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The Future of School Vouchers in Light of the Past Chaos of the Establishment Clause Jurisprudence

Criticism of the public education system is ever increasing. Complaints range from failures in academics to discipline problems. These complaints are motivating public officials to look for new solutions. The issuance of school vouchers is one proposal to revamp the United States educational system that has received a lot of attention and recently resulted in controversy. Voucher programs have been formally adopted in a few states, are being considered in others, and are increasingly becoming a part of political rhetoric.

The overall success of the sectarian schools and the inadequacy of many public schools have given rise to a movement for parental choice in education. In response to these realities, efforts to provide additional educational opportunities are being made throughout the country. Public officials around the country are desperately seeking creative alternatives to provide increased educational opportunities in their communities.

Vouchers provide government money for tuition for the school of the parents' choice, thus introducing a "market-oriented approach to educational reform." The idea is that choice will stimulate competition, which will force schools to improve or go out of business.

The use of government funds for religious education, however, implicates our constitutionally established separation of church and state. The United States Supreme Court has ruled on various instances of governmental aid to religious institutions. These cases have not, however, provided clarity in this area of constitutional law. Old precedents providing guidance for the constitutionality of church-state issues

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7. Sharn, *supra* note 5, at 3A.
in an educational context have, at least, been weakened by the Court's more recent decisions. The Court has been careful not to overrule the prior precedents and in fact often appears to rely on them. It may appear to be simply distinguishing new cases from old cases, but the rules have changed.

This Comment looks at the newly-emerging school choice programs in light of the Supreme Court's changing Establishment Clause jurisprudence. The thesis rejects the thrust of the Supreme Court's reasoning in the latest Establishment Clause cases. I argue that, given the existing social and economic relationships in the United States, a strict adherence to first amendment protection of separation of church and state is not only consistent with, but is required by, first amendment theory. This Comment will analyze the ideological underpinnings of the Establishment Clause jurisprudence in order to better recognize how the Supreme Court is changing in its approach to church and state issues involving education.

The Establishment Clause jurisprudence is moving toward a theory of neutrality that is more concerned with the process than the effect of government action. This analysis adopts definitional neutrality rather than a balancing approach to the first amendment, and argues that interpretations of the Establishment Clause should focus on the process. The main difference between the traditional approach and the neutrality approach to the interpretation of the Establishment Clause lies in an argument over whether the focus of the religious clauses is the effect of legislation or the legislative process. Should the main concern of the

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8. See Agostini v. Felton, 521 U.S. 203 (1997) (upholding a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis, taught on the premises of sectarian schools by government employees); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (holding that providing a deaf student with a government-paid sign language interpreter who accompanies the student to classes in a sectarian school does not violate the Establishment Clause); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (holding that the extension of aid to blind student under a state vocational program by making direct payments to a student enrolled in a sectarian college does not violate the Establishment Clause); Mueller v. Allen, 463 U.S. 388 (1983) (upholding a Minnesota statute providing tax deductions for expenses incurred by the taxpayers' children attending public and private school whether sectarian or not); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (striking down a New York statute which provided tuition reimbursement for low-income students of parochial schools); Lemon v. Kurtman, 403 U.S. 602, 612-13 (1971) (creating a three-prong Establishment Clause test: first requiring governmental action to have "a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally the [action] must not foster 'an excessive government entanglement with religion.")

9. Mueller, 463 U.S. at 394 ("The general nature of our inquiry in this area has been guided, since the decision in Lemon v. Kurtzman, 403 U.S. 602 (1971), by the "three-part" test laid down in that case." The court goes on to quote the three-part test, and use it, at least nominally, in the reasoning.)
courts in determining when government action has offended the religious clauses be the neutral treatment of religion in the process or the neutral effects upon religion? The main argument of this Comment is that the best way to protect the freedom of individuals to participate or not participate in religion is by protecting against government action, which in effect is not neutral toward religion. An argument will be made that the Court has not fully adopted a neutrality approach. Predictions about how the Court may deal with vouchers will be made in Part VI.

I. DISCUSSION OF VOUCHERS

School choice has become an important issue in the school reform debate. School choice varies in its form, funding, and degree of choice. The first type of school choice programs allow parents to choose from among public schools, rather than being assigned to a school according to residency or desegregation requirements. These programs can be separated into three groups: intradistrict options, interdistrict transfers, and magnet schools. Intradistrict choice restricts the choice to the public schools within a particular district. Interdistrict choice broadens the options to public schools outside of the district. Magnet schools, intradistrict or interdistrict, offer programs intended to attract students with particular interests.

The second type of school choice programs allow parents to choose a public or private school. Privately-funded school vouchers or scholarships, funded by philanthropists, provide poor students with an opportunity to attend a private school.

The final and most controversial category provides public funds for public or private school tuition. The school cashes in the vouchers to the government for its funding. These voucher plans are surrounded by questions of social stratification, expense, effectiveness, and constitutionality. This Comment is particularly concerned with these plans, which use public funds to give choices between private and public schools.

14. Sharn, supra, note 5, at 3A.
A. School Choice Debate

Vouchers and tuition reimbursement schemes have created a heated debate. Proponents of the plans argue that vouchers are the answer to a failing school system. Opponents argue that taking funds away from public schools will not lead to improvement, or are uncertain that supply and demand will work in the educational arena.  

Parental involvement, competition, and diversity of options are some of the more common reasons why school choice is attractive to some. Proponents of vouchers assume that the parents who choose their child’s school will be substantially more satisfied than parents who are assigned a school. According to a study by the National Center for Educational Statistics, the percentage of satisfaction among parents who are able to choose (combining all types of school choice) is high (ninety percent) but parental satisfaction overall is a high percentage as well (eighty percent).  

Another assumption behind voucher proposals is that they will create healthy competition that will lead to better performance by schools. A “school’s success will be determined by how many students it can attract.” This competition is seen as a way to match a student’s needs to the programs offered by the school.  

One major point of contention in the voucher debate is the issue of government funding of nonpublic schools. Advocates of these plans claim that since private schools do a better job of educating, they deserve the public funds. Public school supporters, however, deny that private schools are superior to public schools. An October 1994 issue of Money magazine found that the best public schools outperform most private schools, and that the average public school teacher has stronger academic qualifications than the average teacher in private schools. This study also found that class sizes in public and private schools were comparable. The curriculum was found to be more challenging in public schools than in private. The argument that private schools deserve federal money is, thus, suspect.

15. Id.  
18. Use of School Choice, supra note 16.  
20. Id.  
23. Doerr, supra note 1.
Vouchers are seen by critics as using tax dollars to fund increased division between social classes. By introducing competition into education, some schools will attract the best students, parents, and teachers. The resources provided by certain parents and students, which now are dispersed, will become concentrated into particular schools. Of course, if the market is working, this will not happen. The breakdown is that private schools are still able to pick and choose their student body. Private schools tend not to provide programs for the physically or mentally disabled. Thus, handicapped, poor, or minority students may still be unable to attend these schools because of admissions requirements. In order for vouchers to provide adequate education to special needs students, the dollar amount of the vouchers needs to reflect the individual needs of the student. Transportation services would also be needed for any voucher system to provide truly fair access to schools. Yet, most voucher plans do not specify transportation services to private schools, which may cause some parents to decline vouchers. These types of special services would require an additional layer of bureaucracy that most voucher supporters do not want to introduce.

Students in poorer schools will have even fewer resources than before. Many see vouchers as taking much-needed funds from public schools and funneling this money into private schools. Additionally, "cream-skimming of the best students by nonpublic schools would leave public schools with mostly under-performing pupils." This system is thought to bring more social stratification. Thus, opponents to the voucher system point out that its biggest advantages will go to the rich and hurt the poor and handicapped.

