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

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There is a "sensitive relationship between government and religion in the education of our children."[1]

I. INTRODUCTION

Rarely a day goes by that our country's public schools are not under fire for their inability to offer a quality education to our nation's youth.[2] Reports are

1. School Dist. v. Ball, 473 U.S. 373, 383 (1985).

constantly showing students are not performing as well on standardized tests as they once did.[3] Recent public opinion polls suggest that while parents may feel improvements are still necessary, they generally support public schools and the education they provide.[4] On the other hand, most analysts feel parents would rather send their child to a private school if it were financially feasible and such a choice were available.[5] Even though some polls show support for public schools,[6] it appears there is an overall sense of inequality between the education provided at public and private schools.[7] This perceived inequality between public and private schools has sparked a debate over educational reform in this country.[8] At the heart of this debate are school voucher programs.[9]

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2. *See, e.g.*, Richard Lacayo, *Parochial Politics*, TIME, Sept. 23, 1996, at 30, 31 (finding Cleveland's inner city schools to be "physical and academic dead zone[s]"); Richard Whitmire, *School Vouchers Gaining Support*, DES MOINES REG., Aug. 27, 1997, at A1 (indicating frustration at the continued poor quality of education in light of increased money, time, and effort spent).

3. *See* Jeff Neurauter, *On Educational Vouchers: Revisiting the Assumptions, Legal Issues and Policy Perspectives*, 17 HAMLINE J. PUB. L. & POL'Y 459, 461 (1996).

4. Lowell C. Rose et al., *The 29th Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools*, PHI DELTA KAPPAN, Sept. 1997, at 41, 42, 47. Forty-six percent of those polled would give a grade of *A* or *B* to public schools in their community. *Id.* at 47. When asked what grade they would give to the nation's public schools, 22% of those polled gave a grade of *A* or *B*. *Id.* The groups giving unusually high percentages of *A*s and *B*s were blacks (44%) and non-whites (35%). *Id.*

5. *See* William Bentley Ball, *Economic Freedom of Parental Choice in Education: The Pennsylvania Constitution*, 101 DICK. L. REV. 261, 261 (1997) (stating the belief by parents that private education provides a superior alternative); Dennis P. Doyle, *Vouchers for Religious Schools*, PUB. INTEREST, Spring 1997, at 88.

6. Rose et al., *supra* note 4, at 42, 47.

7. Jo Ann Bodemer, Note, *School Choice Through Vouchers: Drawing Constitutional Lemon-Aid from the* Lemon *Test*, 70 ST. JOHN'S L. REV. 273, 275 (1996).

8. Neurauter, *supra* note 3, at 459 (noting additional areas of school reform to include: graduation standards, open enrollment, outcome-based education, tuition tax credits, and increased privatization); Bodemer, *supra* note 7, at 276 (noting several states have enacted legislation which supports charter schools, parental school choice, and school voucher programs).

9. *See, e.g.*, Frank R. Kemerer, *The Constitutionality of School Vouchers*, 101 EDUC. LAW. REP. 646, 646 (1995) (stating that public policymakers are increasingly looking towards improving schools through voucher programs); Harlan A. Loeb & Debbie N. Kaminer, *God, Money, and Schools: Voucher Programs Impugn the Separation of Church and State*, 30 J. MARSHALL L. REV. 1, 2 (1996) (finding that conservative religious groups, including the Christian Coalition, have been lobbying for school voucher programs to allow state funds to pay for religious schools); Bodemer, *supra* note 7, at 279 (finding that school voucher programs are emerging as the preferred option for educational reform).

Since 1992, at least twenty-three states and the Commonwealth of Puerto Rico have proposed voucher legislation.[10] Eight states introduced voucher legislation in 1996 alone.[11] In July 1997, Republican Senator Paul Coverdell drew up a voucher proposal which had enough support in Congress to wind up in the budget proposal presented to President Clinton.[12] The voucher proposal was eventually deleted when Clinton threatened to reject the entire budget package if the voucher proposal remained.[13] The voucher bill is expected to return to Congress in the near future with a $2000 savings account for parents, which would allow parents to spend the money on education expenses, including private schools.[14] Some scholars suggest that voucher proposals have become widespread, and the preferred choice in education reform, because they appear deceptively simple compared to other school reform legislation.[15] Even though school vouchers are less extreme in nature than many reform proposals, they continue to spark heated legal and political controversy in this country.[16]

This Note takes an up-close look at the policy and legal arguments surrounding school vouchers, looking specifically at their constitutionality in the wake of inconsistent judicial opinions regarding the Establishment Clause and the separation of church and state. Further, this Note argues that school vouchers are a poor choice for educational reform from a policy standpoint. Legally, the Supreme Court's inconsistencies in Establishment Clause jurisprudence leave the fate of school vouchers and the overall issue of how much interaction there should be between church and state extremely uncertain.

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10. Loeb & Kaminer, *supra* note 9, at 3. "The twenty-three states that have proposed voucher legislation are Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Maryland, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Texas, Vermont, Washington, West Virginia, and Wisconsin." *Id.* at 3 n.17.

11. *Id.*

12. Whitmire, *supra* note 2.

13. *Id.*

14. *Id.*

15. *See* Kemerer, *supra* note 9, at 646; Loeb & Kaminer, *supra* note 9, at 4 (noting voucher programs, when compared to bills like the Parental Rights and Responsibilities Act, do not seem too objectionable); Kevin B. Smith & Kenneth J. Meier, *School Choice: Panacea or Pandora's Box?*, PHI DELTA KAPPAN, Dec. 1995, at 312, 312.

16. *See* Frank R. Kemerer & Kimi Lynn King, *Are School Vouchers Constitutional?*, PHI DELTA KAPPAN, Dec. 1995, at 307, 307 (noting "[g]rowing popular support for the use of school vouchers has polarized views about whether such programs are valid policy options and hardened the lines on both sides of the debate"); Ted Olsen, *Voucher Opponents Vow to Gut Cleveland Program*, CHRISTIANITY TODAY, Oct. 28, 1996, at 90, 90; *Religious School Vouchers Have Vermont, Town at Odds*, EDUC. USA (Capitol Publications Inc., Alexandria, Va.), Sept. 9, 1996, at 7, 7 (finding a town in Vermont and the state's education department in a showdown over school vouchers).

The Supreme Court should take jurisprudential lessons from the lower courts because the Court's continued weakening of the *Lemon* test,[17] and allowing more interaction between states and religious schools, is wrong and contrary to the original intent of the Establishment Clause. Accordingly, if proper review were to be given by the Supreme Court, school voucher programs that include religious schools would be unconstitutional.

Part II of the Note outlines and explains the history, structure, and policy reasons for school voucher programs, including a specific look at two voucher programs in Milwaukee, Wisconsin and Cleveland, Ohio. Parts III and IV address the constitutional issues surrounding school vouchers. Specifically, Part III analyzes federal constitutional issues by looking at the Supreme Court's past and present use of the *Lemon* test as a standard for Establishment Clause jurisprudence concerning school issues. Part IV discusses the state voucher programs in Wisconsin, Ohio, and Maine that have been or are currently being challenged in state and federal courts. Finally, Part V discusses the author's conclusions about the constitutionality of school vouchers in light of the Supreme Court's recent holdings. This Part also provides insight into the expected path vouchers will take in the future, including when the issue of school vouchers will reach the United States Supreme Court and what decision it is likely to make.

II. BACKGROUND AND POLICY ARGUMENTS ON THE THEORY OF VOUCHERS

School choice programs, allowing students to attend any school they choose regardless of the school's location or its religious affiliation, if any, are far from novel.[18] Plans similar to school choice programs have been proposed by critics of American education for over thirty years.[19] As early as 1952-1953, a tuition grant program "had already been considered by the Georgia legislature" and measures to privatize education were also being created in several other states.[20]

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17. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The *Lemon* test is a three-part test created by the Supreme Court in *Lemon v. Kurtzman* to evaluate whether a statute contravenes the Establishment Clause. *Id.*

18. James B. Egle, Comment, *The Constitutional Implications of School Choice*, 1992 WIS. L. REV. 459, 459; Michael J. Stick, Note, *Educational Vouchers: A Constitutional Analysis*, 28 COLUM. J.L. & SOC. PROBS. 423, 427-28 (1995).

19. Stick, *supra* note 18, at 427-28.

20. Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 364 (1997).

