. at 212).

58. 403 U.S. 602 (1971), *aff'd*, 411 U.S. 192 (1973).

Establishment Clause.[59] The *Lemon* test, as it has come to be known, has three conditions that must be satisfied in order for a law to be constitutional.[60] First, the law must have a secular purpose.[61] Second, the law's primary effect "must be one that neither advances nor inhibits religion."[62] Finally, the law may not create an excessive entanglement between the government and religion.[63]

The *Lemon* Court applied the test and found two state laws related to education unconstitutional.[64] A Rhode Island program that supplemented the salaries of teachers instructing secular subjects in nonpublic schools was found unconstitutional because it benefited the school's religious mission.[65] Furthermore, the Court stated that the potential for teachers to indoctrinate students with religious messages was too great.[66] This potential danger created the excessive entanglement that caused the Court to find the program unconstitutional.[67]

Also in *Lemon*, a Pennsylvania program that reimbursed nonpublic schools for teachers' salaries and other materials used to teach secular subjects was found unconstitutional.[68] In addition to the excessive entanglement created by reimbursing the teachers, the Court found an additional constitutional violation because the state provided financial aid directly to religious schools.[69] The Court stated that direct aid to religious schools is always impermissible.[70]

### 2. *Strict Application of the Lemon Test*

During the 1970s, the Supreme Court regularly struck down programs for religious schools by strictly applying the conditions set forth in *Lemon*.[71] The Court applied the *Lemon* test in *Committee for Public Edu-*

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59. *Lemon*, 403 U.S. at 612-13.
60. *Id.*
61. *Id.* at 612 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).
62. *Id.* (citing *Allen*, 392 U.S. at 243).
63. *Id.* at 613 (quoting Walz v. Tax Comm'r of N.Y., 397 U.S. 664, 674 (1970)).
64. *Id.* at 606-11.
65. *Id.* at 618-20.
66. *Id.*
67. *Id.*
68. *Id.* at 620.
69. *Id.* at 620-21.
70. *Id.* at 621-22. Direct aid is impermissible because money subsidies and grants by the government are almost always accompanied by various controls and government surveillance. *Id.* at 621. The Court was particularly concerned with the government's post-audit power to evaluate the financial records of religious organizations receiving direct aid. *Id.* at 621-22.
71. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 365 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000) (holding a Pennsylvania program that loaned instructional material and equipment directly to nonpublic schools unconstitutional); Wolman v. Walter, 433 U.S. 229, 236

*cation v. Nyquist*,[72] a case that many scholars believe was the closest the Court has ever come to deciding the constitutionality of school vouchers.[73]

In *Nyquist*, the Court held that a tuition reimbursement and tax credit program for low-income families violated the Establishment Clause.[74] It found that the program had the neutral purpose of raising national levels of knowledge and competence.[75] However, the program violated the second prong of the *Lemon* test because it impermissibly advanced religion.[76] The Court noted that a substantial majority of schools that benefited from the program were affiliated with the Catholic Church.[77] The program was found to directly subsidize religious activity because it relieved schools of significant financial burdens.[78] The Court saw the tax benefits as incentives for parents to send children to religious schools, and thus, the program was unconstitutional.[79]

A few years after *Nyquist*, the Court invalidated three state programs that provided aid to religious schools. First, in *Meek v. Pittenger*,[80] the Court held that a Pennsylvania program that provided disadvantaged children in nonpublic schools with teachers, counselors, and instructional materials[81] was unconstitutional because it created an excessive entanglement between government and religion.[82] The Court was concerned that the monitoring necessary to ensure against Establishment Clause violations created an excessive entanglement.[83] Also of concern was the direct loan of educational supplies, which the Court saw as benefiting the religious nature of schools because the supplies would likely be used to teach both secular and religious curriculum.[84]

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(1977), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000) (holding an Ohio program that loaned secular textbooks and standardized test scoring devices directly to nonpublic schools unconstitutional).

72. 413 U.S. 756 (1973).

73. WITTE, *supra* note 31, at 21.

74. *Nyquist*, 413 U.S. at 798.

75. *Id.* at 795.

76. *Id.* at 791.

77. *Id.* at 768.

78. *Id.*

79. *Id.* at 786.

80. 421 U.S. 349 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

81. *Meek*, 421 U.S. at 352-53, 365. Instructional materials were defined as photographs, charts, sound recordings, films, or any other printed or published material of a similar nature. *Id.* at 355.

82. *Id.* at 370.

83. *Id.* at 371-72. The monitoring the Court referred to involved program administrators ensuring that personnel remained strictly committed to nonideological teaching. *Id.* at 372.

84. *Id.* at 364-66.

Second, in *Wolman v. Walter*,[85] the Court held an Ohio program that purchased materials and equipment for use in religious schools was unconstitutional.[86] The Court reasoned that materials and equipment had the inescapable effect of advancing religious education.[87] Because the very purpose of the religious schools was to promote an integrated secular and religious education, the teaching process was devoted to the indoctrination of religious values and beliefs.[88]

Third, the Court in *Aguilar v. Felton*[89] found that a New York program, which sent public school teachers into religious schools to teach remedial courses, was unconstitutional.[90] Aware of previous Supreme Court rulings, the school district had implemented a system of monitoring that ensured the funds would not be used to advance religious purposes.[91] However, the Court stated that this system of monitoring inevitably resulted in excessive entanglement between the church and state because the freedom of religion suffered when the state became enmeshed with matters of religious significance, even when the government's purpose was secular.[92]

The period between *Lemon* and *Aguilar* represented the high water mark for the Court's separationist ideology.[93] The high water began to recede in the 1980s, when the first cracks began to appear in the mythical wall separating church from state.[94] Of the four cases from the high water mark period—*Nyquist*, *Meek*, *Wolman*, and *Aguilar*—*Nyquist* is the only one that has not been expressly overruled by the Court.[95] However, some

85. 433 U.S. 229 (1977), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

86. *Wolman*, 433 U.S. at 251.

87. *Id.* at 250.