The biggest problem that hangs over all of the other arguments against vouchers is that vouchers are simply not found to be any more effective than the current system. Florida's attempt at a voucher program had difficulty getting private schools to participate, thus limiting the competition voucher plans are supposed to foster. Comprehensive studies by the pro-voucher George H.W. Bush Administration's Depart-

24. Id.
26. Tamara Henry, Florida Pupils Teach Nation About Vouchers, State's System Called a 'Money-Back Guarantee,' USA TODAY, Sept. 1, 1999, at 1D. Florida provides transportation to public schools in other districts but not to private schools. Id.
28. Use of School Choice, supra note 16.
29. Peterson, supra note 22, at 20.
30. Doerr, supra note 1, at 88.
31. Henry, supra note 26, at 1D. Four religious schools and one other private school participated. Lieutenant Governor Frank Brogan speculated that this because, "[m]any schools are concerned or are questioning what the relationship will be with the state." Id.
ment of Education, the Carnegie Foundation, and Jeffrey Henig, Kevin B. Smith, and Kenneth J. Meier in *The Case Against School Choice* all found that voucher programs fail to improve performance, and that they are expensive to implement.\(^3\) Newfoundland, Canada voted in 1995 to scrap its long-standing voucher system because of its inefficiency and expense. The province opted to move to a system similar to the United States system of public schools to improve its students’ performance.\(^3\) The actual school options that are available to students will depend on the value of the voucher. Since elementary schools are cheaper to run than high schools there may be more to choose from in elementary grades than secondary.\(^3\) Decentralization of the educational system would erode the common purpose of fostering democratic ideas, appreciation of our pluralistic society, and our sense of national heritage. This cost is an unknown, dependent upon the particularities of a voucher plan. As a plan having no proof of even being able to benefit the American educational system, vouchers have many hurdles to overcome before becoming an acceptable plan to American voters.\(^3\) There are many unanswered questions as to the true benefits and equity of a voucher plan.

The problems facing vouchers go beyond policy concerns over the actual benefits, and implicate the Constitution. The Constitution prohibits government sponsorship of religious organizations. The First Amendment to the Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”\(^3\) These two provisions of the Constitution have given both sides of the voucher debate a constitutional challenge. The Free Exercise Clause is used to argue that students attending religious schools must be given the same tuition benefits as other students so as not to intrude upon their ability to receive religious training.\(^3\) Conversely, the Establishment Clause is used to argue the unconstitutionality of a voucher system that includes religious schools.\(^3\)

How tuition payments to parochial schools will withstand scrutiny under the Establishment Clause is a concern, because nonpublic schools are pervasively sectarian. A constitutional challenge to a school voucher

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33. Id.
34. Sham, *supra* note 5.
35. Id. at 3A.
36. U.S. CONST. amend. I.
37. Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999); Bagley v. Raymond Sch. Dep’t, 728 A.2d 127 (Me. 1999) (alleging that a voucher program excluding religious schools was a violation of the free exercise clause).
program could affect several states currently in the process of implementing voucher programs.\textsuperscript{39} States considering voucher proposals need certainty about how to proceed on the matter of religious school participation.

II. DUELING CONSTITUTIONAL PROVISIONS

A. Free Exercise v. Establishment Clause

The Free Exercise of Religion Clause and the Establishment Clause of the Constitution counterbalance each other. No other provisions of the Constitution are as directly at war with each other as are these two. Although this Comment is concerned with the implication of the Establishment Clause on school vouchers schemes, any complete discussion of the Establishment Clause must be made in light of its counterpart, the Free Exercise Clause. The Establishment Clause must not be interpreted so as to swallow up the Free Exercise Clause, or vice versa. Thus a discussion of the Establishment Clause requires a discussion of the Free Exercise Clause as well.

The Free Exercise Clause prevents the government from acting in a way that is coercive to one’s religious beliefs. “The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.”\textsuperscript{40} In regards to religious expression and school attendance, the Supreme Court has held that a state may not: require students to attend public schools rather than private schools;\textsuperscript{41} require Amish children to attend public school after the eighth grade;\textsuperscript{42} or prevent parents from choosing religious education for their children.\textsuperscript{43}

The Constitution does not provide affirmative guarantees of rights, but rather negative liberties.\textsuperscript{44} The Free Exercise Clause is, therefore, only a guarantee that the government will not act to set up a barrier to religious practices or favor nonreligious institutions vis-à-vis religious ones. The protection that the Free Exercise Clause provides is “designed to prevent the government from impermissibly burdening an individual’s free exercise of religion, not to allow an individual to exact special

\textsuperscript{39} Tony Mauro, \textit{Steering Clear of Controversy Court’s Inaction Allows Confusion}, USA TODAY, Dec. 23, 1998, at 1A.
\textsuperscript{40} Hernandez v. Comm’r, 490 U.S. 680, 699 (1989).
\textsuperscript{41} Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925).
\textsuperscript{42} Wisconsin v. Yoder, 406 U.S. 205 (1972).
\textsuperscript{44} DeShaney v. Winnebago County Dept. of Soc. Serv., 489 U.S. 189, 195 (1989).
treatment from the government." The Free Exercise Clause has been held not to require funding of the constitutional right to send children to religious schools.

The Establishment Clause was intended to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity." The government violates the Establishment Clause through symbolic endorsement of religion. The Establishment Clause "has no role in requiring government assistance to make the practice of religion more available or easier. It simply does not speak to government actions that fail to support religion." As with any provision of the Bill of Rights, the First Amendment provides only negative liberty.

"The fact that government cannot exact from [a citizen] a surrender of one iota of [her] religious scruples does not, of course mean that [she] can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."

Since both provisions are a part of the Constitution a constant tension is created between the concept of not promoting religion and not inhibiting religion. The Establishment Clause part of the dual concept of religious freedom proffered in the First Amendment is an order to government not to act in an affirmative manner toward religion. The Free Exercise Clause prohibits the government from negative action toward religion.

45. Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 702 (10th Cir. 1998) (citing Snyder v. Murray City Corp., 124 F.2d 1349, 1353 (10th Cir. 1997)).
49. Id. at 134. See also Brusca v. Missouri, 332 F. Supp. 275, 279 (E.D.Mo. 1971) (quoting with approval Justice Douglas's concurrence in Sherbert); Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 390 (1990) (holding that a collection of sales and use taxes applicable to religious materials did not violate organization's free exercise); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. Lakewood, 699 F.2d 303, 306 (6th Cir. 1983) (holding that "[i]nconvenient economic burdens on religious freedom do not rise to a constitutionally impermissible infringement of free exercise"). See also Strout v. Comm'n, Me. Dep't of Educ., 13 F. Supp. 2d 112, 114 (D.Me. 1998) (holding that no right exists to require taxpayers to subsidize parents' choice to send their children to religious school).
51. Watson v. Jones, 80 U.S. 679, 730 (1871) ("The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.").
neither for better nor worse.

There are certain ways the government comes into contact with religion—real estate taxes or a police officer directing traffic—which in the strictest sense of the word affect religion positively or negatively. This has always been allowed as incidental and normal government interaction. This sort of contact is inevitable. Take the example of real estate taxes: if the government exempted religious institutions, then it would be encouraging religion because there is a tax benefit. This is a tax imposed upon every property owner, not a special system of providing tax dollars to private institutions, as is the case with vouchers and other similar programs. This is a fine distinction, but it is more protective of religion to make these distinctions rather than to let religious institutions be treated like everything else.

The Court has upheld certain government expenditures on religious schools and struck down others. The task at hand is to understand the Court’s method of distinguishing between these cases and then applying this method to vouchers. Some acceptable benefits, according to the Court, include supplying bus transportation and secular textbooks to parents of all school children. These benefits were allowed because they were deemed indirect and incidental. "These lines arguably may not be logical or rational, but they represent the best efforts of the Court to resolve these most difficult problems."

