THE INCREASING JUDICIAL RATIONALE FOR EDUCATIONAL CHOICE: *MUELLER*, *WITTERS* AND VOUCHERS

Since the days of Puritan New England, sectarian private schools have played a vital role in American education.[1] In early America, when all schools were privately or locally controlled,[2] parents retained greater control over the content of their children's education. Education has radically changed during the past two hundred years.[3] In the early 1800s, the public education movement gained momentum in the states.[4] The growth of large public school systems brought with it secularized education.[5]

Many parents, however, objected *to the increasing secularization of public schools* and desired religious education for their children.[6] In

1. *See generally* McCollum v. Board of Educ., 333 U.S. 203, 213-31 (1948) (Frankfurter, J., concurring); E. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES (1919); and L. PFEFFER, CHURCH, STATE AND FREEDOM 274-312 (1953).

2. In New England in 1634, the Boston Town Meeting financed the first public school from the public treasury. A few years later in 1642, Massachusetts passed the first of several compulsory education laws. *See generally* L. PFEFFER, CHURCH, STATE, AND FREEDOM (1953).

3. *See generally* R. FINNEY, A BRIEF HISTORY OF THE AMERICAN PUBLIC SCHOOL (1946).

4. After the Revolutionary War, education became a federal concern. The Continental Congress stipulated in the Northwest Ordinance of 1787 that every township provide a public school. The Ordinance illustrated Congress' belief that the "high and binding duty of Government [was] to support schools and advance the means of education." *See* C. MOEHLMAN, SCHOOL AND CHURCH: THE AMERICAN WAY (1944).

The framers of the Constitution, however, left the authority to regulate schools to the state by not referring to education as one of the federal government's delegated powers. The tenth amendment reserved to the states the "powers not delegated to the United States by the Constitution nor prohibited by it to the States."

After the ratification of the Constitution, the states accepted the responsibility that Congress reserved for them. Thomas Jefferson influenced many to accept the idea of public education. *See* C. ARROWOOD, THOMAS JEFFERSON AND EDUCATION IN A REPUBLIC (1930). Jefferson also argued that public education should be free from sectarian control. *See Memorial and Remonstrance against Religious Assessments in* Everson v. Board of Educ., 330 U.S. 1, 63-72 (1947) (appendix). During Jefferson's time, several states still maintained a state church and supported schools as a function of the church. As the states evolved into separate secular entities, the control of the schools gradually shifted from the church to the state. *See* CUBBERLEY, *supra* note 1, at 44-45.

5. *See* L. PFEFFER, CHURCH, STATE, AND FREEDOM 281-86 (1953).

6. The dispute between New England educator Morace Mann and the President of the American Sunday School Union, Frederick Packard, illustrates many typical objections to secularization. Mann, the first Secretary of the Massachusetts Board of Education, advocated strict enforcement of a Massachusetts' law that barred the public schools from using textbooks that favored any sect. *See* R. CULVER, HORACE MANN AND RELIGION IN THE MASSACHUSETTS PUBLIC SCHOOLS (1929).

1925, the Supreme Court held that parents have a constitutional right to choose how their children will be educated, and to send their children to private schools if they choose.[7] Economic realities, however, limit the ability of parents to exercise this constitutional right. Most parents simply cannot afford private tuition while also paying mandatory public school taxes.[8]

In addition to desiring control over the content of their children's education, parents also seek a higher quality education frequently obtainable in private schools. Many believe that public schools, particularly in inner cities, provide a substandard education.[9] In contrast to parents wanting religious content in school curricula, these parents simply wish to send their children to a quality school, public or private.[10]

Many believe that a diverse educational system also benefits society by

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7. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925). Justice James McReynolds, speaking for a unanimous Court, said that

> the fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 535.

Almost fifty years later, the Court reaffirmed its holding and explained that this right to choose alternatives to public education also derived from the "fundamental interest" of parents to guide the "religious future and education" of their children. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). *See also* State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750, 758 (1976); Diehl, *The Right to Regulate Nonpublic Education*, 15 URB. LAW 97 (1983); Note, *Constitutional Law—Public Regulation of Private Religious Schools*, 37 OHIO ST. L.J. 899 (1976).

8. A 1986 Gallup/Phi Delta Kappa Poll of the Public's Attitudes Toward the Public Schools indicates that at least a narrow majority of Americans prefer private schools. Lack of finances is a major reason why more parents do not send their children to private schools. The poll asked 1,552 adults across the nation the following question: "If you had the means, would you send any of your children to a private or church-related school?" Forty-nine percent of parents whose children currently attend public schools answered "yes" and 46% answered "no."

Eighty-seven percent of the nation's school children currently attend public schools. With respect to the 1986 poll, if 49% of the public-school parents prefer private schools, then 43% (49% of 87%) of all parents prefer private schools. Adding this 43% to the 13% of all parents whose children already attend private schools results in a rough national majority of 56% of all parents who favor private school over public schools. *See Do Most Americans Prefer Private Schools?*, 1986 PHI DELTA KAPPAN 3.

9. *See* Blum, *Private Elementary Education in the Inner City*, 1985 PHI DELTA KAPPAN 643, 644. Several years ago, the U.S. Department of Health, Education, and Welfare found that 42% of black 17-year-olds who attended public schools were functionally illiterate. Parents of other inner-city students made staggering sacrifices to send their children to private schools. The private school children on the average were several grades ahead of their public school peers. *Id.*

10. *Id.*

advancing pluralism,[11] creating positive competition for public schools[12] and by alleviating the financial burdens of public schools.[13] More importantly, private schools also give students a nonreligious education and thus can further the states' interest in providing a competent secular education for every school-aged child.[14] In addition, legislators and educators generally recognize that increasing the ability of parents to make choices regarding the education of their children improves education.[15]

During the past forty years, legislatures have attempted to encourage diverse educational systems and to provide attainable alternatives for parents.[16] Usually, this encouragement has materialized as grants of state aid to the private schools, direct aid to the students, or to their parents. In most instances, the Supreme Court has rejected these attempts as violations of the establishment clause because some of the aid benefited sectarian schools.[17] This benefit, the Court has held, amounts

11. *See* Committee for Public Educ. v. Nyquist, 413 U.S. 756, 773 (1983). *See also* R. CAMPBELL, L. CUNNINGHAM, R. NYSTRAND & M. USDAN, THE ORIGIN AND CONTROL OF AMERICAN SCHOOLS 438 (1975); and D. ERICKSON, STRATEGIES FOR PRESERVING EDUCATIONAL FREEDOM 125 (1973).

12. *See* Mueller v. Allen, 463 U.S. 388, 395 (1983) ("private schools may serve as a benchmark for pulic schools, in a manner analogous to the 'TVA yardstick' for private power companies"); Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part, concurring judgment in part, and dissenting in part) ("parochial schools often afford wholesome competition with our public schools").

13. *See* Mueleer v. Allen, 463 U.S. 388, 395 (1983) (parochial schools benefit all taxpayers and relieve public schools of a great burden "[b]y educating a substantial number of students"); Wolman v. Walter, 433 U. S. 229, 262 (1977) (Powell, J., concurring in part, concurring in judgment in part, and dissenting in part) ("[parochial schools] relieve substantially the tax burden incident to the operation of public schools"); and Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 773 (1973) (overburdened public school system would suffer if large number of children abandoned parochial schools).

14. *See* Board of Educ. v. Allen, 392 U.S. 236, 247-48 (1968) ("wide segment of informed opinion, legislative and otherwise, has found that [sectarian] schools do an acceptable job of providing secular education to their students"). *Id.*

15. *See* Nathan, *The Rhetoric and the Reality of Expanding Educational Choices*, 1985 PHI DELTA KAPPAN 476, 479. A 1976 study by the National School Boards Association reported that 80% of small school districts, 60% of medium-sized school districts, and 33% of districts enrolling more than 25,000 students do not provide *any* alternative programs.

A growing majority of Americans desire more educational choices. A 1983 Gallup Poll of the Public's Attitudes Toward the Public Schools reported that 51% of the general public favored a voucher plan and that U.S. blacks favored vouchers by a margin of 64% to 23%. In addition, 60% of the respondents between the ages of 18 and 29 also favored such a plan. *Id.* at 477.

