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# The Milwaukee Parental Choice Program: A Constitutional Victory for School Choice

## I. INTRODUCTION

A recent Wisconsin Supreme Court decision gave advocates for school choice new ammunition in the constitutional battle over government funded voucher programs. In *Jackson v. Benson*,<sup>1</sup> the Wisconsin court determined that the Milwaukee Parental Choice Program<sup>2</sup> ("MPCP") is constitutional.<sup>3</sup> Opponents claimed that the program violated the Establishment Clause of the Federal Constitution by allowing parents to direct state monies to private religious schools.<sup>4</sup> The Wisconsin court rejected this argument and determined that the parental choice program is consistent with Establishment Clause principles enunciated by the Supreme Court.<sup>5</sup> Opponents of the voucher program immediately petitioned the United States Supreme Court for review of the Wisconsin decision. The Court denied the request for certiorari and allowed the decision of the Wisconsin court to stand.<sup>6</sup> The Milwaukee Parental Choice Program is thus the first voucher program involving private religious schools to survive constitutional challenge, and hence is a significant victory for advocates of school choice.

This Comment will focus on the impact of both the Milwaukee Parental Choice Program and its accompanying litigation on the constitutional debate over school choice. Although the MPCP implicates many important considerations of public policy that deserve attention, this Comment will not address these issues. Rather, the focus will be on a single constitutional question: does the Establishment Clause prohibit school choice initiatives which—like the MPCP—involve religious schools?

Part I of this Comment will discuss the history of the Establishment Clause with particular attention given to cases involving educational programs.<sup>7</sup> Part II will introduce the Milwaukee Parental Choice Program, and then focus on the

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1. 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998).

2. WIS. STAT. § 119.23 (West 1996).

3. *See Jackson*, 578 N.W.2d at 620.

4. *See id.* Opponents also raised several state constitutional claims not discussed in this Comment. *See id.*

5. *See id.*

6. *See* 119 S. Ct. 466 (1998).

7. *See infra* notes 10-81 and accompanying text.

constitutional analysis used by the Wisconsin Supreme Court in its decision upholding the state voucher program.<sup>8</sup> Finally, part III will examine the impact that *Jackson v. Benson* will have in the continuing national constitutional debate over school choice initiatives involving private religious schools.<sup>9</sup>

## II. THE HISTORY AND JUDICIAL DEVELOPMENT OF THE ESTABLISHMENT CLAUSE: ARE VOUCHER PROGRAMS INHERENTLY UNCONSTITUTIONAL?

In modern constitutional jurisprudence, cases involving the Establishment Clause<sup>10</sup> “have presented some of the most perplexing questions to come before [the] Court.”<sup>11</sup> Interpretation and application of the Establishment Clause have proven to be particularly challenging in cases involving state funding of school choice initiatives.<sup>12</sup> The Court has refused to draw any clear lines in this “sensitive area” of constitutional law.<sup>13</sup>

Despite the Court’s decision to refrain from creating bright-line rules in this area,<sup>14</sup> critics of school choice insist that the First Amendment proscribes all voucher programs involving sectarian schools.<sup>15</sup> However, an examination of the history and purpose of the Establishment Clause, as well as its judicial interpretation, reveals a solid constitutional foundation for state funded programs that satisfy certain constitutional criteria.

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8. See *infra* notes 82-142 and accompanying text.

9. See *infra* notes 143-158 and accompanying text.

10. U.S. CONST. amend. I (stating that “Congress shall make no law respecting an establishment of religion . . .”).

11. See Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973); see also, Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) (suggesting that “Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country”).

12. See J.W. PELTASON, UNDERSTANDING THE CONSTITUTION 121-23 (9th ed. 1982) (describing the “especially troublesome and controversial” nature of Establishment Clause jurisprudence relating to education); see also, Margaret A. Nero, *The Cleveland Scholarship and Tutoring Program: Why Voucher Programs Do Not Violate the Establishment Clause*, 58 OHIO ST. L.J. 1103, 1112 (1997) (noting that the Establishment Clause has “generated fierce debate” concerning government funded school choice programs involving religious schools); Joseph P. Viteritti, *Blaine’s Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657, 659-60 (Summer 1998) (claiming that confusion over the meaning of the Establishment Clause is most apparent in the debate over school choice).

13. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). In this landmark Establishment Clause decision, the Court noted that it could “only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.” See *id.* In a later case, the Court explained that it has chose to “sacrifice clarity and predictability for flexibility” in cases considering the role of the Establishment Clause and government funding of educational programs. See Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

14. See *supra* note 10 and accompanying text.

15. See Suzanne H. Bauknight, *The Search For Constitutional School Choice*, 27 J.L. & EDUC. 525, 525 (Oct. 1998). “The most controversial proposal for school choice involves provision of state-funded vouchers to parents for payment of private school tuition.” *Id.*

### A. Intent of the Framers

Religious freedom is central to human liberty.<sup>16</sup> It was with this principle in mind that the framers of the Bill of Rights drafted the Establishment Clause.<sup>17</sup> The constitutional mandate to avoid the establishment of a state-sponsored church was not intended to prevent religion from impacting government, but rather to prevent the religious tyranny that the colonists had fled.<sup>18</sup> However, in the Framers' minds, "disestablishment was not synonymous with separation."<sup>19</sup> For example, the first Congress, which drafted and enacted the Establishment Clause, also created a national day of prayer, instituted a military chaplain program supported by state funds, and recognized the necessity of religion to the formation of good government.<sup>20</sup> Strict separation of church and state was not intended by the framers of the Establishment Clause,<sup>21</sup> and, therefore, voucher programs involving religious institutions should not be written off as inherently unconstitutional.

16. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 287-301 (J.P. Mayer ed. & George Lawrence trans., Doubleday 1969) (1835). "Despotism may be able to do without faith, but freedom cannot." *Id.*

17. See Viteritti, *supra* note 12, at 661-62 (citations omitted). Although the concept of religious freedom varied in the early states, "[the] common element of protection throughout the thirteen jurisdictions was a decided determination to refrain from establishing a single publicly supported church." *See id.*

18. *See id.* The Framers intended to prevent religious tyranny without hampering the practice of religion in America. *See id.* This is evidenced in part by the balance struck in the First Amendment between the Establishment Clause and the Free Exercise Clause. *See infra* note 35 and accompanying text.