In 1971, the Supreme Court created a three-prong test in *Lemon v. Kurtzman* to be applied to Establishment Clause cases. "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."\(^5\)

An apparent shift in the Supreme Court’s Establishment Clause jurisprudence, evidenced by modifications of the Lemon test, has created confusion over application of the Lemon test to vouchers. There are questions as to how vouchers would fare if put to the Lemon test. More fundamental are questions as to whether Lemon is still applicable precedent.\(^5\) In recent decisions, the United States Supreme Court has indicated that it is modifying, or perhaps abandoning, the continually criticized Lemon test.\(^6\) While the results of these cases do not clearly require the total abandonment of the Lemon test, the Court broke away from the strict separation idea underlying the Lemon decision. This apparent new ideological scheme that the Court has applied to the Establishment Clause has not created any clearer standards than Lemon.\(^6\)

**B. Religion and Education**

The Supreme Court first dealt with the issue of funding religious schools in *Everson v. Board of Education*,\(^6\) which involved a New Jersey statute that reimbursed parents for transportation expenses of children attending both public and private schools, including religious schools. While the court upheld these ordinary government services being provided to religious schools, a strict separationist view of the religious clause was proffered.\(^6\) The Court was emphatic that subsidies to religious schools were highly suspect and, in most instances, would constitute a violation of the Establishment Clause.

The Court was true to the separationist language of the opinion in *Everson* by showing restraint in applying the precedent. In *Lemon v. Kurtzman*,\(^6\) the Court did not use *Everson* as a spring board to launch an attack on the Establishment Clause.\(^6\) *Lemon*, a landmark Establishment Clause case, involved a Rhode Island statute that subsidized non-public schoolteachers’ salaries and a Pennsylvania statute that allowed

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57. Id. at 612-13 (internal citations omitted).
58. Doerr, supra note 1, at 88.
59. See discussion infra Part ILB.
60. See discussion infra Part ILB. Another Supreme Court decision that causes problems for voucher supporters is *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). In this case, the Court struck down an attempt to reimburse parents for denominational school tuition. Id.
62. "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable." Id. at 18.
63. 403 U.S. 602 (1971).
64. Id. at 624. See also Sloan v. Lemon, 413 U.S. 825, 832 (1973) (being cautious not to overstep and use *Everson* to diminish the Establishment Clause).
reimbursement of “teachers’ salaries, textbooks, and instructional materials in specified secular subjects” in nonpublic schools were struck down.\textsuperscript{65}

The case condensed the history of the Establishment Clause jurisprudence into a three-part test. “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster ‘an excessive government entanglement with religion.’\textsuperscript{66}

The next major decision concerning funding of religious schools was Committee for Public Education v. Nyquist.\textsuperscript{67} This case involved a New York state tuition program that provided reimbursement for low-income parents whose children attended private schools\textsuperscript{68} and tax breaks for parents who did not qualify for reimbursement\textsuperscript{69} failed the “effects” prong of the Lemon test. “[T]he effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.”\textsuperscript{70}

Nyquist is distinguished from Board of Education v. Allen\textsuperscript{71} and Everson because the funds provided by the New York program could not be restricted to the purely secular purposes, as was possible in those cases.\textsuperscript{72} Unrestricted grants for reimbursement of private school tuition, most of which were religious, were held to have the impermissible effect of advancing religion.\textsuperscript{73} The court based its reasoning on the amount of money going to religious schools and the ability to separate secular from non-secular.\textsuperscript{74}

Later, another New York program was struck down under the Establishment Clause in Aguilar v. Felton.\textsuperscript{75} The Court held that New York public school teachers could not provide services funded through Title I of the Elementary and Secondary Education Act of 1965 within religious schools because such action constituted an excessive entanglement of government with religion, in violation of the Establishment Clause of the First Amendment.\textsuperscript{76} Such Title I funds provide remedial

\textsuperscript{65} Lemon, 403 U.S. at 606-07.
\textsuperscript{66} Id. at 612-13 (internal citations omitted).
\textsuperscript{67} 413 U.S. 756 (1973).
\textsuperscript{68} Id. at 767. Eighty-five percent of New York private schools were church affiliated. \textit{Id.} at 768.
\textsuperscript{69} Nyquist, 413 U.S. at 764.
\textsuperscript{70} \textit{Id.} at 783.
\textsuperscript{71} Bd. of Educ. v. Allen, 392 U.S. 236, 243-44 (1968) (finding the benefit was to the parents and not to the schools themselves).
\textsuperscript{73} Nyquist, 413 U.S. at 780.
\textsuperscript{74} \textit{Id.} at 783.
\textsuperscript{75} 473 U.S. 402 (1985).
\textsuperscript{76} \textit{Id.} at 413.
education, guidance, and counseling to eligible students, those who are from low income areas and at risk of failing, regardless of whether or not they attend private or public school. Prior to Aguilar, New York City provided Title I services to students who attended private schools by sending public school teachers into the private school. A monitoring system was put in place to guard against inculcation of religion by public school teachers because many of the schools served were religious private schools.

The Aguilar Court applied the three-prong Establishment Clause standard created in Lemon v. Kurtzman. It reasoned that the program had a secular purpose of providing remedial services to at-risk students, thereby satisfying the first prong. Although the Court in District of Grand Rapids v. Ball and Meek v. Pittenger found similar programs to be in violation of Lemon’s second prong because the program advanced religion by placing public school teachers in religious school classrooms. The Aguilar court held this action satisfied the second prong because it had a neutral effect on religion. The Court then moved to the third and fatal prong, wherein action must not foster an excessive entanglement of government and religion. The Court found there was entanglement because public authorities were involved in the monitoring of teachers to ensure that they did not inculcate religion. In order to do this, administrative cooperation was required between the Board of Education and parochial schools, increasing the danger of political divisiveness. The Court ultimately held in Aguilar that public school teachers providing instruction within a religious school violated the Establishment Clause.

One of the first cases to show a major shift in the Supreme Court’s handling of Establishment Clause cases was Mueller v. Allen. In Mueller, the Court allowed parents to deduct expenses incurred in providing tuition, textbooks, and transportation to parochial schools from state taxes. Mueller stands for the position that a state may “aid” a

77. Aguilar, 473 U.S. at 406.
78. Id. at 406-07.
82. 421 U.S. 349 (1975) (striking down a Pennsylvania law providing loans of educational materials and equipment directly to religious schools).
83. Aguilar, 473 U.S. at 409-10.
84. Id.
85. Id. at 413-14.
86. Id. at 414.
88. Id. at 391.
religious institution without "establishing a religion." This distinction, however, is not that helpful because it merely substitutes one word for another without defining how merely "aiding" is to be distinguished from the "establishment" that occurred in Nyquist. One distinction between the permissible "aid" and the impermissible "establishment" that can be gleaned from the case is that aid is provided to all parents whether or not their child attends public, non-secular private, or secular private schools. The "flow" of the aid also seems to be important in Mueller, although this was not a factor in Nyquist. The Court makes a distinction between the direct flow of state funds to private religious schools in Nyquist and the primary benefit flowing to the parents in Mueller, where only by the parents' choice do the religious schools receive any benefit. The disbursement of a benefit to both public and private schools without distinction was a point made in Everson and Allen. The Court makes a final distinction between the "aid" given in Mueller and the "establishment" in Nyquist, holding that the tax-deduction of Mueller did not rise to the level of "establishment" as did the tuition payment in Nyquist.