A. *Milton Friedman and the Beginning of Vouchers*

The idea of educational vouchers was first brought to the attention of the academic community in a 1955 article written by economist Milton Friedman.[21] Friedman's main concern was the inefficiencies of the American educational system in allocating its resources for the best use.[22] Friedman believed introducing competitive free-market concepts to schools would help to alleviate this concern and would allow the American education system to receive more benefits from its education spending.[23]

"Friedman's plan proposes giving families a fixed subsidy for each child in elementary or secondary school to be used at a school of the family's choice."[24] This choice would include both public and private schools with both sectarian and nonsectarian affiliation.[25] By giving money to parents and not schools directly, the idea was that competitive market forces would take over and pressure schools to improve programs and efficiency in order to attract quality students.[26]

It did not take long after Friedman's initial voucher proposal for opposition to form.[27] That opposition and controversy remain prevalent today as more and more voucher programs are proposed throughout the country.[28] Simply put, educational voucher programs today have not changed drastically from those proposed by Friedman over thirty years ago. The basic concept behind voucher

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21. Rick Henderson, *Schools of Thought*, REASON, Jan. 1997, at 30, 31. In his Article, *The Role of Government in Education*, Friedman argues, "[G]overnment subsidy of some minimum level of education is desirable, but . . . there is no reason for government to participate in the actual day-to-day operation of schools." O'Brien, *supra* note 20, at 363 n.23 (citing Milton Friedman, *The Role of Government in Education*, *in* ECONOMICS AND THE PUBLIC INTEREST 125 (Robert A. Solo ed., 1955)).

22. Egle, *supra* note 18, at 464.

23. *Id.*

24. Stick, *supra* note 18, at 427 (citing MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 160-61 (1980)). Originally this subsidy was to be in the form of a voucher, equal in value to the average amount spent per student by local school districts, to be given to any student who left a public school. *See supra* note 21 and accompanying text. The voucher was to be fixed at a certain level and would not change according to a family's income or ability to pay. *See* Stick, *supra* note 18, at 429. Friedman has more recently modified his original positions by finding that the private sector should be able to provide education at a lower cost than the government, and thus vouchers need only be equal to half the per-pupil expenditure to interest private schools in taking on students from public schools. *See supra* note 21 and accompanying text.

25. Stick, *supra* note 18, at 427.

26. *See id.*

27. *Id.*

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

programs is to provide "participating or eligible families a 'voucher' issued by the government worth a predetermined amount of money."[29] This voucher can then be used toward tuition costs at any school the student or parents choose.[30] Voucher programs involve many independent factors which often control the specific form they take.[31] "The possible specifics of a voucher proposal are limited only by the philosophy and imagination of those proposing voucher programs."[32]

B. *The Policy Pros and Cons of School Vouchers*

The policy arguments for and against school vouchers are as diverse as the programs themselves. Proponents of school vouchers commonly argue the most appealing aspect of vouchers is that parents are given the voice in their child's education by creating a free-market education system.[33] However, free markets in education will not work the way advocates may have people believe.[34]

> [M]arket advocates create the impression that markets operate in a self-correcting manner, yet the United States has the widest gap between the rich and the poor of any industrialized nation—and that gap is getting wider. Markets are power structures and, as such are a fundamentally inappropriate way to create institutions that care for the young. A school system that assumed the characteristics of the real marketplace would inevitably cast aside the academically weak, the disadvantaged, and the handicapped as unprofitable.[35]

The argument that public vouchers for private schools will give parents control over their child's education is flawed because once the government is paying for the vouchers, private schools will no longer be owned by the parents,

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29. Neurauter, *supra* note 3, at 459.

30. *Id.*

31. *Id.* Specific factors can include: 1) which students are eligible based on their residence or financial background; 2) which schools can participate; and 3) what dollar amount of vouchers are available. *Id.*

32. *Id.* at 460.

33. Douglas D. Dewey, *An Echo, Not a Choice*, POL'Y REV., Nov.-Dec. 1996, at 28, 30; *see supra* note 21 and accompanying text.

34. Jerome J. Hanus & Peter W. Cookson, Jr., *School Vouchers, Pro and Con*, CURRENT, Jan. 1996, at 30, 31.

35. *Id.*

but by the state.[36] "Proposals to require parents to match the government's contribution to their voucher forget that subsidy stimulates dependency."[37]

One of the myths surrounding the school voucher movement is that public schools are inferior learning environments and that private schools are always superior.[38] Many voucher proponents try to fuel emotions and debates by endless criticism of public schools and their inadequacies.[39] Voucher supporters constantly throw out studies claiming to prove such inadequacies, but most of these studies can easily be dismissed with contrary studies.[40] In addition, education experts have stated: "[T]here is no known relationship between deregulation and student achievement."[41] In fact, when comparing practical achievement levels in other school improvement programs such as preschool, compensatory education, and preparation of work, school vouchers should rank among the lowest in effectiveness for generating student achievement.[42] Opponents of vouchers argue that public schools would not be able to survive financially with the implementation of voucher programs because they would take needed money away from public schools.[43] In addition, any financial assistance vouchers do provide is disproportionate in favor of the upper class because most voucher programs only subsidize part of the tuition for a private school.[44]

While policy issues abound on both sides of the voucher debate, it appears that voucher proponents are getting their message out loud and clear as

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36. *See* Dewey, *supra* note 33, at 30.

37. *Id.*; *see also* Loeb & Kaminer, *supra* note 9, at 5 (noting that "voucher programs impinge on private schools' autonomy by making them financially dependent on the government and by requiring schools to submit to government compliance reviews").

38. Bob Peterson, *Teacher of the Year Gives Vouchers a Failing Grade*, PROGRESSIVE, Apr. 1997, at 20, 20.

39. Edd Doerr, *The Empty Promises of School Vouchers*, USA TODAY, Mar. 1997, at 88, 89. If public schools became first-rate academically, there would still be a demand for private schools because of the desire by parents to offer their child a vision for moral life. *See* Dewey, *supra* note 33, at 30; *see supra* note 9 and accompanying text.

40. *See* Doerr, *supra* note 39, at 89 (finding that data does not support the widespread belief that students are less smart than they used to be or that American schools are failing badly); Hanus & Cookson, *supra* note 34, at 31 (stating that "evidence is scanty at best and far too weak to support" reorganization of public schools due to their poor performance); Neurauter, *supra* note 3, at 467-68 (questioning an original high school study that found private schools superior to public).

41. Hanus & Cookson, *supra* note 34, at 31; Loeb & Kaminer, *supra* note 9, at 5 (noting "that several studies indicate that voucher programs do not improve student achievement").

42. Hanus & Cookson, *supra* note 34, at 31.

43. Loeb & Kaminer, *supra* note 9, at 5.

44. *Id.*

Americans appear to be warming up to the idea of school vouchers.[45] According to the annual Phi Delta Kappan/Gallup Poll, until recently the general public's attitude toward vouchers has been quite negative.[46] In 1997, a significant change developed in the public's attitude toward vouchers with the public split on the issue.[47] Demographically, the groups most likely to support vouchers are blacks, non-whites, urban residents, and eighteen to twenty-nine year-olds.[48]

One of the most influential groups opposed to vouchers is teachers.[49] Public school teachers opposed to vouchers claim: "Parents with money will be able to pay more for their kids to be with kids just like them. Or parents who care [will] search for their choice school, and [we] are left with an entire school of kids whose parents didn't care enough to make the choice."[50]

School vouchers are a poor choice for reform from a public policy standpoint. If problems exist within the public educational system in this country, policy makers should work to find a solution to the problem rather than avoid the problem by creating a new forum to house the same problems. Perhaps Bob Peterson, the Wisconsin Elementary Teacher of the Year for 1995-96, put it best by stating:

> Vouchers are yet another diversion from the real problems in our failing urban schools. It's easy to chant the mantra of vouchers, as if they could magically transform education. It's much harder to do something about the real needs of urban public school students.

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45. *See, e.g.*, *Opposition to Vouchers May Be Dissipating*, EDUC. USA (Capitol Publications Inc., Alexandria, Va.) Sept. 9, 1996, at 7-8 (discussing the school voucher program); Whitmire, *supra* note 2 (stating that voucher support "surged" in 1997).

46. Rose et al., *supra* note 4, at 48. In 1993 the percentage of people opposed to students and parents choosing a private school to attend at *public expense* was 74% with only 24% in favor. *Id.* In 1995 opposition to school vouchers was at 65%, while 33% favored them. *Id.* In 1996 support grew to 36%, while opposition fell to 61%. *Id.* Support for vouchers reached an all-time high in 1997 with public opinion almost split with 52% still opposed, but 44% in favor. *Id.* Interestingly, when the question was phrased differently, changing the title of the entity that was paying for the vouchers from *public expense* to *government expense*, there was a virtual dead heat with opposition and support both at 48%. *Id.*

47. *See supra* note 45 and accompanying text.

