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Mitchell v. Helms: Giving the Cleveland School Voucher Program a Fighting Chance

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He only says, "Good fences make good neighbors."
Spring is the mischief in me, and I wonder
If I could put a notion in his head:
"*Why* do they make good neighbors? Isn't it
Where there are cows? But here there are no cows.
Before I built a wall I'd ask to know
What I was walling in or walling out,
And to whom I was like to give offense.
Something there is that doesn't love a wall,
That wants it down."
- Robert Frost, *Mending Wall*[1]

I. INTRODUCTION

In 1995, in response to an educational crisis in Cleveland's public schools, the Ohio State legislature enacted a scholarship program which provided money in the form of "vouchers" to students within the local school district.[2] This scholarship enabled students to choose which among the program's "alternative schools" they wished to attend.[3] The majority of the schools participating in the program were private and "church-affiliated."[4] Thus, most of the children enrolled in the Cleveland Voucher Program received money to attend a private, sectarian school.[5]

1. ROBERT FROST, THE POETRY OF ROBERT FROST 33-34 (Edward Connery Lathem ed., Henry Holt and Co. 1979).

2. Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 836 (N.D. Ohio 1999), *aff'd*, 234 F.3d 945 (6th Cir. 2000). The 1995 program was struck down by the Ohio Supreme Court in May of 1999 as being in violation of the Ohio Constitution. However, it was "re-enacted in all pertinent respects by the Ohio Legislature" in June of 1999. *Id.*

3. *Id.*

4. *Id.* at 836-37.

5. *Id.*

Does the Cleveland School Voucher Program violate the Establishment Clause of the First Amendment to the United States Constitution?[6] The Establishment Clause provides, "Congress shall make no law respecting an establishment of religion . . . ."[7] Interpreting the meaning of this Clause when it comes to governmental aid to religious schools has proved one of the most controversial and challenging tasks in judicial history.[8]

In December of 1999, the District Court for the Northern District of Ohio held that the Cleveland Voucher Program violated the Establishment Clause, and permanently enjoined the State of Ohio from administering the program.[9] One year later, the Sixth Circuit affirmed the decision of the District Court, but in hotly debated majority and dissenting opinions, which evidenced the current uncertainty of Establishment Clause precedent when applied to school vouchers.[10] Cleveland Voucher Program supporters, including President George W. Bush, have petitioned the Supreme Court to hear the case.[11]

The judicial battle over the Cleveland Program came in the wake of a decision by the Wisconsin Supreme Court to uphold a similar "parental choice" program implemented in Milwaukee, and the Supreme Court of the

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6. *See* U.S. CONST. amend. I.

7. *Id.*

8. *See* Mitchell v. Helms, 530 U.S. 793, 807 (2000) ("In the over 50 years since *Everson* we have consistently struggled to apply these simple words in the context of governmental aid to religious schools."); *see also* Tilton v. Richardson, 403 U.S. 672, 678 (1971) ("[C]andor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.").

9. Simmons-Harris v. Zelman, 72 F. Supp. 2d at 865.

10. *See* Simmons-Harris v. Zelman, 234 F.3d 945, 948 (6th Cir. 2000), *reh'g and suggestion for reh'g en banc denied,* (Feb. 28, 2001). Circuit Judge Clay, writing for the majority, concluded:

> The effect of the voucher program is in direct contravention to [the] Supreme Court cases which mandate that the state aid be neutrally available to all students who qualify, that the parents receiving the state aid have the option of applying the funds to secular organizations or causes as well as to religious institutions, and that the state aid does not provide an incentive to choose a religious institution over a secular institution.

Id. at 961. In contrast, dissenting judge Ryan concluded that "a reading of the Supreme Court's Establishment Clause cases decided since 1973 makes it unmistakably clear that the voucher program passes constitutional muster." *Id.* at 963 (Ryan, J., concurring in part, dissenting in part).

11. *See* Pet. for Cert. Filed, 70 U.S.L.W. 3035 (May 23, 2001) (No. 00-1751); Pet. for Cert. Filed, 69 U.S.L.W. 3763 (May 25, 2001) (No. 00-1777); Pet. for Cert. Filed, 69 U.S.L.W. 3764 (May 25, 2001) (No. 00-1779); *see also* Linda Greenhouse, *White House Seeks Ruling on Vouchers*, DAYT. D. NEWS, July 8, 2001, at 15A

> ("In a brief filed late last month in support of Ohio's petition, Theodore B. Olson, who was confirmed as the new solicitor general in May, said that it was 'in the nation's interest' for the court to take up the case. Olson said policy-makers needed to 'know, without further delay, whether such programs are a constitutionally permissible option for expanding education opportunity for children enrolled in failing public schools across America, or whether other solutions must be sought for this critical national problem.");

Karen Gullo, *Bush Urges High Court on Vouchers*, AP ONLINE, June 23, 2001 ("By filing an uninvited brief to the nation's top court, the Bush administration is signaling its intention to press the case for programs that allow tax dollars to be used to pay student tuition at religious schools.").

United States decision to allow it to stand.[12] As more and more states propose and enact similar voucher programs, the question intensifies as to their constitutionality, and how and when the Supreme Court will ultimately decide the issue.[13]

This past term, however, the Supreme Court in *Mitchell v. Helms* may have given some indication of its leanings when it held that Chapter 2 of the Education Consolidation and Improvement Act, which provided government aid in materials and equipment to public and private schools in Jefferson Parish, Louisiana, did not violate the Establishment Clause.[14] In a plurality opinion, the Court found that there is "no basis for concluding that Jefferson Parish's Chapter 2 program 'has the effect of advancing religion'" because the aid itself is neutral, eligibility for aid is determined by neutral factors, and allocation of the aid is based on the private choices of the parents of schoolchildren.[15] Is *Mitchell v. Helms* merely the latest case in the long line of Supreme Court decisions struggling to give coherent meaning to the Establishment Clause, or did it signal a significant breakthrough in the Court's analysis of these issues?[16]

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12. *See* Jackson v. Benson, 578 N.W. 2d 602, 632 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998); *see also* Robert L. McFarland, Comment, *The Milwaukee Parental Choice Program: A Constitutional Victory for School Choice*, 27 PEPP. L. REV. 107 (1999); Christopher A. Hoffman, Note, *The Future of School Vouchers for Religious Academies After Jackson v. Benson*, 43 ST. LOUIS U. L.J. 1083 (1999).

13. *See* Jaime Steven Kilberg, Note, *Neutral and Indirect Aid: Designing a Constitutional School Voucher Program Under the Supreme Court's Accommodationist Jurisprudence*, 88 GEO. L.J. 739, 739 & n.3 (2000) (noting that "[s]everal states have active legislation pending: Alaska, California, Colorado, Delaware, Georgia, Hawaii, Kansas, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, Rhode Island, South Carolina, Virginia, and Washington"); *see also* Frank R. Kremerer, *The Constitutionality of School Vouchers*, 101 EDUC. L. REP. 17, 17 (1995) (stating that public policymakers are increasingly looking towards improving schools through voucher programs); Danielle Jess Latham, Note, *Wall of Separation or Path to Interaction: The Uncertain Constitutional Future of School Vouchers in Light of Inconsistent Developments in Judicial Neutrality Between Church and State*, 48 DRAKE L. REV. 403, 405 (2000) (noting that vouchers "continue to spark heated legal and political controversy in this country"); Kilberg, *supra* at 770 ("The school voucher issue is perhaps one of the most publicly debated, national constitutional issues [that the] U.S. Supreme Court has consistently refused to address."); Kim K. Metcalf & Polly A. Tait, *Free Market Policies and Public Education: What is the Cost of Choice*, 81 PHI DELTA KAPPAN 65 (1999) ("Educational choice will continue to be the most contentious issue in U.S. education for the foreseeable future.").

14. 530 U.S. 793, 808 (2000).

15. *Id.* at 829.

16. For one opinion and analysis of the question, see Julie F. Mead & Julie K. Underwood, *Lemon Distilled with Four Votes for Vouchers: An Examination of Mitchell v. Helms and its Implications*, 149 ED. LAW REP. 639 (Feb. 15, 2001) ("That *Mitchell* will ultimately shine brightly in the constellation of Establishment Clause jurisprudence is doubtful, given the deep divisions between the plurality and concurring opinions. But . . . the multiple opinions filed in relation to its dispute do shed light on this evolving and interesting facet of the application of constitutional law to

From this nation's beginnings, religion and education have, and continue to be, intrinsic features of American life.[17] Indeed, the Supreme Court has on numerous occasions reaffirmed this fact. In 1952, Justice Douglas wrote:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.[18]

Two years later, in the landmark opinion *Brown v. Board of Education*, Chief Justice Warren declared:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state

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elementary and secondary education.").

17. *See* McFarland, *supra* note 12, at 109 ("Religious freedom is central to human liberty."); *see also* Christian W. Johnston, *Agostini v. Felton: Redefining the Establishment of Religion Through A Modification of the Lemon Test*, 26 PEPP. L. REV. 407, 407 (1999) ("Even though there is no fundamental right to an education, public policy strongly favors education.") (footnote omitted); Hoffman, *supra* note 12, at 1086 ("Education is central both to democracy and the economy of this nation.").

18. Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).

> has undertaken to provide it, is a right which must be made available to all on equal terms.[19]

Almost fifty years later, strikingly similar arguments are made in favor of school vouchers.[20]

This Comment argues that school voucher programs, and specifically the program implemented in Cleveland, are constitutional under the Establishment Clause as it was historically fashioned and interpreted,[21] and especially in light of the Supreme Court's most recent addition to Establishment Clause jurisprudence in *Mitchell v. Helms*.[22] History reveals

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19. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

20. *See* JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 19 (1999). Viteritti explains:

> [E]ducational inequality is a corrosive correlate to political inequality. If we are committed to bolstering the health of American democracy, it is essential to replenish an interest in civic life, and it is imperative to find ways for involving those who are disaffected. But we must start by providing all citizens with a decent education. Religious institutions can be instrumental on all of these counts.

Id.; *see also* TERRY M. MOE, SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC 15 (2001). Moe argues:

> School vouchers might seem a natural for American society. Our culture has long been marked by widely shared beliefs in personal freedom, markets, and limited government, and someone who didn't know anything about the history of American education might expect to find these cultural values embodied in the nation's school system. A truly American system of education, it might seem, would give parents a maximum of choice. It would keep government control of the schools to a minimum. It would extend a prominent role to private schools. It would encourage competition among schools. And to make all these things possible, it would provide parents with vouchers.

Id.

21. *See* Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 685 (2001) ("The *Mitchell* litigation perfectly illustrates the great changes in the Establishment Clause doctrine over the last fifty years. Had the constitutionality of the program been decided thirty years ago, when it was first enacted, it probably would have been upheld."); *see also* Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 659-64 (1998) (noting that:

> [T]he history of First Amendment jurisprudence in America is filled with irony and paradox. The very idea of constitutionalism in Western political thought was inspired by determination to set limits upon government by identifying provinces of individual conduct beyond the scope of state interference, thus imposing constraints upon public authority rather than upon the citizenry. Our convoluted reasoning regarding the First Amendment has evolved in such a way that the courts have not only imposed unusual restrictions on individual prerogatives, but they have done so in the name of constitutionalism and freedom. In no area of legal argument is this confusion more apparent than the debate over school choice.);

McFarland, *supra* note 12, at 109-10 ("The history of education in the United States . . . indicates an early understanding of the Establishment Clause that did not require separation of state funds from religious schools.").

22. 530 U.S. 793 (2000), *reh'g denied*, 530 U.S. 1296 (2000).

that strict separation of church and state was not the intent of the framers,[23] nor has it been the goal of modern jurists.[24] Therefore, "voucher programs involving religious institutions should not be written off as inherently unconstitutional."[25]

Part II of this Comment discusses the history and policy behind the school voucher movement, and looks closely at the two most notable modern examples, the Cleveland and Milwaukee programs. Part III examines the First Amendment's Establishment Clause in depth; analyzing its origins, development, and most notably the Supreme Court's curious and rather convoluted treatment of the Clause throughout history. Part IV introduces *Mitchell v. Helms* and each of its three opinions: the plurality written by Justice Thomas, the concurring opinion by Justice O'Connor, and the dissent by Justice Souter. Part V applies the framework in *Mitchell v. Helms* to the Cleveland Program, reasoning toward the conclusion that it does not violate the Establishment Clause. Part VI concludes the Comment, and offers a proscription for future school voucher jurisprudence and debate.

II. SCHOOL VOUCHERS

A. Origins:

Vouchers were first proposed in 1955 by economist and Nobel laureate Milton Friedman.[26] In 1979, Friedman and his wife, Rose, published *Free to Choose: A Personal Statement*, which fully explained their argument for school vouchers.[27] Friedman argues that increasing government control over education has resulted in the gradual decline of America's schools.[28] He

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23. *See* ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 15 (1982); VITERITTI, *supra* note 20, at 117-29; *see also* discussion *infra* Part III.B.

24. *See* Zorach v. Clauson, 343 U.S. 306, 312 (1952) (stating that the First Amendment "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."); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("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.").

25. McFarland, *supra* note 12, at 109.

26. *See* Milton Friedman, *The Role of Government in Education, in* ECONOMICS AND THE PUBLIC INTEREST (Robert A. Solo ed., 1955). Forty-five years later, Friedman is still advocating for vouchers. *See, e.g.*, Milton Friedman, *How Can We Fix Our Public Schools? By Making Them Private, in* 2 HOOVER DIGEST 8, 9 (Peter Robinson ed., 2001), ("The most feasible way to bring about a gradual yet substantial transfer from government to private enterprise is to enact in each state a voucher system that enables parents to choose freely the schools their children attend.").

27. *See* MILTON & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 150-88 (2d ed. 1990).

28. *Id.* at 151-52. Friedman continues:

explains that the American school system was initially private and locally run.[29] However, in the 1840s, Horace Mann, the first secretary of the Massachusetts State Board of Education, lead a campaign to replace the private school system with a system of "free schools" paid for indirectly by parents through taxes.[30] According to Friedman, this movement reflected to a minor extent the emerging socialist distrust of the free market system, but mostly, "it simply reflected the importance that was attached by the community to the ideal of equality of opportunity."[31]

Since the mid-nineteenth century, most children in the United States have attended government schools.[32] Friedman notes that citizens had every reason to be proud of the "American" public school system.[33] However, the initial success of the system was due largely to local control.[34] Friedman explains:

> The most important factor determining how the system operated was its decentralized political structure. The U.S. Constitution narrowly limited the powers of the federal government, so that it played no significant role. The States mostly left control of schools to the local community, the town, the small city, or a subdivision of a large city. Close monitoring of the political authorities running the school system by parents was a partial substitute for competition

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> For schooling, this sickness has taken the form of denying many parents control over the kind of schooling their children receive either directly, through choosing and paying for the schools their children attend, or indirectly, through local political activity. Power has instead gravitated to professional educators. The sickness has been aggravated by increasing centralization and bureaucratization of schools, especially in the big cities.

Id.

29. *Id.* at 152.

30. *Id.* at 153. Mann argued that "education was so important that government had a duty to provide education to every child, that schools should be secular and include children of all religious, social, and ethnic backgrounds, and that universal, free schooling would enable children to overcome the handicaps of the poverty of their parents." *Id.*

31. *Id.* at 154.

32. *Id.* at 153.

33. *Id.* at 150-51. Friedman explains:

> We have always been proud, and with good reason, of the widespread availability of schooling to all and the role that public schooling has played in fostering the assimilation of newcomers into our society, preventing fragmentation and divisiveness, and enabling people from different cultural and religious backgrounds to live together in harmony.

Id.

34. *Id.*

and assured that any widely shared desires of parents were implemented.[35]

The era of governmental reform following the Great Depression changed this structure.[36] "Power shifted rapidly from the local community to broader entities–the city, the county, the state, and more recently, the federal government. . . . [P]rofessional educators have taken over, [and] control by parents has weakened."[37] This bureaucratization and centralization has fostered a system in which costs have increased and quality has decreased; a system which has ultimately failed to serve the consumers, the parent and child.[38] Moreover, under the current system, the upper income classes have retained their freedom to choose where to send their children to school, but the lower classes have not.[39] Friedman concludes that all parents must be given more control over their children's schooling.[40]

One method by which Friedman proposes to return choice and control back to parents is the voucher.[41] He outlines the basic voucher theory as follows:

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35. *Id.* at 154-55.