The reasoning of Mueller used the three-prong Lemon test, but Chief Justice Rehnquist, in the majority opinion, used the test in a way that is inconsistent with the test's origins in Lemon. The Court diminished the importance of Lemon by stating that the precedent, which has long been used in Establishment Clause cases, is "no more than [a] helpful signpost." The secular purpose requirement established in Lemon was disposed of quickly. The Chief Justice reasoned that two possible secular purposes existed for this statute: (1) ensuring a well-educated citizenry and (2) assuring continued financial health of private

89. Id. at 398-99.
92. Id. at 399.
93. The Court in Nyquist noted that the flow of funds to parents rather than directly to religious schools is just one factor to consider and does not make the statute per se constitutional. Nyquist, 413 U.S. at 781. This is contradictory to the Court's position toward the impact of the funds being given to the parents in Mueller. Mueller, 463 U.S. at 399.
94. Mueller, 463 U.S. at 399.
100. Id. at 394-95.
schools. The Court, not the legislature, provided these purposes. In applying the second Lemon prong to the statute, the primary effect was found not to advance sectarian aims. The Court noted that broad latitude should be given when the legislature is creating tax classifications. These tax-deductions are equated with deductions for medical expenses and charitable contributions. The opinion does not indicate that the government should be any more concerned when the tax-deductions will benefit a religious institution. The Court found that because this “aid” is given to all parents and is a result of decisions made by parents it is not direct aid from the state.

Of great concern is the Court’s refusal to look into statistics analyzing whether or not the program will benefit religious schools more than secular schools. This was a vital part of the Nyquist rationale. This allows a statutory plan that primarily benefits religious schools to pass Establishment Clause muster. Preventing religion from being the primary beneficiary was the exact purpose of the second prong of the Lemon test. This interpretation alters to the second prong of the Lemon test. This assertion also departs from the spirit of prior case law regarding the secular purpose prong. Under the original Lemon regime, it would be difficult to find that a statute which primarily benefits religious institutions has a secular purpose.

The final prong, which prohibits excessive entanglement of government with religion, was found not to frustrate the continuance of the Mueller. The petitioners in Mueller claimed that the program’s method of separating religious textbooks from being included in the deduction given for textbooks entangled government impermissibly with

101. Id. at 395.
102. Id. at 395 n.4 (stating no express statement of legislative purpose was given and that the legislative history does not tell the actual intent).
103. Id. at 396.
104. Id.
105. Id. at 396 n.5.
107. Id. at 399. See also id. at n.6 (distinguishing Nyquist).
109. See Nyquist, 413 U.S. at 778-779.
110. See Mueller, 463 U.S. at 401-02.
111. See Nyquist, 413 U.S. at 792-794; Ball, 473 U.S. at 394.
112. See Lemon, 403 U.S. at 612.
113. Id.
religion. The Court dismissed this claim with little explanation. In fact, in footnote eleven, the Court stated that this prong only applies when the program involves "direct financial subsidies."  

Subsequently, the Court decided Witters v. Washington Department of Services for the Blind. In Witters, a young man studying to become a pastor, missionary, or youth director at a Christian college requested funds from a Washington state vocational rehabilitation program. The state agency refused to supply funds because the agency concluded that it would violate the state constitution. The Washington Supreme Court agreed, concluding that providing funds would violate the First Amendment of the United States Constitution. The United States Supreme Court reversed the Washington Supreme Court's decision. The Court concluded that provision of funds under the state program would not violate the second prong of the Lemon test because the program "was made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." The significance to the Establishment Clause jurisprudence was to once again weaken the "effects" prong of Lemon. Witters was viewed by the Court as similar to the case in Nyquist, thus limiting impermissible effects of advancing religion to the narrow category established in Nyquist where the provisions of the program affect the choice of whether the student will use the reimbursement for public or secular schools.

Zobrest v. Catalina Foothills School District also weakened Lemon's "effects" prong. Zobrest held that providing an interpreter to a deaf Catholic high school student, pursuant to the Individuals With Disabilities Education Act (IDEA), did not violate the Establishment Clause. The Court's reasoning was similar to that of Witters. Zobrest is distinguishable from School District of Grand Rapids v.

115. Id.
116. Id.
117. Id. at 403-04 n.11.
119. Id. at 481-485.
120. Id. at 487-488 (quoting Nyquist, 413 U.S. at 782-783). "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 assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." Nyquist, 413 U.S. at 782-83 n.38.
125. Zobrest, 509 U.S. at 3.
126. Vaccari, supra note 2, at 36.
Ball and Meek v. Pittenger because the Zobrest program did not relieve the school of costs that the school would have normally incurred. The fact that this was an interpreter was another important point that the Court noted in its reasoning. As in Mueller, the Court pointed out that the choice was being made by the individual’s parents and not the legislature that created the statute.

Agostini v. Felton, is the most recent case concerning religious school funding. In response to the decision in Aguilar, the New York School Board provided vans to pick up students from parochial schools and taught the students in the vans. Petitioners in Agostini claimed that the requirements of Aguilar should not be imposed in their case because it would be too expensive. Furthermore, the petitioners claimed that the Supreme Court’s Establishment Clause jurisprudence had changed so as to undermine Aguilar and required that it be overturned. Petitioners cited views expressed by five Justices in Board of Education of Kiryas Joel Village School District v. Grumet, and subsequent holdings in Witters v. Washington Department of Services for the Blind, Zobrest v. Catalina Foothills School District, and Rosenberger v. University of Virginia, to indicate that the holding of Aguilar was no longer good law.

The Court in Agostini still inquired whether the program in question had a secular purpose, claiming that the first prong of the Lemon test had not changed. The second prong, while changed, was still utilized. The Agostini opinion views the “effects” prong and the “entanglement” prong concurrently. The Court stated that it will still examine whether the statute advances religion, but that the level necessary to

128. 421 U.S. 349 (1975) (striking down a Pennsylvania law that provides loans of educational materials and equipment directly to religious schools).
129. “By awarding parents freedom to select a school of their choice, the statute insures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, and interpreter’s presence there cannot be attributed to state decision making.” Zobrest, 509 U.S. at 10.
131. Id. at 213.
132. Id. at 215-16.
133. Id. at 216.
138. See Agostini, 521 U.S. at 216-223.
139. Id. at 222-23.
render it "an impermissible effect has changed."\textsuperscript{140}

The program in \textit{Agostini} was compared to the interpreter program in \textit{Zobrest} because the Court found no reason to conclude that the teachers' presence would advance religion.\textsuperscript{141} This approach represents a move away from an approach which recognizes that symbolic endorsement of religion can constitute an Establishment Clause violation.\textsuperscript{142} The Court also compared this case to \textit{Witters} by stating that not all direct aid of religious schools is establishing religion.\textsuperscript{143} The key is that there is a "genuinely independent and private choice of individuals."\textsuperscript{144}

There has been a shift in the Establishment Clause jurisprudence, but the extent and the nature of that shift are debatable. There is some thought that the Supreme Court is moving towards accommodation of religion, while others see the shift as a move toward neutralism.\textsuperscript{145} Neither of these theories completely explain the Court's position because in \textit{Mueller} and \textit{Agostini} the Court's method still looks at the impact of government action and the only change is what the Court sees as advancing religion. The Court does not look at any form of accommodation in determining advancement of religion, but rather the Court looks at the impact on individual choice and economic benefits.

\section*{III. Reading the Religion Clauses}

There are two ways of looking at the neutrality of the government's actions toward religion. One is of means and the other is of ends.

\textbf{A. Neutral Means}

This view is often referred to as neutrality because the concept asserts that as long as the \textit{development} of law, i.e., the law making process, is neutral toward religion, neither the Free Exercise nor the Establishment Clause is implicated. Religious organizations are treated like any other organization. If the government is regulating other charitable organizations, then a church could be regulated.

This theory is based on the assumption that the religious clauses address the danger of the government making decisions concerning religion. If religion is treated the same as all other institutions, then the

\begin{footnotesize}
\begin{enumerate}
\item Id. at 223.
\item Id. at 224.
\item Agostini, 521 U.S. at 225-26.
\item Id. at 226 (quoting Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481, 487 (1986)).
\end{enumerate}
\end{footnotesize}
state has not acted toward religion specifically. Regardless of the consequences under this theory, there is no recourse under the First Amendment as long as the legislative process was neutral. The legislative body should not consider the effects its legislation may have on religion, positive or negative. If the legislative process treats all alike, then neither the Establishment nor the Free Exercise Clauses has been offended.