88. *Id.* at 249-50.

89. 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

90. *Aguilar*, 473 U.S. at 406-07. The companion to this case was *Grand Rapids v. Ball*, 473 U.S. 373 (1985).

91. *Aguilar*, 473 U.S. at 409. Field personnel attempted to monitor teachers by paying "at least one unannounced visit per month" to the schools. *Id.* at 407. The field personnel reported to field supervisors, who also paid unannounced visits to Title I classes in religious schools. *Id.*

92. *Id.* at 409-10. The Court stated that the freedom of religion for those who were not devoted to the denomination receiving government aid suffered because the government was helping one denomination over another. *Id.*

93. Catherine L. Crisham, Note, *The Writing Is on the Wall of Separation: Why the Supreme Court Should and Will Uphold Full-Choice School Voucher Programs*, 89 GEO. L. J. 225, 238 (2000).

94. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 409 (1983) (upholding a Minnesota tax deduction for private school tuition).

95. The Court overruled *Meek* and *Wolman* in *Mitchell v. Helms*, 530 U.S. 793 (2000), and *Aguilar* in *Agostini v. Felton*, 521 U.S. 203 (1997).

argue that even *Nyquist* has been undermined by subsequent Court decisions.[96]

### C. *MUELLER V. ALLEN*: THE BIRTH OF EDUCATIONAL VOUCHER CONSTITUTIONALITY

Many argue that *Mueller v. Allen*,[97] a case decided in 1983, undermined *Nyquist's* authority as precedent in Establishment Clause jurisprudence.[98] In *Mueller*, the Court upheld a tax deduction for private school tuition under the *Lemon* test.[99] This tax deduction was similar to a school voucher because parents ultimately could use the tax savings to fund their child's private school education.[100] The Court stated that the legislature deserved great deference where tax deductions were concerned.[101] The tax deduction at issue in *Mueller* was ruled constitutional because it was available to all parents, regardless of whether their children attended a religious school.[102] Channeling the aid through parents reduced the Court's suspicion of Establishment Clause violations.[103] The Court reasoned that the Establishment Clause was not designed to protect against attenuated financial benefits controlled by the private choices of individual parents.[104]

The *Mueller* Court focused on the neutrality of the aid program instead of the aid's actual effect.[105] The fact that most people who claimed the tax deduction used it for religious schools was not constitutionally important because the law was facially neutral.[106] The Court stated that with private school tax deductions, "we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights."[107]

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96. *See, e.g.*, Jamie Steven Kilberg, Note, *Neutral and Indirect Aid: Designing a Constitutional School Voucher Program Under the Supreme Court's Accommodationist Jurisprudence*, 88 GEO. L.J. 739, 762 (2000); *see also* Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2472 (2002).

97. 463 U.S. 388 (1983).

98. *E.g.*, Kilberg, *supra* note 96, at 762.

99. *Mueller*, 463 U.S. at 394-95.

100. *Id.* at 391. The tax deduction was "limited to actual expenses incurred for the 'tuition, textbooks and transportation' of dependents attending elementary or secondary schools." *Id.*

101. *Id.* at 396.

102. *Id.* at 401-02.

103. *See id.* at 402.

104. *Id.* at 400.

105. *Id.* at 401.

106. *Id.* The Minnesota law at issue was facially neutral because it permitted taxpayers to deduct certain educational expenses—the cost of tuition, textbooks, and transportation—from their gross income without regard to religion. *Id.* at 391.

107. *Id.* at 399 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 694 (1970)). The "dangers" are that government involvement in religion has throughout history caused the collapse of many political systems. *Id.* at 399-400.

### D. DISMANTLING THE WALL SEPARATING CHURCH FROM STATE

After *Mueller*, the Court upheld several state programs that benefited religious schools in the face of Establishment Clause challenges. For example, in *Witters v. Washington Department of Services for the Blind*,[108] the Court reiterated that the Constitution does not place restrictions on religious schools receiving general aid provided for the benefit of all students.[109] *Witters* concerned a program that provided state grants to train and educate blind students.[110] An otherwise qualified college student, who planned to study religion, was denied the grant because he attended a religious school.[111]

The Court reaffirmed that direct subsidies to religious schools were impermissible.[112] Direct subsidies are similar to cash supplements, which are impermissible because they have the inescapable effect of advancing the religious mission of a sectarian school.[113] The Court added that even aid to parents or students, such as the lending of textbooks, could be termed a direct subsidy and be found impermissible.[114] However, the Court held that the Washington program was constitutional.[115]

The Court relied on four facts in deciding the program was constitutional.[116] The first important fact was that the aid went to the college only as a result of a student's genuinely independent and private choice to attend a religious school.[117] Second, the Washington program allocated the aid without regard to religion,[118] and third, the aid did not create an incentive to attend a religious school.[119] The final important fact the *Witters* Court relied on was that the program did not provide a significant amount of aid to religious schools.[120]

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108. 474 U.S. 481 (1986).

109. *Witters*, 474 U.S. at 489; *see also* Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947) (stating a general governmental program, such as busing, cannot be denied to children just because they attend a private religious school).

110. *Witters*, 474 U.S. at 483.

111. *Id.* at 483-84. Witters was "otherwise qualified" because he met the credentials for the program. *Id.* The credentials were (1) no vision or limited vision that constitutes or results in a substantial handicap to employment, and (2) can reasonably be expected to benefit from vocational rehabilitation services in terms of employability. *Id.* at 483.

112. *Id.* at 487.

113. Sch. Dist. of the City of Grand Rapids v. Ball, 473 U.S. 373, 394 (1985).

114. *Witters*, 474 U.S. at 487 (citing Wolman v. Walter, 433 U.S. 229, 248-51 (1977)).

115. *Id.* at 489.

116. *Id.* at 487-89.

117. *Id.* at 487.

118. *Id.*

119. *Id.* at 488.