36. *Id.* ("After the depression, when the public joined the intellectuals in an unbridled faith in the virtues of government, and especially of central government, the decline of the one-room school and the local school board became a rout.").

37. *Id.*

38. *Id.* at 155-57. Friedman argues that the Theory of Bureaucratic Displacement applies to the public school system and explains its declining results. He quotes Dr. Max Gammon, the developer of the theory, who noted, "[I]n 'a bureaucratic system . . . *increase in expenditure* will be matched by *fall in production*. . . . Such systems will act rather like "black holes" in the economic universe, simultaneously sucking in resources, and shrinking in terms of "emitted" production.'" *Id.* at 155.

39. *Id.* at 157-58. Friedman laments:

> The tragedy, and irony, is that a system dedicated to enabling all children to acquire a common language and the values of U.S. citizenship, to giving all children equal educational opportunity, should in practice exacerbate the stratification of society and provide highly unequal educational opportunity. Expenditures on schooling per pupil are often as high in the inner cities as in even the wealthy suburbs, but the quality of schooling is vastly lower. In the suburbs almost all of the money goes for education; in the inner cities much of it must go to preserving discipline, preventing vandalism, or repairing its effects. The atmosphere in some inner city schools is more like that of a prison than of a place of learning. The parents in the suburbs are getting far more value for their tax dollars than the parents in the inner cities.

Id. at 158.

40. *Id.* at 160. Contrary to many social reformers, Friedman believes that "[p]arents generally have both greater interest in their children's schooling and more intimate knowledge of their capabilities and needs than anyone else." *Id.*; *see also* Metcalf & Tait, *supra* note 13 (noting that:

> Even scholars of education cannot agree about what is "good" education or "desirable" educational practice . . . [and] until or unless a consensus is reached among all the stakeholders in children's education, it is unfair and patronizing to suggest that parents and families are generally less entitled or less equipped than others to make these determinations for themselves and for their children.).

41. FRIEDMAN, *supra* note 27, at 160.

> Suppose your child attends a public elementary or secondary school. On the average, countrywide, it cost the taxpayer–you and me–about $2,000 per year in 1978 for every child enrolled. If you withdraw your child from a public school and send him to a private school, you save taxpayers about $2,000 per year–but you get no part of that saving except as it is passed on to all taxpayers, in which case it would amount to at most a few cents off your tax bill. You have to pay private tuition in addition to taxes–a strong incentive to keep your child in a public school.
>
> Suppose, however, the government said to you: "If you relieve us of the expense of schooling your child, you will be given a voucher, a piece of paper redeemable for a designated sum of money, if, and only if, it is used to pay the cost of schooling your child at an approved school." The sum of money might be $2,000, or it might be a lesser sum, say $1,500 or $1,000, in order to divide the savings between you and the other taxpayers. But whether the full amount or the lesser amount, it would remove at least a part of the financial penalty that now limits the freedom of parents to choose.[42]

The basic mechanism driving the voucher process is competition.[43] Friedman's proposed plan, in effect, employs the free market system to improve failing inner-city schools.[44]

B. America's Educational Crisis

There is little doubt that educational problems in America have increased dramatically since Milton Friedman first proposed his plan.[45] Moreover, the current crisis is most dramatically illustrated in the inner

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42. *Id.* at 160-61.

43. *Id.* at 161 ("The public schools would then have to compete both with one another and with private schools.").

44. In 2001, Friedman underscores that "[v]ouchers are not an end in themselves; they are a means to make a transition from a government to a market system." Friedman, *How Can We Fix Our Public Schools? By Making Them Private*, *supra* note 26, at 14; *see also* Metcalf & Tait, *supra* note 13 (noting arguments that vouchers provide poor families opportunity for educational choice, lead to greater competition, which leads to better effectiveness in education).

45. Friedman, *How Can We Fix Our Public Schools? By Making Them Private*, *supra* note 26, at 10 ("The quality of schooling is far worse today than it was in 1955.").

cities.[46] In the past decade, while black and Hispanic college admission rates decreased, the odds of becoming a victim of crime in school have increased.[47] According to the Institute for Justice's Clint Bolick, "poor and minority inner-city students have no greater chance of graduating with basic proficiency than of being a victim of crime in their schools."[48] For example, in the Cleveland public schools students "have a 1 in 14 chance of graduating on time from high school at senior-level proficiency, and an equivalent 1 in 14 chance each year of being a victim of crime in their schools."[49] In Milwaukee, "only 48 percent of the students [in public schools] graduate–a dropout rate of more than seven times the state-wide average–and only 15 percent of children from families on public assistance graduate."[50] Additionally, in the eleven Milwaukee public high schools "that enroll more than three-fourths of the city's black students, the median grade-point average is less than 1.5 on a four-point scale."[51]

Yet studies have shown that "students from poor socioeconomic backgrounds do much better in private schools."[52] Why is this the case? According to Bolick, "[t]he key differences between effective and ineffective schools are autonomy, parental involvement, and a sense of mission."[53] Inner-city public school systems are characterized by massive bureaucracies, little parental influence, and a lack of responsiveness to parents because parents cannot exit the system.[54] In contrast, inner-city and suburban private schools "tend to have smaller bureaucracies and to be more responsive to parental concerns" because parents have the ability to change schools if they are dissatisfied.[55]

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46. *See* Clint Bolick, *Solving the Educational Crisis Through Parental Choice*, 11 STAN. L. & POL'Y REV. 245, 245 (2000) (noting the "appalling failure of America's public school system to deliver quality educational opportunities to a large number of black and Hispanic children in our nation's inner cities."); Friedman, *How Can We Fix Our Public Schools? By Making Them Private*, *supra* note 26, at 10 ("There is no respect in which inhabitants of a low-income neighborhood are so disadvantaged as in the kind of schooling they can get for their children.").

47. *See* Bolick, *supra* note 46, at 246 ("Although black high school students were steadily closing the achievement gap between blacks and whites in the 1980s, that gap has widened substantially during the past decade.").

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* (citing study by Chicago economist Derek Neal who found that "although Catholic schools produce negligible academic gains for suburban and white students, they strongly improve educational outcomes for urban minority children.").

53. *Id.* (citing JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, & AMERICA'S SCHOOLS 140 (1990)).

54. *Id.*

55. *Id.* at 246-47.

C. Current School Voucher Programs

1. The Milwaukee Parental Choice Program

In 1990, Wisconsin's governor Tommy F. Thompson labeled the Milwaukee public school system a failure, and urged the state legislature to give low-income parents a way out.[56] The Wisconsin legislature responded by enacting the Milwaukee Parental Choice Program, the nation's first school voucher program targeting inner-city, low-income families.[57] The initial program was limited in scope,[58] providing up to $2,500 for private school tuition to parents "whose family income did not exceed 175% of the national poverty level."[59] In addition, the program did not permit voucher recipients to attend private sectarian schools.[60] The program proved highly successful, however, and in 1995 it was amended to provide financial assistance to more children[61] while allowing parents to direct voucher money to any private or public school, including private religious schools.[62] Perhaps anticipating a constitutional attack, the state legislature specified in its amendments that checks would no longer be sent directly to the participating school, but rather made out in the name of the parents, and "endorsed by the parents and the school of their choice."[63] In addition, students using voucher payments to attend private sectarian schools were given the option of "opting out" of any required religious activities of the school.[64]

By the 1998-99 school year, the Milwaukee Parental Choice Program enrolled six thousand students in eighty-six schools and provided vouchers

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56. McFarland, *supra* note 12, at 117.

57. Bolick, *supra* note 46, at 247 ("[T]he program's implementation in the fall of 1990 set off an education revolution. For the first time ever, the program 1) transferred control over public education funds from bureaucrats to parents, and 2) forced the public schools to compete for low-income youngsters and the resources they commanded.").

58. The original program, being highly experimental, limited the total number of Milwaukee public school students eligible to 1.5%. McFarland, *supra* note 12, at 117.

59. Jason T. Vail, Comment, *School Vouchers and the Establishment Clause: Is the First Amendment a Barrier to Improving Education for Low-Income Children?*, 35 GONZ. L. REV. 187, 205 (2000).

60. *Id.*

61. Enrollment in the program was increased from 1.5% to 15% of Milwaukee public school children. McFarland, *supra* note 12, at 117-18.

62. *Id.* at 118.

63. *Id.*

64. *Id.*

of up to $5,000 per child.[65] However, despite the legislature's efforts to neutralize the program, its constitutionality was challenged immediately.[66] In 1995, the Milwaukee Teachers Education Association filed actions in state circuit court, asserting that the amended voucher program violated the Establishment Clause because it provided state aid to private religious schools.[67] For three years the program stood in limbo as it bounced around Wisconsin's state and appellate courts, primarily losing its constitutional battles, not on Establishment Clause, but on state constitutional grounds.[68] In June of 1998, however, the Supreme Court of Wisconsin held that Milwaukee Parental Choice Program did not violate the Establishment Clause, nor any state constitutional provisions.[69] The Supreme Court of the United States denied certiorari and allowed the decision to stand.[70] For many advocates of school vouchers, the Milwaukee challenge signaled a promising future for voucher programs and their possible success at withstanding constitutional scrutiny.[71]

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65. *See* Metcalf & Tait, *supra* note 13.

66. *See* Jackson v. Benson, 578 N.W.2d 602, 609 (Wis. 1998).

67. *Id.*

68. The circuit court found that the amended voucher program violated the religious benefits and compelled support clauses, the public or local bill prohibitions, and the public purpose of the Wisconsin constitution. *Id.* at 609-10.

69. *Id.* at 620 ("Since the amended MPCP has a secular purpose, does not have the primary effect of advancing religion, and does not create an excessive entanglement, it is not invalid under the Establishment Clause."); *see also* Hoffman, *supra* note 12, at 1110. Hoffman explains the Wisconsin courts' dilemma:

> The differing opinions of the Wisconsin Appeals and Supreme Court illustrate the difficulties attending any decision on the constitutionality of school vouchers for parochial students. Their disagreement turned essentially on one question: Is *Nyquist* still good law? If it is, voucher programs such as the MPCP will at some point be struck; if not, such programs will stand and other states will be able to implement similar programs of their own.

Id. But as McFarland argues, the Court in *Nyquist* "refused to determine 'whether an educational assistance program that was both neutral and indirect would survive an Establishment Clause challenge.'... Therefore, the Wisconsin Supreme Court correctly determined that its holding should not be controlled by the *Nyquist* decision." McFarland, *supra* note 12, at 122-23 ("*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."). For further analysis of this issue, see discussion *infra* Part V.

70. 525 U.S. 997 (1998).

71. *See* Clint Bolick, *Milwaukee: The End is a New Beginning*, Liberty and Law, Vol. 7, No. 5 (Dec. 1998), *at* http://www.ij.org/publications/liberty/1998/1_12_98_a.html (last visited Jan. 21, 2002) ("For school choice proponents nationwide, the decision demonstrates that the education establishment and its allies can be beaten."); McFarland, *supra* note 12, at 125 ("The Milwaukee Parental Choice Program is a milestone in the constitutional debate over school choice.... *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."). *But see* Hoffman, *supra* note 12, at 1086-87 ("Because the Court is deeply divided over how to interpret the Establishment Clause, and *Jackson* was a facial challenge to the Wisconsin voucher program, the Court may have decided that the issue is not yet ripe.... The Court has, therefore, wisely adopted a

2. The Cleveland Scholarship and Tutorial Grant Program

The second major and currently most prominent inner-city school voucher program is the Cleveland Scholarship and Tutorial Grant Program, which was implemented in 1995.[72] The educational crisis in Cleveland's public schools had become so pronounced that a United States District Court ordered the State of Ohio to take over the administration of the Cleveland City School District.[73] Ohio Governor George Volinovich proposed a plan, which the Ohio legislature subsequently enacted, to provide private school tuition scholarships to low-income families within the Cleveland School District.[74] The program included both a scholarship program, enabling students to attend "alternative schools," and a tutorial program for Cleveland's public school children.[75] Public and private schools were eligible to participate in the program as alternative schools.[76]

The program specified that recipients were to be chosen by lot and to receive tuition based on their level of family income.[77] In addition, the state distributed scholarship money by sending a check to the chosen school made payable to the parents, with the parents endorsing the check to the school.[78] There were no restrictions on the private school's use of the money.[79] In the three years following its implementation, no public schools registered for participation in the Cleveland Program.[80] Of the fifty-six schools registered for the 1999-2000 school year, forty-six were church-affiliated.[81] Thus, ninety-six percent of the students enrolled in the program attended sectarian schools.[82]

Like the Milwaukee Parental Choice Program, the Cleveland Scholarship Program underwent rapid constitutional attack. In its initial test, the program was struck down in 1999 by the Supreme Court of Ohio, which found that the pilot program violated the state constitution's "one-subject

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'wait and see' approach.").

72. *See* Metcalf & Tait, *supra* note 13; *see also* OHIO REV. CODE ANN. § 3313.975 (Anderson 1999) (detailing regulations for pilot school program).

73. Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 836 (1999).

74. Metcalf & Tait, *supra* note 13.

75. Simmons-Harris v. Zelman, 72 F. Supp. 2d at 836.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 836-37.

82. *Id.* at 837.

rule."[83] The Ohio legislature responded quickly by re-enacting the program in all pertinent respects.[84] This proved short-lived, however, when on August 24, 1999, United States District Judge Solomon Oliver, Jr. issued a preliminary injunction barring the program from beginning its fifth year.[85] This action, coming one day before the start of school, prompted alarm from parents and an immediate appeal to higher courts.[86] With over three thousand students facing the possibility of being forced to leave their private school after the fall semester, on November 5, 1999, the United States Supreme Court, in a five to four ruling, granted a request for stay of the preliminary injunction pending disposition by the Sixth Circuit.[87] The Sixth Circuit sent the case back to the district court for final determination of the issue.[88] On December 20, 1999, Judge Oliver permanently enjoined the State of Ohio from continuing its voucher program.[89] Following appeal, in December 2000, the Sixth Circuit upheld the injunction and affirmed the decision of the district court that the Cleveland Program violated the Establishment Clause.[90] Both sides now await the Supreme Court's decision whether to hear the case.[91]

As evidenced by the above two examples, the voucher movement in the United States is growing, but contentiously. In addition to Ohio and Wisconsin, many other states have experimented with voucher and voucher-like programs. In 1999, Arizona,[92] Florida,[93] and Vermont[94] passed voucher

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83. Simmons-Harris v. Goff, 711 N.E.2d 203, 216 (Ohio 1999). The court found, however, that the program did not violate the Establishment Clause. *Id.* at 211 ("We conclude that the School Voucher Program has a secular legislative purpose, does not have the primary effect of advancing religion, and does not excessively entangle government with religion.").

84. Simmons-Harris v. Zelman, 72 F. Supp. 2d at 836.

85. Simmons-Harris v. Zelman, 54 F. Supp. 2d 725, 729 (N.D. Ohio 1999). Judge Oliver found that "[t]he participating schools are overwhelmingly sectarian. This means that parents cannot make an educational choice without regard to whether the school is parochial or not. Consequently, the Cleveland Program has the primary effect of advancing religion." *Id.* at 741.

86. Mark Vosburgh & Scott Stephens, *Judge Suspends School Vouchers: Ruling Hits Families of 4,000 Area Pupils*, THE PLAIN DEALER (Cleveland), Aug. 25, 1999, at 1A.

87. Zelman v. Simmons-Harris, 528 U.S. 983 (1999); *see also* Linda Greenhouse, *Justices Restore Cleveland's School Voucher Program for Now*, N. Y. TIMES ABSTRACTS, Nov. 6, 1999, at Sec. A.

88. Simmons-Harris v. Zelman, 72 F. Supp. 2d at 841.

89. *Id.* at 865. Judge Oliver found that "[i]n all pertinent respects, the Voucher Program is factually indistinguishable from the tuition reimbursement program struck down in *Community for Pub. Educ. & Religious Liberty v. Nyquist*." *Id.* at 846 (citation omitted).

90. Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000); *see also* Bill Sloat, *Future of School Vouchers Goes Before Appeal Judges*, THE PLAIN DEALER (Cleveland), June 21, 2000, at 2B. For further discussion of the Sixth Circuit's reasoning, see *infra* Part V.

91. *See supra* note 11.

92. *See* Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999), *cert denied*, 528 U.S. 921 (1999) (upholding state program that gives tax credits to those who donate money to school tuition organizations).

93. Bolick, *supra* note 46, at 248.

94. *See* Campbell v. Manchester Bd. of Sch. Dir., 641 A.2d 352 (Vt. 1994) (upholding state

legislation.[95] However, Indiana, Maine,[96] and North Dakota have recently defeated proposed voucher programs in their legislatures.[97] Nevertheless, many states have active voucher legislation pending.[98] With respect to a national voucher program, the recent election of George W. Bush, a voucher proponent, offered hope for a voucher experiment on the federal level in 2001.[99] However, the voucher proposal in President Bush's highly touted Education Bill received criticism from both sides of the political aisle, and was eventually conceded because of a lack of congressional support.[100]

C. The Movement Toward School Choice

With all this commotion surrounding the voucher movement, one may wonder, are they effective? Studies have yet to yield any real definitive answers, particularly because of the relative novelty of full-fledged voucher programs.[101] However, several preliminary studies analyzing the Milwaukee

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tuition reimbursement program).

95. Kilberg, *supra* note 13, at 739 n.2.

96. *See* Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999), *cert. denied*, 528 U.S. 931 (1999) (upholding Maine legislation that excluded religious schools from a program allowing local school districts without secondary schools to reimburse parents a specified amount for high school tuition in nonsectarian schools); *see also* Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999) (rejecting challenges under the Free Exercise, Establishment, and Equal Protection Clauses to the exclusion of sectarian schools and finding that if religious schools were included in the tuition reimbursement program, they would receive a direct government benefit in violation of the Establishment Clause).

97. Kilberg, *supra* note 13, at 739 n.4.

98. *Id.* at 739 n.3. States with active legislation pending include: "Alaska, California, Delaware, Georgia, Hawaii, Kansas, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, Rhode Island, South Carolina, Virginia, and Washington. Some of these are voucher programs, others are tuition tax credits." *Id.* The following states are expected to introduce voucher or tuition tax credit programs in 2000: Idaho, Illinois, Iowa, Mississippi, New Jersey, New Mexico, Pennsylvania, Utah, Vermont, and West Virginia. *Id.*

99. Elizabeth Auster, *Bush Disappoints School Voucher Advocates, President's Pullback on Education Bill Expected by Many*, THE PLAIN DEALER (Cleveland), May 4, 2001, at 10A ("When President Bush was elected, advocates of school vouchers were thrilled. With Republicans controlling both the White House and Congress, they thought, the time was ripe for a national version of Cleveland's experiment.").

100. *Id.* Auster reported:

> [W]hen Bush conceded defeat on the [voucher] issue this week, before Congress even voted on it, voucher advocates were disappointed. . . . Bush said he still supports vouchers, but acknowledged he doesn't have the votes in Congress for his voucher proposal to pass. "There are people that are afraid of choice," Bush said. "They really are. And I'm a realist. I understand that. It doesn't change my opinion, but it's not going to change the votes, either."

Id.

101. Metcalf & Tait, *supra* note 13 ("It must be acknowledged at the outset that definitive answers about the fundamental goodness of publicly funded voucher programs are not now available and

and Cleveland programs reveal distinct evidence about the success of school voucher programs.[102] First, most studies of voucher programs reveal increased parental satisfaction with the education of their child.[103] Second, voucher programs provide additional educational choices to families of children who have the highest risk of school failure.[104] Third, only a small portion of eligible families apply for available vouchers.[105] Fourth, whether voucher programs actually improve academic achievement cannot yet be determined.[106] These findings show that, in the least, voucher programs have been successful in reaching their initial goals of "providing private school educational opportunities for the children of economically disadvantaged, inner-city families."[107]

Due to continued educational problems and the initial success of voucher programs in providing greater opportunities for low-income families, public perception has shifted in favor of the school choice movement.[108] For example, over ninety-five percent of adults think that parents should be given greater choice with regard to their children's education.[109] In addition, fifty percent of public school parents are in favor

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may never be."). *But see* VITERITTI, *supra* note 20, at 15 ("Most empiricists would agree that there is no substantial evidence to suggest that choice would be educationally harmful to disadvantaged students.").

102. Metcalf & Tait, *supra* note 13. Metcalf and Tait detail the findings of prominent voucher studies, including John Witte's study of the Milwaukee Program, and Jay P. Greene, William G. Howell, and Paul E. Peterson's examination of the Cleveland Program, while at the same time detailing their own findings. *See also* Jay P. Greene et al., *An Evaluation of the Cleveland Scholarship Program*, Program on Education Policy and Governance, Harvard Univ., Sept. 1997, *at* http://www.schoolchoices.org/roo/cleveland1.htm (last visited Jan. 21, 2002) (concluding that "both test score and parental survey data provide strong justification for the legislative decision to continue and expand the [Cleveland Program] for another year."); Hanna Skandera & Richard Sousa, *School Choice: The Evidence Comes In*, *in* 2 HOOVER DIGEST 24, 27 (Peter Robinson ed., 2001) (answering critics arguments that voucher programs result in underperforming public schools, and finding that "as participation [in the Milwaukee Parental School Choice Program] increased the score of the students left behind increased, not decreased, as alarmists would predict.").

103. Metcalf & Tait, *supra* note 13 ("Participating parents were dissatisfied with their children's former public schools and chose to enroll their children in private schools for improved educational quality and greater safety.").

104. *Id.* ("Participating families are of lower income than typical public school families, they come primarily from ethnic minority groups, and they are usually headed by a single mother.").

105. *Id.* ("Neither voucher program has produced the mass exodus from public schools that was forecast.").

106. *Id.* ("When prior achievement and relevant demographic variables are controlled, the achievement of voucher students is not consistently different from that of public school students.").

107. *Id.*

108. Bolick, *supra* note 46, at 248 ("Public opinion is moving strongly and steadily in favor of parental choice."). Bolick gives several reasons for this shift: (1) public schools continue to underachieve; (2) parental choice program news is promising; and (3) changing demographics. *Id.* Moreover, in areas in which voucher programs have been implemented, the approval rate is generally higher. *Id.* ("The closer people reside to the program, the more likely they appear to support parental choice.").

109. Metcalf & Tait, *supra* note 13.

of some type of redirection of public money for vouchers to allow parents the choice of whether to send their children to either a public or private school.[110] Moreover, eighty percent of minority families living in the inner-city view vouchers as a desirable alternative to current educational options.[111]

Despite such approval, voucher opponents continue to stall or otherwise impede parental choice programs across the country.[112] Such opponents argue that vouchers subsidize private schools while draining money from already financially strapped public schools, provide little accountability, and result in no overall educational improvement.[113] Interesting, however, is the chasm between the civil rights organizations that routinely challenge vouchers, and the minority individuals who are vouchers' greatest supporters.[114] According to one commentator, "[n]ever has the climate for [educational] reform been so vibrant, nor the need for reform more urgent. . . . [It is] the primary civil rights goal of the millennium . . . ."[115] Based on the current storm surrounding the voucher issue, the Supreme Court is likely to eventually weigh in on the legal soundness of voucher programs, and the Cleveland Voucher Program stands as the prime candidate.[116]

110. *Id.*

111. *Id.*

112. *Id.*

113. Elliot Mincberg, *Vouchers, the Constitution and the Court*, 10 GEO. MASON U. CIV. RTS. L.J. 155 (Win.-Spr. 1999-2000) (arguing that vouchers are "a bad policy choice.").

114. *See* Bolick, *supra* note 46, at 248 ("Black Americans consider education the top national priority."). Bolick argues, "It is time for politicians to recognize the will of the people, to reject the entreaties of special interest groups, and to make parental choice a reality." *Id.* at 249.

115. *Id.* ("If we can do only one thing in public policy to improve prospects for minority individuals and economically disadvantaged people, there is nothing more tangible or important than making good on the promise of equal educational opportunities."); *see also* MOE, *supra* note 20, at 1 ("As the new century unfolds, the most controversial issue in American education is the issue of school vouchers.").

116. Greenhouse, *supra* note 11, at 15A ("The Cleveland voucher case has been seen for several years as the likely Supreme Court test of the concept's constitutionality . . . . Granting a stay of a lower court's decision is usually a strong indication of the justices' interest in eventually hearing the case."); *Cleveland's Challenge*, WALL ST. J., June 20, 2000, at A26, *available at* 2000 WL-WSJ 3033485 ("Cleveland may become the key test case for vouchers.").

III. THE ESTABLISHMENT CLAUSE

A. Origins:

The first Americans were a religious people.[117] Many of the first settlers came to America to escape religious persecution by an absolute sovereign, and to establish a society in which they would be free to worship as they wished. In his sermon *A Model of Christian Charity*, originally delivered on the deck of the ship *Arabella* on its way to the new world, John Winthrop explained that the first American settlers had entered into a "covenant" with God to found a new society according to His laws and to do His work.[118] This society under God would be looked upon by the rest of the world as an ideal model to follow:

> For wee must consider that wee shall be as a citty upon a hill. The eyes of all people are uppon us. Soe that if wee shall deale falsely with our God in this worke wee have undertaken, and soe cause Him to withdrawe His present help from us, wee shall be made a story and a byword through the world. Wee shall open the mouthes of enemies to speake evill of the wayes of God, and all professors for God's sake. Wee shall shame the faces of many of God's worthy servants, and cause theire preayers to be turned into curses upon us til wee be consumed out of the good land wither we are a goeing . . . .[119]

Religion played a central role in the first American settlements and in the growth of democracy.[120] When the first settlers gathered together to

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117. *See* Viteritti, *supra* note 21, at 661-62; *see also* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 303-14 (Phillips Bradley ed., Alfred A. Knopf 1963) ("On my arrival in the United States the religious aspect of the country was the first thing that struck my attention; and the longer I stayed there, the more I perceived the great political consequences resulting from this new state of things."); Anthony Cardinal Bevilacqua, *Constitutionality of Tuition Vouchers: Address Delivered to Marquette University Law School, October 7, 1992*, 76 MARQ. L. REV. 487, 488 (1993) ("We are a religious people whose institutions presuppose a Supreme Being."); Church of the Holy Trinity v. United States, 143 U.S. 457, 465 (1892) ("[N]o purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people.").

118. DOUGLAS W. KMIEC & STEPHEN B. PRESSER, THE HISTORY, PHILOSOPHY AND STRUCTURE OF THE AMERICAN CONSTITUTION 4 (1998) (quoting John Winthrop, *A Model of Christian Charity* (1630), *reprinted in* 1 A DOCUMENTARY HISTORY OF AMERICAN LIFE 66-99 (Jack P. Greene ed., 1966)).

119. *Id.*

120. RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE 95 (2d ed. 1996) ("The contention that the American enterprise is derived from religious belief is widely, although not universally,

establish methods of organizing these new societies, they formed compacts under God, governed by popular consent.[121]

As the American colonies grew, the religious focus developed into various establishments of religion.[122] Traditionally, an "establishment of religion" was defined as "a legal union of government and [one] religion."[123] In the eighteenth century, such "[c]onventional establishments of religion existed in the southern colonies of Virginia, Maryland, North Carolina, South Carolina, and Georgia."[124] These colonies adopted the Church of England as their state church.[125] Within these colonies, citizens were required to attend the state church and to learn only its tenets in schools or elsewhere.[126] Moreover, "dissenters" from the established faith enjoyed little protection under the laws and were disqualified from service in any public office.[127] The northern colonies of New York, Massachusetts, Connecticut, and New Hampshire did not subscribe to any one establishment of religion, permitting several established churches to coexist; however, in each of these colonies, the largest establishment generally controlled the religious power.[128]

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acknowledged.").

121. *See, e.g., The Plymouth Combination, or The Mayflower Compact, reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION 31-32 (Donald S. Lutz ed., 1998). In this "oldest surviving compact based on popular consent," the first American settlers declared:

> *In the Name of God, Amen.* We whose Names are under-written, the Loyal Subjects of our dread Soveraign Lord King *James*, by the grace of God of *Great Britian, France* and *Ireland*, King, *Defender of the Faith etc.* Having undertaken for the glory of God, and advancement of the Christian Faith, and the Honour of our K[i]ng and Countrey, a Voyage to plant the first Colony in the Northern parts of *Virginia;* Do by these Presents, solemnly and mutually, in the presence of God and one another, Covenant and Combine our selves together into a Civil Body Politick, for our better ordering and preservation, and furtherance of the ends aforesaid: and by virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions and Officers, from time to time, as shall be thought most meet and convenient for the general good of the Colony; unto which we promise all due submission and obedience.

Id. at 32 (emphasis in original).

122. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 1 (1986) ("Those colonies, although resentful of British violations of American rights, discriminated against Roman Catholics, Jews, and even dissenting Protestants who refused to comply with local laws benefitting establishments of religion.").

123. *Id.* at 4.

124. *Id.* at 5.

125. *Id.*

126. *Id.* at 4.

127. *Id.*

128. *Id.* at 10. Four colonies, Rhode Island, Pennsylvania, Delaware, and New Jersey never had an "establishment of religion." *Id.* at 9-10.

After the Revolution, however, the states moved to disestablish religion.[129] Many state constitutions contained specific anti-establishment provisions.[130] James Madison and Thomas Jefferson waged perhaps the most fervent and well-documented colonial struggle for disestablishment in their staunchly Anglican state of Virginia.[131] The Virginia Constitution of 1776 guaranteed the "free exercise" of religion, but did not address the issue of religious establishment.[132] In 1779, believing that religion was a personal matter between God and the individual, Jefferson introduced his *Bill for Religious Freedom* to the Virginia legislature.[133] Jefferson's proposal declared:

> That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[134]

Strong opposition from establishment forces led by Patrick Henry ensued, and neither Jefferson's nor any counter proposal could command a majority in the legislature.[135] However, in 1784, a more moderate general assessment bill was passed that ostensibly allowed for multiple establishments of religion, but still levied moderate taxes to support the Christian faith.[136] This general assessment raised the ire of many Virginians, including James Madison, who responded by writing his *Memorial and Remonstrance Against Religious Assessments*:

> Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by

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129. *Id.* at 25.

130. *Id.* For example, New Jersey's 1776 constitution provided that no person should:
[E]ver be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform.
Id.

131. *Id.* at 51-53.

132. *Id.* at 51.

133. *Id.* at 53.

134. THOMAS JEFFERSON, WRITINGS 346-47 (Merrill D. Peterson ed., 1984).

135. LEVY, *supra* note 122, at 53-54.

136. *Id.* at 54.

> force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right.[137]

Madison's *Remonstrance* galvanized the Virginia population, which responded by electing an overwhelmingly anti-establishment legislature in 1785.[138] This legislature passed Jefferson's bill and let the assessment bill die.[139]

At the Constitutional Convention of 1787, little mention was made of religion.[140] Despite the clear invocation of God in the Declaration of Independence,[141] and the founders' avowed belief in God,[142] the Constitution contains no mention of God at all.[143] During the First Congress, however,

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137. JAMES MADISON ON RELIGIOUS LIBERTY 55-56 (Robert S. Alley ed., 1985).

138. LEVY, *supra* note 122, at 59.

139. *Id.*

140. *Id.* at 63.

141. The text of the Declaration of Independence states:

> When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, *the separate and equal Station to which the Laws of Nature and of Nature's God entitle them*, . . . We hold these Truths to be self-evident, that all Men are created equal, that they are *endowed by their Creator with certain unalienable Rights* . . . .

THE DECLARATION OF INDEPENDENCE para. 1 & 2 (U.S. 1776) (emphasis added).