This approach is not concerned with the actual effects of government action on religion. Supporters argue that a neutral approach will protect the community from government abuse and prevent the government from affecting religious participation. Thus, according to this approach, neutrality in the legislative process is the goal of these two dueling religion-related clauses. Were the legislature to treat religious institutions differently so as to avoid a positive effect upon religion, that action would favor the Establishment Clause at the cost of the Free Exercise Clause. This is a facially valid argument. The reason that the Constitution prohibits state establishment of a religion and state interference with religious practices was surely to ensure government neutrality toward religion.

The shift toward neutrality can be seen in the Court's treatment of the Free Exercise Clause in the case of Employment Division Department of Human Resources of Oregon v. Smith. Smith held that the Free Exercise Clause does not prohibit the application of Oregon drug law to the religious ingestion of peyote. The Smith Court upheld the Oregon law because a neutral, generally applicable law needs only a rational basis of a permissible state interest, even if it burdens one's religious practice. Although the Oregon drug law interfered with the Native American religious use of peyote, the Court found no violation of the Free Exercise Clause, because the state had a permissible interest in regulating drug use.

Neutrality is heralded as preventing discrimination against religion in the name of the Establishment Clause. Neutrality does not, however, always provide more protection of free exercise of religion. The problem is best illustrated by example. For example, suppose that Wisconsin public law required children to attend school until age sixteen.

The legislative process underlying this regulation was neutral toward religion. The act was not designed to promote or burden religion. The legislature's concern was the education of the state's children. If neutrality was the only concern of the Establishment/Free Exercise Clause dichotomy, there would be no problem with this law. Additionally, assume that at this time there was a large Amish population in Wisconsin that did not believe in formal education past the eighth grade. The Amish religion and social structure depends on the children being taught in the ways of the Amish. By removing their children from school at the age deemed appropriate by their religious convictions, the Amish were in violation of this religiously neutral law. Based on these facts, Wisconsin v. Yoder held that a facially neutral law violated the Free Exercise clause. This was a narrow exception carved out for the Amish by Chief Justice Burger based on the denial of free exercise of religion. If the neutrality argument had been adopted in Yoder, neither the Court nor the legislature could have made this exception for the Amish or others with adverse religious beliefs.

Whether the two religious clauses are "directly at war," as claimed herein, depends on how they are construed. The clauses should be interpreted as being at war with each other, because that way a balance can be struck. The easiest way to read the language of the religious clauses is that there should be a balance. One says no establishment of religion and the other says no interference with religion. They appear to try to strike a compromise.

Religion must be treated differently during the legislative process in order to achieve neutral effects on religion. According to the neutrality argument, this is exactly the problem the religious clauses were intended to prevent. At first blush, the right answer seems to be to simply treat religion the same as any other subject during the legislative process in order to ensure that government actors are not acting on behalf of religion or against religion. This approach, however, does not protect religion at all (as argued in the discussion of Wisconsin v. Yoder). That argument aside, the language of the First Amendment supports the view that religion must be looked at separately. The First Amendment treats religion differently. The First Amendment specifically mentions religion as an area that the government cannot interfere with, positively or negatively. Government actors are commanded to consider the effects of their actions on religion. This cannot be done by

152. Id. at 213.
153. 406 U.S. 205 (1972) (holding parents have a direct, personal right to control the religious upbringing and training of their minor children).
154. Id. at 220-21.
putting on blindfolds and treating churches, synagogues, mosques, etc., like the Rotary Club. Professor Ely makes a similar argument concerning the First Amendment Free Speech clause.\textsuperscript{155}

I can certainly understand the instinct that might incline one to minimize the number of occasions in which the judiciary could become involved in assessing the importance of the interest the state adduces to support its regulation. But, some attention to that question is unavoidable . . . if there is to be review at all. Moreover, the theory that demands review in the first place demands that judicial review attend to ends.\textsuperscript{156} The appropriate relationship between the government and religion is neutrality in the legislative process, \textit{and} neutrality in the effects of government regulation on individuals expressing their religious beliefs. The dichotomy between means and ends is complex and the issues intermingle, such that one cannot be discussed without the other.

\textbf{B. Neutral Ends}

The other view of the Establishment Clause focuses on the effects of government regulation rather than the means of government regulation.\textsuperscript{157} How does government action affect religion? The \textit{Lemon} test asks whether state action 1) has a secular purpose; 2) promotes religion; or 3) excessively intermingles. This is a retrospective look at state action. Advocates of the neutrality theory believe that religion must not be treated differently, but the Establishment Clause requires that religion be treated differently.\textsuperscript{158}

How a particular piece of legislation affects religion is crucial to its constitutionality. The Establishment Clause prohibits government promotion of religion and the Free Exercise Clause prohibits government interference with religion. The result is legislation that does not, in effect, help or hurt religion. This approach requires that religion be treated differently in the legislative process so that the effect is neutral. Does it matter that the legislature did not intend to promote religion or is it more important that it actually did? Ask the Amish whether they care if the Wisconsin Legislature intended to harm their children’s upbringing in the Amish lifestyle, or if they care that it had the effect of doing just that? When one’s individual exercise of religion is at stake, the impact of government action is of more concern. The intended or unin-

\begin{itemize}
\item \textsuperscript{155} \textsc{John Hart Ely, Democracy and Distrust} (1980).
\item \textsuperscript{156} \textit{Id.} at 106.
\item \textsuperscript{157} See generally \textsc{Lupa, supra note} 145.
\item \textsuperscript{158} \textsc{Douglas Laycock, The Underlying Unity of Separation and Neutrality, 46 Emory L.J. 43} (1997). Laycock refers to neutrality theory as nondiscriminatory theory.
\end{itemize}
tended result of a voucher plan is to provide government funds to religious institutions, which raises establishment concerns.

Neutralist theory disagrees, because, according to neutralist theory, it is violative of the Establishment Clause for legislatures and courts to engage in such a balance. Neutrality supporters argue that a court should not examine the centrality of a religious practice. The judicial system, however, is well equipped to weigh the impact of government action on religion. The court system is where the religious clauses are best evaluated. The political process should deal, as best it can, with preventing abuse of legislative mandates. But, when the legislature inevitably fails to protect minorities, the judicial system is the appropriate body to uphold the ideals of the religious clauses. Judges will not be placed in the position of determining religious issues forbidden by the Establishment Clause, because an injury must be shown to have occurred either to one attempting to practice her religious faith (an implication of the Free Exercise Clause) or to a taxpayer by way of state aid to a religious institution (an implication of the Establishment Clause). There is, of course, a level of judicial interpretation required to determine whether an injury rises to the level of a constitutional violation. Determining whether an injury has occurred, however, is a valid judicial role. Process-oriented neutrality will not simplify the adjudication of these types of cases.

A neutral-ends approach to the determination of whether government action violates the religious clauses does not make for neat line drawing and precedent setting, hence the mess in the current system. The Court’s concern, however, should not be limited to efficiency. There may be a social benefit to indoctrinating students with a particular religious doctrine. Conversely, the political majority may deem suppression of an unpopular religious practice or belief socially beneficial. These two contradictory clauses prevent legislative bodies from making neutrally applicable law and washing their hands of the consequences. The consequences should matter.