48. Rose et al., *supra* note 4, at 48 (finding school choice through vouchers to be most heavily supported by blacks (72%), non-whites (68%), 18-29 year-olds (70%), and urban residents (59%)).

49. *See* Hanus & Cookson, *supra* note 34, at 30 (discussing how many teachers' unions believe that a voucher system would lead to the bankruptcy of public schools); Carol A. Langdon, *The Third Phi Delta Kappa Poll of Teachers' Attitudes Toward the Public Schools*, PHI DELTA KAPPAN, Nov. 1996, at 244, 247-48 (showing a majority of teachers (76%) oppose vouchers as a means for helping parents send their children to any school they choose, while only 20% favor vouchers).

50. Langdon, *supra* note 49, at 247.

> As a classroom teacher, I am less concerned with competition from private schools than I am with my immediate problems: class size, inadequate facilities, and staff training.
>
> Vouchers only aggravate the already troubling reality that our schools do not serve all children equally well.[51]

C. *A Look at How Voucher Programs Work*

To fully understand the controversy surrounding school vouchers one must understand how voucher programs are designed to work. This is often difficult because with no federally funded program, voucher programs are likely to vary in their design features from state to state.[52] Examining the voucher programs in Milwaukee, Wisconsin and Cleveland, Ohio will provide a basis for understanding the technical workings of a voucher system and how it may vary in its design to meet different educational needs.

In 1990, Wisconsin created the first voucher plan in the nation that allowed low-income, inner-city students to use public funds to pay for their education at private schools.[53] As originally enacted, the Milwaukee Parental Choice Program (MPCP) was limited to one percent of Milwaukee Public School District (MPSD) students and allowed students to use the public money only to attend nonsectarian private schools.[54] The original MPCP program spawned legal challenges,[55] the most noteworthy of which was *Miller v. Benson*.[56] In *Miller*, the plaintiffs charged that the exclusion of religious schools violated their rights under the Free Exercise Clause of the First Amendment and that the MPCP should be expanded to include private sectarian schools.[57] The federal

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51. Peterson, *supra* note 38, at 22.

52. Frank Kemerer, Address at the Education Law Association Annual Conference (Nov. 21, 1997).

53. Loeb & Kaminer, *supra* note 9, at 10; Paul E. Peterson et al., *School Choice in Milwaukee*, PUB. INTEREST, Fall 1996, at 38, 41.

54. *See* Kemerer, *supra* note 52; Loeb & Kaminer, *supra* note 9, at 10. Since 1990, the MPCP has been amended twice: first in 1993 and in 1995. Kemerer, *supra* note 52.

55. *See* Davis v. Grover, 480 N.W.2d 460 (Wis. 1992). The court in *Davis* considered allegations that the MPCP violated three Wisconsin constitutional provisions: the public purpose doctrine, the uniformity clause, and the local/private bill clause. *Id.* at 462-63. The trial court upheld the program against all challenges, while the court of appeals reversed. *Id.* at 465. The Wisconsin Supreme Court found the MPCP passed constitutional muster. *Id.* at 477.

56. Miller v. Benson, 878 F. Supp. 1209 (E.D. Wis.), *vacated*, 68 F.3d 163 (7th Cir. 1995).

57. *Id.* at 1212.

district court granted summary judgment for the state.[58] However, while the plaintiff's appeal was pending, the Wisconsin legislature amended the MPCP to allow sectarian schools to participate in the program.[59] Due to the amendment passed in the legislature, the appeals court found the judicial proceedings in *Miller v. Benson* moot and vacated the judgment.[60]

Under the current MPCP, any Milwaukee student in grades kindergarten through twelve may attend, at no charge, any private school located in the city if all of the following apply: 1) The pupil is a member of a family whose income does not exceed 175 percent of the poverty level; 2) The pupil was enrolled in a public school in the city, was attending a private school under this program, or was not enrolled in school the previous year; 3) The private school notifies the department of education of its intent to participate in the program and the number of pupils participating in the program for which the school has space; 4) The private school complies with 42 U.S.C. § 2000d, which prohibits discrimination based on race, color, or national origin in programs receiving federal money; and 5) The private school meets all health and safety laws or codes that apply to public schools.[61] Besides the requirements for students, the MPCP also requires that private schools participating in the program meet at least one of the following standards: 1) At least seventy percent of the pupils in the program advance one grade level each year; 2) The pupils in the program must attain a ninety percent attendance rate at the private school; 3) At least eighty percent of the students in the program must show significant academic progress; and 4) At least seventy percent of the families with pupils in the program must meet parent involvement criteria established by the private school.[62] The MPCP's long-developing history has still not shielded it from current litigation challenging its constitutionality both on a state and federal level.[63]

The second example of a school voucher program in the United States is the Ohio Scholarship Pilot Program in Cleveland.[64] The Cleveland voucher

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58. *Id.* at 1216.

59. WIS. STAT. § 119.23 (1997) (showing the current design of the program which reflects the 1995 amendment). The 1995 amendment also enlarged the program's participation from 1% to 7% in 1995-96 and to 15% in 1996-97, thus allowing as many as 15,000 students to participate in the program. *Id.* The amendment also eliminated any caps previously placed on the percentage of students in a private school who had tuition vouchers. *See* Peterson et al., *supra* note 53, at 56.

60. Miller v. Benson, 68 F.3d at 164.

61. WIS. STAT. § 119.23(2)(a) (1999).

62. *Id.* § 119.23(7)(a).

63. *See infra* notes 178-91 and accompanying text.

64. *See* OHIO REV. CODE ANN. § 3313.975 (Anderson 1997).

program was enacted in June 1995 by the Ohio legislature and provides $1500 for economically needy Cleveland students in kindergarten through third grade with state aid in the form of scholarships regardless of whether they attend private, sectarian, or nonsectarian schools.[65] Once in the voucher program, a student could continue to receive financial assistance through the eighth grade.[66] Students receive assistance to cover either seventy-five percent or ninety percent of their tuition costs up to $2250, depending on their families' income.[67]

The Ohio statute pronounced two types of schools that were allowed to participate in this pilot program: "private schools located within the Cleveland City School District, and public schools located in adjacent school districts."[68] The Ohio legislature chose the Cleveland School District because in recent years the district had suffered several problems, including high dropout rates and increasingly poor graduation rates.[69] Even though Cleveland's voucher program has a much shorter history than Milwaukee's plan, it too has been challenged constitutionally in the courts.[70] While many similarities exist between the Cleveland voucher program and the Milwaukee voucher program,[71] there are important differences between the two programs[72] which help to illustrate why it

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65. *See* Loeb & Kaminer, *supra* note 9, at 19.

66. *Id.*

67. *Id.*

68. Gatton v. Goff, Nos. 96CVH-01-193, 96CVH-01-721, 1996 WL 466499, at *1 (Ohio Ct. C.P. July 31, 1996), *rev'd*, Simmons-Harris v. Goff, Nos. 96APEO8-982, 96APEO8-999, 1997 WL 217583 (Ohio Ct. App. May 1, 1997). The program was designed as a pilot project to "determine whether it is feasible for the state [of Ohio] to provide assistance to those children who could not attend private schools." *Id.* There was originally no termination date set for the pilot program, rather, it would continue for as long as the legislature appropriated funding. *Id.*

69. *Id.*

70. *Id.*; *see* Loeb & Kaminer, *supra* note 9, at 19. For a complete discussion of the legal challenges to the Cleveland voucher program see *infra* notes 195-209 and accompanying text.

71. Some similarities between the two programs are: 1) both seek to help low income children; 2) both provide an outlet of help for specific urban school districts under attack for their poor student performance; 3) both are characterized as pilot programs with no specific date for termination; 4) both state statutes creating the programs list minimum criteria that must be met for participating schools; and 5) both require payment to be made to parents and endorsed to schools when religious private schools are included. Julie F. Mead, Address at the Education Law Association Annual Conference (Nov. 21, 1997).

72. Some of the differences between the programs include: 1) voucher amount is fixed and based on state aid amount in Milwaukee, while in Cleveland the program is based on tuition charged by private schools up to a limiting cap amount and provides a varying percentage of the tuition based on student need; 2) there is no grade level restriction in Milwaukee for students to receive aid, but in Cleveland the program only allows participation by kindergarten through third graders who may then continue to receive scholarships through eighth grade once enrolled in the program; 3) Milwaukee limits the number of participants to a percentage of Milwaukee Public

is so difficult to anticipate what the constitutional future of vouchers will be because there are so many different forms a voucher program may take.