120. *Id.*

*Zobrest v. Catalina Foothills School District*[121] represents another example of the Court's willingness to uphold state programs that aid religious schools. In *Zobrest*, the Court upheld a government program that provided an interpreter to a deaf student who attended a religious school.[122] The aid was available to all deaf students neutrally, without regard to their religion.[123] The Court cited *Mueller* and *Witters* as precedent for the proposition that a government program that distributes benefits neutrally is not susceptible to an Establishment Clause challenge just because religious institutions may receive a benefit.[124] The Court also found it important that the aid did not create an incentive to attend a religious school.[125] It explained that there was not an incentive because the parents had the choice to place the child in either a secular environment or a pervasively religious environment, and the interpreter would not add or subtract from this environment.[126] Furthermore, the schools were not the primary beneficiaries of the aid, and thus, the aid was constitutionally permissible.[127]

The Court distinguished *Meek* from *Zobrest*.[128] First, the Court stated that sending an interpreter into a private school was not a direct subsidy of religious schools, but instead was a program designed to help handicapped individuals.[129] Second, the Court stated that interpreters, unlike teachers, were required to follow ethical guidelines and "transmit everything that is said in exactly the same way it was intended."[130]

The 1980s and 1990s demonstrated the Court's movement toward a neutrality analysis and its reluctance to strictly apply the *Lemon* test to Establishment Clause cases.[131] This reluctance, coupled with the Court's failure to directly overrule the *Lemon* test, created confusion among the lower courts as to when to apply the test.[132] The confusion was partly

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121. 509 U.S. 1 (1993).
122. *Zobrest*, 509 U.S. at 14.
123. *Id.* at 10.
124. *Id.* at 8.
125. *Id.* at 10.
126. *Id.*
127. *Id.*
128. *Id.* at 12.
129. *Id.*
130. *Id.* at 13.
131. *See* Michaelle Greco Cacchillo, Zobrest v. Catalina Foothills School District*: A Victory For Disabled Children, A Snub For The* Lemon *Test*, 25 LOY. U. CHI. L.J. 445, 461 (1994).
132. *See id.* at 477. Justice Scalia wrote the following in regard to the Court's invocation of the *Lemon* test:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys. . . . The secret of the *Lemon* test's survival is that it is so easy to kill. It is

alleviated, but also partly aggravated, when the Court reaffirmed, yet revised, its use of the *Lemon* test in *Agostini v. Felton*.[133]

### E. REVISING THE *LEMON* TEST AND THE MOVEMENT TOWARD NEUTRALITY

*Agostini* arose directly out of the Supreme Court's ruling in *Aguilar v. Felton*,[134] in which the Court prevented the New York City School Board from sending public school teachers into religious school buildings to teach remedial courses.[135] To comply with the ruling, New York schools taught remedial courses to religious school students in trailers located near the schools.[136] However, the cost of operating the trailers was prohibitive, so New York schools filed a motion for relief from the *Aguilar* judgment.[137]

The case once again found its way to the Supreme Court.[138] The Court reversed *Aguilar*, citing significant changes in recent Establishment Clause jurisprudence.[139] It stated that the *Aguilar* opinion rested on four assumptions that were undermined in *Witters* and *Zobrest*.[140] First, the Court now assumes that public employees will dutifully follow the ethical guidelines of their profession.[141] Second, the Court no longer assumes that public employees working in religious schools creates a "symbolic union of church and state."[142] Third, the Court now considers aid to be constitutionally permissible and neutral if it is made as a result of genuinely independent and private choices of individuals.[143] Finally, the Court no longer assumes that the monitoring required to ensure compliance with statutes needs to be so

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> there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Lamb's Chapel v. Ctr. Morich's Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993) (Scalia, J. concurring).

133. 521 U.S. 203 (1997).

134. *Agostini*, 521 U.S. at 214.

135. *Id.* at 210-11.

136. *Id.* at 213.

137. *Id.* at 203.

138. *Id.*

139. *Id.* at 237. The doctrine of stare decisis "does not prevent [the Supreme Court] from overruling a previous decision when there has been a significant change in, or subsequent development of, our constitutional law." *Id.* at 235-36 (citing United States v. Gaudin, 515 U.S. 506, 521 (1995)).

140. *Id.* at 222-23.

141. *Id.* at 222.

142. *Id.*

143. *Id.* at 226.

extensive as to create an excessive entanglement between church and state.[144]

Even though the assumptions were undermined, *Agostini* reaffirmed the general principles used to evaluate aid under the Establishment Clause.[145] For instance, the Court still examined whether the government acted with the purpose of inhibiting or advancing religion.[146] In addition, the Court still examined whether the aid had the effect of advancing or inhibiting religion.[147]

However, an important aspect of *Agostini* was that the Court redefined the criteria used to determine whether government aid had the effect of advancing or inhibiting[148] by applying a new three-factor test.[149] Initially, the Court looked to see if the government program resulted in governmental indoctrination.[150] Then the Court investigated whether the program defined its recipients by reference to religion.[151] Finally, the Court determined whether the program created an excessive entanglement between church and state.[152] Whether this redefinition was limited to situations involving public school employees on religious school property was not determined.[153] The uncertainty that lingered as a result of the Court's failure to decide the bounds of *Agostini* was clarified in *Mitchell v. Helms*.[154]

In *Mitchell*, a group of concerned parents challenged a Louisiana school district's program that directed federal education assistance funds to private religious schools[155] in order to purchase educational materials such as library books and computers.[156] A plurality of the Court upheld the program because it neither resulted in religious indoctrination by the government nor defined its recipients by reference to religion.[157]

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144. *Id.* at 222.

145. *Id.* The Court modified the *Lemon* test by examining only the purpose and effect of a program. Mitchell v. Helms, 530 U.S. 793, 807 (2000). However, the Court still considered excessive entanglement under the effect prong of the test. *Id.* at 807-08.

146. Agostini v. Felton, 521 U.S. 203, 222-23 (1997).

147. *Id.*

148. *Id.* at 234.

149. *Id.* at 230-32.

150. *Id.* at 230.

151. *Id.* at 230-31.

152. *Id.* at 232.