Under a position that looks purely at effects, however, the secular purpose prong of the Lemon test would be abolished. This prong is not helpful in determining whether legislation will either negatively or positively affect religion. Under the Court’s current regime, this prong has become a mechanical touchstone that is so easy to fulfill that it serves no purpose to require courts to go through the motions of applying it. For example, in Mueller, where the legislature provided no purpose for the tuition program, the Court merely created plausible secular purposes that

159. Id.
sufficed to leap this non-existent hurdle.\textsuperscript{161} This prong has only been used to strike down legislation in the case of \textit{Wallace v. Jaffree}.\textsuperscript{162}

IV. \textbf{Law and Social Order}

A. \textbf{Political Issues}

The religious clauses of the First Amendment provide an important protection for the autonomy of religious faiths. When the government gives money to fund any group or activity, there are always strings attached. Vouchers for religious schools will provide a way for government to regulate religious schools that has not been available before. Vouchers do not treat religion neutrally because they will ultimately result in government regulation of and intervention in religious institutions. The Constitution does not treat religion like other institutions and organizations that may be subject to more government regulation. While religious schools may, in the beginning, like the idea of a voucher system,\textsuperscript{163} they may not be as enthusiastic when subjected to the same government regulations as any other school receiving government aid.

If vouchers are found to be constitutional based on an idea that the vouchers are not a direct flow of funds to religion, then the state will be able to impose the same anti-discrimination protections and open-meetings requirements on religious schools that are imposed upon public schools. Government funding of private schools also creates a lack of accountability, because private schools are not controlled by the taxpayers. Traditionally, taxpayers feel a need to monitor the usage of their tax dollars, yet private schools, unlike public schools, do not have to adhere to public laws that require open meetings or access to school records.\textsuperscript{164} Nonpublic schools are not held to nondiscriminatory policies in admissions, hiring, and curriculum selection.\textsuperscript{165} Tax funding of schools that systematically discriminate may be found unconstitutional, if challenged, and would likely be very unsettling to many voters.\textsuperscript{166} State regulation of religious institutions in this manner is surely an “excessive


\textsuperscript{162} 472 U.S. 38 (1985) \textit{(holding that an Alabama statute authorizing public school teachers to hold a one-minute moment of silence for meditation or voluntary prayer was unconstitutional for lack of a secular purpose because the sponsor of the bill said the purpose was to “return voluntary prayer’’ to the public schools).}

\textsuperscript{163} Sham, supra note 5, at 3A (stating that “[p]rivate school vouchers” are “a priority of the nations top Republican leaders, religious groups and some school reformers . . .”).

\textsuperscript{164} Peterson, supra note 22, at 20.

\textsuperscript{165} Lemon v. Kurtzman, 403 U.S. 602, 611 n.5 (1971). The plaintiffs in Lemon alleged an equal protection violation because the private schools receiving funds practiced racial and religious discrimination in hiring and admissions policies. They were held to lack standing for failure to show that any of their children had been denied admission based on race or religion. \textit{Id.}

\textsuperscript{166} See Doerr, \textit{supra}, note 1, at 88.
entanglement” of government with religion, if not a violation of free exercise. Essentially, this opens up a host of complex issues, which will not lead to better treatment of religion or less interference by government.

B. Economic Issues

Voucher programs are a market approach to school reform, so a discussion of economic issues is appropriate. There are several economic approaches that can be taken in defining the Establishment Clause. A discussion focused on tuition payments is particularly aided by an examination of the economic issues involved. Government funding typically has the effect of expanding the funded activity, whereas taxing an activity will reduce participation in the activity. The same effect will be seen if the government pays for or taxes religious school attendance. “[I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions.” Every rational business decision takes into account subsidies given for an activity.

Introducing a market approach to the education system will create dependence on private and religious institutions for the education of our children. Commitment to a market system is commitment to interdependence. Competition is dependant on market forces of supply and demand and market actors. This is the kind of excessive entanglement of government and religion that the Establishment Clause prohibits. “In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral and non-ideological purposes, it is clear from our cases that direct aid in whatever form is invalid.”

An argument is often made that parents should have the choice to send their child to a religious school because it is their tax money to spend as they choose (i.e., the taxpayer is simply choosing the forum in which their tax money for education will be spent). This argument is flawed because all taxpayers have an interest in the government’s mandate to refrain from establishing a religion. Every taxpayer has standing to bring a claim that the government is fostering religion. One taxpayer using her tax money to fund religion in an unconstitutional manner

167. See McConnell & Posner, supra note 146.
168. See id. at 5.
170. Id. at 780 (Marshall dissenting).
(whatever that may be) injures every other taxpayer. Neither the burden of paying taxes for public schools and paying for religious schools, nor "the State's purposes . . . justif[ies] an eroding of the limitations of the Establishment Clause now firmly implanted." The taxpayer claiming a violation is not going to be the one sending her child to a religious school on the government's bill. If only the tax money of the parent sending the child to a religious school was being used, then the complainant would not have an injury. The standing doctrine states that an injury does exist to the taxpayer. The argument that the money is my tax dollars going to pay for my kids fails. The argument just does not coincide with Establishment Clause standing.

V. APPLYING THE PRECEDENTS TO VOUCHERS

The Supreme Court's shift in its Establishment Clause jurisprudence has left lower courts in a state of confusion. State and federal courts have not been consistent in their decisions concerning the Establishment Clause. Some jurisdictions have maintained strict adherence to the Lemon test, while others have strayed from this convention.

Simply excluding religious schools from a voucher plan has not saved controversy, as has been demonstrated by Maine and Milwaukee's voucher programs. Maine's voucher program pays to send students to public school or a state-approved private school in districts without a high school. Originally, the program allowed parochial schools, but in 1981 the Maine legislature excluded parochial schools from a tuition payment program, at the suggestion of the Attorney General, because of the Supreme Court's holding in Nyquist. Maine's high school tuition reimbursement plan for school districts without a public high school was challenged under the Constitution for excluding religious schools. Parochial school parents sued and lost in both federal and state court.

The First Circuit held in Strout v. Albanese that the exclusion of sectarian schools in the Maine voucher program did not violate the Establishment Clause and did not implicate the free exercise clause.
The statute was challenged on establishment clause, free exercise, equal protection, free speech, and due process grounds. The question was framed as "whether Maine is constitutionally required to extend subsidies to sectarian schools." The case, however, presented the opposite question of whether or not vouchers for religious schools are an impermissible funding of religion, but is useful for examining the method of balancing the free exercise of the parents who wish to send their children to a religious high school with the Establishment Clause. The parents claimed that the statute was hostile to religion in violation of the Establishment Clause. This proposition was found to have no supporting authority. The court stated that the Establishment Clause was sufficient to permit a government action that might otherwise infringe upon the free exercise of religion. The court relied heavily on Nyquist in order to find that direct aid to sectarian schools would violate the Establishment Clause. The court stated that to hold any other way would be to extend the current precedents. The circuit court held to a strict separationist view by refusing to imply anything from the latest Establishment Clause decisions of the Supreme Court. The court stated that "approving direct payments of tuition by the state to sectarian schools represents a quantum leap that we are unwilling to take."