16. *See* Hoffman, *Educational "Choice" Debate Has Shifted From Washington to State Capitals*, NATIONAL JOURNAL, October 19, 1985.

17. *See* Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) (state could not provide supplementary classes or community education classes at private schools); Aguilar v. Felton, 473 U.S.

to government "furthering the establishment of religion."[18]

State and federal legislators have perennially proposed various educational voucher programs.[19] Recurring criticism of American public education at the elementary and secondary levels has sustained the debate over the efficacy of vouchers.[20] This Note examines the drafting of a

402 (1985) (state could not appropriate Title I funds to provide supplementary classes at private schools); Wolman v. Walter, 433 U.S. 229 (1977) (state could not provide field trip transportation for sectarian schools); Meek v. Pittenger, 421 U.S. 349 (1975) (state cannot provide counseling, testing or teaching on private schools grounds); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (state could not give income tax relief to parents of parochial school children); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973) (state could not reimburse church schools for costs of testing and recordkeeping); Lemon v. Kurtzman, 403 U.S. 602 (1971) (state could not supplement salaries of parochial school teachers).

But see Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986) (state could provide vocational assistance to blind student preparing for the ministry); Mueller v. Allen, 463 U.S. 388 (1983) (state could authorize income tax deduction for the cost of all students' tuition, textbooks, and transportation); Wolman v. Walter, 433 U.S. 229 (1977) (state could provide diagnostic services off the premises of the private school); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (state could provide annual non-categorical grants to all private colleges to be used for sectarian purposes); Hunt v. McNair, 413 U.S. 734 (1973) (sectarian college permitted to borrow capital facilities funds at interest rates available only to the state); Tilton v. Richardson, 403 U.S. 672 (1971) (state could provide sectarian college with funds for the construction of buildings to be used for nonsectarian purposes), Board of Educ. v. Allen, 392 U.S. 236 (1968) (state could loan free nonreligious textbooks); Everson v. Board of Educ., 330 U.S. 1 (1947) (state could provide school transportation for parochial students).

18. *See infra* notes 37-38 and accompanying text.

19. In 1985, the national government introduced two voucher proposals. President Reagan, Secretary of Education William Bennett, and others advocated general vouchers which would provide education assistance to disadvantaged students. Senator Moynihan and others favored extension of Basic Educational Opportunity Grants (BEOGs), which are currently applicable to higher education, to include primary education.

In addition, legislators in four states have introduced education voucher proposals. Thse include at least two voucher proposals in California, two in Colorado, three in Minnesota, and one each in Tennessee and South Dakota. *See* McGarry, *Family Choice in Education: Current Laws and Various Proposals*, THE CLEARINGHOUSE ON EDUCATIONAL CHOICE, July 1986.

The idea of giving parents vouchers with which they may pay their child's education at the school of their choice has found expression in other legislation. In California, the state supreme court sustained a statute designed to eliminate the dependence of school quality upon district wealth. *See* Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976). Legislators designed the statute to comply with the ideas of Professor John Coons of Berkeley Law School. Coons argued that as a constitutional principle, public education must be a function of the wealth of the state as a whole. *See* J. COONS, W. CLUNE III, & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970).

In the early seventies, legislators in Illinois, Missouri, Wisconsin, and Iowa proposed per capita grants or vouchers for private schools. These proposals have been termed "parochian" after the primary beneficiaries of the legislation. *See* Doerr, *Federal Parochaid Again*, HUMANIST, July/Aug. 1979.

20. Stephen Arons argues that the prolonged interest in vouchers reflects a desire to bring

constitutional voucher system. Part I discusses the economic justifications and educational merits of vouchers. Part II traces the development of the Supreme Court's establishment clause test and identifies the guiding principles in the court's most recent cases involving aid to sectarian schools. Part III presents a basic voucher plan, applies the principles extracted from the establishment clause cases, and concludes that the proposed voucher plan has a secular legislative purpose, does not primarily advance religion, and does not impermissibly entangle government with the sectarian schools, thus meeting the current establishment clause test.[21]

I. THE VOUCHER SYSTEM

For centuries, classical economists have promoted the idea of providing parents with cash grants to purchase their children's education.[22] Eighteenth century theorists Adam Smith and Thomas Paine advocated compulsory education laws and government subsidization of education because they believed that many families would underinvest in education. They feared that many parents either did not appreciate the importance of education or simply could not afford it. In advocating government subsidy of education, they proposed that the government give aid directly to the student or parent. They argued that permitting parents to choose good instructors would increase the instructors' incentives to teach well.[23]

Basically, a voucher plan consists of a simple cash grant, or voucher,

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"structural rather than particularistic school reform." Instead of focusing on classroom overcrowding and inadequate texts, reformers have been advocating "parent control, equitable allocation of resources, and decentralization." *Id.* Arons participated in the feasibility study of educational vouchers for the federal Office of Economic Opportunity. *See* Arons, *Equity, Option and Vouchers*, 1972 TCHR'S COL. REC. 337, 339.

21. *See infra* notes 49-56 and accompanying text.

22. Milton Friedman first used the term "voucher" to label these cash subsidies in his book ECONOMICS AND THE PUBLIC INTEREST (1955).

23. Adam Smith argued that government should only subsidize the capital expenses of schools. Parents would pay the teacher's fees if the teacher's performance satisfied them. Thomas Paine fleshed out Smith's idea and created a tax reimbursement plan that the poor could spend on their children's education. *See* A. SMITH, WEALTH OF NATIONS, 758-88 (Campbell, Skinner, and Todd ed. 1976); *See also* E. West, *Tom Paine's Voucher Scheme for Public Education*, S. ECON. J. 378 (1967).

A twentieth-century classical economist, Milton Friedman, has recommended that the government give all parents of school children a flat grant voucher to be used at "approved" schools. Friedman adovcates reduced governmental intervention in the educational process and increased competitiveness in the school market. *See* M. FRIEDMAN, *The Role of Government in Education*, in

that is given to parents for each eligible school-age child. The parents then may use the vouchers to purchase education at any school that satisfies the voucher system's accreditation requirements.[24] Beyond these general components, voucher plans differ according to the types of schools—sectarian or nonsectarian—that may participate in a particular program.[25]

Voucher proposals also differ according to which students they benefit. In Colorado, Governor Lamm has introduced a "second chance" voucher scheme that would permit drop-outs and drug users to choose the school they wish to attend.[26] In Minnesota, Senator Brandyl has introduced a voucher program that would only benefit children of lower-income families.[27] The Reagan Administration's voucher proposal for Chapter I aid recipients[28] only benefits disadvantaged children.[29]

Advocates of vouchers generally agree that subsidizing parents, not

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CAPITALISM AND FREEDOM (1962); and M. FRIEDMAN, *The Role of Government in Education*, in ECONOMICS AND THE PUBLIC INTEREST (1955).

24. *See* Areen, *Education Vouchers*, 6 HARV. C.R.-C.L. L. REV. 466, 468-69 (1971).

25. One form of voucher program would permit only nonsectarian schools to participate. The state of Vermont has employed such a plan for years. Vermont's 1977 constitution provides that "a competent number of schools ought to be maintained in each town unless the General Assembly permits other provisions for the convenient instruction of youth." State law authorizes the local school boards to designate a high school and to pay a full tuition for any local student to attend it. If a school district does not establish a high school, it must pay each pupil in that district an amount equal to the average Vermont school tuition.

Today, ninety-five of the state's towns have no public high school and pay their students' tuition to attend approved nonsectarian private schools or public schools in other towns. Twenty-five towns have a voucher system for all grades, not just high school. *See* McClaughry, *Who Says Vouchers Wouldn't Work?* 1984 REASON 24. Proponents of vouchers argue that even a voucher system that only included public schools would improve education *within the public system*. Parents would send their children to the best schools. Those public schools that did a less than satisfactory job would lose students and money, and would have to improve to stay open. *See* Areen and Jencks, *Education Vouchers: A Proposal for Diversity and Choice* 1973 TCHR'S COL. REC. 327, 329.