142. *See* KMIEC & PRESSER, *supra* note 118, at 129 (noting that, for example, George Washington in his first inaugural address observed, "the propitious smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right, which Heaven itself has ordained." (quoting GEORGE WASHINGTON, FIRST INAUGURAL ADDRESS (Apr. 30, 1789), *reprinted in* GEORGE WASHINGTON A COLLECTION 460, 462 (W.B. Allen ed., 1988))). Kmiec and Presser also point out that John Adams believed the Old Testament to be a fundamental building block of American culture. *Id.* at 5. In a letter written to a colleague in 1809, Adams stated, "I should believe that chance had ordered the Jews to preserve and propagate to all mankind the doctrine of a supreme, intelligent, wise, almighty sovereign of the universe, which I believe to be the great essential principle of all morality, and consequently of all civilization." *Id.* at 5-6; *see also* Viteritti, *supra* note 21, at 716 ("Our Constitution was crafted by individuals with a deep commitment to religious freedom.").

143. LEVY, *supra* note 122, at 63. The absence of any reference to God or religion in the text of the Constitution, however, can be traced to the framers' belief in the separation of powers, which among other things, was designed to ensure religious liberty. *Id.* ("[T]he drafters of the Declaration, and the framers of the Constitution, believed that government authority must necessarily be limited to leave room for individuals to pursue moral instruction within their freely chosen religious community."); *see also* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1599 (1989) ("The separation concept, however, is really a servant of an even greater goal; it is a means, along with concepts such as accommodation and neutrality, to achieve the ideal of religious liberty in a free society."); KMIEC & PRESSER, *supra* note 118, at 129 ("[D]enominational differences merely reveal the founder's justification for narrowing the role of government by prudentially enumerating federal power, and securing religious freedom in the Bill of

James Madison proposed a series of amendments to the Constitution, which included a section on religion: "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[144] This proposal would be condensed into the First Amendment to the United States Constitution, providing that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[145]

B. A Wall of Separation?

On January 1, 1802, in a letter to the Danbury Baptist Association, explaining his refusal to honor a national day of fasting and thanksgiving first begun by George Washington and John Adams, President Thomas Jefferson wrote:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a *wall of separation* between church and State.[146]

Jefferson's "wall of separation" has in many ways come to stand for the de facto popular meaning of the First Amendment; that there must be an "absolute separation" between church and state.[147] To be sure, commentators

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Rights. . . . They anticipated, maybe better than they knew, that where God is banished, the state–as a substitute source of ultimate authority–expands rapidly."); Martha McCarthy, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 126 (2000) ("In its most basic form, separationinsm reflects the sentiment that religious liberty will be enhanced by adhering to the principle that religion is not the concern of government.").

144. LEVY, *supra* note 122, at 75.

145. U.S. CONST. amend. I. The First Amendment incorporated "John Locke's philosophy that 'the care of souls cannot belong to the civil magistrate.'" McCarthy, *supra* note 143, at 123; *see also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 182 (1690) ("The Natural Liberty of Man is to be free from any Superior Power on Earth, and not to be under the Will or Legislative Authority of Man, but to have only the Law of Nature for his Rule.").

146. THOMAS JEFFERSON, WRITINGS 510 (Merrill D. Peterson ed., 1984) (emphasis added). The phrase "wall of separation" can first be traced to Roger Williams, who fled Massachusetts in 1636 to establish a settlement in Providence, one of the few colonial settlements without an established church supported by public taxes. VITERITTI, *supra* note 20, at 118. Williams' separationist ideology was designed to protect the church from civil authority. *Id.* In contrast, Jefferson's goal was to ensure that the church did not contaminate the state. *Id.* at 118-19.

147. Professor Leonard Levy argues:

> [H]istory, seen in the context of the drive to add a bill of rights to the Constitution in order to restrict the powers of the national government, proves that the framers of the

have admitted that we may never know its true meaning.[148] Nevertheless, history does not support the strict separationist approach.[149]

In addition to drafting the Bill of Rights, the First Congress also enacted legislation to a national day of thanksgiving and prayer.[150] The same Congress also approved the *Northwest Ordinance*, which contained compacts between the original states and the people of the future states in the territory north and west of the Ohio River.[151] Article III of the *Northwest Ordinance* stated, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[152] Rather than strict separation, history supports the view that Madison meant exactly what he said: "no *national* religion shall be established."[153]

Several Constitutional scholars concur with this view. Commenting on the meaning of the First Amendment, Justice Joseph Story noted:

> The real object of the amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.[154]

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establishment clause meant to make explicit a point on which the entire nation agreed: The United States had no power to legislate on the subject of religion.

LEVY, *supra* note 122, at 89; *see also* Hoffman, *supra* note 12, at 1091-92 ("According to the 'strict separationists,' the Establishment Clause prohibits all government support for religion and churches. The 'accommodationists,' on the other hand, argue that the Constitution permits government to give support to religion, provided it does not prefer one religion over another.").

148. McCarthy, *supra* note 143, at 123 ("[T]he original intent cannot be delineated with certainty."); *see also* LEVY, *supra* note 122, at 84 ("The history of the drafting of the establishment clause does not provide us with an understanding of what was meant by 'an establishment of religion.'").

149. McCarthy, *supra* note 143, at 127 ("There is considerable evidence that adherence to an absolute separation of church and state never has been universal in our nation . . . .").

150. Viteritti, *supra* note 21, at 663, 716 ("Although their model of government was designed to prohibit the formal union between public and ecclesiastical authority, their notion of religious liberty did not require a complete separation between church and state.").

151. NORTHWEST TERRITORIAL GOVERNMENT, ORDINANCE OF 1787, 1 U.S.C. at LI (1988).

152. *Id.* at LIII; *see also id.* at art. I ("[N]o person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territories.").

153. *See* VITERITTI, *supra* note 20, at 121-26 ("[A] reading of Madison demands that no priority should be given to one religion over another."). *But see* LEVY, *supra* note 122, at 75 (arguing that "[t]he term 'national religion' has ambiguous connotations.").

154. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 606

According to Story, the national government must not prefer one religion over another, as in supporting one national religion. Professor Thomas M. Cooley agreed, "By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others."[155] Such interpretations focus on equality rather than separation, and come much closer to uniting the framer's belief in the importance of both religion and individual freedom.[156]

Commentators may never agree as to the original purpose or meaning of the First Amendment.[157] This confusion is perhaps most clearly exhibited in the Supreme Court's attempts at interpreting the Establishment Clause.

C. The Supreme Court's Treatment of the Establishment Clause

1. Early Supreme Court Jurisprudence

For 150 years after the ratification of the First Amendment, the Establishment Clause was virtually ignored by the Supreme Court.[158] In

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(Thomas Cooley ed., Little, Brown, and Company, 4th ed. 1873).

155. THOMAS M. COOLEY, CONSTITUTIONAL LAW 224 (Andrew C. McLaughlin ed., Little, Brown, and Co., 3d ed. 1898) ("It was never intended by the Constitution that the government should be prohibited from recognizing religion . . . ."); *see also* KMIEC & PRESSER, *supra* note 118, at 190 ("There is ample historical evidence that the word 'establishment,' as used by the framers of the First Amendment in 1791 meant what it had in Europe–government's 'exclusive patronage' of one church.").

156. Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 629 (2001) ("Even at the Founding, one of the big ideas of the First Amendment was Equality—government should not favor or disfavor any religion, just as it should not favor or disfavor a speaker because of his political viewpoint under the neighboring Free Speech clause."). Similar to this approach is the preferentialist approach, espoused by Edward S. Corwin. *See* Edward S. Corwin, *The Supreme Court as a National School Board*, 14 LAW & CONTEMP. PROBS. 3, 10 (1949) ("In a word, what the 'establishment of religion' clause of the First Amendment does, and *all that it does, is to forbid Congress to give any religious faith, sect, or denomination a preferred status* . . . .") (emphasis in original).

157. McCarthy, *supra* note 143, at 124 ("[C]ommentators and Justices have voiced their frustration with Establishment Clause jurisprudence by referring to it as 'chaotic,' 'doctrinal gridlock,' a 'legal quagmire,' contradictory and unprincipled, 'ad hoc,' 'intuitive,' and a 'maze.'").

158. Jeffrey Stiltner, Note, *Rethinking the Wall of Separation: Zobrest v. Catalina Foothills School District–Is this the End of Lemon?*, 23 CAP. U. L. REV. 823, 825 (1994). Stiltner explains:

> The lack of Establishment Clause adjudication was due to the fact that until *Everson*, the clause applied only to the federal government. To the extent that establishment issues arose, if at all, they arose at the state level and were subsequently decided on state grounds. It was only with *Everson* that the Establishment Clause was selectively incorporated into the Fourteenth Amendment.

Id.; *see also* John M. Flynn, Note, *Constitutional Law–Accommodation of Religion–The Answer to the Invocation Dilemma–Jager v. Douglas County School District*, 24 WAKE FOREST L. REV. 1045, 1052 (1989) (commenting that,

> [D]uring the first 150 years of establishment clause jurisprudence, it seems that the principle concern of the Court was to safeguard religion as government made efforts to

1947, however, the Court decided the landmark case *Everson v. Board of Education of Ewing Township.*[159] In *Everson*, a taxpayer challenged a New Jersey statute that provided reimbursement to parents for money spent on the bus transportation of their children to both public and Catholic parochial schools.[160] The statute was challenged in two respects: that it violated the Due Process Clause of the Fourteenth Amendment, and the First Amendment, as a "law respecting an establishment of religion."[161] The Court quickly dismissed the due process argument, and focused on the Establishment Clause question.[162] After a lengthy historical and philosophical analysis of the origins of the Establishment Clause,[163] the Court arrived at a definition:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to

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encroach upon it. Laws were upheld provided that they allowed religion to flourish. What today might be considered the most grotesque example of establishment of religion was embraced as undergirding America's religious tradition. Much change was yet to come.).

159. 330 U.S. 1 (1947). *Everson* is widely considered:

> [T]he single most important American constitutional law case in the realm of the Establishment of Religion Clause. There, for the first time–over a century and a half after the Clause was added to the *Constitution*–the U.S. Supreme Court set forth a comprehensive interpretation of the *minimal* prohibitions that the Court said were required by the phrase: "Congress shall make no law respecting an establishment of religion . . . ."

CORD, *supra* note 23, at 109 (emphasis in original).

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

161. *Id.* at 5-8.

162. *Id.* at 6-7.

163. *Id.* at 8-14. Justice Black explained:

> A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. . . . These practices of the old world were transplanted to and began to thrive in the soil of the new America. . . . These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. . . . It was these feelings which found expression in the First Amendment.

Id.

> support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[164]

Despite the Court's finding that the "wall [between church and state] must be kept high and impregnable," the Court held that under this standard, the New Jersey statute presented no Establishment Clause violation.[165] Justice Black stated, "[W]e cannot say that the First Amendment prohibits New Jersey from spending taxraised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools."[166] The Court reasoned that bus fare reimbursement was analogous to state programs that provide police, fire protection, and public utilities.[167] Without such "ordinary" services, parents may be deterred from sending their children to church schools, or the schools may not be able to operate.[168] According to the Court, such an adversarial relationship was not required by the First Amendment, rather, it required the state to be "neutral in its relations with groups of religious believers and non-believers."[169]

As did the majority, in dissent, Justice Rutledge provided an in-depth historical account of the Establishment Clause,[170] but came to a more absolutist conclusion:

> The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a *complete and permanent separation* of the spheres of religious activity and civil authority by

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

165. *Id.* at 18 ("The First Amendment has erected a wall between church and state. . . . We could not approve of the slightest breach. New Jersey has not breached it here.").

166. *Id.* at 17.

167. *Id.*

168. *Id.* at 17-18.

169. *Id.* at 18.

170. *See id.* at 31-43 (Rutledge, J., dissenting) ("The Amendment was broadly but not loosely phrased. It is the compact and exact summation of its author's views formed during [Madison's] long struggle for religious freedom.").

> comprehensively forbidding every form of public aid or support for religion.[171]

For Justice Rutledge, funds raised by taxation could not, no matter what their purpose, be given to another to support their religious training or belief.[172] Thus, the New Jersey statute violated the Establishment Clause.[173]

Everson was significant in that it established two means by which government aid to religion could be theoretically justified.[174] First, aid distributed neutrally to the public at large was not considered aid to religion.[175] Second, aid to religious education is not violative of the Establishment Clause as long as it can be characterized as aid to children, rather than aid to the religious institution.[176]

One year later, in *McCollum v. Board of Education*,[177] the Supreme Court signaled that the Establishment Clause would continue to play a major role in church state relations when it applied the Clause to the states through the Fourteenth Amendment.[178] In *McCollum*, taxpayers challenged a Champaign, Illinois "released time" program, which allowed public school students to attend weekly religion classes on their public school campuses.[179] Parents gave permission for their child to attend these thirty to forty-five minute classes, and the local Counsel on Religious Education supplied the religion instructors' salaries.[180]

Relying on its recent decision in *Everson*, the Court held that the Illinois program was barred by the First Amendment.[181] The Court found the released time program unconstitutional for two reasons.[182] First, the program utilized tax-supported public school facilities to promote religious

171. *Id.* at 31-32 (emphasis added).

172. *See id.* at 44-45.

173. *Id.* at 44 ("Does New Jersey's action furnish support for religion by use of the taxing power? Certainly it does . . . .").

174. Hoffman, *supra* note 12, at 1091.

175. *Id.*

176. *Id.* This "child benefit theory" holds that "government aid to religious institutions, such as parochial schools, can be upheld on the ground that the children–and not the religious institutions–are the actual beneficiaries of the aid." Stiltner, *supra* note 158, at 829.

177. 333 U.S. 203 (1948).

178. McFarland, *supra* note 12, at 110 ("[T]he 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 *McCollum* . . . .").

179. 333 U.S. at 207-09.

180. *Id.*

181. *Id.* at 210 ("This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.").

182. *Id.* at 209-10.

education.[183] Second, the state's compulsory education system, which required students to attend school, had the effect of mandating the religious education under the program.[184]

In *Zorach v. Clauson*,[185] the Supreme Court addressed another "released time" program, but reached a startlingly different result. In *Zorach*, taxpayers challenged New York's released time program which allowed its public schools to "release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instructions and devotional exercises."[186] Writing for the Court, Justice Douglas distinguished *McCollum*[187] and held that "we do not see how New York by this type of 'released time' program has made a law respecting an establishment of religion within the meaning of the First Amendment."[188]

Although the Court in *Zorach* acknowledged the "constitutional standard [of] the separation of Church and State,"[189] and took great care to distinguish this released time program from that of Illinois in *McCollum*,[190] the absolutist language and tone had clearly changed.[191] Rather, in *Zorach* the Court emphasized that "[w]e are a religious people whose institutions presuppose a Supreme Being."[192] Furthermore, "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."[193] This was a marked shift from *Everson* and *McCollum* and signaled that the Supreme Court's Establishment Clause doctrine was by no means settled.

Board of Education v. Allen[194] presented the Court with a challenge to a 1965 New York statute that required school districts to purchase and loan textbooks to students enrolled in parochial, private, and public schools.[195] In

183. *Id.* at 209.

184. *Id.* at 209-10.

185. 343 U.S. 306 (1952).

186. *Id.* at 308-09.

187. *Id.* ("This 'released time' program involves neither religious instruction in public school classrooms nor the expenditure of public funds.").

188. *Id.* at 312.

189. *Id.* at 314.

190. *See id.* at 315 ("In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction.").

191. *See id.* at 312 ("The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State."). *But see id.* at 317-18 (Black, J. dissenting) ("In dissenting today, I mean to do more than give routine approval to our *McCollum* decision. I mean to reaffirm my faith in the fundamental philosophy expressed in *McCollum* and *Everson* . . . .").

192. *Id.* at 313.

193. *Id.* at 313-14.

194. 392 U.S. 236 (1968).

195. *Id.* at 238-39.

approaching this question, the Court for the first time applied its "purpose and effect" test.[196] Justice White explained:

> "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 that 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."[197]

Applying this test, the Court found that the New York statute did not violate the Constitution.[198] The Court reasoned that the parochial schools do not receive the benefit of the free books, rather, the children do.[199] Moreover, the books did not contain any religious content.[200] The Court in *Allen* also noted the importance of private and parochial schools to the American educational system,[201] and the fact that "parochial schools are performing, in addition to their sectarian function, the task of secular education."[202]

In *Walz v. Tax Commission of the City of New York*,[203] the Court considered the constitutionality of another New York statute, this time the New York City Tax Commission's grant of "property tax exemptions to religious organizations for religious properties used solely for religious

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196. *Id.* at 243.