The Maine Supreme Court has been unwilling to use any of the Supreme Court’s precedents to weaken the Establishment Clause. The same issue was raised in state court in Bagley v. Raymond School Department. This state court counterpart to Strout took a stronger position concerning the constitutionality of this voucher program. The Supreme Judicial Court of Maine noted that the Maine Constitution provided no more protections than the federal constitution, so the court simply analyzed the federal constitutional issues. The court found the statutes placed no substantial burden on free exercise of religion. As

181. Id. at 59.
182. Id. at 60.
183. Id.
184. Id. at 60-61.
185. Id. at 61.
186. Id. at 62.
188. Strout, 178 F.3d at 64.
191. Id. at 132, (petitioners claimed violations of the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause.)
192. Id. at 135.
to the Establishment Clause, the court held that no part of the Establish-
ment Clause required the state government to subsidize religious
participation.\footnote{193}

The court's reasoning regarding the Equal Protection claim in Bag-
ley is more interesting to this discussion. The court determined that in
order for the exclusion to withstand scrutiny under the Equal Protection
Clause, the Establishment Clause must mandate the exclusion of reli-
gious schools from the program.\footnote{194} The court, therefore, examined the
constitutionality of a program that included religious schools.\footnote{195} Based
on an extensive examination of the precedents, the court held that inclu-
sion of religious schools would violate the Establishment Clause.\footnote{196}
This was different from the district court's holding that exclusion of
religious schools is constitutional, and went further to say that inclusion
would be unconstitutional.\footnote{197} The court used the Equal Protection
Clause to find that not only was this program constitutional, but also that
a program that included religious schools would be unconstitutional.\footnote{198}

Milwaukee's voucher program at one time excluded religious
schools from receiving vouchers that were provided to students of cer-
tain low-income families.\footnote{199} The "Milwaukee Parental Choice Pro-
gram" partially reimbursed eligible students for the tuition of private
nonreligious schools.\footnote{200} It was challenged in federal court by eligible
students and parents who wished to use the tuition reimbursement at
religious schools.\footnote{201} They claimed that the school choice program
violated the free exercise and equal protection clauses of the Constitu-
tion.\footnote{202} Like the Supreme Judicial Court of Maine, the District Court\footnote{203}
held that an expansion of the tuition reimbursement program to religious
schools would violate the Establishment Clause.\footnote{204} While the First Cir-

\footnotesize{193. Id. at 136.}
\footnotesize{194. Id. at 1380.}
\footnotesize{195. Id.}
\footnotesize{196. Id. at 144.}
\footnotesize{197. Id.}
\footnotesize{198. Id.}
\footnotesize{199. Tamara Henry, Florida Pupils Teach Nation About Vouchers State's System Called a
'Money-Back Guarantee,' USA TODAY, Sept. 1, 1999, at 1D.}
\footnotesize{200. Wis. STAT. ANN. § 119.23 (West 1991 & Supp. 1994) (enacted 1990, amended 1993 and
1995). Students and their families must be low-income as defined by statute. § 119.23(2)(a).
Miller v. Benson, 878 F. Supp. 1209, 1210-11 (E.D. Wis. 1995) (discussing the procedure of the
Milwaukee Parental Choice Program).}
\footnotesize{201. Miller v. Benson, 878 F. Supp. 1209 (E.D.Wis. 1995).}
\footnotesize{202. Id. at 1211-12. Plaintiffs brought a claim under the Religious Freedom Restoration Act of
1993, 42 U.S.C. § 2000bb (Supp. 1994), which was later dropped. Id. at 1212 n.7.}
\footnotesize{203. Miller, 878 F. Supp. at 1216. The "Milwaukee Parental Choice Program" had withstood
Wisconsin constitutional challenges that did not raise issues of free exercise or establishment of
religion. Davis v. Grover 480 N.W. 2d 460 (Wis. 1992).}
\footnotesize{204. Miller, 878 F. Supp. at 1216.}
cuit upheld the constitutionality of a voucher plan that excluded religious schools. The Eastern District of Wisconsin held that inclusion of religious schools in a voucher program would violate the constitutional mandate of the Establishment Clause.

Despite the District Court’s ruling, the Wisconsin Legislature amended “Milwaukee Parental Choice Program” in 1995 to include sectarian schools. These amendments were challenged in state court under the U.S. and Wisconsin Constitutions. The Court of Appeals of Wisconsin correctly looked to the state constitutional claims, first noting that the language of the Wisconsin Constitution placed stricter separation between the state and religion than the U.S. Constitution. The Wisconsin Supreme Court took the opposite position and first looked at the U.S. Constitution to find the inclusion of religious schools in the tuition program constitutional under both the U.S. Constitution and the Wisconsin Constitution.

The Wisconsin Court of Appeals has recognized that the Wisconsin Constitution requires stricter separation of state and religion than the U.S. Constitution’s Establishment Clause. If the Supreme Court adopts a neutrality approach, then Wisconsin’s and other state constitutions that impose stricter separation between church and state, may be unconstitutional.

Arizona extended Mueller v. Allen’s holding to apply to vouch-

WIS. CONST. ART. I, § 18.

205. Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999).
209. Jackson, 570 N.W. 2d at 416-17.
210. Jackson, 578 N.W. 2d at 610-621.
211. Jackson, 570 N.W. 2d at 416-17.
Arizona created a tax credit to individuals who donate to tuition credit programs. The Arizona Supreme Court upheld the tax credit under *Mueller v. Allen*.214

Ohio's school voucher program provided "scholarships" to low-income families to be used at certain private or public schools in adjacent school districts.215 There were a limited number of scholarships granted each year and a maximum amount that would be reimbursed.216 Eighty-five percent of the students who received the scholarships attended secular schools.217 Funds were sent to the chosen school, where the parents endorsed the check to the school, but there were no restrictions on how the school spent the money.218

The program was challenged in state court as violating the First Amendment of the U.S. Constitution and various provisions of the Ohio Constitution.219 The Ohio Supreme Court applied *Lemon* in upholding the voucher program under the federal and state Constitutions, but noted that the validity of *Lemon* has been questioned.220 Subsequent statutes were passed in compliance with the Ohio Supreme Court's decision to strike down the program pursuant to the "one-subject rule" of the Ohio Constitution concerning appropriations bills,221 but the procedures remained the same for disbursement of vouchers.222

The federal constitutional issues raised by the voucher program were presented to the U.S. District Court for the Northern District of Ohio.223 The plaintiffs sought a preliminary injunction, which the district court granted.224 The case is a good example of how lower courts are struggling to apply the Establishment Clause precedents. The District Court made an interesting maneuver in determining the constitutionality of the Ohio Scholarship Program. Although the court stated that it must determine whether or not the statute complied with the

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214. *Id.* at 625.
218. *Id.* at 728.
219. Simmons-Harris v. Goff, 711 N.E. 2d 203, 207 (Ohio 1999) (striking down the Scholarship Program as violative of Article II, section 15(D), of the Ohio Constitution in "that creation of a substantive program in a general appropriations bill violates the one-subject rule").
220. *Goff*, 711 N.E. 2d at 207-08 (listing various opinions challenging *Lemon*).
221. *Id.* at 216.
223. *Zelman*, 54 F. Supp. 2d at 727. The court found that the plaintiffs could relitigate the Establishment Clause and Free Exercise issues because the Ohio Supreme Court's decision as to these issues was not essential to its judgment. *Id.* at 731.
224. *Id.* at 742.
Lemon test, it never evaluated the statute under the Lemon regime. Instead, the court examined Nyquist, Mueller, Witters, Zobrest, and Agostini. The court found Nyquist to be binding precedent in this case because, as with the New York statute, the reality of the program was that the majority of the private schools were religious, and the funds were not restricted to secular activities. The court then felt the obligation to examine Mueller and its progeny to determine whether they undermined Nyquist. The court noted that in Mueller the Supreme Court stated that Nyquist was not being overruled. The Ohio program was found to be distinguishable from Mueller because there were no public schools participating in the Ohio scholarship program, and as such parents did not have a significant choice between religious and nonreligious schools. In addition, the majority of nonpublic schools were religious, so the program was not neutral to the religious choice made by the parents, and the benefit realized by religious schools in Ohio was greater than in Mueller’s tax deduction scheme. The court examined Witters and Zobrest, but found that neither undermined the binding precedent of Nyquist.

VI. THE SUPREME COURT’S POSITION

The meaning of the Establishment Clause has, and continues to be, developed through case law. The approach has been to determine the law by looking at the facts of the cases and the results to determine the appropriate results in future situations. From this exercise a pattern develops, hopefully providing some indicia of how subsequent cases are to be adjudicated. As discussed in Part II.B infra, this fact/result approach does not provide much predictability for the Establishment Clause, because the results are diverse. One cannot just look at the prior cases’ facts and results to determine how vouchers would withstand constitutional scrutiny.