26. An example of a voucher system that only included public schools was the Alum Rock experiment in San Jose, California. The Alum Rock School District agreed to implement a voucher system that the Office of Economic Opportunity had authoirzed. The school district ran the experiment from 1972 to 1977. Although the OEO's plan provided for sectarian school involvement, sectarian schools did not participate because none in the area were interested. Also, the California legislature did not pass legislation necessary to include such schools. *See* WEILER, A PUBLIC SCHOOL VOUCHER DEMONSTRATION: THE FIRST YEAR AT ALUM ROCK (1974).

27. *See* The Fowler Education Proposal in McGarry, *Family Choice in Education: Current Laws and Various Proposals*, THE CLEARINGHOUSE ON EDUCATIONAL CHOICE, July 1986 at 13 [hereinafter *Current Laws*].

28. *Id.* at 14

29. *See* THE CLEARINGHOUSE ON EDUCATIONAL CHOICE, Sept., 1986, for discussion of Chapter I aid programs.

schools, most effectively furthers the state's interest in education.[30] Implementation of vouchers, according to advocates, would encourage educational pluralism.[31] Not only would such a system return more choice and control to families in making educational decisions,[32] but having schools compete in a free market would also force educators to improve the quality of education.[33] Schools could more easily specialize, tailoring programs to meet individual needs.[34] In addition, some tax experts see vouchers as a means of eliminating economic discrimination in allocating funds for schooling.[35]

Some educators contend that only a voucher plan that includes sectarian schools could fully produce these perceived benefits. The exclusion

30. *See Current Laws, supra* note 26, at 19-23.

31. First of all, advocates of vouchers agree that education is an important state interest that justifies public financial support. *See supra* notes 22-23 and accompanying text.

32. One research report showed that expanding choice among schools improves education. A summary of 50 research projects shows that when parents and students were given choices among public schools, the children experienced growth and achievement in all areas of development. *See* Raywid, *Synthesis of Research on Schools of Choice*, 1984 EDUCATIONAL LEADERSHIP 77.

33. Many contend that the political mechanisms that supposedly make public schools accountable to parents work ineffectively. If parents have grievances, they may complain to local school boards or their state legislature. If these groups are unresponsive, citizens can unseat unsatisfactory members by electing new representatives. Few parents, however, have the resources to mount a successful campaign. Consequently, school boards, educators, and legislatures have effective control of the public schools. *See* Areens & Jencks, *Education Vouchers: A Proposal for Diversity and Choice*, 72 TCHR'S COL. 327, 328 (1985).

This concentration of control has increased as the number of school districts has declined, allowing each parent even less influence in his district. The number of school districts decreased from 127,531 in 1930, to 15,747 in 1983. The number of public elementary schools dropped from 238,000 to 58,051 in the same period. The concentration is especially overwhelming in large cities. For example, the New York City School Board is responsible for educating more students than the number of students in most individual states. *See* U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, DIGEST OF EDUCATIONAL STATISTICS (1985-86).

34. A major grievance with public schools today is that they cannot accommodate the particular academic needs and interests of individual students. In both small and large districts, a "tyranny of the majority" bars the development of diverse programs within the public schools. One reservation school's treatment of Native Americans is an example of the public schools' failure to accommodate individual needs of students. The schools' textbooks did not mention any Native American contribution in the areas of English or science. The history books described the westward expansion as a great civilizing movement without mentioning the cultural strengths of the Native Americans or telling about the U.S. Government's violation of treaties. After parents on the reservation formed their own school, the Native Americans' grades, attendance, and graduation rates improved dramatically. *See* Nathan, *The Rhetoric and the Reality of Expanding Educational Choices*, 1985 PHI DELTA KAPPAN 476, 479.

35. *See* Arons, *Equity, Option, and Vouchers*, 1972 TCHR'S COL. REC. 337 ("[vouchers] are a means of rationalizing the tax structure and eliminating economic discrimination in resource allocation for schooling.") *Id.* at 338.

of sectarian schools would limit the ability of parents to truly choose the content of their child's education.[36] Opponents of vouchers assert that voucher systems that permit parochial schools to participate violate the religion clauses of the first amendment.[37] If parochial schools participate, the government would be appropriating public funds to parents who then buy "religious" education for their children. Appropriating public monies in this manner, according to opponents, violates the establishment clause.[38]

II. THE ESTABLISHMENT CLAUSE

A. The Language and History of the Establishment Clause

The first amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[39] According to the Supreme

36. *See* Areen, *Education Vouchers*, 6 HARV. C.R.-C.L. L. REV. 466, 492 (1972).

37. The legal objections to vouchers divide into three categories: religion, race, and ensuring quality in schools. The first issue concerns whether aid to parochial schools would violate the establishment clause. This note addresses that issue.

The second issue involves the question of whether financing education by directly paying parents would lead to racially segregated schools. In the late sixties, six southern states attempted to circumvent the desegregation requirements of *Brown v. Board of Education* by instituting tuition voucher programs. In this way, the state attempted to channel public funds to segregated private schools. The courts held all six attempts unconstitutional. *See* Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969); Griffin v. State Bd. of Educ., 296 F. Supp. 1178 (E.D. Va. 1969); Brown v. South Carolina State Bd. of Educ., 296 F. Supp. 199 (D.S.C. 1968), *aff'd per curiam*, 389 U.S. 222; Poindexter v. Louisiana Fin. Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968); Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd sub. nom.*, Wallace v. United States, 389 U.S. 215 (1967); Hawkins v. North Carolina State Bd. of Educ., 11 Race Rel. L. Rep. 745 (W.D.N.C. 1966). The courts, therefore, have not tolerated governmental voucher systems that denied equal protection of the laws. *See also* McCann & Areen, *Vouchers and the Citizen—Some Legal Questions*, 72 TCHR'S COL. REC. 389, 391-95 [hereinafter *Vouchers and the Citizen*].

Another question is whether the government would have to exert controls to ensure the quality of education. Those who maintain that some controls are necessary forecast two distinct problems. First, they fear that vouchers would encourage "fly-by-night" schools. Distributing voucher funds at intervals during the year, they argue, would prevent such schools from collecting funds and then disappearing. Requiring certification of all school teachers and specifically defined courses would discourage such an illusory school from even opening. Second, some argue that legislation may be necessary to guarantee open admissions and due process protections in suspension or expulsion proceedings. Otherwise, nonpublic schools may arbitrarily deny entrance or expel poor students or those with learning problems. *See* Note, *Educational Vouchers: Addressing the Establishment Clause Issue*, 11 PAC. L.J. 1061, 1062 n.11 (1980); *Some Legal Questions*, at 402-04.

38. *See, e.g.*, Tractenburg, *Some Problems with Family Control* (Book Review), 57 TEX. L. REV. 155 (1978).

39. U.S. CONST., amend. I.

Court, the religion clauses prohibit the government from elevating any religion to a state religion,[40] discriminating among religions,[41] or supporting any religion.[42] The Court has interpreted the due process clause of the fourteenth amendment to make the establishment clause binding on the states.[43]

The Supreme Court has asserted that the establishment clause erects "a wall of separation"[44] between church and state.[45] Traditionally, courts have read this metaphor as an image of government "neutrality" towards religion.[46] According to the Court, neutrality means that "[n]either a state nor the Federal Government can set up a church.

40. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 771 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); and McGowan v. Maryland, 366 U.S. 420, 441-442 (1961).

41. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 216-17 (1963); McCollum v. Bd. of Educ., 333 U.S. 203, 211 (1948).

42. *See* Grand Rapids School Dist. v. Ball 473 U.S. 373, 389 (1985); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).

But see Wallace v. Jaffree, 472 U.S. 106-07 (1985) (Rehnquist, J., dissenting); and CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982) [hereinafter SEPARATION OF CHURCH AND STATE]. These revisionist historians argue that Justice Black's history in Everson v. Bd. of Educ., 330 U.S. 1 (1947) was incorrect. They assert that the only purposes of the religion clauses were to prevent the federal government from establishing a state religion and from discriminating among religions.

43. Everson v. Board. of Educ., 330 U.S. 1 (1947) (establishment clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause). In Abington School Dist. v. Schempp, 374 U.S. 203 (1963), the Court rejected the argument that the fourteenth amendment could not incorporate the establishment clause because the latter was not a provision that protected an individual liberty. *Id.* at 215-16.