197. *Id.* (quoting Arbington Township Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963) (citation omitted)).

198. *Id.* at 243-44. Justice White argued:

> The express purpose of § 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. . . . Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fairs in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.

Id.

199. *Id.* ("Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.").

200. *Id.* at 244-45 ("[O]nly secular books may receive approval.").

201. *Id.* at 247 ("Underlying these cases, and underlying also the legislative judgements that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience.").

202. *Id.* at 248.

203. 397 U.S. 664 (1970).

worship."[204] In finding that this tax exemption did not violate the First Amendment,[205] the Court once again reexamined its Establishment and Free Exercise jurisprudence.[206] The Court admitted its struggles to come up with a consistent and intelligible standard to govern this area of law,[207] but concluded that "neutrality" best appropriated the delicate balance between government and religion.[208] Writing for the Court, Chief Justice Burger explained:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.[209]

Despite its admitted struggles and confusion, the Court in *Walz* added a new test to the purpose and effect test, "excessive entanglement."[210] The Court reasoned that the tax exemption program did not result in excessive entanglement between church and state, but rather fostered greater separation.[211]

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204. *Id.* at 666.

205. *Id.* at 680.

206. *See id.* at 668-72.

207. *Id.* Recognizing that "[t]he Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution," Chief Justice Burger admitted:

> In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

Id. at 668.

208. *Id.* at 669-70 ("Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.").

209. *Id.* at 669.

210. *Id.* at 674 ("We must also be sure that the end result–the effect–is not an excessive government entanglement with religion.").

211. *Id.* at 676 ("The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.").

2. Recent Supreme Court Jurisprudence: *Lemon* and its Progeny

In 1971, the Supreme Court ushered in the modern era of Establishment Clause jurisprudence with its decision in *Lemon v. Kurtzman*.[212] *Lemon* involved a challenge to Pennsylvania and Rhode Island statutory programs that provided reimbursement and monetary supplements for teacher salaries to non-public elementary schools.[213] Under each program, aid was given to church-affiliated schools.[214] In *Lemon*, the Court combined the three primary tests it had developed to analyze Establishment Clause questions into one all-inclusive method of analysis.[215] Chief Justice Burger explained, "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.'"[216]

Under this new test, the Court found that both statutes had a secular legislative purpose.[217] The Court refrained from addressing the primary effect test, because it concluded that there was excessive entanglement.[218] In *Lemon*, the Court reiterated its evolving belief that "total separation is not possible in an absolute sense."[219] But, under the excessive entanglement inquiry, "[t]he objective is to prevent, as far as possible, the intrusion of either into the precincts of the other."[220] The statutes in question fostered an excessive entanglement between schools with affirmatively religious purposes,[221] the teachers in those schools,[222] and the state scrutiny necessary

212. 403 U.S. 602 (1971).

213. *Id.* at 606-07.

214. *Id.* at 607.

215. *Id.* at 612-13.

216. *Id.*

217. *Id.* at 613 ("[T]he statutes . . . clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws.").

218. *Id.* at 613-14.

219. *Id.* at 614.

220. *Id.* According to the Court, this inquiry involved the examination of "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.* at 615.

221. *Id.* at 616 ("[P]arochial schools involve substantial religious activity and purpose.").

222. *Id.* at 617. Chief Justice Burger distinguished the situation in *Lemon* from *Allen*:

> We cannot . . . refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspects of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious

to implement the programs.[223] With the *Lemon* test, the Supreme Court found a means of reconciling its separation and neutrality jurisprudence;[224] however, the test has proven difficult to apply.[225]

A year after the *Lemon* decision, in *Committee for Public Education & Religious Liberty v. Nyquist*,[226] the Court addressed for the first time the question of whether a state financial aid program violated the Establishment Clause. In 1972, the State of New York enacted amendments to its Education and Tax laws, implementing "financial aid programs for nonpublic elementary and secondary schools."[227] The amendments included money grants for maintenance and repair, student tuition reimbursement, and parental tax relief.[228] In addition, a substantial number of the schools receiving aid were church-affiliated.[229]

The Court in *Nyquist* applied the *Lemon* three-part test and held that the assistance provisions had the "primary effect" of advancing religion and thus violated the Establishment Clause.[230] The Court did not question the secular purpose of New York's education laws.[231] However, it did address each of the forms of aid in turn as to their "effect" on religion.[232] First, with regard to the provisions for maintenance and repair, the Court found that they had a "primary effect that advances religion" because the program did not include any restrictions as to where and how the aid would be spent.[233] According to the Court, such "subsidizing" of religious schools was unconstitutional.[234]

> control and discipline poses to the separation of the religious from the purely secular aspects of precollege education. The conflict of functions inheres in the situation.

Id.

223. *Id.* at 615-20. The Court noted that the Rhode Island program excludes teachers employed by private schools "whose average per-pupil expenditures on secular education equal or exceed the comparable figures for public schools." *Id.* at 620. This requires the government to periodically examine the school's records. *Id.* The Court explained that, "[t]his kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids." *Id.*

224. Stiltner, *supra* note 158, at 831 ("The importance of *Lemon* was that it became the only means adopted by the Court to reconcile and apply its conceptions of neutrality and separation.").

225. *See id.* at 836 ("*Lemon* as a workable standard has proven difficult. . . . No fewer than six of the current members have criticized *Lemon* in whole or in part and have advocated significant revision or abandonment of *Lemon* due to the problems that arise in its application.").

226. 413 U.S. 756 (1973).

227. *Id.* at 761-62.

228. *Id.* at 762-67.

229. *Id.* at 767-68.

230. *Id.* at 798.

231. *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.").

232. *Id.* at 774-94.

233. *Id.* at 774 ("Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities.").

234. *Id.* at 779-80 ("New York's maintenance and repair provisions violate the Establishment Clause because their effect, inevitably, is to subsidize and advance the religious mission of sectarian

Second, the Court began its analysis of the tuition reimbursement provision[235] by declaring unequivocally that in absence of sufficient restrictions, "direct aid in whatever form is invalid."[236] The issue then for the Court was "whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result."[237] The Court distinguished *Everson* and *Allen*, noting that the beneficiaries in those programs "included *all* schoolchildren, those in public as well as those in private schools."[238] The Court refrained, however, from closing off the possibility of all types of tuition grant programs, with this now-infamous footnote:[239]

> 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 cases 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.[240]

For the Court, there simply were not enough guarantees of neutrality and separation in New York's program.[241] Rather, "it [was] precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian."[242] Thus, the Court concluded, "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions."[243] Lastly, with regard to the primary effect

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schools.").

235. *Id.* at 780. The provision provided direct, unrestricted grants of $50-$100 per child as reimbursement to parents earning less than $5,000 in taxable income who sent their children to nonpublic schools. *Id.*

236. *Id.* at 780.

237. *Id.* at 781. The State relied on *Allen* and *Everson*, which upheld grants which went directly to parents rather than the schools. *Id.* But the Court explained, "the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered." *Id.*

238. *Id.* at 782 n.38.

239. Voucher proponents argue that this footnote opens the door to such neutrally based programs. *See supra* note 69; *see also infra* text accompanying notes 441-42.

240. *Id.* at 782-83 n.38.

241. *Id.* at 783 ("There has been no endeavor 'to guarantee the separation between secular and religious educational functions and to ensure the State financial aid supports only the former.'" (quoting Lemon v. Kurtzman, 403 U.S. 602, 613 (1971))).

242. *Id.*

243. *Id.* The Court also went on to note that the fact that the aid involved reimbursement, rather than a subsidy or reward, was not of constitutional significance. *Id.* at 786-87.

of the tax benefits to parents, the Court distinguished *Walz*, and found little difference in impermissibility between the tax benefits and the tuition reimbursement program.[244]

During the middle of the 1970's, the Court issued two opinions that attempted to draw boundary lines between constitutional and unconstitutional state aid to private schools based on the character of the aid itself. In *Meek v. Pittenger*,[245] the Court upheld part of a Pennsylvania statute that lent textbooks to children attending nonpublic schools, but invalidated the portion of the statute that provided "instructional materials," including "periodicals, photographs, maps, charts, sound recordings, films, . . . projection equipment, recording equipment, and laboratory equipment."[246] The Court found the textbook loan program almost identical to that approved of in *Board of Education v. Allen*, in that the statute "'merely makes available to all children the benefits of a general program to lend school books free of charge.'"[247] In contrast, the statute authorized the loan of instructional materials "*directly* to qualifying nonpublic" schools.[248] Therefore, "the primary beneficiaries of [the] instructional material and equipment loan provisions [were] nonpublic schools with a predominant sectarian character."[249] The Court in *Meek* concluded that "indirect and incidental benefits to church-related schools" did not violate the Establishment Clause, but that "the massive aid provided the church-related nonpublic schools of Pennsylvania . . . is neither indirect nor incidental."[250]

Relying heavily on the reasoning in *Meek*, the Court in *Wolman v. Walter*[251] held that portions of an Ohio statutory scheme providing nonpublic schools "with books, standardized testing and scoring, diagnostic services, and therapeutic and remedial services" were constitutional, and that "portions relating to instructional materials and equipment and field trip

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244. *Id.* at 790-91 ("The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools.").

245. 421 U.S. 349 (1975).

246. *Id.* at 353-55.

247. *Id.* at 362 (quoting Bd. of Educ. v. Allen, 392 U.S. 236, 245 (1967)).

248. *Id.* at 362-63 (emphasis in original).

249. *Id.* at 364.

250. *Id.* at 364-65. Justice Stewart continued,

> The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian enterprise as a whole. "The secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined."

Id. at 366 (quoting Lemon v. Kurtzman, 403 U.S. 602, 657 (1971)) (internal citations omitted). This "divertibility" argument is revived and explicitly rejected by the plurality in *Mitchell v. Helms*. *See infra* text accompanying notes 342-47.

251. 433 U.S. 229 (1977).

services" were unconstitutional.[252] The Court once again distinguished between different types of aid by reference to the particular characteristics of the aid itself.[253] For example, the Court reasoned that "diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school."[254] Ohio sought to avoid the strictures of *Meek* by emphasizing that the materials and equipment were loaned to the student and parents.[255] However, the Court found this distinction would merely "exalt form over substance" and that "[d]espite the technical change in legal bailee, the program in substance is the same as before."[256]

In 1983, the Court in *Mueller v. Allen*[257] addressed a challenge to a Minnesota income tax law which allowed state taxpayers to deduct costs for tuition, textbooks and transportation.[258] Under *Lemon*, the Court held that the state law did not violate the Establishment Clause.[259] In an opinion written by Justice Rehnquist, the Court began by finding that the Minnesota statute had a secular purpose.[260] Most notably, however, the Court found that the statute "satisfie[d] the primary effect inquiry" for several reasons.[261] First, the deduction for educational expenses was one among many, such as medical expenses and charitable contributions.[262] Second, "the deduction [was] available for educational expenses incurred by" parents whose children attended both public and private schools.[263] The Court noted that the economic effect of the Minnesota program was "comparable to that of aid given directly to the schools," but pointed out the distinction that "under Minnesota's arrangement public funds become available only as a result of

252. *Id.* at 255.

253. *Id.* at 254-55.

254. *Id.* at 244.

255. *See id.* at 250.

256. *Id.* The Court analogized the issue to the tuition reimbursement program addressed in *Nyquist* and found that "[i]f a grant in cash to parents is impermissible, we fail to see how a grant in kind of goods furthering the religious enterprise can fare any better." *Id.* at 250-51.

257. 463 U.S. 388 (1983).

258. *Id.* at 390.

259. *See id.* at 402-03.

260. *See id.* at 395 ("A State's decision to defray the cost of educational expenses incurred by parents–regardless of the type of schools their children attend–evidences a purpose that is both secular and understandable.").

261. *Id.* at 402.

262. *Id.* at 396.

263. *Id.* at 397. In this respect, the Court distinguished the tax deductions from those in *Nyquist*. *Id.* at 398 ("There, public assistance amounting to tuition grants was provided only to parents of children in *nonpublic* schools."). *But see id.* at 411 ("This is a distinction without a difference.") (Marshall, J., dissenting).

numerous private choices of individual parents of school-age children."[264] Finally, the Court found that the statute passed the third *Lemon* prong, because it did not "'excessively entangle' the State in religion."[265]

Lynch v. Donnelly[266] provided significant insight into the Establishment Clause analysis because of Justice O'Connor's concurring opinion in which she introduced her "endorsement" test.[267] *Lynch* involved a challenge to a Christmas nativity scene erected by the City of Pawtucket, Rhode Island.[268] The Court held that the city had not violated the Establishment Clause.[269] Writing for the majority, Chief Justice Burger stated, "We are satisfied that the city has a secular purpose for including the creche, that the city has not impermissibly advanced religion, and that including the creche does not create excessive entanglement between religion and government."[270] In her concurring opinion, Justice O'Connor offered an amendment to the purpose and effect prong of *Lemon*.[271] She asserted, "The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion."[272] For Justice O'Connor, the impermissible effect of a government practice involved "communicating a message of government endorsement or disapproval of religion."[273]

In 1985, just when it seemed that *Lemon* was here to stay, the test experienced a serious attack in *Wallace v. Jaffree*.[274] The case involved challenges to three Alabama statutes: one that allowed for a period of silence in all public schools "'for meditation,'" another that authorized time for "'meditation or voluntary prayer,'" and a third that allowed teachers to lead students in prayer to "'Almighty God . . . the Creator and Supreme Judge of

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264. *Id.* at 399 ("For these reasons, we recognized in *Nyquist* that the means by which state assistance flows to private schools is of some importance . . . .").

265. *Id.* at 403.

266. 465 U.S. 668 (1984).

267. See *id.* at 688-89 (O'Connor, J., concurring) ("Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device."); *see also* County of Allegheny v. Greater Pittsburgh Chapter of ACLU, 492 U.S. 573, 626-27 (1989) (O'Connor, J., concurring) (concluding that the "creche displayed on the Grand Staircase of the Allegheny County Courthouse . . . has the unconstitutional effect of conveying a government endorsement of Christianity.").

268. 465 U.S. at 671.

269. *Id.* at 687.

270. *Id.* at 285.

271. *See id.* at 690 (O'Connor, J., concurring).

272. *Id.* at 691.

273. *Id.* at 692; *see also* Stiltner, *supra* note 158, at 841 ("After *Lynch*, the endorsement test gained momentum as a viable alternative to *Lemon*.").

274. 472 U.S. 38 (1985).

the world.'"[275] Under *Lemon*, the Court held that the statutes violated the Establishment Clause because they did not have a secular purpose.[276]

In dissent, Justice Rehnquist took the opportunity to criticize the Supreme Court's past and current doctrinal confusion regarding the Establishment Clause.[277] Justice Rehnquist specifically argued that *Everson's* incorporation of the "wall of separation"[278] and *Lemon's* three-part test were "in no way based on either the language or intent of the drafters" of the First Amendment.[279] For Justice Rehnquist, the Court's difficulty in reaching principled, consistent decisions reflects this doctrinal inaccuracy:

> [A] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the

275. *Id.* at 40 (quoting ALA. CODE §§ 16-1-20 to 20.2 (1984)).

276. *Id.* at 56 ("[T]he enactment . . . was not motivated by any clearly secular purpose–indeed, the statute had *no* secular purpose.").

277. *See id.* at 92 (Rehnquist, J., dissenting); *see also* Bevilacqua, *supra* note 117, at 488.

278. *Wallace*, 472 U.S. at 91-92 (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years.").

279. *Id.* at 108.

> public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.[280]

Disgusted with *Lemon* and its "sisyphean task of trying to patch together [its] blurred, indistinct and variable barrier," Justice Rehnquist proposed his "original intent" test,[281] which was based on his view that the "true meaning of the Establishment Clause can only be seen in its history."[282] Although Justice Rehnquist could not persuade other justices to join him, following *Wallace*, and in the cases to follow, *Everson's* wall and *Lemon's* strictures would become less absolute and impenetrable.