The method of getting a result from a case involving the Establishment Clause used to be Lemon v. Kurtzman. While the Court has not officially abandoned Lemon, the recent precedents show that there is

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225. Id. at 732-33.
226. See generally id. at 733-41.
227. Id. at 735.
228. Id.
229. Id. at 736.
230. Id. at 737.
231. Id. at 738, 739.
232. Id. at 739.
233. See cases cited supra note 49.
something else going on in the space between fact and result in current Establishment Clause jurisprudence. There has to be an underlying justification for changing the interpretation of the Establishment Clause. A change in the composition of the Supreme Court is not a justifiable reason.

The rationale, of course, is a good place to look, but when the rationale of the Court appears to be changing, this too has limited benefits. Rationales can change if there is a logical reason for the change. Since the Supreme Court is unwilling to take up the issue of vouchers, lower courts and legislators must try to determine the rationale the current Supreme Court is using.

If the rules concerning the Establishment Clause have changed, then the new approach needs to be clearly defined. While vouchers have become a widespread issue which has produced conflicting results in lower courts thereby meriting Supreme Court review, every issue cannot be decided by the Supreme Court. The Court, however, has a responsibility to establish rules for legislatures and lower courts. The Supreme Court is risking one of its core functions as the nation's highest court: bringing a measure of consistency to the law, so that legal rules on issues . . . are the same nationwide." The volatility of the Establishment Clause puts the time and money states are investing in voucher schemes in danger. "By not taking the case, they [the Supreme Court] have left a lot of things to happen that may have to be undone or redone," says Elliot Mincberg of People for the American Way, which challenged the Wisconsin voucher program for religious schools. "The result is a lot more confusion and political conflict." The current state of the Establishment Clause makes a government-funded voucher system that includes religious schools too great of a leap. Several church-state issues were recently appealed to the United States Supreme Court. The issues included tuition assistance programs, such as vouchers, to student-led prayer in public schools, and tax-exemptions for religious publications. The Court is taking Mitchell v. Helms to make another step in the direction of tearing down Lemon. The new Establishment Clause jurisprudence suggests that it is

236. See generally Mauro, supra note 39, at 1A.
237. Id.
238. Id.
240. See id.
unlikely that the court will hold that tuition paid to religious schools is a violation of the Establishment Clause. The Court has to take small incremental steps by carefully choosing the cases they will hear. The Court needs to base its reasoning on the secular purpose of the challenged legislation and show that it is because of the neutrality of the legislative actions that any subsequent benefits to religion are not the product of government action.

Justice Thomas has made clear that he is ready to make a radical change. He wanted to grant certiorari to a case involving a Maryland program that provided financial aid to private colleges. Columbia Union College was excluded by the state from the program for being "too religious." Thomas said in his dissent that the “pervasively sectarian” test should be abandoned, because it makes two unfounded assumptions. First, “the Establishment Clause prohibits government funds from ever benefiting, either directly or indirectly, ‘religious’ activities.” The Court used to state that some benefits to religion were permissible but that the limit was a matter of degree. In this view, it is the impact upon religion that is to be guarded against. Abandonment of the idea of the degree or nature of the benefit looks more like a neutral process approach.

Second, the “other [assumption] is that any institution that takes religion seriously cannot be trusted to observe this prohibition.” This assumption, however, is not made if one believes that the government action is to be neutral. Rather, the issue is that the more pervasive the religion, the more danger that the funds will impermissibly aid religion. The issue goes back to degree. Thomas seems to be assuming that degree has been done away with, but that has not been explicit in any Supreme Court case. Thomas says that the Court’s new “neutrality” should force Maryland to include Columbia Union College so as to prevent hostility toward religion. Thomas’s assumption that the Court has fully embraced neutrality is debatable, but he is correct that “the growing confusion among the lower courts illustrates that we cannot long avoid addressing the important issues that it presents.”

242. Id. at 826-827.
244. Id. at 1013.
245. Id. at 1014. But see Simmons-Harris v. Zelman, 54 F. Supp. 2d 725, 729 (N.D. Ohio 1999) (discussing the “pervasive religious orientation” of some of the schools that participate in Ohio’s Scholarship Program).
246. Id.
249. See id. at 1014-1015.
250. Id. at 1015.
One example that neutrality has not been fully adopted by the Court is Justice O’Connor’s strong opinion in Agostini. In writing for the Court, O’Connor makes a concerted effort to assure that the Court is not overturning any precedents without doing so explicitly.251 She may be the key member of the Court who determines the truth of this statement.

By loosening the constraints of the Establishment Clause, the Court is allowing states more freedom in educational reform. This may be appealing to many who believe that state and local governments best handle education, which are no doubt the arenas where such power resides. The Supreme Court, however, cannot circumvent the issue of the constitutionality of these programs. The justices’ political opinions cannot override the guarantees of the First Amendment, nor should any state court be tempted to overlook the prevailing authority of the Establishment Clause252 so that the state legislature may reform education. “Where such fundamental rights as those expressed in the First Amendment are at stake, we must examine the issues independently, and we will not limit our inquiry by the constraints of the often relied on deference to legislative findings.”253

Lemon v. Kurtzman has been widely criticized through subsequent cases, making it difficult to determine how the Supreme Court would evaluate vouchers. Nyquist stated that the Lemon prongs should be “viewed as guidelines.”254 Mueller characterized the Lemon test as “no more than a helpful signpost.”255 Lynch v. Donnelly256 went so far as to say that Lemon had never been binding. “The court essentially collapsed the Lemon test so that the focus is on whether the challenged activity has the effect of advancing religion.”257 In Agostini, O’Connor combined the effect and entanglement prongs into one inquiry into the advancement of religion. Using the approach in Agostini, the first prong will be applied and will generally pass because of the clear and legitimate purpose of providing education. All of the lower court rulings on voucher plans have held them to have a secular purpose.

Under Mueller and Agostini, the Court does not have to uphold tuition payments to religious schools. Lemon, while perhaps a bit bruised, is not dead.

We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decision, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.\textsuperscript{258}

The Court must give an adequate justification to overturn such an important precedent. The justification needed is not present, so the Court has correctly not taken such a bold step. The Ohio Supreme Court noted that even “[i]n its most recent Establishment Clause case [Agostini], the Supreme Court used the principles set forth in the Lemon test, even as it modified the analytical framework with the three-prongs.”\textsuperscript{259} The Court is showing respect for the doctrine of stare decisis.

The Supreme Court has said, “it may not be possible to promote the former [Free Exercise] without offending the later [Establishment Clause].”\textsuperscript{260} According to the Court, the two clauses inevitably collide, and an attempt must be made to reach a compromise between the two. The compromise could be a line drawn in the sand, but, as with most legal line drawing, there would be a level of arbitrariness. Perhaps the correct view is not to attempt to find a line, but rather a balance. This is arguably not the cleanest approach, but may be unavoidable in order to give both clauses due respect. Cases concerning free exercise and establishment of religion are not best looked at as to whether they fall more on one side of the line or another, but rather through looking at the essence of the church and state relationship the Court’s rationale in its First Amendment precedents, and the inner-workings of the situation at hand.

The Establishment Clause, whatever it does protect, does not change with the composition of the Supreme Court. This is the nice theoretical truth that most would agree is not reality and others would say should not be the truth. “The Supreme Court’s evolving treatment of the Establishment Clause has been a study in the changing forces of our society.”\textsuperscript{261} While some areas of constitutional protections may

\textsuperscript{258} Agostini, 521 U.S. at 237 (1997) (citation and internal quotation marks omitted).
\textsuperscript{259} Simmons-Harris v. Goff, 711 N.E. 2d 203, 208 (Ohio 1999).
\textsuperscript{260} Nyquist, 413 U.S. at 788.
\textsuperscript{261} Bagley v. Raymond Sch. Dept. 728 A.2d 127, 138 (Me. 1999).
need to reflect societal change, the Establishment Clause is an area where such movement is not a sound practice.

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