44. Thomas Jefferson used this metaphor in a letter to a church to describe how he hoped the religion clauses would be understood. *See* CORD, SEPARATION OF CHURCH AND STATE 216 (1982).

45. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

46. *See id.* at 15-6. The concept of neutrality is elusive. One commentator has noted that it raises as many questions as it answers "because it depends on sub-concepts like comparability and on definitions . . . of religious and non-religious activities, on a determination whether it overrides the policies of voluntarism and mutual abstention, and on a decision whether in any event it requires or only permits public aid." Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1686 (1969).

A comparison of West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) with Abington School Dist. v. Schempp, 374 U.S. 203 (1963) illustrates the factor of defining religious practices in applying principles of neutrality. The *Barnette* Court *excused* the children of Jehovah's Witnesses from saluting the flag in school. In *Schempp*, the Unitarians succeeded in *removing* ceremonial prayers from school.

"Neutrality" suggests that the law must treat the religious beliefs of Jehovah Witnesses and Unitarians equally. The Court, however, followed the majoritarian view of religion in these cases. The dominant view characterizes a flag-salute as secular but a ceremonial prayer as religious. In *Schempp*, this majoritarian view justified *removing* prayers altogether as opposed to merely *excusing* those Unitarians who objected. Therefore, "neutrality . . . does not assure equal weight to differing denominational views as to what constitutes a religious practice." *See* Freund, at 1686. *See also*

Neither can pass laws that aid one religion, aid all religions, or prefer one religion over another."[47] The concept of neutrality has played an important part in the cases involving aid to private schools.[48]

B. The Development of the Lemon *Test*

The Supreme Court has developed a three-part test to determine when public aid to religious schools violates the establishment clause. *Lemon v. Kurtzman*[49] produced the Court's first complete articulation of the test. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.' "[50]

The *Lemon* test has attracted much criticism, even by members of the Court.[51] Without question, the test has proven a poor predictor of outcome.[52] At best, the test provides "no more than [a] helpful signpos[t]"[53] for analyzing establishment clause cases.[54]

Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 515 (1968).

47. Everson v. Board of Educ., 330 U.S. 1, 15 (1942).

48. *See infra* notes 70-72 and accompanying text for the Court's application of the concept of neutrality.

49. 403 U.S. 602 (1971). In *Lemon*, the Court invalidated two state statutes that authorized salary supplements for teachers in underfunded nonpublic schools. Both programs limited the supplements to those teachers who only taught secular courses. *Id.* at 608.

50. *Id.* at 612-13.

51. *See* Wallace v. Jaffree, 472 U.S. 38 (1985) (various opinions filed in that case). In *Lemon*, the Court admitted, "[W]e can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." 403 U.S. at 612. Moreover, when a case involves entanglement problems, the Court has acknowledged "that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.* at 614. *See also* Committee for Public Educ. v. Regan, 444 U.S. 646, 662 (1980) (*Regan* fails to provide a litmus paper test any more than past cases).

52. The Court has mentioned that one of the reasons it has had such difficulty in articulating reliable principles is that the purpose of the religion clauses "was to state an objective, not to write a statute." Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). Consequently, "[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Id.* at 668-69.

53. Hunt v. McNair, 413 U.S. 734, 741 (1973).

54. Commentators also have criticized the lack of coherence in the establishment clause cases and agree that they are difficult if not impossible to reconcile. *See* Lewin, *Disentangling Myth from Reality*, 3 J.L. & EDUC. 107 (1974) (the Court's cases in this area resemble a "drunkard's reel"); Note, *Public Funding of Private Education: A Public Policy Analysis*, 10 J. OF LEG. 146, 148 (1983) ("Court has chosen to sacrifice clarity and predictability for flexibility").

The Court, nonetheless, has held fast to this test. Attempting to clarify "the broad contours of [its] inquiry,"[55] the Court has employed the test in its most recent decisions involving indirect public assistance to sectarian schools.[56] As a result, the test remains the accepted framework for analyzing the constitutionality of a voucher program that includes sectarian schools.

1. The Secular Purpose Requirement

Any government activity coming under an establishment clause attack must have a "secular legislative purpose."[57] The Court's decision in *Everson v. Board of Education*[58] provided the foundation for the *Lemon* test's secular purpose requirement.[59] In that case, the Court sustained a law that authorized reimbursement to parents for the transportation costs of sending their children to public and Catholic schools.[60] The Court characterized the aid as a general public safety law, analogous to

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55. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 761 (1973).

56. *See* Witters v. Washington Dep't. of Services for the Blind, 474 U.S. 481 (1986); Aguilar v. Felton, 473 U.S. 402 (1985); School Dist. of the City of Grand Rapids v. Ball, 473 U.S. 373 (1985); and Mueller v. Allen, 463 U.S. 388 (1983).

57. *Lemon*, 403 U.S. at 612.

58. 330 U.S. 1 (1947).

59. *Everson* presented the Court with its first opportunity to develop establishment clause standards applicable to statutes providing state aid to sectarian schools. Before 1947, the Supreme Court had few opportunities to interpret the establishment clause. *See* Quick Bear v. Leupp, 210 U.S. 50 (1908); and Bradfield v. Roberts, 175 U.S. 291 (1899).

The only other case prior to *Everson* dealing with the question of state aid to sectarian schools was Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930). The Court avoided the establishment clause issue by deciding it on fourteenth amendment grounds. In *Cochran*, the state spent state tax funds to purchase school books for children attending private and parochial schools. Taxpayers complained that the expenditure violated the fourteenth amendment's prohibition against taking public funds for private use.

The Supreme Court held that the expenditure was constitutional because it was for a public purpose:

> The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.

Id. at 375. *See also* P. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 14-17 (1961).

60. *Everson*, 330 U.S. at 17. Although the statute authorized reimbursement only for parents of public and Catholic schoolchildren, the appellant did not challenge the statute on equal protection grounds. No evidence existed that any children attended other kinds of private schools. Nor did any evidence indicate that children would have attended other private schools if they had transportation. *Id.* at 4 n.2.

police and fire protection.[61] The next state aid case, *Board of Education v. Allen*,[62] expanded the "general welfare benefit" theory to the broader secular legislative purpose criterion.[63] *Lemon v. Kurtzman*[64] and subsequent cases[65] have confirmed this more inclusive requirement.

Arguably, this part of the test has become little more than a formality. Statutes providing aid to sectarian schools have easily passed this part of the test.[66] The Court only reluctantly will impute to the legislature an unconstitutional intent, particularly when the challenged statute is facially neutral and a secular purpose is clear.[67]

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61. *Id.* at 17-18.

62. 392 U.S. 236 (1968).

63. Although the *Allen* Court applied the *Everson* "child benefit theory" to sustain the program in question, it relied on *Abington v. Schempp*, 374 U.S. 203 (1963), for the test it actually used. In *Schempp*, the Court held that devotional Bible reading and recitation of the Lord's Prayer in the public schools violated the establishment clause. The *Schempp* Court extracted the principles established in the few establishment clause cases, including *Everson*, and formulated the following test: "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 222.

The *Allen* court adopted the *Schempp* two-part test as the applicable framework for establishment clause challenges to state aid cases. The statute in question mandated that local public school authorities lend textbooks free of charge to all students in public and private schools. The Court found that the program had a secular purpose because it "further[ed] the educational opportunities available to the young." Moreover, the effects of the law did not contradict its purpose: "the law merely makes available to all children the benefits of a general program." 392 U.S. at 243.

64. 403 U.S. 602 (1971). In applying the first part of the test, the *Lemon* Court had no difficulty finding the secular purpose. The Court noted that "the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else." *Id.* at 613.

65. In cases in which government was fostering religious beliefs, the Court often has used this part of the test to invalidate the law. For example, the Court will invalidate laws requiring religious activities at public schools because the purpose of such laws is to advance religious beliefs. *See* Wallace v. Jaffree, 472 U.S. 38 (1985) (state law authorizing "moments of silence" held unconstitutional); Stone v. Graham, 449 U.S. 39 (1980) (state law requiring posting of Ten Commandments in every classroom held unconstitutional); Epperson v. Arkansas, 393 U.S. 97 (1968) (state could not prohibit the teaching of evolution simply because it conflicted with commonly held religious beliefs); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (practice of devotional Bible reading held unconstitutional); and Engel v. Vitale, 370 U.S. 421 (1962) (state's recommendation that certain prayer be recited at beginning of school day held unconstitutional).