In *Witters v. Washington Department of Services for the Blind*,[283] the Court analyzed whether a blind student studying at a Christian college seeking to become a pastor could apply for financial aid under the State of Washington's vocational rehabilitation assistance program.[284] Under *Lemon*, the Court found the assistance constitutional.[285] The Court in *Witters* primarily focused on the "primary effect" test.[286] Justice Marshall began by noting that "[i]t is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution."[287] The Court found certain facts determinative. First, the aid is "paid directly to the student."[288] Second, any aid that "ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."[289] Third, the program is available "'without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.'"[290] Fourth, it "creates no financial incentive for students to undertake sectarian education."[291] Finally, no "significant portion of the aid . . . will end up flowing to religious education."[292] The Court added that the Washington program did not result

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280. *Id.* at 110-11 (citations omitted).

281. *See* Stiltner, *supra* note 158, at 839 ("Chief Justice Rehnquist believes Establishment Clause jurisprudence should be approached from a proper understanding of the original intent of the First Amendment.").

282. *Wallace*, 472 U.S. at 112-13 (Rehnquist, J., dissenting).

283. 474 U.S. 481 (1986).

284. *Id.* at 483.

285. *Id.* at 485-89.

286. *Id.* at 486-89. "[A]ll parties concede the unmistakably secular purpose of the Washington program." *Id.* at 485.

287. *Id.* at 486.

288. *Id.* at 487.

289. *Id.*

290. *Id.* (quoting Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 782-83 n.38 (1973)).

291. *Id.* at 488 (citing *Nyquist*, 413 U.S. at 785-86).

292. *Id.*

in the state "sponsoring or subsidizing religion."[293] Moreover, it did not "confer any message of state endorsement of religion."[294]

In *County of Allegheny v. ACLU,*[295] the Court addressed another challenge to the constitutionality of a creche placed outside the local county courthouse.[296] In contrast to *Lynch*, the majority found that the creche violated the Establishment Clause because it resulted in an endorsement of the Christian religion.[297] *Allegheny* is most significant, however, because Justice Kennedy proposed yet another method of Establishment Clause analysis in his concurring opinion.[298] Specifically, Justice Kennedy proposed a "coercion" test, which asks whether the government remains a passive participant or actually coerces religious participation.[299]

In 1993, in *Zobrest v. Catalina Foothills School District,*[300] the Court moved further away from *Lemon* and towards a broader test of neutrality.[301] In *Zobrest*, a deaf student requested that his Arizona school district provide him with a sign language interpreter to accompany him to class at a Catholic high school.[302] Relying on precedent set in *Mueller* and *Witters*, rather than *Lemon*, the Court held that the Establishment Clause did not bar the use of the state-provided interpreter.[303] Writing for the Court, Chief Justice Rehnquist began by once again reaffirming the principle of "neutrality" in these cases.[304] He then argued that the program was similar to the programs

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293. *Id.*

294. *Id.* at 489.

295. 492 U.S. 573 (1989).

296. *Id.* at 579.

297. *Id.* at 601.

298. *Id.* at 655-56 (Kennedy, J., concurring) ("I am content for present purposes to remain within the *Lemon* framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area.").

299. *Id.* at 662 ("Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal.").

300. 509 U.S. 1 (1993).

301. *See* Stiltner, *supra* note 158, at 824. Stiltner comments:

> While the Court did not explicitly overturn *Lemon*, the Court's silence as to *Lemon* indicates that it is no longer the controlling test in Establishment Clause cases. The Court's inability to agree on the proper standard to replace *Lemon*, however, serves only to confuse further an already unpredictable area of law. No matter what test, if any, emerges in the future, the Court in *Zobrest* affirmed its willingness to recognize exceptions to the principles of neutrality and separation, as embodied in the "wall of separation," by narrowly reaffirming the child benefit theory.

Id.

302. *Zobrest*, 509 U.S. at 3.

303. *Id.*

304. *Id.* at 8 ("[W]e 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

upheld in *Mueller* and *Witters*, because its benefits were distributed neutrally[305] and the "interpreter will be present in a sectarian school only as a result of the private decision of individual parents."[306] For these reasons, and the fact that "children, not sectarian schools, are the primary beneficiaries" of the program, the state was not "subsidiz[ing] the religious functions of the parochial schools . . . ."[307]

In *Agostini v. Felton*,[308] the *Lemon* test underwent an explicit transformation. In 1985, the Supreme Court in *Aguilar v. Felton* held that the Establishment Clause prevented the city of New York from "sending public school teachers into parochial schools to provide remedial education to disadvantaged children."[309] Twelve years later, the petitioners in *Aguilar* sought relief from the injunction, arguing, based on subsequent Establishment Clause jurisprudence, that *Aguilar* was no longer good law.[310] The Court in *Agostini* held that *Aguilar* was inconsistent with current Establishment Clause analysis.[311] First, the Court stated that it "abandoned the presumption . . . that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."[312] Second, the Court noted that it had "departed from the rule . . . that all government aid that directly assists the educational function of religious schools is invalid."[313] Finally, the Court noted that the "criteria by which an aid program identifies its beneficiaries" had evolved

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Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.").

305. *Id.* at 10 ("The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as 'disabled' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends.").

306. *Id.* ("[B]ecause the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking.").

307. *Id.* at 12 (quoting Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 397 (1985)). The Court also distinguished a sign-language interpreter from a teacher, asserting that the interpreter "will neither add to nor subtract from" the educational environment. *Id.* at 13. Furthermore, the Court stated that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." *Id.*

308. 521 U.S. 203 (1997).

309. *Id.* at 208 (citing Aguilar v. Felton, 473 U.S. 402 (1985)). The statute in question was Title I of the Elementary and Secondary Education Act of 1965, which channeled federal funds to local school agencies. *Id.* at 209. The "funds must be made available to *all* eligible children, regardless of whether they attend public" or private schools. *Id.*

310. *Id.* at 208-09. In *Agostini*, the Court reviewed *Aguilar* and its companion case, *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and the underlying assumptions of those two decisions. *Id.* at 218-20.

311. *Id.* at 237 ("We therefore conclude that our Establishment Clause law has 'significant[ly] change[d] since we decided *Aguilar*.").

312. *Id.* at 223. The Court cited *Zobrest* for this conclusion. *Id.*

313. *Id.* at 225. The Court cited *Witters* for this conclusion. *Id.* The Court also observed that Title I instruction would not impermissibly finance religious indoctrination. *Id.* at 228 ("No Title I funds ever reach the coffers of religious schools.").

from not only the concern for subsidizing religion, but also for creating a "financial incentive to undertake religious indoctrination."[314] Writing for the Court, Justice O'Connor explained that, "[t]his incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[315]

The most significant aspect of *Agostini* is its abandonment of "excessive entanglement" as a separate test under *Lemon*—a more current understanding of "effect."[316] The new "effect" test asks whether the state action "results in governmental indoctrination; define[s] its recipients by reference to religion; or create[s] an excessive entanglement" with religion.[317] For many, *Agostini* signaled that the Supreme Court may be shifting toward a more receptive stance with regard to interactions between church and state.[318]

IV. MITCHELL V. HELMS[319]

A. Facts

In 1985, taxpayers brought an action challenging the constitutionality of the Chapter 2 of the Education and Consolidation and Improvement Act of 1981.[320] The Act provided aid in the form of instructional and educational materials, library books, computer software and other curricular materials to both private and public schools.[321] Several restrictions applied to aid to private schools, including that such aid be "secular, neutral, and

314. *Id.* at 230-31.

315. *Id.* at 231 ("Under such circumstances, the aid is less likely to have the effect of advancing religion.").

316. *Id.* at 232 ("[T]he factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.'"); *see also* Johnston, *supra* note 17, at 429 ("Perhaps the most significant judicial impact of *Agostini* is the effect it has had on the *Lemon* Test.").

317. *Id.* at 234.

318. McCarthy, *supra* note 148, at 155 ("In light of *Zobrest* and *Agostini*, states are likely to enact laws that provide additional public financial assistance to religious school students and to probe how far they can go using the child-benefit justification."); *see also* Johnston, *supra* note 17, at 426 ("Perhaps the most significant future impact of *Agostini* will be the role it plays in the ongoing debate over private school vouchers.").

319. 530 U.S. 793 (2000).

320. *Id.* at 803-04.

321. *Id.* at 802.

nonideological."[322] In Jefferson Parish, Louisiana, approximately thirty percent of Chapter 2 funds were allocated for private schools, a majority of which were religiously affiliated.[323]

In December 1985, parents and teachers challenged the constitutionality of Chapter 2 aid.[324] For the next fifteen years, the validity of the program would remain in doubt.[325] In 1990, after extended discovery, Chief Judge Heebe of the District Court for the Eastern District of Louisiana held that Chapter 2 violated the Establishment Clause.[326] In 1994, after resolving several other issues in the case, Judge Heebe issued an order permanently enjoining sectarian schools in Jefferson Parish from receiving any Chapter 2 aid.[327] After Chief Judge Heebe retired, Judge Livaudais received the case, and in 1997, ruling on postjudgment motions, reversed Judge Heebe's decision and upheld the Chapter 2 aid.[328] On appeal, the Fifth Circuit reversed,[329] and the Supreme Court granted certiorari.[330] When the Supreme Court agreed to hear the case, many commentators noted that the result in *Mitchell* could very likely signal the eventual success or failure of school voucher programs in the United States.[331]

B. The Plurality Opinion by Justice Thomas

Justice Thomas began the plurality opinion by recognizing that although the Court had in the past struggled with its interpretation of the Establishment Clause, it had recently "brought some clarity to our case law"

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322. *Id.*

323. *Id.* at 803.

324. *Id.* at 803-04.

325. *Id.* at 804-07. Justice Thomas commented, "The case's tortuous history over the next 15 years indicates well the degree to which our Establishment Clause jurisprudence has shifted in recent times, while nevertheless retaining anomalies with which the lower courts have had to struggle." *Id.* at 804.

326. Helms v. Cody, No. CIV. A. 85-5533, 1990 WL 36124, at *1 (E.D. La. Mar. 27, 1990).

327. *Mitchell*, 530 U.S. at 804.

328. Helms v. Cody, No. CIV. A. 85-5533, 1997 WL 35283, at *20 (E.D. La. Jan. 28, 1997). In reversing the decision, Judge Livaudais relied primarily on the Ninth Circuit's decision in *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (1995) which upheld Chapter 2 aid on similar facts, and the Supreme Court's decisions in *Zobrest* and *Rosenberger.*

329. Helms v. Picard, 151 F.3d 347 (5th Cir. 1998) (holding use of federal funds to provide computers and other instructional equipment a violation of Establishment Clause), *cert. granted sub nom.*, Mitchell v. Helms, 527 U.S. 1002 (1999).

330. Mitchell v. Helms, 527 U.S. 1002 (1999).

331. Maureen E. Cusack, *The Unconstitutionality of School Voucher Programs: The United States Supreme Court's Chance to Revive or Revise Establishment Clause Jurisprudence*, 33 COLUM. J.L. & SOC. PROBS. 85, 88 (1999) ("Because the issue of providing federal financial assistance to private schools closely relates to the constitutionality of school voucher programs, the Court's final determination of [*Mitchell*] will be important for Establishment Clause jurisprudence and the future of school vouchers.").

under the "revised test" of *Agostini*.[332] Justice Thomas explained that "in *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors," whether a statute has a secular purpose, and whether it has a primary effect of advancing or inhibiting religion.[333] Because the secular purpose of Chapter 2 was not challenged, Justice Thomas noted that the Court would limit its consideration to the statute's effect.[334] Moreover, only the first two prongs of the *Agostini* effect test were at issue.[335]

The first question under the *Agostini* "effect" prong was "whether governmental aid to religious schools results in governmental indoctrination,"[336] and specifically "whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action."[337] In analyzing this issue, Justice Thomas noted that the Court has "consistently turned to the principle of neutrality."[338] Justice Thomas explained that "[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government."[339] As a means of "assuring neutrality," the Court looks to "whether any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'"[340] Justice Thomas reasoned that "if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment."[341]

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332. *Mitchell*, 530 U.S. at 807.

333. *Id.*

334. *Id.* at 808.

335. *Id.* ("[N]either respondents nor the Fifth Circuit has questioned the District Court's holding that Chapter 2 does not create an excessive entanglement." (citation omitted)).

336. *Id.* at 809.

337. *Id.*

338. *Id.*

339. *Id.* Justice Thomas continued:

> To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.

Id. at 810 (citation omitted).

340. *Id.* at 810 (quoting Agostini v. Felton, 521 U.S. 203, 226 (1997)).

341. *Id.*

Justice Thomas next addressed the second *Agostini* question, "whether an aid program 'define[s] its recipients by reference to religion.'"[342] He noted that this inquiry includes neutrality, but also encompasses the question of "whether the criteria for allocating the aid 'creat[e] a financial incentive to undertake religious indoctrination.'"[343] In *Agostini,* the Court held that "'[t]his incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.'"[344] Justice Thomas also explained that "simply because an aid program offers private schools, and thus religious schools, a benefit that they did not previously receive does not mean that the program . . . creates . . . an 'incentive' for parents to choose such an education for their children. For *any* aid will have some such effect."[345]

Justice Thomas next rejected respondents' two primary arguments, namely, that "'direct, nonincidental' aid to the primary educational mission of religious schools is always impermissible," and that "provision to religious schools of aid that is divertible to religious use is similarly impermissible."[346] According to Justice Thomas, the indirect/direct aid distinction is now determined by the principle of private choice.[347] He reasoned, "If aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'"[348] With regard to the divertibility of aid, Justice Thomas declared:

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342. *Id.* at 813 (quoting *Agostini*, 521 U.S. at 234).

343. *Id.* (quoting *Agostini*, 521 U.S. at 231).

344. *Id.*

345. *Id.* at 814 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 244 (1968), Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947), and Mueller v. Allen, 463 U.S. 388, 399 (1983)).

346. *Id.* at 814–15. "Respondents' arguments are inconsistent with our more recent case law, in particular *Agostini* and *Zobrest*, and we therefore reject them." *Id.* at 815.

347. *Id.* at 815-16 ("Although some of our earlier cases . . . emphasize the distinction between direct and indirect aid, the purpose of this distinction was merely to prevent 'subsidization' of religion. . . . [O]ur more recent cases address this purpose not through the direct/indirect distinction but rather through the principle of private choice."). Justice Thomas distinguished and rejected the "formalism" developed in *Meek* and *Wolman*, which required that "any direct aid be literally placed in the hands of schoolchildren." *Id.* at 817. "That *Meek* and *Wolman* reached the same result, on programs that were indistinguishable but for the direct/indirect distinction, shows that that distinction played no part in *Meek*." *Id.* at 818. The Court in fact specifically overruled both *Meek* and *Wolman*, acknowledging "what has long been evident," that such formal distinctions are no longer valid under current precedent. *Id.* at 835-36.

348. *Id.* at 816 (citing Witters v. Wash. Dept. of Services for Blind, 474 U.S. 481, 489 (1986)). Justice Thomas recognized that "we have seen 'special Establishment Clause dangers' when *money* is given to religious schools or entities directly rather than . . . indirectly." *Id.* at 818-19 (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 842 (1995)). Such payments were not at issue in *Mitchell*, and Justice Thomas "refuse[d] to allow a 'special' case to create a rule for all cases." *Id.* at 820. In a subsequent footnote, however, Justice Thomas posited,

> So long as the governmental aid is not itself "unsuitable for use in the public schools because of religious content," . . . and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern.[349]

For Justice Thomas and the plurality, the divertibility argument was a distinction without any reasoned basis because in actuality "*any* aid . . . is 'divertible' in the sense that it allows schools to 'divert' resources."[350] Accordingly, the focus should not be the divertibility of the aid, but rather "whether the aid itself has an impermissible content."[351]

Finally, Justice Thomas addressed the dissent's arguments,[352] but only dealt with one concern in depth: "whether a school that receives aid (or whose students receive aid) is pervasively sectarian."[353] Justice Thomas gave four reasons why this factor no longer is of any constitutional concern.[354] First, it is no longer a factor in the Court's precedents.[355] Second, the "religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose."[356] Third, the "inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive."[357] Finally, Justice Thomas asserted that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow."[358]

> It is arguable . . . at least after *Witters*, that the principles of neutrality and private choice would be adequate to address those special risks, for it is hard to see the basis for deciding *Witters* differently simply if the State had sent the tuition check directly to whichever school Witters chose to attend.