19. *See Viteritti, supra* note 12, at 661-62.

20. *See id.* at 663-64 (citations omitted). In his dissent to *McCollum v. Board of Education*, Justice Reed relied on these examples as evidence that the Establishment Clause does not require strict separation of church and state. *See* 333 U.S. 203, 253-55 (1948) (Reed, J., dissenting). In addition to these examples, Tocqueville's writings also indicate that the early understanding of the Establishment Clause did not require a strict separation between the church and state:

[It] is just when [religion] is not speaking of freedom at all that it best teaches the Americans the art of being free. . . . There is an innumerable multitude of sects in the United States. They are all different in the worship they offer to the Creator, but all agree concerning the duties of men to one another. . . . [W]hat is most important for [society] is not that all citizens should profess the true religion but that they should profess religion. . . . Religion, which never intervenes directly in the government of American society, should therefore be considered as the first of their political institution, for although it did not give them the taste for liberty, it singularly facilitates their use thereof.

Tocqueville, *supra* note 16, at 301.

21. *See Zorach v. Clauson*, 343 U.S. 306, 312 (1952). "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. . . . Otherwise the state and religion would be aliens to each other – hostile, suspicious, and even unfriendly." *Id.*

## B. Pre-Lemon Application of the Establishment Clause

The history of education in the United States also indicates an early understanding of the Establishment Clause that did not require separation of state funds from religious schools. Until the middle of the nineteenth century, state monies were sent directly to religious institutions to support their important contributions to education in America.<sup>22</sup> This historical relationship between the state and religious schools was not considered violative of the Establishment Clause. Indeed, “[n]o federal court had ever ruled, at that point in time, that it was unconstitutional for a government agency to provide direct or indirect aid to religious institutions.”<sup>23</sup> However, as the “common school” movement gained momentum in the middle of the nineteenth century, the desire to separate religion from education led to the first judicial attack on state funding of religious institutions via the Establishment Clause.<sup>24</sup>

However, the Establishment Clause did not play a major role in the battle over state funding of religious schools until it was made applicable to the states in *McCullum v. Board of Education*.<sup>25</sup> Shortly after the *McCullum* decision, the Court handed down the first in a continuing series of cases addressing the applicability of the Establishment Clause to state funding of parochial schools.<sup>26</sup> In *Everson v. Board of Education*,<sup>27</sup> the Court determined that a New Jersey program reimbursing parents for expenses incurred in bussing their children to religious schools did not violate the constitution.<sup>28</sup> To explain this holding, the Court analogized the state-funded bussing program to other services, like police or fire protection, which are made available to the public without regard to the religious affiliations of the persons served.<sup>29</sup> The Court concluded that religiously neutral programs created to benefit the general welfare do not violate the Establishment Clause.<sup>30</sup> *Everson* was a victory for proponents of religious education.

Nevertheless, *Everson* is frequently cited by critics of programs that lend financial assistance to students attending religious schools as precedent precluding such programs.<sup>31</sup> These critics highlight language in Justice Black’s majority opinion describing the Establishment Clause as requiring a “high wall of separa-

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22. See Viteritti, *supra* note 12, at 664 (citation omitted).

23. See *id.*

24. See *id.* at 671.

25. 333 U.S. at 210-11.

26. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

27. *Id.*

28. See *id.* at 18.

29. See *id.*

30. See *id.*

31. See Viteritti, *supra* note 12, at 705.

tion" between church and state.<sup>32</sup> Based on this description of the Establishment Clause, many are quick to jump to the conclusion that the Constitution is intolerant of any relationship whatsoever between religion and government.<sup>33</sup> However, this argument for strict separation is inconsistent with Justice Black's ultimate application of this language to the facts of that case. As noted above, Justice Black determined that the state program reimbursing parents for expenses incurred by transporting their children to parochial schools did not breach the high wall of separation between church and state that he had just described.<sup>34</sup> *Everson* does not require isolation of religious schools from state funds. Rather, *Everson* established a standard of neutrality vital to a proper understanding and application of the Establishment Clause.<sup>35</sup>

The Establishment Clause principles articulated in *Everson* would continue to guide the Court in several subsequent cases. In *Zorach v. Clauson*,<sup>36</sup> the Court determined that a state program allowing students to be released from school for private religious instruction did not violate the Establishment Clause.<sup>37</sup> In addition, the Court approved a New York program allowing public schools to lend textbooks to private religious schools in *Board of Education v. Allen*.<sup>38</sup> The Court also reviewed a state program granting property tax exemptions to religious organizations and concluded that it did not breach the wall of separation between church

32. See *Everson*, 330 U.S. at 15-16 (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

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. . . . 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. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between church and State."

*Id.*

33. See Viteritti, *supra* note 12, at 705.

34. See *Everson*, 330 U.S. at 18. "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here." *Id.* "Moreover, the Court specifically identified attendance at a sectarian school as a form of religious exercise protected by the First Amendment that could not be encumbered by the state." Viteritti, *supra* note 12, at 706.

35. See *Everson*, 330 U.S. at 18 (stating that "[The First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."); see also, Peter M. Kimball, Comment, *Opening the Door to School Choice in Wisconsin: Is Agostini v. Felton the Key?*, 81 MARQ. L. REV. 843, 853 (Spring 1998) (claiming that "[In *Everson*] the Supreme Court recognized an underlying principle for Establishment Clause jurisprudence: the government action must be neutral toward religious and nonreligious groups.") (citation omitted).

36. 343 U.S. 306 (1952).

37. See *id.* at 314-15.

38. 392 U.S. 236, 248 (1968).

and state.<sup>39</sup> These cases demonstrate the Court's willingness to accommodate some relationships between religious organizations and the state.