III. THE SUPREME COURT'S USE AND NON-USE OF THE *LEMON* TEST IN ANALYZING ESTABLISHMENT CLAUSE CASES

A. *The Establishment Clause and* Lemon *Test*

The First Amendment to the United States Constitution contains the Establishment Clause, which states: "Congress shall make no law respecting an establishment of religion . . . ."[73] The Establishment Clause is generally interpreted within a spectrum of two opposing views: "strict neutrality and strict separation."[74] Those who support strict neutrality argue that the "First Amendment prohibits government from using religious classifications either to confer benefits or impose burdens."[75] Therefore, under the theory of strict neutrality, government programs are free to benefit religion as long as there are no religious classifications employed.[76] The theory of strict separation, on the other hand, "prohibits any government aid to religion."[77]

The United States Supreme Court has held that the Establishment Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment.[78] The Supreme Court, while upholding the significance of the Establishment Clause, has long recognized that interpreting the Clause as requiring complete and absolute separation between church and state is both unrealistic and undesirable.[79] Without an absolutist approach to Establishment Clause jurisprudence, the Supreme Court has noted: "Cases arising under these

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School students Cleveland's program sets a fixed number of scholarships based on appropriations, and participants are chosen by lot. *Id.*

73. U.S. CONST. amend. I.

74. Stick, *supra* note 18, at 433.

75. *Id.*

76. *Id.*

77. *Id.*

78. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 n.3 (1973); Everson v. Board of Educ., 330 U.S. 1, 8 (1947).

79. *See* Lynch v. Donnelly, 465 U.S. 668, 672-73 (1984) (noting that the Constitution does not require complete separation of church and state; it rather "mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any"); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. at 760 (stating "this Nation's history has not been one of entirely sanitized separation between Church and State"); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (stating that "[o]ur prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense").

[Establishment and Free Exercise] Clauses have presented some of the most perplexing questions to come before this Court."[80]

Most of the Establishment Clause cases to come before the Supreme Court involve the relationship between religion and education.[81] Two categories of cases have evolved around this relationship: first, those involving religious activities within the public schools[82] and second, those involving various forms of public aid to sectarian educational institutions.[83] Thus, school voucher programs, which include private sectarian schools as part of the program, are undoubtedly subject to Establishment Clause challenges.[84]

To evaluate and determine whether a statute violates the Establishment Clause, the Supreme Court, in 1971, developed a three-pronged test in *Lemon v. Kurtzman*[85] now known commonly as the "*Lemon* test." The Court, in crafting the three prongs of the test, paid special attention to the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[86] According to the first prong of the *Lemon* test, a statute must have a "secular legislative purpose."[87] Secondly, the statute's "principal or primary effect must be one that neither advances nor inhibits religion."[88] Lastly, "the statute must not foster 'an excessive governmental entanglement with religion.'"[89] A statute violates the Establishment Clause if it fails any one of the three prongs.[90]

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80. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. at 760.

81. *See id.*

82. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 98-100 (1968) (providing anti-evolutionary limitation on public school teachings); Engel v. Vitale, 370 U.S. 421, 422-24 (1962) (regarding prayer reading in public schools); McCollum v. Board of Educ., 333 U.S. 203, 204-06 (1948) (discussing release time from public education for religious education).

83. *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236, 238-40 (1968) (providing money for textbooks).

84. Bodemer, *supra* note 7, at 292; *see* Neurauter, *supra* note 3, at 477; *see also* Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37, 40-41 (1993) (stating that the leading constitutional concern with school voucher programs has been the Establishment Clause problems associated with state funding of religious schools). The issue of state funding of private schools has become so prevalent in voucher programs because 85% of the nation's private schools are religiously affiliated. Kemerer, *supra* note 52. Additionally, in some locations of the country, religious schools account for more than 95% of all private school enrollment. *See* Green, *supra*, at 41.

85. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

86. *Id.* at 612 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

87. *Id.*

88. *Id.* (citing Board of Educ. v. Allen, 392 U.S. at 243).

89. *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. at 674).

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

B. *Analyzing the Court's Inconsistent Applications*

While stating the three prongs of the *Lemon* test may be easy in theory, the use of the test by members of the Supreme Court has been far from unanimously accepted.[91] Some Supreme Court analysts suggest that the Court's recent reliance on other theories, like Justice O'Connor's endorsement test[92] or Justice Kennedy's coercion test,[93] show that the *Lemon* test "may be dead."[94] Others suggest that even if *Lemon* has been silently and unceremoniously put to death, its shadow is still long enough to affect any replacement test. Development of the possible replacement tests of endorsement and psychological coercion reflects similar neutrality concerns to those that framed the *Lemon* test, and even where the Supreme Court has not relied on *Lemon* in its decisions, the broad purpose of that test can still be seen.[95]

The first prong, or "secular purpose" prong, of the *Lemon* test is designed to "ensure that the legislative process does not become a surrogate pulpit for religious institutions."[96] However, past cases illustrate that drafters of most legislation are creative and skilled enough to write a statute that does not fail the first prong.[97]

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91. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 397-98 (1993) (Scalia, J., dissenting) (discussing the *Lemon* test, Justice Scalia stated: "[It is] some ghoul in a late-night horror movie that repeatedly sits up in its grave and schuffles along, after being repeatedly killed and buried . . . no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart . . . ."); Lee v. Weisman, 505 U.S. 577, 586 (1992) (writing for the majority, Justice Kennedy, while not overruling *Lemon*, did suggest a new "coercion" test); Wallace v. Jaffree, 472 U.S. 38, 110-13 (1985) (Rehnquist, J., dissenting) (advocating abandonment of the *Lemon* test); Lynch v. Donnelly, 465 U.S. 668, 688-92 (1984) (O'Connor, J., concurring) (indicating that the *Lemon* test is unclear and in need of clarification).

92. Lynch v. Donnelly, 465 U.S. at 687-88 (O'Connor, J., concurring). Justice O'Connor has suggested that a statute violates the Establishment Clause when it endorses or disapproves of a certain religion. *Id.*

93. Lee v. Weisman, 505 U.S. at 586, 593. Justice Kennedy's definition of coercion is very broad and goes so far as to include in its definition social and psychological pressure. *Id.*

94. Ralph D. Mawdsley, *Neutrality Between Government and Religion*, 106 EDUC. LAW REP. 351, 356 (1996).

95. *Id.* at 357.

96. Bodemer, *supra* note 7, at 294.

97. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 395 (1983) (holding that "[a] State's decision to defray the cost of educational expenses incurred by parents—regardless of the type of school their children attend—evidences a purpose that is both secular and understandable"); *see also* Board of Educ. v. Allen, 392 U.S. 236, 245-47 (1968) (finding the secular purpose prong was met because a state's strong interest in its children's education does not change simply because they go to parochial schools).

The Court must address more difficult questions when it tackles the most intriguing of the three prongs—the second "affects" prong.[98] This prong requires the principal or primary effect of the statute neither advance nor inhibit religion.[99] In school aid cases, such as voucher programs, the crucial inquiry under this prong is generally "whether the financial aid flows either directly or indirectly from the state to the sectarian school."[100] Most of the cases and analysis discussed in this Note deal with the Court's difficulty in setting a standard for this prong.

The third prong of the *Lemon* test, "excessive entanglement," requires the Court to consider "the character and purpose 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."[101] The Court is mainly concerned with administrative entanglement, which would require the state to monitor activities in religious institutions.[102]

The application of the *Lemon* test has "resulted in inconsistent Supreme Court decisions on the issue of whether and to what extent to allow state aid to religious schools."[103] It is these inconsistent decisions, and the Court's lack of a true Establishment Clause standard, which makes a prediction regarding the constitutional future of school vouchers uncertain and subject to constant debate. The following analysis of Supreme Court case law regarding the Establishment Clause reflects not only the Court's inconsistent application of the *Lemon* test, but it also shows the divided case law that both sides of the voucher debate can and do use to support their differing positions.

1. *Cases Lending Support to School Vouchers*

In *Committee for Public Education & Religious Liberty v. Nyquist*,[104] the Court considered three provisions of New York State's Education and Tax Laws which established various financial aid programs that channeled public money to

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98. Bodemer, *supra* note 7, at 295.

99. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (citing Board of Educ. v. Allen, 392 U.S. at 243).

100. Bodemer, *supra* note 7, at 296; *see also infra* note 121 and accompanying text. Indirect funding occurs when aid is given to parents who in turn make an independent decision as to which school to give their money. *Id.* In other words, the money reaches the schools, not directly from the state but via parents. *See id.*

101. *See* Lemon v. Kurtzman, 403 U.S. at 615.

102. *See id.* at 619-20; Walz v. Tax Comm'n, 397 U.S. 664, 695 (1970) (Harlan, J., concurring).

103. *See* Stick, *supra* note 18, at 423.

104. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

sectarian elementary and secondary schools.[105] In a six to three decision, the Court invalidated the provisions that provided maintenance and repair grants directly to private schools, as well as a tuition grant program for low-income families and a tax deduction program that varied by income level for other families so that they could attend private school.[106] The Court in *Nyquist* explicitly used the three-prong test of *Lemon*[107] and demonstrated the kind of well thought out reasoning and unwavering commitment to Establishment Clause jurisprudence that has been lacking by the Court in recent years.[108]

In analyzing the provisions of the *Lemon* test, the Court found no problem with the provisions under the first prong.[109] The Court continued on to the second prong, where the provisions failed the effects test.[110] The Court concluded the provisions had an impermissible effect of advancing religion, because there had been no effort made "'to guarantee the separation between secular and religious educational functions and to ensure the State financial aid supports only the former.'"[111] There was no need for the Court to examine the third prong—entanglement—because the second prong had not been met.[112]

Opponents of school vouchers undoubtedly support the *Nyquist* decision, because it stands for the proposition that even if tuition grants are paid directly to parents, rather than to schools, there is still an Establishment Clause violation.[113] In addition, Justice Powell's statement in *Nyquist* encompasses the beliefs of many voucher opponents:

> [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. Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same.[114]

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105. *Id.* at 761-62 (citing N.Y. EDUC. LAW §§ 549-553 (McKinney 1972)).
106. *Id.* at 798.
107. *Id.* at 773.
108. *See id.*
109. *Id.* The Court noted: "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." *Id.*
110. *Id.* at 794.
111. *Id.* at 783 (quoting Lemon v. Kurtzman, 403 U.S. 602, 613 (1971)).
112. *Id.* at 794.
113. *See id.* at 781-83.
114. *Id.* at 786.

In *Meek v. Pittenger*,[115] the Court applied the three prongs of *Lemon*[116] but only in theory, as it was reluctant to examine actual effect.[117] The Court in *Meek* considered the constitutionality of a Pennsylvania statute which provided for loans of instructional materials and equipment to students of nonpublic schools, in addition to textbooks.[118] The instructional materials consisted of periodicals, photographs, charts, maps, and films.[119] The instructional equipment contained "projection equipment, recording equipment, and laboratory equipment."[120] The Court upheld the textbook loans as constitutional but struck down the other loan provisions for equipment and instructional materials.[121] The Court in *Meek* distinguished the loaning of textbooks from instructional materials and equipment on the basis that the textbooks were going to the students and the other materials were given directly to the schools.[122] In his concurrence, Justice Brennan stated that such a distinction solely based on who received the materials "was contrary . . . to the plain and explicit teaching of *Kurtzman* and *Nyquist* . . . ."[123]

The Court, in 1985, was more willing to examine the actual effect of the program at issue in *School District v. Ball*.[124] In *Ball*, the School District of Grand Rapids, Michigan, offered two programs in which the school district would provide public financing and public teachers to hold classes for nonpublic school students.[125] The classes were held in classrooms leased from the private schools.[126] The major problem with the program, according to Justice Brennan, writing for the majority, was "that forty of the forty-one schools in which the program operated were sectarian and that the beneficiaries of the programs were thus designated on the basis of religion."[127] The Court relied on *Lemon* as the

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115. Meek v. Pittenger, 421 U.S. 349 (1975).
116. *Id.* at 362-73.
117. Stick, *supra* note 18, at 439.
118. Meek v. Pittenger, 421 U.S. at 354-55 (citing PA. STAT. ANN. tit. 24, § 13-1327 (1949)).
119. *Id.* at 355.
120. *Id.*
121. *Id.* at 373.
122. *Id.* at 362-63.
123. *Id.* at 376 (Brennan, J., concurring in part and dissenting in part). Justice Brennan was concerned with political divisiveness. *Id.* (Brennan, J., concurring in part and dissenting in part).
124. School Dist. v. Ball, 473 U.S. 373 (1985).
125. *Id.* at 375.
126. *Id.*
127. Stick, *supra* note 18, at 446 (citing School Dist. v. Ball, 473 U.S. at 379).

basis for its inquiry.[128] Using *Lemon*, the Court in *Ball* concluded that the programs violated the test's second prong by having a primary or principal effect of advancing religion.[129] The Court noted that private schools have to perform both religious and secular functions; therefore, when it uses public funds to aid secular purposes it is in effect subsidizing the institution by leaving them more funds for religious purposes.[130]

According to one analyst, the rationale in *Ball* likely provides the strongest support for the position that school voucher programs, which include religious schools, violate the Establishment Clause.[131] Justice Brennan stated in *Ball* "the following 'cardinal principal' that would seemingly strike down any such [voucher] program: '[T]he state may not in effect become the prime supporter of the religious school system.'"[132]

2. *Cases Providing Opposition to School Vouchers*

In recent years the Court has shown a weakening hold on past Establishment Clause jurisprudence by displaying increased support for an "ideological perspective that is more accommodating to religion."[133] This new perspective, while troublesome to this author, has been viewed as a welcomed change to voucher supporters.

Almost ten years after its decision in *Nyquist*, the Court considered another governmental program in *Mueller v. Allen*[134] that had the same practical effects as the one in *Nyquist*.[135] Surprisingly or unsurprisingly, the Court reached a different result in *Mueller* than it had in *Nyquist*.[136] In *Mueller*, the Court held five to four that a Minnesota statute giving parents an income tax deduction for tuition, textbooks, and transportation expenses they incurred by educating their children in either public or private institutions was constitutional.[137] The Court had little trouble finding that the Minnesota statute survived the first prong of the *Lemon* test because it is a government assistance

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128. School Dist. v. Ball, 473 U.S. at 383. The Court stated: "We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children." *Id.*

129. *Id.* at 397.

130. *See id.*

131. Stick, *supra* note 18, at 446.

132. *Id.* at 446-47 (quoting School Dist. v. Ball, 473 U.S. at 397).

133. Kemerer & King, *supra* note 16, at 309.

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

135. Stick, *supra* note 18, at 442.

136. *See id*; *cf.* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 798 (1973).

137. Mueller v. Allen, 463 U.S. at 391 (citing MINN. STAT. § 290.09(22) (1982)).

program.[138] In order for *Mueller* to survive the second prong, Justice Rehnquist, writing for the majority, had to distinguish the case from *Nyquist* which already held a New York tax program violated the second prong of *Lemon*.[139] Justice Rehnquist distinguished the two cases on two bases: 1) the program in *Nyquist* was a tax grant,[140] while the one in *Mueller* was a tax deduction,[141] and 2) the New York statute applied only to nonpublic schools,[142] whereas the Minnesota program included both nonpublic and public schools.[143] Focusing on the Court's new liking to neutrality among public and nonpublic programs, *Mueller* has been viewed as a basis for finding that a school voucher program, which was open to all students, would not be an advancement of religion.[144]

Continuing its favoritism toward statutes with neutrality, the Court in *Witters v. Washington Department of Services for the Blind*[145] unanimously held that the Establishment Clause did not preclude the State of Washington from enacting a program to aid blind students in pursuing training at a Christian college or becoming a pastor.[146] Once again, focusing on the neutrality of the program, the justices emphasized that the aid provided in this case goes directly to the student who then chooses which school will benefit from the money.[147] The Court noted: "[T]he mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education [does not] confer any message of state endorsement of religion."[148] *Witters* marks a serious deviation from the Court's previous reasoning, striking a blow to voucher opponents' reliance on the Court's language in *Ball*.[149]

In *Zobrest v. Catalina Foothills School District*[150] the Court considered whether the Establishment Clause barred a school district in Arizona from providing a sign-language interpreter, under the Individuals with Disabilities

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138. *Id.* at 394.
139. *See supra* note 111.
140. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. at 761-62.
141. Mueller v. Allen, 463 U.S. at 396.
142. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. at 761-62.
143. Mueller v. Allen, 463 U.S. at 398.
144. *See* Egle, *supra* note 18, at 484. In a telling passage from *Mueller*, Justice Rehnquist stated: "The historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choice of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." Mueller v. Allen, 463 U.S. at 400.
145. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986).
146. *Id.* at 489.
147. *Id.* at 488.
148. *Id.* at 488-89.
149. *See* School Dist. v. Ball, 473 U.S. 373, 397 (1985).
150. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

Education Act (IDEA), to a deaf student who was attending classes at a Catholic high school.[151] Applying the *Lemon* test, the Court found that the IDEA has a specific secular purpose—to help states and school districts provide for the education of disabled children.[152] In meeting the second two prongs of *Lemon*, the Supreme Court relied on its holdings in *Mueller* and *Witters* when it stated: "[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 subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."[153] The Court found the program at issue in this case was a general government program that distributed benefits neutrally to any disabled child, and therefore, the handicapped children were the primary beneficiaries of the program, not the state.[154] With *Zobrest*, the Court clearly shifted its attitude toward state aid for private religious schools.[155] The major question is on what basis is it making the shift: a constitutional one or a philosophical one?