153. Helms v. Picard, 151 F.3d 347, 374 (5th Cir. 1998), *vacated in part by* Helms v. Cody, No. 85-5533, 1997 U.S. Dist. LEXIS 876 (E.D. La. Jan. 28, 1997).

154. *See generally* Mitchell v. Helms, 530 U.S. 793 (2000).

155. Brief for Respondents at 1, Mitchell v. Helms, 530 U.S. 793 (2000) (No. 98-1648).

156. *Mitchell*, 530 U.S. at 802-03.

157. *Id.* at 813-14.

The plurality claimed it was applying the revised version of the *Agostini* effect test.[158] However, the plurality seemingly analyzed all prongs of the test using a neutrality inquiry.[159] In her concurring opinion, Justice O'Connor criticized the plurality for reducing the test for constitutionality to a mere test of even-handed neutrality.[160] In her opinion, neutrality was an important factor in the analysis, but so was the diversion of government funds for religious use.[161]

Technically, the plurality decision in *Mitchell* is not binding on the circuits.[162] When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in judgments on the narrowest grounds."[163] Therefore, Justice O'Connor's concurring opinion is the precedent to be followed by the circuits.[164]

## IV. APPLICATION TO RELIGIOUS SCHOOL VOUCHER PROGRAMS

Constitutional challenges to school voucher programs that allow participants to choose a religious school are a relatively new phenomenon because political opposition to school choice prevented most states from enacting voucher programs until the mid-1990s.[165] Legal challenges to those programs arose almost immediately, but well after the Court's decisions in *Mueller*, *Zobrest*, and *Agostini*. Thus, most lower courts found sufficient support to hold religious school voucher programs constitutional.[166]

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158. *Id.* at 807-08.

159. *Id.* at 813-14.

160. *Id.* at 838-39 (O'Connor, J. concurring).

161. *Id.* at 840.

162. Gregg v. Georgia, 428 U.S. 153, 169 (1976).

163. *Id.* at n.15.

164. *See id.*

165. *See supra* Part II.

166. *See, e.g.*, Jackson v. Benson, 578 N.W.2d 602, 620 (Wis. 1998). In 1998, the Wisconsin Supreme Court considered the constitutionality of the state's voucher program in *Jackson*. *Id.* at 607. The court applied the *Lemon* test and found that the voucher program had a secular purpose of ensuring a well-educated citizenry, which it stated was a necessity for the political and economic health of the state. *Id.* at 612. The court also found that the voucher program would not lead to an excessive entanglement between the state and religious schools, and the program did not have the primary effect of advancing religion. *Id.* at 619. The court stated that neutral programs offering educational assistance do not have the primary effect of advancing religion. *Id.* at 613. Therefore, the Wisconsin Supreme Court upheld the constitutionality of Wisconsin's voucher program. *Id.* at 620; *see also, e.g.*, Kotterman v. Killian, 972 P.2d 606, 625 (Ariz. 1999) (upholding the constitutionality of Arizona's school-choice tax credit legislation); Bush v. Holmes, 767 So. 2d 668, 677 (Fla. Dist. Ct. App. 2000) (finding Florida's A+ tuition scholarships constitutional on state grounds, but not discussing whether they violated the

### A. OHIO'S VOUCHER PROGRAM

The voucher program that has received the most judicial attention is the Ohio Pilot Project Scholarship Program. In the mid-1990s, the Cleveland School District was in a state of crisis.[167] The dropout rate was more than twice the state average and only seven percent of Cleveland eighth graders passed a basic proficiency test.[168] Statistically, students were just as likely to become victims of a crime on school property, as they were to graduate on time with basic proficiency.[169] A federal judge forced the State Superintendent of Public Instruction to intervene,[170] and in response, the Ohio Legislature adopted a voucher program.[171]

The vouchers were redeemable at any school, including religiously affiliated schools.[172] Significantly, no public schools enrolled in the program and eighty-two percent of participating schools were religiously affiliated.[173] The program gave low-income families priority[174] and participating schools were subject to various anti-discrimination restrictions.[175] Otherwise, the voucher program did not place restrictions on the use of funds available under the program.[176] Shortly after the program began, a parent, a teacher, and a pastor filed suit against the state superintendent, challenging the constitutionality of the Pilot Program.[177]

#### 1. *The Ohio Supreme Court—Simmons-Harris v. Goff*

The Supreme Court of Ohio upheld the constitutionality of the voucher program in *Simmons-Harris v. Goff*.[178] Applying the *Lemon* test, the court found that the Ohio voucher program had a secular purpose because it did nothing more than provide scholarships to certain children, which enabled

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Establishment Clause). *But see* Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539, 563-64 (Vt. 1999) (invalidating on state constitutional grounds a Vermont law providing tuition reimbursement to parents of children who attended private religiously affiliated schools).

167. Reed v. Rhodes, 1 F. Supp. 2d 705, 710 (N.D. Ohio 1998).

168. Daniel McGroarty, Symposium, *Are School-Voucher Programs for Parochial Schools a Good Idea?*, INSIGHT, Aug. 12, 1996, at 26.

169. *Id.*

170. *Reed*, 1 F. Supp. 2d at 705.

171. OHIO REV. CODE ANN. §§ 3313.974-979 (Anderson 2002).

172. Simmons-Harris v. Zelman, 54 F. Supp. 2d 725, 728 (N.D. Ohio 1999), *rev'd*, 122 S. Ct. 2460 (2002).

173. *Id.* at 728-29.

174. *Id.* at 728.

175. *Id.* The anti-discrimination restrictions included not discriminating on the basis of race, religion, or ethnic background; not advocating or fostering unlawful behavior; and not teaching hatred of any person or group on the basis of race, ethnicity, national origin, or religion. *Id.*

176. *Id.*

177. *Id.* at 727-28.