### C. *Lemon v. Kurtzman and Related Cases*

In 1971, the Court attempted to clarify its Establishment Clause analysis in *Lemon v. Kurtzman*.<sup>40</sup> In *Lemon*, the Court considered the constitutionality of programs in Pennsylvania and Rhode Island that provided salary supplements to private school teachers.<sup>41</sup> After noting its difficulty in resolving Establishment Clause questions,<sup>42</sup> the Court determined that boundaries must be drawn to prevent the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"<sup>43</sup> Based upon this understanding of the Establishment Clause, the Court announced a three-prong test to be used in the analysis of Establishment Clause issues.<sup>44</sup>

The first prong of the *Lemon* test requires the reviewing court to determine whether the program at issue has a "secular legislative purpose".<sup>45</sup> The second prong requires that the court analyzes the primary effect of the statute.<sup>46</sup> If the statute's primary effect inhibits or advances religion, then the statute violates the Establishment Clause.<sup>47</sup> The third prong of the *Lemon* test requires an examination of the relationship between the state and religion created by the statute.<sup>48</sup> If the statute fosters an "excessive entanglement" between the state and religion, the statute is unconstitutional.<sup>49</sup> The Court determined that the Pennsylvania and Rhode Island programs satisfied the first two prongs of this analysis,<sup>50</sup> but held the programs unconstitutional based on the "excessive entanglement between

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39. See *Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970).

40. 403 U.S. 602 (1971).

41. See *id.* at 606-07. The Pennsylvania statute also reimbursed private schools for expenses they incurred in purchasing secular textbooks and instructional materials. See *id.*

42. See *id.* at 612. "The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment." *Id.* In its introduction to the Establishment Clause issues presented in the case, the Court noted that "[j]udicial caveats against entanglement must recognize that the line of separation [of church and state], far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." See *id.* at 614. In addition, the Court acknowledged that some relationships between religious organizations and the state are "inevitable" and not violative of the Establishment Clause. See *id.* Therefore, the argument that all programs creating relationships between the government and religious organizations are unconstitutional is incorrect.

43. See *id.* at 612 (citing *Walz*, 397 U.S. at 668).

44. See *Lemon*, 403 U.S. at 612.

45. See *id.*

46. See *id.*

47. See *id.* at 612-13.

48. See *id.* at 613.

49. See *id.* (citing *Walz*, 397 U.S. at 674).

50. See *id.*

government and religion" created by the programs.<sup>51</sup>

Although the *Lemon* test was intended to clarify Establishment Clause jurisprudence, many believe that this three-prong analysis is the source of even greater constitutional confusion.<sup>52</sup> Nevertheless, several Establishment Clause principles identified by the Court in *Lemon* must be extracted to properly identify impermissible state programs. First, *Lemon* recognized that the Constitution does not require total separation of church and state.<sup>53</sup> In addition, the three-prong test itself echoes the important theme of *Everson*: statutes that are religion-neutral ordinarily do not violate the Establishment Clause.<sup>54</sup> Accordingly, public programs that benefit the "general welfare" without regard to the religious affiliations of those being served are constitutional, unless these programs create an "excessive" relationship between the church and state.<sup>55</sup> Although the *Lemon* test has been used to invalidate many statutes allowing state funds to reach religious institutions, the test is not a per se rule against all programs involving religious schools.<sup>56</sup>

Two years after the *Lemon* decision, the Court handed down another important Establishment Clause case involving a state program directing aid to private religious schools. In *Committee for Public Education and Religious Liberty v. Nyquist*,<sup>57</sup> the Court addressed a New York program that directed state aid to qualifying private schools in an effort to lower maintenance and repair expenses.<sup>58</sup> This program also established a tuition reimbursement plan and tax relief program designed to assist parents who chose to place their children in private school.<sup>59</sup>

51. *See id.* at 613-14.

52. *See* Kristen M. Engstrom, Comment, *Establishment Clause Jurisprudence: The Souring of Lemon and the Search for a New Test*, 27 PAC. L.J. 121, 160 (Fall 1995). "In many critical areas of the law, the Supreme Court has formulated distinct, identifiable criteria to use in its adjudication. . . . However, in recent years, the [*Lemon*] test used has been neither distinct, nor identifiable." *Id.* (footnote omitted).

53. *See* *Lemon*, 403 U.S. at 614. "Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." *Id.* (citations omitted). If the Constitution were intolerant of any relationship between the state and religious organizations, the *Lemon* test would not be necessary. However, the Establishment Clause does not require such a strict separation.

54. *See* *Jackson v. Benson*, 578 N.W.2d 602, 613 (Wis. 1998).

55. *See* *Lemon*, 403 U.S. at 614-15.

56. *See* *Bauknight*, *supra* note 15, at 533 (noting that the Court has not accepted the argument that all state programs involving religious schools are unconstitutional).

57. 413 U.S. 756 (1973).

58. *See id.* at 756.

59. *See id.* The state program only assisted parents whose taxable income was less than five thousand dollars. *See id.* The program allowed the state to send fifty dollars per elementary student and one hundred dollars per high school student to qualifying families. *See id.* For families who did not qualify for tuition reimbursement, the state allowed stipulated tax deductions for each child attending nonpublic schools. *See id.* at 757.



This case presented the Court with an opportunity to apply the *Lemon* test.