The Court's liberalizing views of neutrality between church and state were most recently seen in 1997 with the landmark decision *Agostini v. Felton*.[156] The Court in *Aguilar v. Felton*,[157] twelve years prior to *Agostini*, held the Establishment Clause barred New York City from sending its public school teachers to provide remedial Title I education to disadvantaged students in parochial schools.[158] In *Aguilar*, the Court found that New York's Title I program violated the Establishment Clause "because it 'excessively entangled' government and religion."[159] The Court in *Agostini* revisited this same issue and, in a divisive five to four decision, overruled the holding in *Aguilar*.[160] In order

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151. *Id.* at 3-4.

152. *Id.* at 5.

153. *Id.* at 8.

154. *Id.* at 10; *see also* Kemerer & King, *supra* note 16, at 308 (citing other cases in which the Court found public-funded programs benefiting private school students to be valid and did not create an inference of the government endorsing religion).

155. *High Court Okays Title I in Religious Schools*, EDUC. USA (Capitol Publications Inc., Alexandria, Va.), June 30, 1997, at 3 [hereinafter *High Court*].

156. Agostini v. Felton, 521 U.S. 203 (1997).

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

158. *Id.* at 413-14.

159. *See High Court*, *supra* note 155, at 3 (quoting Aguilar v. Felton, 473 U.S. at 418).

160. Agostini v. Felton, 521 U.S. at 208-09. Justice O'Connor, writing for the majority stated: "*Aguilar* is no longer good law . . . . *Aguilar* is not consistent with our subsequent Establishment Clause decisions." *Id.* at 209.

for the Court to rule in the *Agostini* case, amidst a Rule 60(b)(5)[161] injunction, the petitioners had to show the "factual or legal landscape [had] changed" since the holding in *Aguilar*.[162] Justice O'Connor noted the general principles used to evaluate Establishment Clause violations have not changed, but rather, the Court's understanding of the criteria used to assess whether aid to religion has an impermissible effect has changed.[163] Going even further Justice O'Connor stated: "[W]e have departed from the rule relied on in *Ball* that all government aid that directly aids the educational function of religious schools is invalid."[164]

Prior to *Agostini*, those justices who disapproved of the Court's continuing weakening of Establishment Clause jurisprudence were able to distinguish cases such as *Witters* and *Zobrest* from *Ball* and *Aguilar*.[165] According to Justice Souter, the new law created by the Court in *Agostini* allowing public school Title I teachers in parochial schools, has "opened a Pandora's Box of church-state entanglement in schools."[166]

Does the Court's ruling in *Agostini* shed any light on the Court's position on school vouchers? Justice Souter may have answered it best: "If a State may constitutionally enter the schools to teach [Title I], it must in constitutional principle be free to assume . . . the entire cost of instruction provided in any ostensibly secular subject in any religious school."[167] School voucher supporters reacted positively to the *Agostini* decision, believing the Court has given them the "green light" to increase school choice efforts.[168] Even voucher opponents recognized that the Court's changing views on schools and religion have given school vouchers a chance for new life under the Constitution.[169]

It appears clear from the Supreme Court's recent Establishment Clause cases that it is loosening its hold on the once clear standard set forth in *Lemon* and is now being guided in its decisions by personal beliefs and desired

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161. Fed. R. Civ. P. 60(b)(5). Rule 60(b)(5) states, "the court may relieve a party . . . from a final judgment, order, or proceeding [if] the judgment has been satisfied, released, or discharged . . . ." *Id.*

162. Agostini v. Felton, 521 U.S. at 216.

163. *Id.* at 223.

164. *Id.* at 225.

165. Justice Souter acknowledged the task of the sign-language interpreter in *Zobrest* is very different from that of a teacher in *Aguilar*. *Id.* at 248 (Souter, J., dissenting). According to Souter, the *Zobrest* holding accepts the presence of public employees in sectarian schools only in limited circumstances. *Id.* at 249 (Souter, J., dissenting).

166. *Voucher Supporters See Hope in Justices' Ruling*, EDUC. USA (Capitol Publications Inc., Alexandria, Va.), June 30, 1997, at 3 [hereinafter *Voucher*].

167. Agostini v. Felton, 521 U.S. at 246 (Souter, J., dissenting); *see Voucher*, *supra* note 166, at 3.

168. *See Voucher*, *supra* note 166, at 4.

169. *Id.*

outcomes.[170] Instead of providing lower courts with precise decisions in the Establishment Clause arena, the Supreme Court struggles with every case not only to get a majority but to provide less than curious distinctions. Without a clear standard it is not surprising that the debate over school vouchers is continuing to heat up. A review of the relevant Supreme Court cases suggest that the Court's new focus bears well for the future of school vouchers.[171]

IV. VOUCHER PROGRAMS CHALLENGED IN THE COURTS

Three publicly funded voucher programs in Wisconsin, Ohio, and Maine have been challenged in the courts on both federal and state constitutional violations.[172] These cases are *Jackson v. Benson*,[173] *Simmons-Harris v. Goff*,[174] and *Bagley v. Raymond School Department*.[175] All three cases have long histories and involve complex litigation.

A. *Wisconsin*

The Wisconsin case, *Jackson v. Benson*, challenges the 1995 amendments to the MPCP which added religious schools to the program.[176] The petitioners brought suit claiming the amended program violates the Establishment Clause of the United States Constitution and various provisions of the Wisconsin Constitution.[177] For the purpose of this Note, the focus will be on the courts' resolution of the Establishment Clause issue.

This case began in February of 1996, with an expedited appeal to the Supreme Court of Wisconsin, where the court split three to three, with one abstention, on the amendment's viability under the Wisconsin Constitution's prohibitions against the establishment of religion.[178] The court dismissed the

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170. *See* Stick, *supra* note 18, at 435.

171. *See* Kemerer, *supra* note 9, at 665.

172. Jackson v. Benson, 570 N.W.2d 407 (Wis. Ct. App. 1997); Simmons-Harris v. Goff, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583 (Ohio Ct. App. May 1, 1997), *rev'd*, 711 N.E.2d 203 (Ohio 1999); Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me. 1999).

173. Jackson v. Benson, 570 N.W.2d 407 (Wis. Ct. App. 1997).

174. Simmons-Harris v. Goff, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583 (Ohio Ct. App. May 1, 1997), *rev'd*, 711 N.E.2d 203 (Ohio 1999).

175. Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me. 1999).

176. Jackson v. Benson, 570 N.W.2d at 411; *see supra* notes 59-61 and accompanying text.

177. Jackson v. Benson, 570 N.W.2d at 411.

178. State *ex rel.* Thompson v. Jackson, 546 N.W.2d 140, 142 (Wis. 1996) (giving no substantive discussion to explain the factions on the court).

action without prejudice.[179] Later, in August of 1996, a Wisconsin state judge issued an oral injunction preventing Milwaukee from expanding its program to religious schools but allowing an expansion of the program to nonsectarian schools.[180]

In January 1997, the case was heard before a Wisconsin trial court in Dane County.[181] The court held the amendments to the program violated the Wisconsin Constitution on several grounds including the state's establishment of religion clause.[182] The court stated "its primary effect is to benefit the religious missions of the . . . schools and . . . it compels Wisconsin taxpayers to support places of worship without their consent."[183] Because the issues of the case were resolved on state constitutional grounds, the court did not need to address the Federal Establishment Clause issues raised.[184]

Jackson v. Benson found no better fate in the hands of the Wisconsin Court of Appeals.[185] In a two to one decision, the court upheld the lower court's decision and held the amended program unconstitutional solely on the basis of the religion clause of the Wisconsin Constitution.[186] In choosing to look at federal cases as a guide for interpreting its own religion clause, the court looked to *Nyquist* as precedence, rather than some of the Court's later cases.[187] The court citing *Nyquist,* stated: "[P]roper legislative purpose does not immunize [the] act from further scrutiny if it has 'primary effect' to advance religion."[188] The court found the use of money from the state treasury, for the benefit of sectarian schools, was a primary effect of the amended program, making the program unconstitutional.[189]

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179. *Id.*

180. *Wisconsin Judge Blocks Religious School Vouchers*, EDUC. USA (Capitol Publications Inc., Alexandria, Va.), Aug. 26, 1996, at 5.