Id. at 820 n.8. For discussion of this footnote and its implication for future of the Cleveland Voucher Program see *infra* Part V.

349. *Id.* at 820 (quoting *Allen*, 392 U.S. at 245).

350. *Id.* at 824.

351. *Id.* at 822 ("Where the aid would be suitable for use in a public school, it is also suitable for use in any private school.").

352. Justice Thomas discarded the dissent's "11 factor" test, which he regarded as chaotic and "clouded." *Id.* at 825-26.

353. *Id.* at 826.

354. *Id.* ("There are numerous reasons to formally dispense with this factor.").

355. *Id.*

356. *Id.* at 827 ("If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be.").

357. *Id.* at 828 ("It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs.").

358. *Id.*

Turning to the facts presented, Justice Thomas in *Mitchell* found that there is "no basis for concluding that Jefferson Parish's Chapter 2 program 'has the effect of advancing religion.'"[359] First, Chapter 2 does not define its recipients with reference to religion.[360] Rather, "[a]id is allocated based on enrollment."[361] Second, Chapter 2 does not result in governmental indoctrination.[362] Justice Thomas noted that "[t]he program makes a broad array of schools eligible for aid without regard to their religious affiliations or lack thereof."[363] Accordingly, Chapter 2 is "neutral with regard to religion."[364] Third, students and parents, not the government, determine which school receives Chapter 2 funds.[365] As Justice Thomas put it: "The aid follows the child."[366] Fourth, although the aid is direct, it is "provided pursuant to private choices."[367] Fifth, the aid is not of an impermissible content.[368] Lastly, although there is evidence of diversion, it is "not relevant to the constitutional inquiry."[369] According to Justice Thomas, and the plurality, Chapter 2 satisfied the *Agostini* criterion, and "therefore [did] not have the effect of advancing religion."[370]

C. Justice O'Connor's Concurring Opinion

Justice O'Connor agreed with much of the plurality opinion, but voiced two concerns.[371] The first was the plurality's treatment of "neutrality."[372] For

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359. *Id.* at 829 (quoting Agostini v. Felton, 521 U.S. 203, 234 (1997)).

360. *Id.* ("[I]t is clear that Chapter 2 aid 'is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.'").

361. *Id.*

362. *Id.* at 830.

363. *Id.*

364. *Id.*

365. *Id.* "Chapter 2 aid . . . like the aid in *Agostini*, *Zobrest*, and *Witters*, reaches participating schools only 'as a consequence of private decisionmaking.'" *Id.* (quoting Agostini v. Felton, 521 U.S. 203, 222 (1997)).

366. *Id.*

367. *Id.* at 831 ("The ultimate beneficiaries of Chapter 2 aid are the students who attend the schools that receive that aid . . . .").

368. *Id.* ("The chief aid at issue is computers, computer software, and library books.").

369. *Id.* at 833-34.

370. *Id.* at 835. Justice Thomas went on to note that "Chapter 2 also 'cannot reasonably be viewed as an endorsement of religion . . . .'" *Id.* (quoting *Agostini*, 521 U.S. at 235).

371. *Id.* at 837 (O'Connor, J., concurring) ("I write separately because, in my view, the plurality announces a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to governmental school-aid programs.").

372. *Id.* at 838-39. Justice O'Connor explained:

> I do not quarrel with the plurality's recognition that neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges. . . . Nevertheless, we have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid.

Justice O'Connor, neutrality is an important factor, but it is merely one among many factors to consider in the Establishment Clause analysis.[373] Thus, Justice O'Connor agreed with Justice Souter "that our 'most recent use of "neutrality" to refer to generality or evenhandedness of distribution . . . is relevant in judging whether a benefit scheme so characterized should be seen as aiding a sectarian school's religious mission, but this neutrality is not alone sufficient to qualify the aid as constitutional.'"[374]

In addition, Justice O'Connor questioned the plurality's rejection of "actual diversion."[375] She disagreed with the conclusion that "actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause."[376] The key distinction with regard to divertibility for Justice O'Connor is between a neutral per-capita-aid program (in *Mitchell*) and a true private choice program (as in *Witters* and *Zobrest*).[377] She observed, "[l]ike Justice Souter, I do not believe that we should treat a per-capita-aid program the same as the true private-choice programs considered in *Witters* and *Zobrest*."[378] Justice O'Connor gave three reasons for this view: first, the fact that the aid goes directly to the student beneficiary means that the student can control whether or not the aid is applied toward religious education;[379] second, the distinction is important for purposes of "endorsement";[380] and third, the distinction is critical when "considering aid

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Id. at 838.

373. *Id.* at 839.

374. *Id.* at 840 (quoting *Id.* at 883-84 (Souter, J., dissenting)).

375. *Id.*

376. *Id.* ("[O]ur decisions 'provide no precedent for the use of public funds to finance religious activities.'" (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 847 (1995))).

377. *Id.* at 842. With regard to this distinction, professor Michael McConnell, who represented the petitioner in *Mitchell*, has noted:

> Perhaps the most striking feature of the concurring opinion was its agreement with the plurality regarding the constitutionality of what they called "true private-choice programs," without the need for secular use restrictions. These are programs, like vouchers, in which "the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use. . . . This may be the most significant aspect of the entire *Mitchell* litigation . . . .

McConnell, *supra* note 21, at 696.

378. *Mitchell*, 530 U.S. at 842. Justice O'Connor emphasized that the approval of the aid in *Witters* and *Zobrest* was highly conditioned on the fact that the aid was provided directly to the individual student. *Id.* at 841. "This characteristic of both programs made them less like a direct subsidy, which would be impermissible under the Establishment Clause, and more akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution." *Id.*

379. *Id.*

380. *Id.* at 842-43 ("In terms of public perception, a government program of direct aid to religious

that consists of direct monetary subsidies."[381] For Justice O'Connor, direct money subsidies are clearly impermissible, and the plurality's broad neutrality language comes close to discarding the Court's reliance on the other significant factors outlined in *Agostini*.[382]

Justice O'Connor next considered the specific *Agostini* factors. She explained that "it is clear that Chapter 2 does not define aid recipients by reference to religion."[383] With regard to governmental indoctrination, Justice O'Connor stated that the "Chapter 2 program at issue here bears the same hallmarks of the New York City Title I program that we found important in *Agostini*."[384] First, Justice O'Connor noted that Chapter 2 aid is "distributed on the basis of neutral, secular criteria."[385] Second, Chapter 2 funds are only supplemental.[386] For Justice O'Connor, Chapter 2 funds must in no case be used to supplant the funds otherwise available to a religious school.[387] Third, it is critical to Justice O'Connor that "no Chapter 2 funds ever reach the coffers of a religious school."[388] Finally, Chapter 2 materials must be "'secular, neutral, and nonideological.'"[389]

Justice O'Connor rejected respondents' attempts to distinguish *Agostini*.[390] In addition, she disagreed with both the plurality and the dissent on the adequacy of the statutory safeguards to prevent divertibility of aid.[391]

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schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious school.").

381. *Id.* at 843-44. Justice O'Connor noted:

> If, as the plurality contends, a per-capita-aid program is identical in relevant constitutional respects to a true private-choice program, then there is no reason that, under the plurality's reasoning, the government should be precluded from providing direct money payments to religious organizations (including churches) based on the number of persons belonging to each organization.

Id.

382. *Id.* at 844 ("For these reasons, as well as my disagreement with the plurality's approach, I would decide today's case by applying the criteria set forth in *Agostini*.").

383. *Id.* at 845.

384. *Id.* at 848. The factors the Court found important in *Agostini* include the following:

> [T]he aid was "provided to students at whatever school they chose to attend," the services were "by law supplemental to the regular curricula" of the benefitted schools, "no Title I funds ever reach the coffers of religious schools," and there was no evidence of Title I instructors having "attempted to inculcate religion in students."

Id. (quoting Agostini v. Felton, 521 U.S. 203, 226-28 (1997)).

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* at 849 (quoting 20 U.S.C. § 7372(a)(1)).

390. *Id.* at 849-60. O'Connor also rejected respondents' and Justice Souter's reliance on a divertibility argument derived from *Meek* and *Wolman*, noting that such a theory "does not provide a logical distinction between the lending of textbooks and the lending of instructional materials and equipment. An educator can use virtually any instructional tool, whether it has ascertainable content or not, to teach a religious message." *Id.* at 852-55.

391. *Id.* at 861. The plurality avoids the safeguard issue by contending that actual divertibility is

Justice O'Connor argued that safeguards are relevant to the discussion, but in the present case, were sufficient to pass the constitutional muster.[392] Accordingly, Justice O'Connor concluded that the Chapter 2 program was sufficiently similar to the Title I aid in *Agostini* to survive the Establishment Clause challenge.[393]

D. The Dissenting Opinion by Justice Souter

In dissent, Justice Souter asserted that "the plurality opinion . . . espouses a new conception of neutrality as a practically sufficient test of constitutionality that would, if adopted by the Court, eliminate enquiry into a law's effects."[394] His dissent therefore began with a review of the history and philosophy of the Establishment Clause.[395] According to Souter, the Establishment Clause represented three fundamental concerns: (1) freedom of conscience;[396] (2) government aid corrupts religion;[397] and (3) government establishment of religion is linked with conflict.[398]

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permissible, and the dissent argues that the safeguards are insufficient. *Id.* For Justice O'Connor, proof that aid has been used for religious purposes would be sufficient to establish a First Amendment violation, however, "inculcation of religion" should not be presumed. *Id.* at 857-60. Moreover, although teachers "need [to] ensure that any such religious teaching is done without the instructional aids provided by the government," O'Connor rejected a presumption that religious school teachers do not adhere to secular restrictions on aid. *Id.* at 859.

392. *Id.* at 861 ("The safeguards employed by the program are constitutionally sufficient."). Furthermore, it is "entirely proper to presume that these school officials will act in good faith." *Id.* at 863-64. Justice O'Connor also rejected Justice Souter's argument that "*any* evidence" of actual diversion requires the Court to declare the program unconstitutional. *Id.* at 865-66.

393. *Id.* at 867. Illustrating these similarities, Justice O'Connor stated:

> As in *Agostini*, the Chapter 2 aid is allocated on the basis of neutral, secular criteria; the aid must be supplementary and cannot supplant non-Federal funds; no Chapter 2 funds ever reach the coffers of religious schools; the aid must be secular; any evidence of actual diversion is *de minimus*; and the program includes adequate safeguards.

Id.

394. *Id.* at 869 (Souter, J., dissenting). Justice Souter explained:

> [T]he Court has isolated no single test of constitutional sufficiency, and the question in every case addresses the substantive principle of no aid: what reasons are there to characterize this benefit as aid to the sectarian school in discharging its religious mission? Particular factual circumstances control, and the answer is a matter of judgment.

Id.

395. *Id.* at 868-72.

396. *Id.* at 870 ("Madison's and Jefferson's now familiar words establish clearly that liberty of personal conviction requires freedom from coercion to support religion, and this means that the government can compel no aid to fund it." (citing Jefferson's *Bill for Religious Freedom*, *supra* text accompanying note 134)).

397. *Id.* at 871 (citing Engel v. Vitale, 370 U.S. 421, 431 (1962)). Justice Souter stated that "Madison argued that establishment of religion weakened the beliefs of adherents so favored, strengthened their opponents, and generated 'pride and indolence in the Clergy; ignorance and

Justice Souter next canvassed the Supreme Court's Establishment Clause jurisprudence.[399] Emerging from over half a century of Supreme Court effort was the principle of "neutrality."[400] According to Justice Souter, however, the concept of neutrality has undergone a marked transformation in recent years.[401] Neutrality as originally posited in such cases as *Everson* was merely a "label for the required relationship between the government and religion as a state of equipoise between government as ally and government and adversary."[402] However, the current conceptions of neutrality, as in *Agostini*, "recast neutrality as a concept of 'evenhandedness.'"[403] Under the original conception, "neutrality was tantamount to constitutionality," but under the current definition "neutrality is not alone sufficient to qualify the aid as constitutional.[404] Rather, there must be other necessary lines of enquiry.[405]

The first category addresses the "types of school aid recipients."[406] In "pervasively sectarian" schools the religious mission is "not confined to a discrete element of the curriculum."[407] In addition, according to Justice Souter, special concerns exist with regard to aid to primary and secondary religious schools because "the youth of the students in such schools makes them highly susceptible to religious indoctrination," and because "the religious element in the education offered in most sectarian primary and secondary schools is far more intertwined with the secular than in university teaching, where the natural and academic skepticism of most older students may separate the two."[408]

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servility in the laity; [and] in both, superstition, bigotry and persecution.'" *Id.* (quoting Madison's *Memorial and Remonstrance*, *supra* text accompanying note 137).

398. *Id.* at 872 (citing Everson v. Bd. of Educ., 330 U.S. 1, 8-11 (1947)). "In our own history, the turmoil thus produced has led to a rejection of the idea that government should subsidize religious education." *Id.* (citing Lemon v. Kurtzman, 403 U.S. 602, 645-49 (1971) (Brennan, J., concurring)).

399. *Id.* at 873-78.

400. *Id.* at 878-84.

401. *Id.*

402. *Id.* at 882-83.

403. *Id.* at 883.

404. *Id.* at 883-84. Justice Souter explained:

> [I]f we looked no further than evenhandedness, and failed to ask what activities the aid might support, or in fact did support, religious schools could be blessed with government funding as massive as expenditures made for the benefit of their public school counterparts, and religious missions would thrive on public money.

Id. at 885.

405. *Id.* at 885. Justice Souter noted that "three main lines of enquiry . . . have emerged to complement evenhandedness neutrality." *Id.*

406. *Id.*

407. *Id.* at 886.

408. *Id.* at 887 ("[G]overnment benefits accruing to these pervasively religious primary and secondary schools raise special dangers of diversion into support for the religious indoctrination of children and the involvement of government in religious training and practice.").

The second important category to consider is the "method by which aid is granted."[409] Justice Souter challenged the plurality's abandonment of the direct/indirect distinction.[410] He argued that the Court should distinguish between "incidental[]" indirect aid that reaches schools through private choices and aid "directed to religious schools by the government . . . ."[411]

Lastly, the Court must consider the features of the aid itself.[412] Aid with actual religious content is clearly barred.[413] Similarly, "divertible" aid is also invalid.[414] For Justice Souter, "supplementary" aid in some instances is allowable, but aid that "supplants expenditures" for religious schools cannot pass constitutional muster.[415] "Substantial amounts" of aid are also unconstitutional.[416] Justice Souter explained, "together with James Madison we have consistently understood the Establishment Clause to impose a substantive prohibition against public aid to religion and, hence, to the religious mission of sectarian schools."[417] According to Justice Souter, "[t]he substance of the law has . . . not changed since *Everson*."[418]

For Justice Souter and the dissent, the most relevant facts in *Mitchell* were the divertibility and actual diversion of the aid.[419] Justice Souter argued

409. *Id.* at 888.

410. *Id.* at 488 n.8 ("The plurality misreads our precedent in suggesting that we have abandoned directness of distribution as a relevant consideration.").

411. *Id.* at 889.

412. *Id.* at 889-90.

413. *Id.* at 890-91.

414. *Id.* at 890-95. "I reject the plurality's argument that divertibility is a boundless principle." *Id.* at 894 n.13.

415. *Id.* at 896.

416. *Id.* at 898.

417. *Id.* at 899.