Justice Powell, writing for the majority in *Nyquist*, began his analysis of the Establishment Clause issues with the following statement: “Indeed, the controlling constitutional standards have become firmly rooted and the broad contours of our inquiry are now well defined. Our task, therefore, is to assess New York’s several forms of aid in light of principles already delineated.”<sup>60</sup> In order to make this constitutional assessment, Justice Powell turned to the “well-defined three-part test” that was announced in *Lemon*.<sup>61</sup>

The *Nyquist* Court had little difficulty recognizing that the purpose of the New York program was “fully secular,” thus satisfying the first prong of the required analysis.<sup>62</sup> However, the Court held that the program violated the “primary effect” prong of the *Lemon* analysis in three ways.<sup>63</sup> First, because the program directly subsidized the budgets of religious institutions without significant limitations placed on the use of state funds, the Court determined that the program had the primary effect of advancing religion.<sup>64</sup> In addition, the Court held that the tuition reimbursements given to parents of parochial school students also had the primary effect of advancing religion.<sup>65</sup> Finally, the Court determined that tax exemptions have the same effect as tuition reimbursements and are, therefore, violative of the Establishment Clause.<sup>66</sup> The Court did not reach the final prong of the *Lemon* test because it held the program unconstitutional based on the “primary effect” portion of the analysis.<sup>67</sup>

A subsequent case gave the Court an opportunity to expound on this final

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60. *See id.* at 761. Justice Powell also noted that the principles, although identified, are difficult to extract from precedent. *See id.* at 757 n.5. However, Justice Powell specifically identified two “firmly rooted” principles in Establishment Clause jurisprudence. *See id.* at 770-71. First, a law may violate the Establishment Clause without establishing an official state religion by “merely benefit[ing] all religions alike.” *See id.* at 771 (citations omitted). Second, a state program that indirectly benefits a religious institution does not necessarily violate the Establishment Clause. *See id.* at 771-72 (citations omitted).

61. *See id.* at 772.

62. *See id.* at 773.

We do not question the propriety, and fully secular content, of New York’s interest in preserving a healthy and safe educational environment for all of its schoolchildren. And we do not doubt — indeed, we fully recognize — the validity of the State’s interest in promoting pluralism and diversity among its public and nonpublic schools. Nor do we hesitate to acknowledge the reality of its concern for an already overburdened public school system that might suffer in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools.

*Id.*

63. *See id.* at 774-89.

64. *See id.* at 774.

65. *See id.* at 780.

66. *See id.* at 790-91.

67. *See id.* at 794. However, the Court warned that similar programs “[carry] grave potential for entanglement in the broader sense of continuing political strife over aid to religion.” *See id.*

prong of the *Lemon* test. In *Aguilar v. Felton*<sup>68</sup> the Court held unconstitutional a New York program allowing public school teachers to teach remedial secular subjects in sectarian schools at the expense of the state.<sup>69</sup> The *Aguilar* majority determined that the program created an unconstitutional “excessive entanglement” by requiring “a permanent and pervasive state presence in the sectarian schools receiving aid.”<sup>70</sup> Based on this perceived entanglement of church and state, the Court invalidated New York’s efforts to aid in the remedial education of its children.

*Aguilar* represents the highest point of the judicially constructed wall of separation between church and state in modern constitutional jurisprudence. Naturally, this opinion was subject to immediate criticism. Both Chief Justice Burger and Justice White, writing separate dissenting opinions in *Aguilar*, warned: “[The] Court’s obsession with the criteria identified in *Lemon v. Kurtzman* . . . has led to results that are ‘contrary to the long-range interests of the country’.”<sup>71</sup> In addition, Justice Rehnquist voiced his disapproval by noting: “we have indeed traveled far afield from the concerns which prompted the adoption of the First Amendment when we rely on gossamer abstractions to invalidate a law which obviously meets an entirely secular need.”<sup>72</sup> Finally, Justice O’Connor insisted that the majority greatly exaggerated any “entanglement” the program might produce, and suggested that the majority holding “demonstrates the flaws of a test that condemns benign cooperation between church and state.”<sup>73</sup> This sharp criticism of *Aguilar*’s holding was indicative of a growing frustration with the *Lemon* test and its progeny. This frustration produced a shift in judicial perspective evidenced by a series of cases culminating in a decision that overruled *Aguilar*.

#### D. *Agostini v. Felton*: A Return to Neutrality

In *Agostini v. Felton*,<sup>74</sup> the Court overruled *Aguilar*, and held that New York’s “shared time” program, assisting in the remedial education of students attending

68. 473 U.S. 402, (1985) overruled by *Agostini v. Felton*, 521 U.S. 203 (1997); see also *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985) overruled by *Agostini v. Felton*, 521 U.S. 203 (1997) (companion case to *Aguilar* invalidating a similar “shared time” program).

69. See *Aguilar*, 473 U.S. at 413.

70. See *id.* at 412-13. The Court noted that this program would require an “ongoing inspection [of the public school teachers] to ensure the absence of a religious message” in their remedial classes. See *id.* at 412. It is primarily this inspection which the Court determined to be the source of an excessive entanglement. See *id.*

71. See *id.* at 419 (Burger, C.J., dissenting).

72. See *id.* at 421 (Rehnquist, J., dissenting).

73. See *id.* (O’Connor, J., dissenting).

74. 521 U.S. 203 (1997).

religious schools, did not violate the Establishment Clause.<sup>75</sup> The Court's decision to overrule *Aguilar* rested on several cases that "undermined the assumptions upon which . . . *Aguilar* relied."<sup>76</sup> However, the Court was careful to note that the "general principles" used to evaluate Establishment Clause questions had not changed since *Aguilar*.<sup>77</sup> Rather, "what has changed since . . . *Aguilar* is our understanding of the criteria used to assess whether aid to religion has an impermissible effect."<sup>78</sup> Significantly, the Court turned away from the path of strict separation and returned to *Everson's* theme of neutrality.<sup>79</sup> The Court indicated that neutrality is the key to a proper understanding of the Establishment Clause.<sup>80</sup> *Agostini* marks an important turning point in modern constitutional jurisprudence, and it has set the stage for a final resolution to the constitutional debate surrounding state-funded voucher programs.<sup>81</sup>

### III. THE MILWAUKEE PARENTAL CHOICE PROGRAM AND SURROUNDING LITIGATION

#### A. Introduction to the Milwaukee Parental Choice Program

Like many urban public school systems across the country, Milwaukee's

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75. *See id.* at 237.

76. *See id.* at 222. Justice O'Connor, writing for the majority, identified the following four assumptions of *Aguilar* and *Ball* that had been undermined by subsequent decisions:

(i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; . . . (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decision making . . . [(iv)] that New York City's Title I program necessitated an excessive government entanglement with religion because public employees who teach on the premises must be closely monitored to ensure that they do not inculcate religion.