But see Widmar v. Vincent, 454 U.S. 263 (1981). In *Widmar*, a state university claimed that the establishment clause mandated its policy of prohibiting student religious groups from using the school's facilities for religious worship and instruction. The Court, however, held on free speech grounds that a state university must permit student religious groups to use campus facilities if the school permitted other students groups to do so. *Id.* at 277.

66. *See infra* notes 155-59 and accompanying text for valid secular purposes.

67. In Mueller v. Allen, 463 U.S. 388, 394-95 (1983), the Court said, "Little time need be spent on the question of whether the Minnesota tax deduction has a secular purpose. Under our prior

2. *The Secular Effects Requirement*

The secular purpose of a statute will not "immunize from further scrutiny a law which . . . has a primary effect that advances religion."[68] Under the second prong of the *Lemon* test, the Court will invalidate a statute whose primary effect advances or inhibits religion.[69] The *Everson* Court's reiteration of Jefferson's "wall of separation" metaphor produced the concept of neutrality.[70] According to the Court, the state can only be neutral towards all citizens when the "effect" of its actions neither handicaps nor favors religion.[71] Consequently, the concept of neutrality has evolved into the requirement that the *primary* effect of a statute must not advance or inhibit religion.[72]

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decisions, governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the *Lemon* framework." *Id.* at 394.

See also Lynch v. Donnelly, 465 U.S. 668 (1984). In that case, the Court narrowed the meaning of the secular purpose requirement in sustaining the constitutionality of a city's Christmas nativity display. The Court stated that it would find that government lacked a secular purpose only when there is "no question that the statue or activity was motivated wholly by religious considerations." *Id.* at 680.

Justice O'Connor agrees that the purpose prong of the *Lemon* test requires that the government must have a secular purpose. She contends, however, that the appropriate inquiry under that prong "is whether the government intends to convey a message of endorsement or disapproval of religion." *Id.* at 691 (O'Connor, concurring).

If the Court adopted Justice O'Connor's interpretation of the purpose requirement, fewer statutes would survive the first part of the *Lemon* test. The Court would have an easier task in finding a message of endorsement than it does in finding no secular purpose. This interpretation of the purpose requirement, therefore, acts as a "heckler's veto": one person's perception of the state's activity as a message of endorsement may be sufficient to find an unconstitutional purpose.

68. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 774 (1973).

69. Lemon v. Kurtzman, 403 U.S. at 612 (1971).

70. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947). *See supra* notes 46-48 and accompanying text for discussion of neutrality.

71. *Id.* at 18.

72. Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963). According to the *Schempp* Court, "wholesome neutrality" ensured the promises of both religion clauses. Without neutrality, "powerful sects or groups might bring about a fusion of governmental and religious functions" so that "official support of the State of Federal Government would be placed behind the tenets of . . . orthodoxies." *Id.* This "fusion" would violate the establishment clause. Conversely, neutrality furthers the purpose of the free exercise clause, to ensure "the right of every person to freely choose his own [religion] . . . free of any compulsion from the state." *Id.*

After reviewing several previous cases, the *Schempp* Court formulated the following test:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the constitution. That is to say to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Id. at 222.

Although the Court faithfully quotes the "primary effects" requirement in every school aid case, the Court cannot agree on its proper interpretation. In particular, a majority of Justices have held that the appropriate inquiry is the "direct and immediate effect"[73] of the aid, not the "primary effect." Moreover, the Court tends to scrutinize the nature of the institution receiving the aid rather than whether the aid actually furthers religion. If the school is "pervasively sectarian," the Court is likely to invalidate the program.[74] As a result, the Court has tended to invalidate any direct aid program benefiting a sectarian school, regardless of whether it has a primarily secular effect.

In 1973, the Court struck down three direct aid programs solely on the basis of the secular effects criterion.[75] The Court concluded that the statutes did not guarantee that the aid would flow only to secular activities.[76] In two of these cases, *Committee for Public Education v. Nyquist*[77] and *Sloan v. Lemon*[78], the Court invalidated state programs benefiting parents of children attending private schools.[79] The New York program in *Nyquist* provided small tuition grants and modest tax benefits for lower income parents of children attending private schools.[80] The Pennsylvania program in *Sloan* provided similar grants to all parents of children attending private schools.[81] In both cases, a majority of the

73. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973).

74. *See* Roemer v. Board of Pub. Works, 426 U.S. 736 (1976). In *Roemer* a plurality of three Justices modified the effects test by stating that the proper inquiry was the nature of the institution. If secular activities could not be separated from sectarian ones, then the institution was "pervasively sectarian" and should receive no aid.

75. *See* Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); and Levitt v. Comm. for Pub. Educ., 413 U.S. 472 (1973).

76. In *Levitt*, the Court invalidated a New York statute providing reimbursement to nonpublic schools for performing state-mandated tests. The statute did not assure that teacher-prepared tests were free of religious instruction. This lack of assurance created an impermissible potential for advancement of religion "because the aid that [would] be devoted to secular functions [was] not identifiable and separate from aid to sectarian activities." *Id.* at 480.

77. 413 U.S. 756 (1973).

78. 413 U.S. 825 (1973).

79. The Court found the same constitutional flaws in *Sloan*, 413 U.S. at 832-33, and *Nyquist*, 413 U.S. at 794, as it did in *Levitt*, *see supra* note 76. Both statutes had the impermissible effect of advancing religion.

80. To qualify for the tuition reimbursement plan, a parent's annual taxable income had to be less than $5,000. The amount of reimbursement was limited to $50 per grade school child and $100 per high school child. These amounts could not exceed 50% of actual tuition paid. Parent ineligible for the reimbursement plan could receive tax benefits of at least $50 per school child. *Nyquist*, 413 U.S. at 958.

81. Parents could receive a $75 tuition reimbursement for each grade school child, and $150 for each high school child. *Sloan*, 413 U.S. at 828.

beneficiaries sent their children to sectarian schools.[82]

In *Nyquist*, the Court questioned the validity of the "primary effects" test. Moreover, according to the Court, it is *not necessary* to discern between primary and secondary effects. Even if a statute has the primary effect of advancing a secular interest, it is not immune from further examination to ascertain whether it also has the *direct and immediate effect* of advancing religion.[83]

The Court, therefore, rejected the argument that the indirect nature of the aid rendered it unobjectionable under the establishment clause.[84] The *Nyquist* Court considered the direct disbursement of aid to parents rather than to the schools as only one of many factors to consider.[85] Another factor that the Court weighed heavily in both cases was that the states had "singled out a class of its citizens for a special economic benefit."[86] This special treatment created an incentive for parents to send their children to sectarian schools.[87] The Court held both programs unconstitutional because "their 'primary effect [was to] advance [ ] religion' and offend [ ] the constitutional prohibition against laws 'respecting an establishment of religion.' "[88]

Two years after *Nyquist* and *Sloan*, the Court appeared to abandon the primary effects test completely by refusing to allow direct aid to nonpublic schools in the form of instructional equipment and materials, that "from [their] nature . . . [could] be diverted to religious purposes."[89] Several years later, the Court retreated from this standard and permitted state officials to provide aid programs for religious schools off the reli-

82. Eighty-five percent of the private schools were sectarian in *Nyquist*, 413 U.S. at 768, and ninety percent of the schools were sectarian in *Sloan*, 413 U.S. at 830.

83. *Id.* at 771.

84. *Id.*

85. *Id.* at 774.

86. *Id.* The Court expressly reserved the question of whether a tax exemption or reimbursement plan that benefited a larger class (i.e., parents of both private and public schoolchildren) would be constitutional. It declined to state whether a larger class would be a factor of "controlling significance" and only said that the "narrowness of the benefited class would be an important factor." *Id.* at 794.

87. *Id.*

88. *Id.* at 798.