178. 711 N.E.2d 203 (Ohio 1999).

them to attend an alternative school.[179] The court stated that the program did not result in an excessive entanglement, even though schools were required to register with the state before students could take advantage of the voucher program.[180] It was difficult for the court to understand how this relationship resulted in an entanglement of church and state when private religious schools were already subject to certain state standards.[181]

However, the court concluded that the voucher program was enacted in violation of Ohio's State Constitution.[182] The Ohio Constitution's one-subject rule prevented attaching a program as a rider to a bill so legislators voting on it would be unaware of the program's existence, and therefore, not subject it to legislative scrutiny.[183] State legislators then re-enacted the voucher program to comply with the state constitution, and thereafter, voucher opponents filed suit in federal court.[184]

### 2. *The Sixth Circuit—Simmons-Harris v. Zelman*

In *Simmons-Harris v. Zelman*,[185] parents, teachers, and pastors in the Cleveland City School District sought to enjoin the voucher program on the ground that it violated the Establishment Clause.[186] The Sixth Circuit upheld the district court decision,[187] analogizing the case to the Supreme Court's decision in *Committee for Public Education & Religious Liberty v. Nyquist*.[188] In *Nyquist*, the Court held that a program, which partially reimbursed low-income parents for private school tuition, violated the effect prong of the *Lemon* test.[189] The Court invalidated the tuition program because it did not "guarantee the separation between secular and religious educational functions and ensure that the State supports only the former."[190]

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179. *Goff*, 711 N.E.2d at 208.

180. *Id.* at 211.

181. *Id.*

182. *Id.* at 216.

183. *Id.* at 215-16.

184. *See generally* Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999), *rev'd*, 122 S. Ct. 2460 (2002).

185. 234 F.3d 945 (6th Cir. 2000), *rev'd*, 122 S. Ct. 2460 (2002).

186. *Zelman*, 234 F.3d at 950.

187. *Id.* at 963. On summary judgment, the district court concluded that the voucher program violated the Establishment Clause because the lack of participating non-religious schools deprived parents of a genuine and independent choice. *Zelman*, 72 F. Supp. 2d at 859. The court also found that there were no safeguards in the voucher program to ensure they would be used only for secular instruction and that the program criteria created incentives for students to attend religious schools. *Id.* at 860.

188. *Zelman*, 72 F. Supp. 2d at 958-59 (comparing Comm. for Pub. Educ. for Religious Liberty v. Nyquist, 413 U.S. 756 (1973)).

189. *Nyquist*, 413 U.S. at 785.

190. *Id.* at 783.

The Sixth Circuit stated that the Ohio voucher program and the program in *Nyquist* were substantially similar,[191] and because *Nyquist* was never overruled, it was the controlling precedent.[192] Then, applying the revised *Agostini* effect test as applied by Justice O'Connor in *Mitchell*,[193] the court stated that the Ohio program was not neutral because the government aid went primarily to religious institutions.[194] The effect of the voucher program was to create an incentive for religious schools to participate, while discouraging public school participation.[195] Additionally, the court noted that the program created an illusion of independent parental choice because parents could only choose schools that were willing to participate in the program, and in fact, most schools that participated were religiously affiliated.[196] Based on these factors, the court concluded that the Ohio voucher program violated the Supreme Court's mandate that government funds be neutrally distributed.[197] Supporters of the voucher system appealed, and the Supreme Court granted certiorari.[198]

### 3. *The United States Supreme Court*

The Supreme Court heard oral arguments for *Zelman* in the 2002 Spring Term. Some commentators predicted that it was highly likely the Court would avoid deciding the constitutionality of religious school voucher programs in a general sense, and would instead specifically concentrate on the constitutional ramifications of the Ohio program.[199] The constitutionality of the school voucher program then would likely depend on the particular facts surrounding the program.[200] The potential constitutionally damaging facts surrounding the Ohio program were that religious schools

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191. *Zelman*, 234 F.3d at 958-59. The *Nyquist* program and the *Zelman* program both included only private schools, even though both public and private schools were eligible. *Id.* at 959. In *Nyquist*, eighty-five percent of private schools were affiliated with religion, while eighty-two percent of private schools were religiously affiliated in *Zelman*. *Id.* Additionally, neither program attempted to guarantee that state aid was used only for a secular purpose. *Id.* at 958-59.

192. *Id.* at 954-55. The court noted that the Supreme Court had been more lenient when upholding cases under the Establishment Clause. *Id.* at 955. However, the Court had not overruled *Nyquist* so it was still good law, and because *Nyquist* and *Zelman* were similar, the Ohio voucher program was invalidated. *Id.*

193. *Id.* at 956.

194. *Id.* at 959-60.

195. *Id.* at 959.

196. *Id.*

197. *Id.* at 961.

198. Zelman v. Simmons-Harris, 533 U.S. 976 (2001).

199. Douglas W. Kmiec, Address at Pepperdine University School of Law Federal Judicial Clerkship Institute (Jan. 4, 2002); *see also* Edward B. Foley, *Judging Voucher Programs One at a Time*, 27 U. DAYTON L. REV. 1, 4-16 (2001).

200. Foley, *supra* note 199, at 3-4.

made up 82% of the schools where vouchers could be redeemed, and 96% of the students participating used vouchers to attend religious schools.[201]

In the summer of 2002, the Supreme Court released its decision reversing the Sixth Circuit, and held that the Ohio voucher program did not violate the Establishment Clause because it was "entirely neutral with respect to religion."[202] The Court found it significant that the only preference in the program was one for low-income families.[203] The program permitting public, private, religious, and non-religious schools to participate illustrated its neutrality.[204] The Court also found it significant that there were "no financial incentives that skew[ed] the program toward religious schools."[205] In fact, the Court stated the voucher program created financial disincentives for religious schools because private schools received one-half to one-third the assistance given to public schools.[206]

The Court rejected any notion that the program created a perception of public endorsement of religion.[207] The Court made a point of stating that "[t]hree times [it had] confronted Establishment Clause challenges to neutral government programs that provid[ed] aid directly to a broad class of individuals, who, in turn, direct[ed] the aid to religious . . . institutions of their own choosing[; and] [t]hree times [the Court] rejected such challenges."[208] The Court stated that it "repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions by private individuals, carries with it the imprimatur of government endorsement."[209] This argument was particularly misplaced considering the "history and context" underlying the challenged program.[210]

The Court found it irrelevant that forty-six of the fifty-six (82%) private schools participating in the program were religiously affiliated.[211] This phenomenon was common to many American cities and it certainly

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201. *Id.* at 5. Of the forty-six schools participating in the program, only ten were not religiously affiliated. *Id.*

202. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2473 (2002).