181. *Religious Schools Blocked from Milwaukee Vouchers*, EDUC. USA (Capitol Publications Inc., Alexandria, Va.), Jan. 27, 1997, at 7.

182. Jackson v. Benson, 570 N.W.2d at 415.

183. *Id.* (citation and quotation omitted).

184. *Id.*

185. *Wisconsin Court Bars Milwaukee Vouchers in Church Schools*, EDUC. USA (Capitol Publications Inc., Alexandria, Va.), Sept. 5, 1997, at 7 [hereinafter *Church Schools*].

186. Jackson v. Benson, 570 N.W.2d at 422.

187. *Id.* at 420-21. Justifying its use of *Nyquist*, the court stated: "Even if we were to speculate that a current majority of the U.S. Supreme Court would not endorse *Nyquist's* treatment of the primary effect test, the case remains precedent unless or until it is overruled by the Court." *Id.* at 421.

188. *Id.* at 420 (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973)).

189. *Id.* at 420, 422.

At the appeals court level, voucher proponents could have argued that *Jackson v. Benson* should have little influence in federal courts because its decision rested exclusively on the state constitution's religion clause, which appeared more strict than the Supreme Court's recent interpretation of the Establishment Clause.[190] However, it is noteworthy that the Wisconsin Court of Appeals found the Supreme Court's earlier Establishment Clause cases, such as *Nyquist*, more accurate in helping it decide the voucher issue than the Court's more recent jurisprudence.[191]

On June 10, 1998, the Wisconsin Supreme Court, in a four to two decision, reached the Establishment Clause issue, reversed the court of appeals, and upheld the constitutionality of the MPCP.[192] The court evaluated the amended MPCP under the *Lemon* test and found that it had a secular purpose, did not have the primary effect of advancing religion, and would not lead to excessive entanglement between the state and private sectarian schools.[193]

The court focused little of its energy on the first or third prongs of the *Lemon* test.[194] It quickly found that the MPCP had a clear secular purpose of providing children of low-income parents with an opportunity to be educated outside the Milwaukee Public School system.[195] The court also had little trouble finding that the MPCP would not create an excessive entanglement between church and state.[196] The court found that participating private schools were subject to certain minimum standards, which could be easily overseen by the state superintendent without creating excessive entanglement.[197]

The court concentrated its Establishment Clause analysis on the second primary effect prong of the *Lemon* test.[198] The court began by emphasizing the fact that the Establishment Clause is not automatically violated every time state funds find their way into religious institutions.[199] Looking to prior Supreme Court decisions regarding educational assistance programs, the court concluded that these decisions, while not entirely consistent, "establish an underlying theory based on neutrality and indirection: state programs that are wholly

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190. *See Church Schools*, *supra* note 185, at 7-8.
191. Jackson v. Benson, 578 N.W.2d at 420-21; *see supra* note 185 and accompanying text.
192. Jackson v. Benson, 578 N.W.2d 602, 632 (Wis. 1998).
193. *Id.* at 620.
194. *Id.* at 612, 619-20.
195. *Id.* at 612.
196. *Id.* at 618-19.
197. *Id.* at 619-20.
198. *See id.* at 612-18.
199. *Id.* at 612-13.

neutral in offering educational assistance directly to citizens . . . do not have the primary effect of advancing religion."[200]

The court then applied its theory to the MPCP and held that the program takes a neutral stance toward religion.[201] First, it found that the schools, whether sectarian or nonsectarian, are equally eligible to participate in the program and parents are in no way limited in which type of school they choose.[202] Second, it found that MPCP funds reach sectarian schools only through "'genuinely independent and private choices'" of parents.[203]

The Wisconsin Supreme Court erred in upholding the constitutionality of the MPCP. United States Supreme Court precedent, like *Nyquist*, should have led the court to strike down the program. The court in *Jackson* even acknowledged that the *Nyquist* program "closely parallels the amended MPCP," but yet insisted that significant distinctions separated the two.[204] The court's distinctions are weak at best. The court in *Nyquist* did not buy the argument that the grants were a neutral benefit because over eighty-five percent of the state's private schools were sectarian.[205] The Wisconsin Supreme Court should not have bought the neutral benefit argument either because the MPCP clearly benefits religious institutions.

Jackson v. Benson was a landmark decision which was eventually appealed to the United States Supreme Court.[206] Many suspected the Court would grant certiorari in the *Jackson* case to finally put to rest the constitutional issue of school vouchers. However, the Supreme Court denied certiorari and left this controversial issue to simmer in the lower courts.[207]

B. *Ohio*

Simmons-Harris v. Goff, the case challenging the Cleveland voucher program, may be more telling on the issue of federal law because the Ohio state courts have attempted to answer the program's constitutionality under the First Amendment's Establishment Clause.[208] The Ohio voucher program[209] began its

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200. *Id.* at 613.
201. *Id.* at 617-18.
202. *Id.*
203. *Id.* at 618 (quoting Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986)).
204. *Id.* at 614 n.9.
205. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 768 (1973).
206. Jackson v. Benson, 119 S. Ct. 466, 466 (1998).
207. Jackson v. Benson, 578 N.W.2d 602 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998).
208. *See* Mead, *supra* note 71.

run at the trial court level in July 1996.[210] The plaintiffs in the case challenged the voucher program on Establishment Clause grounds as well as equivalent state constitutional grounds.[211] The trial court in answering the issues looked to the Supreme Court's jurisprudence in the area of state aid to religious schools.[212] The court stated:

> The Supreme Court's jurisprudence in this area has generally fallen into one of two categories. The first consists of cases in which the Supreme Court has struck down the programs at issue because their effect was to provide direct assistance to private, sectarian schools. In the second group of cases, the programs have been upheld because the effect was that the benefits involved were channeled to the sectarian schools only indirectly.[213]

In focusing its analysis on this direct-indirect approach, the court concluded the Cleveland program was constitutional under the Establishment Clause because the money was given to parents and would only benefit the religious schools indirectly.[214] Not surprisingly, the court used the Supreme Court's decisions in *Zobrest* and *Mueller* to support its position.[215]

On appeal, the court in *Simmons-Harris v. Goff* reversed the trial court's holding by declaring the Cleveland program constitutional.[216] In determining the federal constitutional issue, the court focused on the second prong of the *Lemon* test and found the Supreme Court has focused on two factors to determine whether a governmental program "has a primary effect which advances

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209. *See supra* notes 64-69 and accompanying text.

210. Gatton v. Goff, Nos. 96CVH-01-193, 96CVH-01-721, 1996 WL 466499 (Ohio Ct. C.P. July 31, 1996), *rev'd*, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583 (Ohio Ct. App. May 1, 1997). Two lawsuits, filed separately in January 1996, were consolidated into one case challenging the constitutionality of the Cleveland voucher program on both state and federal grounds. *Id.* at *3-4. Both parties filed motions for summary judgment, and the court's opinion on July 31, 1996, was in response to those motions. *Id.* at *3, *20.

211. *Id.* at *4.

212. *Id.* at *9.

213. *Id.*

214. *Id.* at *14; *see Vouchers Upheld in Ohio, but Battle Will Go on*, EDUC. USA (Capitol Publications Inc., Alexandria, Va.), Aug. 12, 1996, at 5.

215. Gatton v. Goff, 1996 WL 466499, at *11-12. For a complete discussion of the cases see *supra* notes 133-55 and accompanying text.