89. Meek v. Pittenger, 421 U.S. 349 (1975) (syllabus of the Court) (instructional materials impermissibly advanced religion). The Court found that the secular and the sectarian functions of the schools were "inextricably intertwined." *Id.* at 366. Materials used for the secular function would invariably be used for the sectarian mission. Therefore, the program authorized "direct aid" to religion which, according to *Nyquist*, 413 U.S. at 780, is an impermissible advancement of religion.

gious school property.[90] The Court continued to invalidate aid schemes that permitted private school officials to retain significant control of the program.[91]

In *Committee for Public Education and Religious Liberty v. Regan*,[92] the Court purported to reject the "formalistic dichotomy" of direct and indirect aid.[93] The *Regan* Court suggested that it would no longer invalidate statutes because they directly fund schools rather than students or parents.[94] The Court refused to draw a constitutional distinction between paying sectarian school teachers to grade state required tests and paying state employees to do the same.[95] The crucial criteria, according to the Court, was whether "grading the secular tests . . . is a function that has . . . primarily a secular effect."[96]

Ten years after *Nyquist* and *Sloan*, the Court in *Mueller v. Allen*[97] *upheld* an indirect aid program providing tax benefits to the parents of both public and private schoolchildren.[98] The program permitted parents, for purposes of computing their state income taxes, to deduct from their gross income their children's educational expenses.[99] Deductible expenses included tuition, textbooks, fees, and transportation.[100]

Quoting from *Regan*, the Court stated that the appropriate inquiry was whether the statute had "the primary effect of advancing the sectarian aims of the nonpublic schools."[101] Although about ninety-five per-

90. Wolman v. Walter, 433 U.S. 229 (1977). In *Wolman*, the Court sustained a state provision authorizing the state to purchase secular textbooks for private schools and to provide standardized testing and scoring services, and diagnostic, therapeutic guidance. These programs did not violate the secular effects requirement because state offered the programs off the property of the nonpublic school site and state authorities administered them.

91. In *Meek*, the Court invalidated aid for instructional materials, equipment, and field trip transportation because they were susceptible of being used to promote religious beliefs by the teacher. *Meek*, 421 U.S. 250.

92. 444 U.S. 646 (1980).

93. *Id.* at 658.

94. The New York legislature revised a statute to comply with the Court's opinion in Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973). The new version of the reimbursement program for state-mandated testing provided for standardized, objective, state-prepared tests that could be machine graded. Schools using the tests could submit vouchers recording the amount of time teachers spent grading them. *Regan* upheld this modified version.

95. *Regan*, 444 U.S. at 658.

96. *Id.* at 657.

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

98. *Id.* at 404.

99. *Id.* at 391.

100. *Id.*

101. *Id.* at 396 (quoting *Regan*, 444 U.S. at 662).

cent of the private school students attended sectarian schools, the Court noted several reasons why the program did not have the primary effect of advancing religion.[102] First, the Court observed that the courts traditionally give broad deference to legislative judgments on tax matters.[103] Second, the Minnesota deduction was "available for educational expenses incurred by *all* parents."[104] Third, Minnesota substantially "reduced the establishment clause objections" by providing benefits to *parents* rather than directly to *sectarian schools.*[105] The Court upheld the deduction's constitutionality even though benefits ultimately went to schools. The Court concluded that the establishment clause did not prohibit this kind of "attenuated financial benefit" that flowed to sectarian schools through "the private choices of individual parents."[106]

Although *Mueller* reflects more relaxed application of the establishment clause than the earlier cases, the Court emphasized that it was not overruling *Nyquist.*[107] One distinguishing factor of the cases is the different classes of beneficiaries.[108] The programs in *Nyquist* and *Sloan* limited the class of immediate beneficiaries to parents whose children attended private schools. In contrast, the *Mueller* beneficiaries included parents of both private *and* public schoolchildren.[109] The *Mueller* Court eschewed any empirical analysis of which parents actually participated in the program.[110] That the benefits were *available* to a broad class of parents was a sufficiently "important index of secular effect."[111]

Grand Rapids School District v. Ball[112] confirms the Court's reluctance

102. *Mueller*, 463 U.S. at 396.

103. *Id.* The Court noted that the *Nyquist* opinion expressly reserved the question of "whether a program having the elements of a genuine tax deduction would be constitutionally acceptable." The *Nyquist* deduction was not "genuine" because it was "unrelated to the amount of money actually expended by any parent on tuition." *Id.* at 397 n.6.

104. The program "includ[ed] those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools." *Id.* at 397.

105. *Id.* at 398-99.

106. *Id.* at 399. "Where . . . aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval,' . . . can be deemed to have been conferred on any particular religion, or on religion generally." *Id.*

107. *Id.* at 404 (Marshall, J., dissenting). The Court also did not question the vitality of *Sloan.*

108. In *Sloan*, *Mueller* and *Nyquist*, the aid was general in nature, contained no limitation to secular use, and ultimately benefited sectarian schools.

109. *Mueller*, 463 U.S. at 397. The Court compared the class of beneficiaries in *Mueller* with those in *Sloan.* In *Sloan*, "the State [had] singled out a class of its citizens for a special economic benefit." *Id.* at 397 n.7, (quoting *Sloan*, 413 U.S. at 832).

110. *Mueller*, 463 U.S. at 404.

111. *Id.* at 397.

112. 473 U.S. 373 (1985).

to uphold an aid program that *directly* benefits a pervasively sectarian institution. In that case, a New York school district provided several supplemental educational programs.[113] The school district conducted the programs in nonpublic schools, employing both public and religious school teachers to instruct the parochial schoolchildren.[114]

Initially, the Court concluded that the recipient schools were pervasively sectarian because "a substantial portion of their functions [were] subsumed in the religious mission."[115] Given the character of the schools, the Court observed that the public programs unconstitutionally advanced religion in several ways.[116] The Court initially contended that an impermissible risk existed that teachers participating in the program would inculcate religious beliefs.[117] The Court also feared that the government assistance symbolically linked the government and the school's religion.[118] In addition, the programs impermissibly subsidized the religious mission of the schools.[119]

More recently, the Supreme Court unanimously rejected an establishment clause challenge of a Washington program that provides vocational aid to handicapped students. In *Witters v. Washington Department of Services for the Blind*,[120] the Court held that the state of Washington did not violate the establishment clause by giving assistance to a blind recipient who used the funds to pursue a career as a minister.[121] The *Witters* opinion provides the question for all future cases involving aid to individuals: is the program of educational aid to an individual a permissible transfer or an impermissible direct subsidy of an institution? Given the unanimity of the opinion, *Witters* in combination with *Mueller* provides

113. The Shared Time program offered classes during the regular school day. The school district formed the program to supplement the core curriculum courses required by the state. The Community Education Program held classes at the end of the school day in voluntary courses, some of which were offered at the public schools. Of the 41 private schools involved in the program, 40 were religious schools. *Id.* at 375-79.

114. The Shared Time teachers were full-time employees of the public schools. A large number of them had previously taught in the private schools. The Community Education Program teachers were part-time public school employees. They were full-time employees of the private school in which they taught the programs. *Id.* at 376.

115. "Our inquiry must begin with a consideration of the nature of the institutions in which the programs operate." *Grand Rapids*, 473 U.S. at 384.

116. *Id.* at 385.

117. *Id.* at 387-89.

118. *Id.* at 390-92.

119. *Id.* at 392-97.

120. 474 U.S. 481 (1986).

121. *Id.*

the clearest guidelines for creating a voucher system that satisfies the secular effects part of the *Lemon* test.

The *Witters* opinion centered on the effects prong of the *Lemon* test, addressing the question of whether the assistance granted to Witters had the "principal or primary effect" of supporting religion.[122] The Court held that it did not. The Court opined that "the establishment clause is not violated every time that money previously in the possession of the state is conveyed to a religious institution."[123] A state employee, the Court asserted, could constitutionally donate his check to a religious institution.[124] The Court cautioned, however, that *direct subsidies* would violate the establishment clause. Even subsidies in the form of aid to parents or students, the Court continued, may constitute direct aid in disguise.[125]

The Court detailed the factors that made Witters' aid more like the salary donation than direct aid. First, the choices of the individual recipients were "genuinely independent and private" because the state paid the money "directly to the student who transfer[red] it to the educational institution."[126] Second, the program was not "skewed towards religion" because individuals were eligible regardless of the "sectarian-nonsectarian, or public-nonpublic nature" of the recipient institution.[127] Third, the program contained no financial incentives for students to undertake sectarian education because the students had the opportunity to spend

122. *Id.* at 486.