203. *Id.* at 2468.

204. *Id.*

205. *Id.* (citing Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487-88 (1986)).

206. *Id.*

207. *Id.*

208. *Id.* at 2466 (referring to Mueller v. Allen, 463 U.S. 388, 397-99 (1983); *Witters*, 474 U.S. at 489; and Agostini v. Felton, 521 U.S. 203, 236 (1997)).

209. *Id.* at 2468.

210. *Id.* at 2468-69 (referring to the low test scores and violence plaguing the Cleveland School District).

211. *Id.* at 2469.

did not arise as a result of the voucher program.[212] The Court declared that finding this statistic relevant would lead to an absurd result.[213] For instance, an identical program might be constitutional in some states, like Maine or Utah, where less than 45% of private schools are religiously affiliated, but unconstitutional in other states like Nebraska or Kansas, where over 90% of private schools are religiously affiliated.[214]

Furthermore, this statistical disparity between participating religiously affiliated schools and non-religiously affiliated schools was explained by a close review of the educational market in the Cleveland area, which revealed that parents and students had a genuine and independent choice.[215] In addition to the voucher program, Ohio enacted a community school program,[216] in which public "community schools" were operated by their own boards, which acted autonomously from local school districts.[217] Only non-religious schools were eligible because they received direct payment from the state for each student enrolled.[218] Also, because community schools received nearly twice as much per student when compared to voucher schools, most non-religious schools had chosen to become community schools.[219] Thus, the lack of non-religious school participation in the voucher program could be attributed to the existence of the community school program.[220] The combination of the voucher program, the community school program, and the regular public school system promoted a genuine and independent choice for families looking to further their children's education.[221]

The Court similarly found it irrelevant that ninety-six percent of the scholarship recipients enrolled in religious schools.[222] It stated, "[t]he constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private

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212. *Id.* at 2469-70.

213. *Id.* at 2470.

214. *Id.*

215. *Id.* at 2469-71.

216. Foley, *supra* note 199, at 7-8.

217. *Id.*

218. *Id.*

219. *Id.* A community school in Cleveland received $4500 per student, while a voucher school received $2250 per student. *Id.*

220. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2470-71 (2002).

221. *Id.* at 2471 (stating that when enrollment of children in nontraditional schools was examined, the percentage enrolled in religious schools dropped from ninety-six percent to under twenty percent).

222. *Id.*

schools are run by religious organizations, or most recipients choose to use the aid at a religious school."[223]

Finally, the Court rejected *Nyquist* as precedent in cases relating to neutral educational assistance programs that offer aid to a broad class of individuals without regard to religion.[224] *Nyquist* involved a New York program that attempted to rescue religious schools from increasingly grave fiscal problems.[225] In that case, the Court expressly withheld judgment on a case that involved "some form of public assistance made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[226] The Ohio voucher program was not an attempt to rescue religious schools, but was a voucher program generally available without regard to the sectarian or public nature of the institution. The Court stated that the direct aid program in *Nyquist* was quite different from Ohio's voucher program where aid was available only as a result of the private choice of individual citizens.[227]

Thus, due primarily to the facts surrounding the Ohio voucher program, the Court upheld its constitutionality.[228] However, the Court did not create a rule with respect to the constitutionality of voucher programs generally.[229] Because of this, a more general constitutional examination of voucher programs is warranted.

### B. THE FUTURE OF VOUCHER PROGRAMS AFTER *ZELMAN*

Assuming the Court continues to apply the *Lemon* test to Establishment Clause cases, it should find that most school voucher programs are constitutionally permissible.[230] To recap, the *Lemon* test requires that a government program have a (1) secular purpose and (2) an effect that does not advance or inhibit religion by (A) resulting in government indoctrination (neutrality), (B) defining recipients by religion (independent choices), or (C) creating an excessive entanglement between church and state.[231]

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223. *Id.*

224. *Id.* at 2472.

225. Comm. for Public Educ. v. Nyquist, 413 U.S. 756, 762 (1973).

226. *Id.* at 782 n.38.

227. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2472 (2002).

228. *Id.* at 2472-73.

229. *Id.*

230. Many constitutional scholars have called for the repeal of the *Lemon* Test. *See, e.g.*, Arlin M. Adams, *Perspectives: Religion and the Law: Recent Decisions by the United States Supreme Court Concerning the Jurisprudence of Religious Freedom*, 62 U. CIN. L. REV. 1581, 1582-83 (1994).

231. Agostini v. Felton, 521 U.S. 203, 218-21 (1997).

First, school voucher programs promote a secular purpose.[232] Voucher programs are designed to promote choice and improve the quality of education.[233] The programs are not designed to boost attendance in religious schools.[234] In fact, the secular purpose of educational voucher programs is conceded in many Establishment Clause cases as courts are reluctant to infer unconstitutional motives to states when a facial review of the statutes exhibit a credible secular purpose.[235]

Furthermore, as to the second prong of the *Lemon* test, school voucher programs do not have the effect of advancing or inhibiting religion.[236] Vouchers programs do not define receipts by religion because they require that vouchers be made out to parents, who then endorse the checks over to the school of their choice whether that school is secular or non-secular.[237] The Supreme Court has stated that aid is considered neutral if it is made as a result of the genuinely independent and private choice of individuals.[238] However, the controversy over school voucher programs still arises because voucher opponents assert that the programs have the effect of advancing religion.[239] Voucher opponents point out that a substantial majority of private schools in the United States are affiliated with religion.[240] This fact, they argue, supports the contention that government money is being used to advance religious objectives by depriving parents of a genuinely independent choice between secular and non-secular schools.[241]

However, this argument by voucher opponents is simplistic because in the future, the Court most likely will address voucher cases on a fact-specific, case-by-case basis.[242] For instance, the constitutionality of a program such as the federal Pell Grants could not be legitimately questioned.[243] Religiously affiliated schools make up only one-third of the participating schools of higher education; thus no one contends that Pell Grants push college students in the direction of religious colleges.[244]

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232. *See id.* at 225-26 (noting that vouchers are no different than a paycheck, which may or may not be used for a religious offering).