216. Simmons-Harris v. Goff, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583, at *16 (Ohio Ct. App. May 1, 1997), *rev'd*, 711 N.E.2d 203 (Ohio 1999); *AFT: Cleveland Vouchers Elicit Little Movement*, EDUC. USA (Capitol Publications Inc., Alexandria, Va.), July 14, 1997, at 5; *Court Voids Vouchers for Cleveland Religious Schools*, EDUC. USA (Capitol Publications Inc., Alexandria, Va.), May 19, 1997, at 5 (noting the Ohio Court of Appeals found the program clearly advances religious schools).

religion."[217] First, the Court looks to whether the program is neutral toward religion.[218] Secondly, the Court looks to whether the proposed aid is direct and substantial or indirect.[219]

In this case, the court concluded unanimously that the voucher program was not facially neutral and provided direct and substantial aid to sectarian schools in contravention of the Establishment Clause.[220] The court noted: "The only real choice available to most parents is between sending their child to a sectarian school and having their child remain in the troubled Cleveland City School District."[221] The court reasoned later in its opinion that because the comparable Ohio Constitution provided protections at least as great as the First Amendment, the program also violated the religious clauses of the Ohio Constitution.[222]

Simmons-Harris v. Goff was eventually appealed to the Ohio Supreme Court.[223] The court held that the program was enacted in violation of Section 15(D), Article II, of the Ohio Constitution[224] in "that creation of a substantive program in a general appropriations bill violates the one-subject rule" found in the provision.[225] The court also addressed the federal constitutional issue raised regarding whether the program violated the Establishment Clause of the First Amendment.[226] In reversing the court of appeals, the court held that it did not violate the Establishment Clause.[227]

Currently in Ohio, the scholarship program enacted by the Ohio Legislature on June 29, 1999, as part of the Education Budget Bill,[228] is being challenged in the federal courts.[229] The 1999 program, in all legal respects, is the same as the original pilot program that was enacted in 1995 and challenged in 1996.[230] In *Simmons-Harris v. Zelman*,[231] opponents of the new scholarship

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217. Simmons-Harris v. Goff, 1997 WL 217583, at *4.
218. *Id.*
219. *Id.*
220. *Id.* at *10 (stating that because the majority of the schools in the program are religious, a significant percentage of the money expended under the program will end up in those schools).
221. *Id.*
222. *Id.* at *11-12.
223. *See* Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999).
224. *Id.* at 214; *see* OHIO CONST. art. II, § 15(D).
225. Simmons-Harris v. Goff, 711 N.E.2d at 216.
226. *Id.* at 211.
227. *Id.*
228. OHIO REV. CODE ANN. §§ 3313.974-.979 (Anderson 1999).
229. *See* Simmons-Harris v. Zelman, 54 F. Supp. 2d 725 (N.D. Ohio 1999).
230. *Id.* at 728.
231. Simmons-Harris v. Zelman, 54 F. Supp. 2d 725 (N.D. Ohio 1999).

program sought a preliminary injunction barring the distribution of program funds to participating students pending the outcome of the trial on whether the program violates the Establishment Clause.[232] After an in-depth look into the legal and factual issues of the case, the court granted the preliminary injunction finding that the plaintiffs had a substantial likelihood of success on the merits.[233] The court further held that any harm done to students participating in the program was overcome by the "great" likelihood of plaintiffs prevailing in their claim.[234]

The *Zelman* decision was handed down on August 25, 1999, by Judge Oliver.[235] On August 27, 1999, just one business day before the start of school in Ohio, Judge Oliver issued a ruling that allowed approximately "3,200 students who were already attending private schools under the state's embattled voucher program to continue to attend those schools for the fall semester."[236] The ruling did nothing for the almost 600 students who had received vouchers for the first time that school year.[237] With the new Ohio scholarship program just beginning to be challenged in the federal courts, it appears there is no clear answer or end in sight with regard to the constitutionality of school vouchers. The solid holding by Judge Oliver in the *Zelman* case—that United States Supreme Court precedent requires school vouchers to be held unconstitutional—brings strong hope for a voucher-free future in Ohio.

C. *Maine*

Under Maine state law, families who reside in towns without public secondary schools may send their children free to public schools in other towns or to nonsectarian private schools.[238] The law explicitly bars the state from paying tuition for students to attend religious private schools.[239] The school district must pay the tuition amount for students to attend other schools.[240] If the tuition is paid by the district, it is given directly to the public or private school selected and not to the individual parents.[241]

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232. *Id.* at 727.
233. *Id.* at 741.
234. *Id.*
235. *Id.* at 725-26.
236. *Ohio Voucher Students Stay in School This Fall*, SCHOOL L. NEWS (Aspen Publications Inc., Alexandria, Va.), Sept. 3, 1999, at 1.
237. *Id.*
238. *See* ME. REV. STAT. ANN. tit. 20-A, § 5204(4) (West 1999).
239. *See id.*
240. *Id.*
241. *See id.* § 5810.

In 1999, two separate challenges were made to this law by parents of parochial school students.[242] In *Bagley v. Raymond School Department*[243] and *Strout v. Albanese*,[244] the parents claimed that by excluding religious schools from the tuition program the Maine law violated the Free Exercise, the Establishment, and the Equal Protection Clauses to the Constitution.[245] Both the First Circuit Court of Appeals and the Maine Supreme Court held the Maine law was constitutional.[246] Because this Note looks mainly at Establishment Clause jurisprudence, the focus of this section will be on the courts' analyses with regard to the Establishment Clause issue.

In *Bagley*, the court found that the parents' use of the Establishment Clause was misplaced.[247] The court held the Establishment Clause "has no role in requiring governmental assistance to make the practice of religion more available or easier. It simply does not speak to governmental actions that fail to support religion."[248] In *Strout*, the court found that upholding the Establishment Clause, which is aimed at avoiding excessive entanglement between church and state, is a paramount interest that justifies otherwise prohibited state infringement on the free exercise of religion.[249]

Both of these cases were appealed to the United States Supreme Court, and again, the Court sidestepped the controversial debate over school vouchers and declined to grant certiorari.[250] Many assumed that because both the First Circuit Court of Appeals and Maine Supreme Court cases came down opposite of the Wisconsin Supreme Court case, in which the Supreme Court also denied certiorari, the issue of school vouchers would finally be ripe for review.[251]

V. CONCLUSION

Will school vouchers really produce the results this country wants and needs in educational reform? Not likely. In fact, school vouchers will only shift

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242. Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999); Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me. 1999).

243. Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me. 1999).

244. Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999).

245. *See id.* at 60, 64-65; Bagley v. Raymond Sch. Dep't, 728 A.2d at 131, 133, 136.

246. Strout v. Albanese, 178 F.3d at 66; Bagley v. Raymond Sch. Dep't, 728 A.2d at 147.

247. Bagley v. Raymond Sch. Dep't, 728 A.2d at 136.

248. *Id.*

249. Strout v. Albanese, 178 F.3d at 61-62.

250. Joan Biskupic, *Maine School Voucher Law Stands*, WASH. POST, Oct. 13, 1999, at A02.

251. Ellen Sung, *Battle Over Church and State Still Rages in Schools* (visited Nov. 7, 1999) <http://www.policy.com/news/dbrief/dbriefarc353.asp>.

current problems into new areas. States must take responsibility for its public schools, invest in them, and work to make them strong, viable entities that signify a place where a child can find consistent and constant guidance.

Consistent and constant guidance is also what this country looks for in the United States Supreme Court. However, it has given its people just the opposite in recent years as it has tried to find a standard for church and state issues. School vouchers will likely provide the Supreme Court an opportunity to change its recent course of direction in Establishment Clause jurisprudence.

Up to this point, the Supreme Court has illustrated "increasing support for an ideological perspective that is more accommodating toward religion" in state areas, especially schools.[252] This path is wrong and contrary to the original meaning of the Constitution. If the Court would return to the original meaning of strict separation between church and state, the school voucher issue would be simple. Voucher programs which exclude private sectarian schools would be constitutional. Programs that include private sectarian schools would be unconstitutional, because state money would go to institutions that weave religion into all of its educational activities.

Unfortunately, the Court has declined to take this simple and original approach; and has even failed to give itself the opportunity to review its Establishment Clause jurisprudence and put an end to the voucher debate. Therefore, predicting what the Court may do when or if the issue of school vouchers comes before it, is difficult to say. Based on recent Supreme Court precedence, it would appear that to survive a constitutional challenge a publicly funded voucher program should: (1) provide payments directly to parents and not to schools; (2) allow parents the opportunity to choose among a wide variety of public and private nonsectarian and sectarian schools; and (3) remain neutral, giving no preference to sectarian schools.

Danielle Jess Latham

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252. *See* Kemerer & King, *supra* note 16, at 309.