*See id.* The Court determined that *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993), and *Whitters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1986), had undermined the assumptions upon which *Aguilar* and *Ball* had rested. *See id.* at 226.

77. *See id.* "For example, we continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged." *Id.* at 222-23 (citations omitted).

78. *Id.* at 223.

79. *See id.* at 230-31.

80. *See id.* The importance of neutrality in the Court's modern Establishment Clause jurisprudence can be seen in *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995). While addressing an Establishment Clause issue presented in that case, "the Court completely ignored the Lemon jurisprudence and relied, instead, on a pure neutrality approach." *See* Bauknight, *supra* note 15, at 536.

81. *See* Kimball, *supra* note 35, at 871-72. "Although the Court insisted that *Agostini* should not be read as a reversal of other school aid cases, it appears the Court is on the road to overturning the tenets of *Nyquist* and opening the door to school choice in the United States." *Id.*

public schools face serious problems and sharp criticism from many in that community.<sup>82</sup> In the early 1990s, Wisconsin's governor Tommy F. Thompson declared that the Milwaukee public school system was a failure.<sup>83</sup> Governor Thompson, along with Wisconsin State Representative Annette Williams, urged legislators to give inner-city parents a way out of this failing system.<sup>84</sup> The Wisconsin legislature responded to Governor Thompson's plea by enacting the Milwaukee Parental Choice Program in April of 1990.<sup>85</sup> The MPCP was created to give low-income families, via state-funded vouchers, financial assistance to enable them to send their children to the school of their choice, whether public or private.<sup>86</sup>

The original MPCP was an experimental program which was limited in scope. The original version of the MPCP limited eligibility to students from families whose income did not exceed 1.75 times the federal poverty level.<sup>87</sup> The original program also limited the total number of students who could receive vouchers to 1.5 percent of the total student enrollment of the Milwaukee public schools.<sup>88</sup> In addition, the original version of the MPCP did not allow the use of vouchers at private sectarian schools.<sup>89</sup> With these limitations, parents of qualifying applicants were empowered by government vouchers to send their children to the school of their choice.<sup>90</sup>

The MPCP proved to be very successful, and the demand from Milwaukee residents for more assistance necessitated a significant expansion of the program.<sup>91</sup> To accommodate growing parental demand for access to the MPCP, the legislature passed several amendments to the original statutes in 1995.<sup>92</sup> First, the limitation on total enrollment in the MPCP was increased from 1.5 percent to 15 percent of

82. See Kristen K. Waggoner, Comment, *The Milwaukee Parental Choice Program: The First Voucher System to Include Religious Schools*, 7 REGENT U. L. REV. 165, 167-71 (1996) (detailing the problems facing the Milwaukee public school through the 1980s and early 1990s); see also Bauknight, *supra* note 15, at 525 (describing the national educational crisis that has sparked many school choice initiatives). For a comprehensive discussion of Wisconsin's educational policy and law see Joseph A. Ranney, "Absolute Common Ground": *The Four Eras of Assimilation in Wisconsin Education Law*, 1998 WIS. L. REV. 791 (1998).

83. See Waggoner, *supra* note 82, at 171.

84. See *id.*

85. See WIS. STAT. § 119.23 (West 1996).

86. See *id.*

87. See *id.* at § 119.23(a)(1).

88. See *id.* at § 119.23(a)(2) (West 1993).

89. See *Jackson v. Benson*, 578 N.W.2d 602, 607 (Wis. 1998).

90. See *id.*

91. See *id.* The original MPCP survived several state constitutional challenges on grounds unrelated to this comment. See *Davis v. Grover*, 480 N.W.2d 460 (1992).

92. See *Jackson*, 578 N.W.2d at 608-09.

Milwaukee's total public school enrollment.<sup>93</sup> In order to accommodate this expansion, the legislature also removed the original program's non-sectarian school restriction.<sup>94</sup> Parents of eligible students were now empowered to send their children to private religious schools if they so chose.<sup>95</sup> This modification to the MPCP made it the first school choice program in the country to allow state funded educational vouchers to be directed to private religious schools.<sup>96</sup> This change also opened the doors to an anticipated constitutional attack.

However, state legislators—anticipating the constitutional attack—attempted to shield the amended MPCP from such attacks by enacting two modifications to the program. First, the amended MPCP no longer sent state checks directly to participating schools.<sup>97</sup> Checks were instead sent, in the name of the student's parents, to be restrictively endorsed by the parents and the school of their choice.<sup>98</sup> In addition, the legislature included a provision in the modified MPCP that required sectarian schools to allow participating students the option of “opting-out” of any required religious activities of the school.<sup>99</sup> These modifications indicate that the legislature was cognizant of the constitutional challenges ahead.

Despite their attempts to shield the program, the constitutional attacks were immediate.<sup>100</sup> The Milwaukee Teachers Education Association (“MTEA”), the National Association for the Advancement of Colored People (“NAACP”), the American Civil Liberties Union (“ACLU”), and a group of individual citizens filed actions against the state in August of 1995.<sup>101</sup> These suits alleged that the amended MPCP violated the Establishment Clause by providing state funds to religious schools.<sup>102</sup> Opponents of the MPCP claimed that the program directly conflicted with the Court's holding in *Nyquist*.<sup>103</sup> In addition, opponents claimed that the MPCP violated several provisions of the Wisconsin state constitution.<sup>104</sup> The Wisconsin Supreme Court issued a preliminary injunction ordering the state to withhold implementation of the amended MPCP until resolution of these claims.<sup>105</sup>

Before its final resolution, the amended MPCP spent almost two years in Wisconsin's courts. Although the Wisconsin Supreme Court considered accepting original jurisdiction in the case, the justices were split on the constitutional issues

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93. See WIS. STAT. § 4003 (West 1996).