233. *Id.* at 229.

234. *Id.*

235. Mueller v. Allen, 463 U.S. 388, 394-95 (1983).

236. *Agostini*, 521 U.S. at 226.

237. *Id.*

238. *Id.*

239. Brief for Respondent at 9-10, Simmons-Harris v. Zelman, 122 S. Ct. 2460 (2002) (Nos. 00-1751, 00-1777, 00-1779).

240. *Id.*

241. *Id.*

242. Foley, *supra* note 199, at 3.

243. *Id.*

244. *Id.*

Conversely, no one could legitimately question the unconstitutional nature of a program that replaces a state's entire system of education with a voucher program if all private schools in the state are religiously affiliated.[245] In the constitutional gray area, however, are the programs that fall between these two extreme examples.

A reasonable prediction could be made that short of the extreme example above, where all of the schools in a system are religiously affiliated, the Court will uphold the constitutionality of voucher programs. In *Mueller*, the Court held that "even where an overwhelming majority (96%) of individual tax benefits go to parents of children in religious schools, this fact, without more, does nothing to call into question whether parents have exercised real choice."[246] In addition, the Court in *Agostini* stated that it was unwilling "to conclude that the constitutionality of an aid program depends on the number of sectarian school students who receive otherwise neutral aid."[247] In that case more than ninety percent of the participating private schools were religious.[248] Thus, aid programs are not subject to invalidation based on the number of recipients who choose to employ aid in the parochial setting.[249]

What's more, voucher programs do not result in government indoctrination because they distribute aid in a neutral manner. In the Ohio program, for instance, the only eligibility requirements were that the family reside in the school district that was or had been under a federal court order requiring the state superintendent to manage the district and that the family have a low income.[250] Distributing the benefits to citizens with the greatest need posed no Establishment Clause danger.[251]

Additionally, religious schools do not arise as a result of voucher programs. Therefore, it would be unconstitutional to invalidate a voucher program, such as Ohio's, while upholding a voucher program in a community where non-religiously affiliated schools command a larger share of the educational market.[252] While the Establishment Clause requires the government to be neutral towards groups of religious believers

245. *Id.*

246. Brief for Petitioner at 38, Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002) (Nos. 00-1751, 00-1777, 00-1779); Mueller v. Allen, 463 U.S. 388, 401 (1983).

247. Petitioner's Brief at 39, *Zelman* (Nos. 00-1751, 00-1777, 00-1779) (quoting Agostini v. Felton, 521 U.S. 203, 229 (1997)).

248. *Id.*

249. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2471 (2002).

250. Petitioner's Brief at 30-31, *Zelman* (Nos. 00-1751, 00-1777, 00-1779).

251. *Zelman*, 122 S. Ct. at 2469.

252. Petitioner's Brief at 30, *Zelman* (Nos. 00-1751, 00-1777, 00-1779).

and non-believers, it does not mandate that government be an adversary of organized religion.[253]

Anti-discrimination measures built into voucher programs provide even more evidence of their neutrality.[254] Many voucher programs require that no participating school discriminate on the basis of race, religion, or ethnic background.[255] This anti-discrimination requirement ensures that no children are denied equal access to education offered by particular schools based on their religious beliefs.[256]

Thus, voucher programs are neutral, like a bus ride or a school lunch. Voucher programs are not inherently religious because, as monetary aid, a voucher is free of content and by its very nature presents no inherent risk of promoting religion.[257] Because educational vouchers are usable at any institution that meets certain religiously neutral educational criteria, such benefits are no more ideological than programs that fund bus rides or school lunches.[258]

However, there is somewhat of a Catch-22 involved in the constitutional evaluation of state-funded school voucher programs that allow parents to elect to have their children attend a religiously affiliated school. The Catch-22 concerns the excessive entanglement prong of *Lemon's* effect test.[259] When vouchers are given to religious schools without limits, government money could potentially be used to advance the mission of the church. For instance, without limits on how and where voucher money is to be spent, religious schools could opt to drop reading and arithmetic in favor of theology classes designed to indoctrinate students with religious values. Conversely, when the government attempts to place limits on voucher programs, it runs the risk of excessively entangling itself in the religious affairs of the church.

Nevertheless, "entanglement must be 'excessive' before it runs afoul of the Establishment Clause."[260] The government's standard regulatory practice that involves no inquiry into religious principles, no delegation of governmental power to a religious entity, and no extravagant supervision of

253. *Id.*
254. *Id.* at 32.
255. *Id.* at 31.
256. *Id.*
257. *Id.* at 32.
258. *Id.*
259. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (quoting Walz v. Tax Comm'r of N.Y., 397 U.S. 664, 674 (1970)).
260. Agostini v. Felton, 521 U.S. 203, 233 (1997).

the school's governance, curriculum, or day-to-day affairs does not itself create an "excessive" entanglement.[261]

Plus, state legislatures are aware of the Establishment Clause's entanglement limitations, and they design voucher programs to comply with those limitations. Programs that have survived constitutional challenges share three common characteristics. The first common characteristic is that all programs have allowed the parent, not the state, to decide which school to send their children.[262] The state transmits funds from the state coffers to religiously affiliated schools only by way of the independent determination of parents.[263] Consequently, "public funds are not subsidies to schools, which are impermissible, but aid to students, which is permissible."[264]

The second common characteristic is that the voucher programs do not produce an incentive to attend a religious school, or even a private school for that matter.[265] Voucher programs allow both private and public schools to participate; hence, aid is distributed on a neutral basis without regard to religion.[266] "This neutrality is enhanced when public schools are among the options or private school options are part of broader education reform."[267] Also, reports demonstrate that religious affiliation is not an important consideration when parents evaluate a private school.[268] Parents rank academic quality, reputation, safety, location, and recommendations of other people ahead of religious affiliation when choosing a school for their children.[269]

The third common characteristic is that the voucher programs do not create a continuous government presence in religiously affiliated schools.[270] Legislatures have kept government controls to a minimum by only requiring religious schools receiving vouchers to comply with standards already required of private schools.[271] This may include standards regarding nondiscrimination, health and safety, and minimum education.[272] However, voucher programs should not include any government supervision of

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261. Clint Bolick & Richard D. Komer, *School Choice Answers to the Most Frequently Asked Legal Questions, available at* http://www.ij.org/cases/school/faq.shtml (last visited Feb. 17, 2003).