123. *Id.*

124. *Id.* at 486-87.

125. *Id.* at 487. *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 248-51 (1977); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 761 (1973); Sloan v. Lemon, 413 U.S. 825 (1973).

126. 474 U.S. at 487. According to Justice Marshall, this case differed from *Grand Rapids*, "[w]here no meaningful distinction [could] be made between aid to the student and aid to the school." *Id.* at 487 n.4 (quoting Wolman v. Walter, 433 U.S. 229 264 (1977) (opinion of Powell, J.)).

Several members of the Court have indicated in recent opinions that indirect aid benefiting an individual will have a greater chance of surviving constitutional scrutiny than direct aid benefiting any institution. In *Witters*, Justice Marshall said, "Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U.S. 481, 487 (1986).

In *Grand Rapids*, Justice Brennan stated, "Where, as here, no meaningful distinction can be made between aid to the student and aid to the school, the concept of a loan to individuals is a transparent fiction." 473 U.S. 373, 396 (1985).

Justice Rehnquist, in *Mueller*, stated, "under Minnesota's arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children." 463 U.S. 388, 399 (1982).

127. 474 U.S. at 487-88.

the vocational rehabilitation aid on wholly secular education.[128] Moreover, the Court did not consider the program an "ingenious" circumvention of constitutional restrictions on state aid to sectarian schools.[129]

Arguably, *Witters* does not apply to programs that aid students in elementary and secondary schools. In *Tilton v. Richardson*,[130] the Court distinguished direct state aid to colleges from direct aid to primary schools.[131] Younger students, the Court contended, are more impressionable and susceptible to influence.[132] The *Witters* Court, however, did not discuss the *Tilton* distinction, nor did it expressly qualify its holding by stressing that the money benefited only college students. In fact, a majority of the Justices in three separate concurring opinions agreed that *Mueller*, a primary school aid case, controlled the *Witters* case.[133] Thus, a majority of the Court would not create an establishment clause distinction between precollege and college programs that indirectly aid sectarian schools.

Another possible basis for limiting *Witters* is that the case only involved one student.[134] Conceivably, the Court could limit the *Witters* holding and invalidate a comprehensive aid scheme. Justice Marshall, the author of the majority opinion, indicated the importance of this factor. He stated that the amount of state aid benefiting the religious college was not "significant" when compared to the whole class of beneficiaries.[135] The majority's reliance upon *Mueller*, however, again undermines this potential limitation.[136] The *Mueller* majority stated that the financial benefit accruing to religious schools was sufficiently "attenuated" despite the fact that parents of religious schools children claimed most of the deductions.[137]

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128. *Id.* at 488. The benefits of the aid program were not limited, "in large part or in whole, to students at sectarian institutions." *Id.*

129. *Id. See Nyquist*, 413 U.S. at 785.

130. 403 U.S. 672 (1971).

131. *Id.* at 679.

132. *Id.*

133. Justices O'Connor, White, Rehnquist, Burger, and Powell all relied upon *Mueller* in their concurring opinions.

134. 474 U.S. 481 (1986).

135. Justice Marshall suggested that this might have been the most significant factor to him: "Further, and importantly, nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education." *Id.* at 488.

136. *See supra* note 133.

137. *See supra* note 126.

3. *The Entanglement Principles*

a. *Administrative Entanglement*

The Court's previous decisions make clear that a program benefiting primary schools violates the administrative entanglement prong of the test if the program engages public authorities in "a comprehensive, discriminating, and continuing . . . surveillance" to ensure adherence to the secular effects requirement.[138] Usually the need for such surveillance arises when two factors coexist: 1) the aid provides materials or services that are not inherently limited to secular use; and 2) the program benefits pervasively religious schools.[139] The Court has required public officials to monitor how the sectarian school uses the public aid to ensure that the school does not use it to promote religion. Ironically this surveillance may unconstitutionally entangle church and state.[140]

This administrative entanglement factor in the *Lemon* test originated in *Walz v. Tax Commission*.[141] In that case, the Court used the concept to *sustain* a state's tax exemption for religious property.[142] Complete exemption for religious property survived the excessive entanglement test because the alternative, taxation, entailed greater entanglement problems.[143] In later cases, the Court used the test to *invalidate* government programs that required official monitoring to avoid a religious effect. *Aguilar v. Felton* [144] is the most recent case in which the Court has relied upon the administrative entanglement prong to invalidate a program. Resembling the *Grand Rapids* program,[145] the plan in *Aguilar* provided supplemental classes for parochial school students in a "pervasively sectarian environment."[146] The *Aguilar* program, however, differed from *Grand Rapids* because it contained a monitoring system to prevent the teachers from interjecting religious beliefs into their teaching.[147] This ongoing supervision, the Court concluded, violated the en-

138. Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

139. *See* Aguilar v. Felton, 473 U.S. 402, 411 (1985); Meek v. Pittenger, 421 U.S. 349, 361 (1975); and Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

140. *Compare* Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) *with* Aguilar v. Felton, 105 S. Ct. 3232 (1985).

141. 397 U.S. 664 (1970).

142. *Id.* at 692.

143. *Id.* at 691-92.

144. 473 U.S. 402 (1985).

145. *See supra* notes 112-119 and accompanying text.

146. *Aguilar*, 473 U.S. at 412.

147. *Id.* at 413.

tanglement clause.[148]

b. Political Entanglement

The nonentanglement test also requires that a program not have a "divisive political potential."[149] The *Lemon* Court first articulated this concern. The Court observed that in a community where many children attend parochial schools, any state aid to such schools will invoke significant political factionalism. Voters would select candidates who agreed with them concerning state aid to parochial schools. According to the Court, "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[150]

The Court, however, has never invalidated any state aid program solely because of its "divisive political potential."[151] In fact, the *Mueller* Court appeared to hold that such an inquiry is appropriate only in cases involving direct public aid to sectarian institutions and that it is inappropriate in cases involving indirect aid.[152]

III. A CONSTITUTIONAL VOUCHER PROPOSAL

The probability of future experimentation with voucher systems necessitates ascertaining whether a voucher scheme would survive a first amendment establishment clause challenge.[153] Making predictions in the abstract, however, is difficult and fails to provide significant guidance. Therefore, the following proposal creates a workable example to address potential constitutional objections.

A. The Components of the Plan

1. Classes of Schools

a. Traditional Public and Private Schools

Existing public and private schools may choose not to participate in

148. *Id.* at 414.

149. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

150. *Id.*

151. Typically, the Court does not treat the administrative and political aspects of entanglement as separate problems. *See* Aguilar v. Felton, 473 U.S. 402 (1985).

152. Indirect aid means assistance that is channeled initially to parents and that reaches sectarian schools only as the result of independent choices made by the initial beneficiaries. *See* Mueller v. Allen, 463 U.S. 388, 403-04 (1983).

153. *See Vouchers and the Citizen*, *supra* note 37. ("The ability of lawyers to predict what the courts might do with such a radically new approach to public education is unavoidably limited.").

the voucher program. If a public school district declines to participate, it may only admit students residing within its district. Public schools will continue to receive funding on a per-student basis. Parents who desire to send their children to a non-participating private school must continue to pay the full tuition of the school.

b. Voucher Schools

This voucher plan creates two classes of participating schools called private and public voucher schools. Private voucher schools include secular and sectarian private schools. Public voucher schools are schools organized as public corporations. School districts, community colleges or public universities may establish public voucher schools. Both private and public voucher schools may redeem state educational vouchers.

2. Limits on Regulation of Voucher Schools

Voucher schools may redeem the state vouchers of their students after filing a statement indicating satisfaction of certain requirements. These requirements include state hiring, employment, facilities, and curriculum standards which *currently* apply to private non-voucher schools. No voucher school is ineligible to redeem state vouchers because it teaches moral or social values, philosophy, or religion. Public voucher schools, however, may not promote religious beliefs. Each voucher school must make information concerning its facilities, curriculum, and teachers readily available to parents and state officials.