94. See *Jackson*, 578 N.W.2d at 608.

95. See *id.*

96. See *id.*

97. See WIS. STAT. § 4003 (West 1996).

98. See *id.*

99. See *id.* at § 4008(e).

100. See *Jackson*, 578 N.W.2d at 609-10.

101. See *id.*

102. See *id.*

103. See *id.* at 614 n.9.

104. See *id.* at 609-10.

105. See *id.* “By the time of the injunction, more than 4,000 children previously enrolled in Milwaukee Public Schools (MPS) had applied and over 3,400 had been admitted to private schools under the amended choice program.” *Id.* at 609 n.3.

involved and, therefore, remanded the case to the circuit court for review.<sup>106</sup> The circuit court granted summary judgment in the action holding that the program violated the Wisconsin constitution.<sup>107</sup> The appellate court affirmed this decision.<sup>108</sup> Neither of the lower courts addressed Establishment Clause questions because the case was resolved on state grounds.<sup>109</sup>

However, the Wisconsin Supreme Court accepted review of the case and overturned the holding of the lower courts.<sup>110</sup> Finding no state constitutional barriers to the MPCP,<sup>111</sup> the Wisconsin Supreme Court began the difficult task of resolving the Establishment Clause challenge to the program. After careful review of the MPCP and the constitutional considerations involved, the Wisconsin court determined that the program did not violate the Establishment Clause.<sup>112</sup>

Many assumed that the Supreme Court would accept a review of this case and quickly correct an error in constitutional judgment. However, on November 9, 1998, the Supreme Court ended the judicial threat to the MPCP by denying the petition for certiorari. The constitutional analysis of the Wisconsin Supreme Court's allowance of a state-funded voucher is very significant in the debate regarding school choice. And the United States Supreme Court further elevated the importance of this decision by its refusal to hear the case. *Jackson v. Benson* represents a model of modern Establishment Clause analysis.

### *B. The Establishment Clause Analysis of the Wisconsin Supreme Court in Jackson v. Benson*

Justice Donald W. Steinmetz, writing for the majority in *Jackson v. Benson*, began his analysis by noting that many of the arguments presented by counsel were not germane to the constitutional issues involved in the case.<sup>113</sup> He noted that most of these arguments concerned the desirability of the MPCP and other school choice programs as a matter of public and educational policy.<sup>114</sup> Indeed, many of the

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106. See *Thompson v. Jackson*, 546 N.W.2d 140 (1996).

107. See *Jackson*, 578 N.W.2d at 609.

108. See *id.*

109. See *id.*

110. See *id.* at 620.

111. See *id.* at 619.

112. See *id.*

113. See *id.* at 610.

114. See *id.*

In their briefs and at oral argument, the parties presented information and testimony expressing positions pro and con bearing on the merits of this type of school choice program. This debate largely concerns the wisdom of the MPCP, its efficiency from an educational point of view, and the political considerations which motivated its adoption.

“constitutional” arguments surrounding school choice seem more focused on the wisdom of school choice as educational policy rather than the constitutional nature of the programs. The desirability of school choice is an important issue of public policy that deserves attention and debate. However, this debate should not take place in the constitutional arena.<sup>115</sup> Rather, this debate should be left for the legislature in order to effectuate the will of the people, unless there are legitimate constitutional barriers. In order to address constitutional concerns, courts should look to the history of the Establishment Clause and constitutional principles defined by the Court in numerous cases.

With this appropriate foundation, Justice Steinmetz turned to the constitutional principles announced in *Lemon* in order to determine the propriety of the Wisconsin program.<sup>116</sup> The court determined that the MPCP easily satisfied the first prong of the *Lemon* test, noting that “the secular purpose of the amended MPCP, as in many Establishment Clause cases, is virtually conceded.”<sup>117</sup> The state’s interest in educating children, and especially in improving the educational opportunities of children from poor families, clearly satisfies an important secular purpose.<sup>118</sup> Every school choice program is motivated by a desire to improve educational opportunities for children throughout the country; this purpose clearly satisfies the “secular purpose” principle of constitutional analysis.<sup>119</sup> Nevertheless, the MPCP and similar school choice programs must achieve this secular goal without offending competing constitutional principles.

As Justice Steinmetz moved into the second prong of the *Lemon* test—asking whether the MPCP has a primary effect that advances or inhibits religion—he noted that the examination of the MPCP’s probable effect is a task more difficult than examining its intended secular purpose.<sup>120</sup> In order to determine if the MPCP creates this impermissible effect, Justice Steinmetz identified and applied two important criteria in his analysis taken from precedent ranging “from *Everson* to *Agostini*.”<sup>121</sup> These constitutional criteria are neutrality and indirection.<sup>122</sup> Based

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*Id.*

115. *See id.* “In the absence of a constitutional violation, the desirability and efficacy of school choice are matters to be resolved through the political process. This program may be wise or unwise, provident or improvident from an educational or public policy viewpoint. Our individual preferences, however, are not the constitutional standard.” *Id.*

116. *See id.* However, Justice Steinmetz noted his cognizance of the Court’s warnings concerning the flexible nature of the constitutional principles defined by *Lemon*. *See id.* at 611.

117. *See id.* at 612 (citing *Jackson v. Benson*, 570 N.W.2d at 407).

118. *See id.*

119. *See* Bauknight, *supra* note 15, at 531. “Any legislature that enacts [a voucher] program would presumably purpose primarily to improve education for children, not provide state aid to sectarian institutions.” *Id.*

120. *See id.*

121. *See id.* at 617.

122. *See id.* at 612-13. Justice Steinmetz also identified criteria that the Court excluded from its analysis. He noted that the Establishment Clause is not violated “every time money previously in the possession of the state is conveyed to a religious institution.” *See id.* (citation omitted). “The simplistic

on these criteria, the Wisconsin court determined that “state programs that are wholly neutral in offering educational assistance directly to citizens in a class defined without reference to religion do not have the primary effect of advancing religion.”<sup>123</sup> The court held that the MPCP did not have the primary effect of advancing religion because state funds are awarded “on the basis of wholly neutral, secular criteria that neither favor nor disfavor religion.”<sup>124</sup> Furthermore, the court determined that the MPCP did not primarily advance religion because state funds reach religious schools “only as a result of numerous private choices of the individual parents of school-age children.”<sup>125</sup> As such the court determined that the MPCP satisfied the second prong of the constitutional analysis.<sup>126</sup>

This determination is consistent with both the history and development of the Establishment Clause.<sup>127</sup> The intended primary effect of the MPCP is improvement in the quality of education, not the advancement of religion.<sup>128</sup> The program attempts to accomplish this secular goal by heightening parental freedom through providing educational choices otherwise unavailable.<sup>129</sup> It is indeed difficult to imagine how this attempt to maximize educational opportunities for poor families, through increasing their ability to choose where their children will attend school, would produce the religious tyranny the framers of the Establishment Clause hoped to avoid.