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. Brief for Petitioner at 24, Simmons-Harris v. Zelman, 122 S. Ct. 2460 (2002) (Nos. 00-1751, 00-1777, 00-1779).

269. *Id.* (citing Peterson Aff. at 28-29 and Metcalf Aff. at PP10-11).

270. Bolick & Komer, *supra* note 261.

271. Petitioner's Brief at 22, *Zelman* (Nos. 00-1751, 00-1777, 00-1779).

272. *Id.* at 25.

"curriculum, personnel, or administration . . . [because] [a]ny program that creates extensive involvement by the state in the schools' internal affairs is likely to be found an unconstitutional 'excessive entanglement.'" [273]

In summary, courts will likely uphold most school voucher programs in the future even though the Supreme Court is not likely to create a general rule in regard to school voucher programs. Carefully drafted voucher programs should be able to pass the *Lemon* test's various prongs. At least for the sake of inner-city school children, let us hope our nation's judiciary is aware of the constitutional nature and social importance of most educational voucher programs.

## V. PUBLIC POLICY SUPPORTS THE USE OF SCHOOL VOUCHERS: MOVING BEYOND THE CONSTITUTIONALITY ISSUE

Regardless of their constitutionality, school voucher programs are a good idea. A study of school choice programs conducted by the RAND Corporation[274] revealed many encouraging results.[275] Parental satisfaction levels were high in virtually all voucher programs studied, and in economics, customer satisfaction is a key indicator of quality.[276] African-American children showed modest achievement benefits after just one or two years when compared with student achievement in local public schools.[277] Programs designed with family income qualifications in mind have succeeded in placing low-income, low-achieving, and minority students into voucher schools, and voucher programs have modestly increased racial integration levels in communities where racial isolation is high.[278]

Over sixty percent of the children receiving scholarships in the Ohio program are from families with incomes at or below the poverty line.[279] "School violence, low test scores and high drop-out rates continue to claim educational casualties, particularly among poor families whose children are captives of the public system."[280] Only one in fourteen students in the

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273. Bolick & Komer, *supra* note 261.

274. Brian Gill et al., *Rhetoric Versus Reality, What We Know and What We Need to Know About Vouchers and Charter Schools*, *available at* http://www.rand.org/publications/MR/MR1118 (last visited Feb. 16, 2003). RAND is a nonprofit institution that helps improve policy and decision-making through research and analysis. *Id.*

275. *Id.*

276. *Id.* at xiv.

277. *Id.*

278. *Id.* at xiv-xv.

279. Simmons-Harris v. Zelman, 234 F.3d 945, 949 (6th Cir. 2000), *rev'd*, 122 S. Ct. 2460 (2002).

280. McGroarty, *supra* note 168, at 26.

Cleveland public school system passes the twelfth grade proficiency test, while the number of students assaulted in the city's public schools or on public school property is also one in fourteen.[281]

The lack of competition in American schools is one of the causes of the poor performance of inner-city public schools. Before enacting its voucher program, the Cleveland School District spent more per student than the state average, and the district's debt-to-revenue ratio was a crippling 25%, making it the hands-down debt leader in the state.[282] A competitive atmosphere in the educational market would force inner-city school districts like Cleveland to become more efficient and effective in order to remain viable. Low-income families would be able to send their children to the schools that they believe will provide the best education possible. This empowerment of low-income families should inspire schools to respond and reform, or risk losing their student population to another school.

## VI. CONCLUSION

America's inner-city public schools are in a state of crisis. The crisis is in part caused by the government's monopoly over the public education market. The well-documented problems with America's education system may be attributed to the government's monopoly, which is inefficient and unresponsive to consumer demands. School choice in the form of vouchers can be an effective tool in combating the problems of America's modern educational system. However, voucher programs are controversial and have faced fierce resistance from teacher unions.

Teacher unions and other voucher opponents have had the opportunity to challenge educational voucher programs in court because most voucher programs provide parents with the opportunity to send their children to a religiously affiliated school. This opportunity raises potential constitutional questions. However, the United States Supreme Court, in recent Establishment Clause decisions, has upheld most religiously neutral educational programs, including Ohio's voucher program; plus, the Constitution has never

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281. *Id.* (quoting Clint Bolick of the Institute for Justice, counsel to the pro-voucher parents in both Wisconsin and Ohio). Additionally,

> Cleveland scored the lowest of any school district in Ohio on the latest state report card, failing to meet a single one of 27 standards for student performance. The district was one of 69 around the state doing so poorly in 1998-99 that they were declared to be in a state of "academic emergency."

*See* Janet Jebben and Mark Vosburgh, *Cleveland Schools Fail All Performance Standards*, PLAIN DEALER, Dec. 23, 1999, at 1-A.

282. Reed v. Rhodes, 934 F. Supp. 1459, 1472 (N.D. Ohio 1996).

been interpreted to require states to be adversaries of organized religion.[283] Thus, the constitutionally mandated "wall of separation" is not likely to bar most educational voucher programs even if the programs permit parents to send their children to religiously affiliated schools.

283. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1946) (declaring a state is not required to be an adversary of organized religion); Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2460 (2002) (upholding Ohio's school voucher program).

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