3. Eligible Students and Value of Voucher

Every school-age child residing in the state is entitled to a state voucher annually without charge. The voucher will equal that year's per-pupil operating cost for public schools in the district of residence. Parents may send their children to private schools if they prefer. If parents choose a private school whose tuition exceeds the value of the voucher, they may pay the difference.

B. The Constitutionality of the Plan Under the Establishment Clause

This proposed voucher plan raises constitutional issues because sectarian schools may participate. The specific question this plan presents is whether it violates the Establishment Clause because parents may give public funds to religious schools to educate their children. Under the

combined holdings in *Witters* and *Mueller*, the plan does not violate the establishment clause.[154]

1. The Secular Purpose Requirement

This voucher proposal would easily satisfy the first criterion of the tripartite test. Stated legislative purposes that have satisfied the Court in the past include the following: "the furtherance of the educational opportunities available to the young";[155] the promotion of "pluralism and diversity among . . . public and nonpublic schools";[156] the protection of the public school system from being inundated by children abandoning private schools because of cost;[157] the assurance of the "full development of the intellectual capacities of children;"[158] and the maintenance of private schools as a qualitative "benchmark" for the public schools.[159]

This proposed voucher plan serves the following purposes: to increase the scope of children's educational opportunities; to encourage parental involvement in education; to foster diversity and competition among participating schools; and to offer nonaffluent families some educational choices that are already available to affluent ones. All of the above purport to improve education. These purposes, therefore, are consistent with the purposes that the Supreme Court has previously found acceptable.

The Court's opinion in *Nyquist* may create one caveat to the conclusions that a court would find that this voucher plan has a secular purpose. In *Nyquist*, the Court first found that the tax and tuition reimbursement programs had acceptable secular purposes: "[W]e do not question the . . . fully secular content, of New York's interest."[160] After the Court found that the programs violated the second prong of the *Lemon* test, however, the Court stated, "[I]nsofar as such benefits render assistance to parents who send their children to sectarian schools, their *purpose* and inevitable effect are to aid and advance those religious institutions."[161]

154. Whether the Court will *adhere* to the principles established in *Mueller* and *Witters* is more problematic.

155. Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).

156. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 773 (1973).

157. Sloan v. Lemon, 413 U.S. 825, 829-30 n.5 (1973).

158. Meek v. Pittenger, 421 U.S. 349, 367 (1975).

159. Mueller v. Allen, 463 U.S. 388, 395 (1983).

160. 413 U.S. 756, 773 (1973).

161. *Id.* at 773.

The exact reason for this inconsistency in the Court's language is unclear. The Court may have "backtracked" and attributed to the legislature an unconstitutional purpose, having found an unconstitutional effect. Alternatively, the inconsistency may indicate that the Court concluded before it began its examination that the true purpose of the program was to advance religion. The Court then structured its analysis to arrive at that predetermined conclusion. Perhaps the Court simply was not careful with its language. This inconsistency does indicate, however, that the Court would probably not invalidate a voucher program solely on the basis of an unacceptable purpose. Therefore, the Court would focus its attention on the next two parts of the test.

2. *The Primary Effects Requirement*

The most problematic aspect of the "aid-to-religious-schools" cases has been that the aid runs afoul of the *Lemon* test's secular effects requirement.[162] This voucher plan, however, satisfies the effects requirement. It does not have "the primary effect of advancing the sectarian aims of the nonpublic schools,"[163] nor does it "confer any message of state endorsement of religion."[164]

The Court continually has rejected the argument that "any program which in some manner aids an institution with a religious affiliation" violates the establishment clause. According to the holdings of *Mueller* and *Witters*, a voucher program that "neutrally provides state assistance to a broad spectrum of citizens" does not offend the establishment clause.[165] The state provides neutral assistance when the voucher is "available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[166] If the state distributes voucher funds directly to parents, sectarian schools receive funds only because of individuals' private independent decisions.[167] The Court has considered parent choices private and independent if the voucher program does not contain *incentives* for recipients to attend sectarian schools. In addition,

162. *See supra* notes 74-75 and accompanying text.

163. Mueller v. Allen, 463 U.S. 388, 396 (1983).

164. Witters v. Washington Dep't. of Services for the Blind, 474 U.S. 481, 489 (1986).

165. *Mueller*, 463 U.S. at 398-99.

166. *Witters*, 474 U.S. at 487, (quoting Committee for Pub. Educ. v. Nuquist, 413 U.S. 756, 782-83 n.38 (1986)). Justice Powell in a concurring opinion noted that "*Mueller* makes the answer clear: state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test." *Id.* at 490-91.

167. *Mueller*, 463 U.S. at 399.

the voucher plan must not appear to the Court as an "ingenious" plan for circumventing previous decisions that prohibited state aid to sectarian schools.[168]

This voucher proposal provides neutral assistance to a broad range of citizens. Like the recipients of the aid programs in *Witters* and *Mueller*, students of both private and state schools may benefit from the vouchers. Moreover, the state is not sponsoring or subsidizing religion because public aid ultimately flows to sectarian schools. Public funds that ultimately accrue to sectarian schools do so only as the result of the private choices of parents to send their children to those schools.

The voucher plan contains no incentive for parents to send their children to sectarian schools. On the contrary, voucher recipients have a greater opportunity to use their vouchers at a nonsectarian school. A large number of public and private secular schools currently exist, compared to only a handful of sectarian schools.[169] In addition, if the tuition of a participating sectarian school exceeds the value of the voucher, parents must pay the difference themselves. Arguably, the voucher plan contains an incentive for parents to send their children to the public school in their district because the state must guarantee that the voucher covers that school's tuition costs.

3. *The Entanglement Requirements*

The entanglement prong of the *Lemon* test does not create a barrier to the constitutionality of this voucher plan. The plan does not violate the administrative entanglement aspect of the *Lemon* test because it does not involve ongoing governmental surveillance to guarantee adherence to the secular effects requirement. Surveillance is not necessary because the aid does not constitute materials or services that are *inherently* susceptible to being used for sectarian purposes. State authorities must ensure that private schools satisfy state curriculum, health and safety, hiring, and employment requirements. Ensuring these requirements, however, does not increase the involvement of government in monitoring sectarian schools. State officials currently enforce these requirements.

A more problematic question is whether the plan violates the political entanglement prong by bearing "divisive political potential."[170] The

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

169. *See supra* note 32.

170. *See supra* notes 149-50 and accompanying text.

Court could find that this voucher scheme created "political division along religious lines"[171] if a state legislature adopted the plan to promote the interests of religious schools. As each school district debated the merits of the voucher system, the legislature's motive may become a heated issue. School officials that advocated the plan could be identified as favoring the religious schools in the community.

This debate is unlikely to occur for two reasons. First, the leading advocates of the voucher system promote the plan to improve education, not to advance the interests of sectarian schools.[172] Although candidates would disclose their opinions concerning the educational merits of the plan, this disclosure would not force them to state whether they favor or oppose aid to sectarian schools. Second, some sectarian schools may choose not to participate in voucher plans. They fear that they would lose their distinctive religious nature[173] by accepting vouchers because the state could more easily control their methods through additional regulations.

IV. CONCLUSION

Parents have a constitutional right to control the content and ensure the quality of their children's education. Economic conditions, however, limit the ability of parents to exercise this right. Statutes that provide assistance to private schools, parents, or students increase the educational choices of parents. Recent educational voucher proposals represent one legislative alternative to the public school system. Vouchers maximize the ability of parents to choose between public and private schools. Following the principles of the Supreme Court's most recent decisions, states could draft voucher plans that fully comply with the establishment clause. The voucher plan proposed in this Note has a secular purpose, does not primarily advance religion, and does not impermissibly entangle the state with sectarian schools.

J. Catherine Rapinchuk

171. *See supra* note 149.

172. *See* Areen, *Education Vouchers*, 6 HARV. C.R.-C.L. L. REV. 466, 501 (1972).

173. *See* Elson, *State Regulation of Nonpublic Schools: the Legal Framework*, in PUBLIC CONTROLS FOR NON-PUBLIC SCHOOLS (1969) (detailed history of state regulatory statutes).