Rather, the MPCP accomplishes the Establishment Clause’s goal of state neutrality towards religion by respecting and encouraging the educational decisions of parents and allowing them to direct educational funds.<sup>130</sup> This program does not have the impermissible primary effect of advancing or inhibiting religion.<sup>131</sup>

argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago. . . .” Tilton, 403 U.S. 672, 679 (1970).

123. See *Jackson*, 578 N.W.2d at 613. The Wisconsin court based this criteria on the following language from *Zobrest*:

Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

See *id.* (citing *Zobrest*, 509 U.S. at 8 (1993)).

124. See *Jackson*, 578 N.W.2d at 613.

125. See *id.*

126. See *id.* at 619.

127. See *supra* notes 10-81 and accompanying text.

128. See *supra* notes 112-13 and accompanying text.

129. See *Jackson*, 578 N.W.2d at 618. “[T]he benefit [of the MPCP] neither promotes religion nor is hostile to it. Rather, it promotes the opportunity for increased learning by those currently having the greatest difficulty with educational achievement.” *Id.* (citation omitted).

130. See *id.* at 618-19.

131. See *id.* at 619.



Having determined that the MPCP did not violate either the first or second prongs of the *Lemon* analysis, the court moved to the next question: does the MPCP create an “excessive governmental entanglement with religion”?<sup>132</sup> The court determined that the MPCP would require the State Superintendent to monitor and enforce “minimal standards” to insure that the participating religious schools satisfy the state’s educational requirements.<sup>133</sup> However, the court noted that this relationship between the State Superintendent and private religious schools already exists pursuant to the standard educational requirements of the state.<sup>134</sup> The court reasoned that “oversight activities relating to conformity with existing law do not create excessive entanglement merely because they are part of the amended MPCP’s requirements.”<sup>135</sup> The court held that this pre-existing regulatory relationship “does not approach the level of constitutionally impermissible involvement” identified by *Lemon*.<sup>136</sup> The MPCP satisfied all three prongs of the required constitutional analysis and the court held that on this basis it did not violate the Establishment Clause.<sup>137</sup>

Opponents of the program claimed that the Court’s holding in *Nyquist* requires a determination that the MPCP is unconstitutional.<sup>138</sup> However, as Justice Steinmetz noted, the *Nyquist* majority refused to determine “whether an educational assistance program that was both neutral and indirect would survive an Establishment Clause challenge.”<sup>139</sup> *Nyquist* itself suggests that a neutral state educational program providing economic assistance without regard to the religious affiliation of participating students might survive constitutional scrutiny.<sup>140</sup> The MPCP is a

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132. *See id.*

133. *See id.* “Participating private schools are subject to performance, reporting, and auditing requirements, as well as to applicable nondiscrimination, health, and safety obligations.” *Id.*

134. *See id.*

135. *See id.*

136. *See id.* at 620.

137. *See id.*

138. *See id.* at 614 n.9.

Although the tuition reimbursement program in *Nyquist* closely parallels the amended MPCP, there are significant distinctions. In *Nyquist*, each of the facets of the challenged program directed aid exclusively to private schools and their students. The MPCP, by contrast, provides a neutral benefit to qualifying parents of school-age children in Milwaukee Public Schools. . . . The amended MPCP, viewed in its surrounding context, merely adds religious schools to a range of pre-existing educational choices available to MPS children. This seminal fact takes the amended MPCP out of the *Nyquist* construction and places it within the framework of neutral education assistance programs.

*Id.*

139. *See id.* at 614. Justice Steinmetz based this conclusion on the following section of the *Nyquist* opinion:

Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute’s beneficiaries might differentiate the present case from a case involving some form of public assistance (e.g. scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.

*Id.* (citing *Nyquist*, 413 U.S. at 782 n. 38).

140. *See supra* note 125.

perfect fit to this mold of neutrality and indirection.<sup>141</sup> Therefore, the Wisconsin court correctly determined that its holding should not be controlled by the *Nyquist* decision.<sup>142</sup>

*Jackson* correctly resolved the constitutional question left open by *Nyquist* and other Establishment Clause decisions by holding that a religion-neutral program which provides indirect economic assistance to students of private schools, without regard to their religious affiliations, does not violate the Establishment Clause.

#### IV. THE IMPACT OF *JACKSON V. BENSON* AND THE MILWAUKEE PARENTAL CHOICE PROGRAM ON THE CONTINUING ESTABLISHMENT CLAUSE DEBATE

Without question, *Jackson v. Benson* has and will continue to impact the debate over school choice in America.<sup>143</sup> The immediate attention given to *Jackson* in the media after it was decided by the Wisconsin court is one indication of its importance in this debate.<sup>144</sup> Further, the Supreme Court's recent decision to deny review of the Wisconsin decision elevates *Jackson's* level of influence in the constitutional debate over school choice.<sup>145</sup> *Jackson* signals an important shift in judicial perspective that removes constitutional barriers that once prevented the expansion of educational options.<sup>146</sup>

*Jackson's* influence in the constitutional debate over school choice can already be seen in the decisions of other state courts addressing Establishment Clause challenges to school choice initiatives.<sup>147</sup> For example, the Arizona Supreme Court recently reviewed an Establishment Clause challenge to a state program granting a tax credit to individuals who made donations to organizations providing educational grants and scholarships enabling students to attend private schools.<sup>148</sup> The Arizona court determined that the program did not violate the principles of the

141. See *Jackson*, 578 N.W.2d at 614.

142. See *id.* at 614 n.9.

143. See David Schimmel, *Wisconsin Supreme Court Approves Vouchers For Parochial Schools: An Analysis of Jackson v. Benson*, 130 ED. LAW RPT. 373, 373-74 (Jan. 1999) (noting that *Jackson* intensified both the political and constitutional debate over school choice).