418. *Id.* at 899. "The plurality's mistaken assumptions explain and underscore its sharp break with the Framers' understanding of establishment and this Court's consistent interpretative course." *Id.* at 902. It is in this area that the dissent challenged the plurality's most basic assumptions regarding the Establishment Clause. Justice Souter continued, "As a break with consistent doctrine the plurality's new criterion is unequaled in the history of Establishment Clause interpretation. Simple on its face, it appears to take evenhandedness neutrality and in practical terms promote it to a single and sufficient test for the establishment constitutionality of school aid." *Id.* at 900. Justice Souter also addressed the "mistaken assumptions" of the plurality. *Id.* First, Justice Souter criticized the plurality for using an "external observer's attribution of religious support to the government as the sole" criterion for measuring a statute's impermissible effect. *Id.* Second, according to Justice Souter, there is no reason to assume that "equal amounts of aid to religious and nonreligious schools will have exclusively secular and equal effects, on both external perception and on incentives to attend different schools." *Id.* at 901. Lastly, Justice Souter argued that the plurality's assumption that "per capita distribution rules safeguard the same principles as independent, private choices" is simply false. *Id.* at 902.

419. *Id.* at 902-03.

that Chapter 2 aid was "highly" divertible.[420] Moreover, the program's design contained insufficient safeguards.[421] In fact, evidence suggested that the aid had been diverted to religious purposes.[422] Based on such findings, "[t]he Court ha[d] no choice but to hold that the program as applied violated the Establishment Clause."[423]

V. THE CLEVELAND VOUCHER PROGRAM AND *MITCHELL V. HELMS*

Under *Mitchell*, the Cleveland Voucher Program stands a fighting chance of passing constitutional muster. The program clearly has a secular purpose: to improve the educational opportunities of low-income inner-city youth.[424] Also, the Cleveland Program is not likely to create an excessive entanglement with religion under *Agostini*'s "effect" test.[425] As in *Mitchell*, the real issues are likely to be whether the Cleveland Program results in government indoctrination or defines its recipients by reference to religion.[426] The latter of these questions should not pose a problem, however, because in the Cleveland Program recipients are chosen by lot.[427] Thus, the Program's constitutionality will likely turn on the Court's treatment of indoctrination.

Under the plurality's test in *Mitchell* (which finds no indoctrination if eligibility for aid is determined according to neutral criteria, allocation of the aid is based on the private choices of the parents of the schoolchildren, and if the aid is not of an impermissible content), the Cleveland Program should be found constitutional. In the Cleveland Program, eligibility for aid is based on family income;[428] scholarship checks are payable to the parents of the

420. *Id.* at 903.

421. *Id.* at 906 ("The plurality has already noted at length the ineffectiveness of the government's monitoring program.").

422. *Id.* at 909.

423. *Id.* at 910.

424. Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 847 (N.D. Ohio 1999).

425. As Justice O'Connor noted in *Agostini v. Felton*, "[e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause." 521 U.S. 203, 233 (1997).

426. *See supra* text accompanying notes 335-36; *see also* Simmons-Harris v. Zelman, 234 F.3d 945, 968 (6th Cir. 2000) (Ryan, J., concurring in part, dissenting in part) ("This court's first duty . . . is to proceed to examine the first two criteria from *Agostini's* 'impermissible effect' test to determine whether the effect of Ohio's voucher program is to advance religion . . . .").

427. *Simmons-Harris*, 72 F. Supp. 2d at 836. As Justice Thomas explained in *Mitchell*, this inquiry also asks "whether the criteria for allocating the aid 'creat[e] a financial incentive to undertake religious indoctrination.'" *Mitchell*, 530 U.S. at 813 (quoting *Agostini*, 521 U.S. at 231). However, "simply because an aid program offers private schools, and thus religious schools, a benefit that they did not previously receive does not mean that the program . . . creates . . . an 'incentive' for parents to choose such an education for their children." *Id.* at 814.

428. Simmons-Harris v. Zelman, 234 F.3d at 948 ("The program requires participating private schools to cap tuition at $2500 per student per year and pays 90% of whatever tuition the school actually charges for low-income families; for other families the State pays 75% of the school's tuition up to a maximum of $1875.") (citing OHIO REV. CODE ANN. § 3313.979(A)(8) (West 2001);

student, who "endorse the checks over to the school" they choose for their child to attend;[429] and the aid itself (*i.e.*, money) possesses no religious content. However, will the fact that the type of aid in question is *money*, instead of educational supplies, effect the Court's analysis?[430]

Justice Thomas, in *Mitchell*, hinted that the private choice principle may be appropriate to deal with the "'special Establishment Clause dangers' when *money* is given to religious schools or entities directly rather than . . . indirectly."[431] Justice Thomas noted that "[t]he reason for such concern is not that the form *per se* is bad, but that such a form creates special risks that governmental aid will have the effect of advancing religion . . . . An indirect form of payment reduces these risks."[432] Thus, indirect payments to parents in the form of a voucher or scholarship, which are wholly dependent upon the parents' choice about where to spend the money, should not offend the Court's primary concern of "whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action."[433] Justice Thomas explained:

> [A]ttribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without

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OHIO REV. CODE ANN. § 3313.978(A) (West 2001), *amended by* 2001 Ohio Laws 13).

429. *Id.* (citing OHIO REV. CODE ANN. § 3313.979 (West 2001)).

430. The fact that is aid is question *is* money proved extremely divisive and critical to the Sixth Circuit's decision. Writing for the majority, Judge Clay asserted that "[t]here is no neutral aid when that aid principally flows to religious institutions; nor is there truly 'private choice' when the available choices resulting from the program design are predominantly religious." *Id.* at 961. In contrast, Judge Ryan in dissent claimed that "[t]he rule is now settled that a government program that permits financial aid ultimately to reach religious schools does not offend the Establishment Clause is the government's role in the program is neutral." *Id.* at 971-72 (Ryan, J., concurring in part, dissenting in part).

431. *Mitchell*, 530 U.S. at 818-19 (citation omitted) (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 842 (1995)). Justice Thomas continued,

> It is arguable . . . at least after *Witters*, that the principles of neutrality and private choice would be adequate to address those special risks, for it is hard to see the basis for deciding *Witters* differently simply if the State had sent the tuition check directly to whichever school Witters chose to attend.

Id. at 820 n.8.

432. *Id.* Justice Thomas gave an example, stating that "we doubt it would be unconstitutional" if a government employer sent a portion of a government employee's paycheck directly to a religious organization designated by that employee. *Id.*

433. *See id.* at 809.

> regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.[434]

Although the plurality does not take it this far, based on its rationale of neutrality, it is difficult to see the distinction between government aid in the form of physical objects (*i.e.*, computers, slide projectors, etc.) and aid in the form of money.[435] Accordingly, the Cleveland Program is likely to have at least four supporters.

Justice O'Connor's analysis will likely be the key. She patently refused to go along with the plurality's broad conception of neutrality.[436] Although Justice O'Connor did appear to completely rule out the constitutionality of direct subsidies,[437] her distinction between per-capita-aid and true private choice programs gives hope to the Cleveland Program.[438] Justice O'Connor clearly appears to favor a true private choice program in general, especially when it comes to her concerns about endorsement and direct monetary subsidies.[439] For example, Justice O'Connor's principle of distinction for purposes of "endorsement" sounds very similar to the rationale of the plurality:

> In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools. In the former example, if the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement. Because the religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as *government* support for the advancement of religion. That the amount of aid received by the school is based on the school's enrollment does not separate the

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434. *Id.* at 809-10 (citation omitted).

435. Justice O'Connor actually points out this fact in *Mitchell* when she warns,

> To be sure, the plurality does not actually hold that its theory extends to direct money payments. That omission, however, is of little comfort. In its logic–as well as its specific advisory language—the plurality opinion foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives.

Id. at 844 (O'Connor, J., concurring).

436. *See id.* at 837-40.

437. *Id.* at 840.

438. *Id.* at 842; *see also* McConnell, *supra* note 21, at 696-97 (noting that based upon this conception of true private-choice programs, "Justices O'Connor and Breyer will likely vote to sustain" the constitutionality of the Cleveland Program).

439. *See Mitchell*, 520 U.S. at 842-44 (O'Connor, J., concurring).

> government from the endorsement of the religious message. The aid formula does not–and could not–indicate to a reasonable observer that the inculcation of religion is endorsed only by the individuals attending the religious school, who each affirmatively choose to direct the secular government aid to the school and its religious mission. No such choices have been made. In contrast, when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, "[n]o reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief." Rather, endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid.[440]

Based on the above rationale, there should be little difference between aid in the form of school supplies and school tuition. However, Justice O'Connor's treatment of the plurality's neutrality logic, as a cautionary and "unprecedented" step forward in Establishment Clause jurisprudence,[441] evidences her hesitancy to abandon such a distinction and sign off fully on the principle of private choice.[442]

Justice O'Connor's primary difficulty with the Cleveland Program may arise under her *Agostini* analysis. In *Mitchell,* Justice O'Connor found it critical that Chapter 2 funds merely "supplement the funds otherwise available to a religious school."[443] In addition, an important factor for Justice O'Connor was that "no Chapter 2 funds ever reach the coffers of a religious school."[444] These factors reflect Justice O'Connor's disagreement with the plurality's conclusion "that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause."[445] Because of the absolutist nature of Justice O'Connor's concerns, if the above factors

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440. *Id.* at 842-43 (citations omitted) (quoting Witters v. Wash. Dep't. Serv. For The Blind, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in judgment)). Compare Justice Thomas' comment on the rationale of the Court in *Zobrest*: "private choices helped to ensure neutrality, and neutrality and private choices together eliminated any possible attribution to the government even when the interpreter translated classes on Catholic doctrine." *Id.* at 811.

441. *Id.* at 837.

442. Justice O'Connor explained, "the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition." *Id.* at 856.

443. *Id.* at 848. Justice O'Connor flatly declared that "Chapter 2 funds must in no case be used to supplant funds from non-Federal sources." *Id.*

444. *Id.*

445. *Id.* at 840.

play heavily into Justice O'Connor's analysis of the Cleveland Program, her vote may be difficult to reach.

However, Justice O'Connor's analysis of the Cleveland Program may not be limited to a simple *Agostini*-type analysis. The facts are simply different.[446] Accordingly, she may decide as she did in *Mitchell* because of her disagreement with the plurality's approach, to focus her analysis on precedent like *Nyquist*, a case more factually analogous to the issue at hand.[447] In evaluating the Cleveland Program, both the district court and the Sixth Circuit determined that *Nyquist* governed their result.[448] For example, the Sixth Circuit found that "the program at hand is a tuition grant program for low-income parents whose children attend private school [and is factually] parallel to the tuition reimbursement program found impermissible in *Nyquist*."[449] However, both lower courts raised concerns as to whether *Nyquist* was applicable to the Cleveland Program, and even more fundamentally, whether *Nyquist* was still good law.[450]

Taking the second question first, *Nyquist* may have been implicitly overruled by the Court's recent precedent. In *Mitchell*, the Court determined that two decisions decided prior to its more recent precedent, *Meek* and *Woolman*, were no longer consistent with the Court's analysis of the Establishment Clause because the Court had "'departed from the rule . . . that all government aid that directly assists the educational function of religious schools is invalid.'"[451] Justice Thomas explained that the indirect/direct aid distinction was now governed by the "principle of private

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446. In *Mitchell*, Justice O'Connor acknowledged that in school aid cases "'judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case.'" *Id.* at 844 (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 847 (1995) (O'Connor, J., concurring)).

447. In *Mitchell*, Justice O'Connor noted that "*Agostini* . . . concerned an Establishment Clause challenge to a school-aid program closely related to the one at issue here." *Id.* at 844.

448. Simmons-Harris v. Zelman, 234 F.3d 945, 958 (6th Cir. 2000) ("Factually, the program at hand is a tuition grant program for low-income parents whose children attend private school parallel to the tuition reimbursement program found impermissible in *Nyquist*."); Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 850 ("Since the court finds that *Nyquist* is directly relevant precedent, it is 'constrained to follow it' . . . . [I]t is not within the power of this court to decide that a case decided by the Supreme Court should be overruled.").

449. Simmons-Harris v. Zelman, 234 F.3d at 958. *Cf.* Simmons-Harris v. Zelman, 72 F. Supp. 2d at 849 ("[T]he fact that the Voucher Program overwhelmingly benefits sectarian schools and that the grants provided under the Program are not restricted to supporting only secular functions of a participating school's educational program make it indistinguishable for Establishment Clause purposes from the tuition reimbursement program in *Nyquist*.").

450. Writing for the majority in the Sixth Circuit, Judge Clay found that "[t[he Supreme Court has refrained from overruling *Nyquist*, and has instead distinguished various cases on the basis of their facts . . . ." Simmons-Harris v. Zelman, 234 F.3d at 955. In sharp contrast, however, Judge Ryan in dissent argued that "[t]he substantial differences in the purpose and application of the two statutes is not the only reason *Nyquist* does not govern our result. The additional reason is that the rule of law upon which *Nyquist* was decided has changed." *Id.* at 965 (Ryan, J., concurring in part, dissenting in part).

451. *Mitchell*, 530 U.S. at 816 (quoting Agostini v. Felton, 521 U.S. 203, 225 (1997)).

choice."[452] Similar reasoning can be applied to the situation of direct money subsidies.[453] Although *Nyquist* has not explicitly been overruled, the Court's tone and method of analysis seems to have shifted since 1973 when it stated in *Nyquist* that "direct aid in whatever form is invalid."[454]

In addition, the New York statute at issue in *Nyquist* may be distinguishable from the Cleveland statute.[455] For example, the program struck down in *Nyquist* provided for direct money subsidies for maintenance and repair of school facilities, which were allocated on a per-capita basis, but were only available to New York's private schools in low-income areas.[456] In contrast, the Cleveland Program provided *indirect* money subsidies (*i.e.*, vouchers), which were allocated based on need, to students attending *public* schools.[457] Perhaps even more simply, an argument can be made that *Nyquist* did not address the situation of a true private choice program like that in Cleveland.[458] The Court in *Nyquist* noted that "we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases 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 benefitted."[459]

Lower courts clearly are unsure how to apply the current Supreme Court precedent to the school voucher issue. The Cleveland Voucher Program is

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452. *Id.* at 816.

453. *See, e.g.*, Simmons-Harris v. Zelman, 234 F.3d at 965 (Ryan, J., concurring in part, dissenting in part) ("First, the *Nyquist* era categorical prohibition against direct grants to aid religious schools is no longer the law; and second, the criteria for determining when a statute has the forbidden 'primary effect' of advancing religion have been modified.").

454. Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973). The Court in *Nyquist* also found that "the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered." *Id.* at 781. Compare Justice Thomas' statement in *Mitchell*: "If aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefitting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'" *Mitchell*, 530 U.S. at 816 (quoting Witters v. Wash. Dept. of Services for the Blind, 474 U.S. 481, 489 (1986)).

455. *See, e.g.*, Simmons-Harris v. Zelman, 234 F.3d at 964 (Ryan, J., concurring in part, dissenting in part) (finding *Nyquist* "simply inapposite" to the present appeal).

456. *Id.* at 964-65 ("The Ohio voucher program . . . could not be more unlike the New York statute both in its purpose and in the manner of its application.").

457. *Id.* ("A case construing a statute so manifestly different than the one before us could hardly, as a *factual* matter, be a binding precedent on this court.").

458. *See, e.g.*, Jackson v. Benson, 578 N.W.2d 602, 614 (Wis. 1998) (finding that *Nyquist* "specifically reserved the issue whether an educational assistance program that was both neutral and indirect would survive an Establishment Clause challenge.").

459. *Nyquist*, 413 U.S. at 782 n.38.

just the type of program the Court refused to put its definitive stamp on in *Nyquist*, and now, almost 30 years later, the Court has that chance.

VI. CONCLUSION

The Cleveland Voucher Program is constitutional under the Court's current Establishment Clause jurisprudence. History evidences that strict or absolute separation between church and state was not the intent, nor the goal of the framers of the First Amendment. The Supreme Court's Establishment Clause jurisprudence, after a slow start, is finally beginning to recognize this fact. Vouchers can provide a reasonable and hopeful educational alternative for those children who need it the most. The bottom line is that government is playing a passive role here, allowing parents and children to choose their school. The money is not subsidizing the schools, but the parents and child. Without such opportunities, many children in the inner-cities face the type of segregated, unequal future that surely the founders would find more objectionable than the possibility that while they learn the "three R's" they might choose to let God in on the process.

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