144. See *id.* "[T]he Wisconsin Supreme Court decision has publicized and intensified the voucher debate across the country. It was, for example, a front page story and lead editorial in the New York Times and was reported and debated in almost every major American newspaper." *Id.* at 386.

145. See *Jackson*, 119 S.Ct. 466 (1998).

146. See Perry A. Zirkel, *The Right Choice?*, 80 PHIDELTA KAPPAN 3, 249 (1998); see also, Kristen K. Waggoner *supra* note 82, at 220. "Twenty years ago, the thought of a voucher system including religious schools being upheld by our Supreme Court would have seemed almost impossible. Today, not only is it possible, it is likely." *Id.*

147. See *Kotterman v. Killian*, No. CV-97-0412-5A, 1999 WL 27517 (Ariz. 1999).

148. See *id.* at 1; see also ARIZ. REV. STAT. § 43-1089 (1997).

Establishment Clause, and cited *Jackson* as supporting authority.<sup>149</sup> This reliance on *Jackson* exemplifies the impact and importance of this decision in the constitutional debate surrounding school choice.

In addition, the supreme courts of three other states are currently considering constitutional challenges to school choice initiatives.<sup>150</sup> The reasoning of *Jackson* will likely influence these courts as they proceed with their own Establishment Clause analysis.<sup>151</sup>

However, the impact of *Jackson* is not limited to courts and their review of state programs. Rather, this decision “add[s] momentum to the voucher movement in other state legislatures and in Congress.”<sup>152</sup> Because the MPCP is the first voucher program to survive all constitutional challenges, it will be used as a model by legislators attempting to establish new school choice programs.<sup>153</sup> Indeed, both critics and proponents of school choice agree that *Jackson* will spark renewed legislative interest in voucher programs.<sup>154</sup>

Additionally, *Jackson* encourages legislative action by removing the judicial roadblocks to the political decision-making process.<sup>155</sup> This judicial restraint unties the hands of state legislators and allows them to search for unique solutions to educational problems faced by their constituents. In fact, the judicial restraint that allowed the MPCP to continue will enable policy-makers to evaluate the effectiveness of a voucher program.<sup>156</sup> This information will increase both the substance and the quality of the debate over educational policy, and hopefully lead to welcome improvements in public as well as private schools.

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149. See *Kotterman*, 1999 WL 27517 at 6, 9. In addition to its use of *Jackson* as supporting authority, the Arizona court’s Establishment Clause analysis parallels the analysis in *Jackson*. Chief Justice Zlaket, writing for the majority in the Arizona decision, noted that the Supreme Court’s Establishment Clause decisions essentially “reflect an effort to steer a course of ‘constitutional neutrality.’” See *id.* at 1 (citing *Walz*, 397 U.S. at 669 (1970)). The Arizona court also noted that “[w]here assistance to religious institutions is indirect and attenuated, i.e., private individuals choose where the funds will go, the Justices have generally been reluctant to find a constitutional impediment.” See *id.* at 6 (citations omitted). This reasoning is very similar to the interpretation used by the *Jackson* majority in its Establishment Clause analysis: “the Court’s decisions generally can be distilled to establish an underlying theory based on neutrality and indirection.” See *Jackson*, 578 N.W.2d at 613 (footnotes omitted). This similarity reflects the influence *Jackson* has already had in Establishment Clause jurisprudence.

150. See John Biskupic, *Vouchers for Religious Schools Allowed: High Court Declines to Take Up Wisconsin Case Involving Taxpayer Funds*, WASHINGTON POST, Nov. 10, 1998, at A2 (Ohio, Maine, and Vermont are expected to release rulings on voucher programs within the next few months); see also, Nero, *supra* note 12, at 1103 (describing the Ohio voucher program and surrounding litigation).

151. See Schimmel, *supra* note 143, at 373-74.

152. See *id.* Several other state legislatures are already considering implementing school choice programs. See Biskupic, *supra* note 135, at A2.

153. See Schimmel, *supra* note 143, at 387.

154. See *id.*

155. See *Jackson*, 578 N.W.2d at 610. “In the absence of a constitutional violation, the desirability and efficacy of school choice are matters to be resolved through the political process.” *Id.*

156. See Waggoner, *supra* note 82, at 220.

*Jackson* has intensified the political debate over school choice.<sup>157</sup> This effect is beneficial to both critics and advocates of school choice programs because it will draw more legislative attention and debate to educational policies. This debate is the key to strengthening both public and private education in our country.<sup>158</sup>

## V. CONCLUSION

The Milwaukee Parental Choice Program is a milestone in the constitutional debate over school choice. This program providing state-funded educational vouchers to underprivileged children is the first in the country involving religious schools to survive a constitutional challenge. This survival makes the Milwaukee program a model for other state legislatures attempting to institute voucher programs.

Although the constitutional debate over school choice has not been officially settled by the Court, its decision to allow *Jackson v. Benson* to stand undercuts assumptions that voucher programs are per se unconstitutional. *Jackson* signals a retreat from a judicially-enforced strict separation of church and state, and a return to the governmental neutrality toward religion intended by the drafters of the First Amendment. This understanding of the Establishment Clause will allow policy-makers to choose the best educational policy for the citizens they represent; truly a constitutional victory for school choice.

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157. See Schimmel, *supra* note 143, at 387; see also Recent Cases, 112 HARV. L. REV. 737, 737-42 (Jan. 1999) (criticizing *Jackson* as a misapplication of Establishment Clause precedent).

158. See Schimmel, *supra* note 143. "While most public school advocates view the Wisconsin decision as a disaster, it ultimately could have a positive impact on public education if it serves as a wake-up call, a call to be more sensitive to the concern of millions of religious parents who view public schools as 'hostile to religious faith and moral values,' and if it encourages public school leaders to work with these critics to change their perception." *Id.* (citation omitted).

