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Changing Interpretations of the Establishment Clause: Financial Support of Religious Schools

Bryan D. LeMoine

Changing Interpretations of the Establishment Clause: Financial Support of Religious Schools

Jackson v. Benson[1]

I. INTRODUCTION

In *Wolman v. Walter*, Justice Stevens voiced concern that the "'high and impregnable' wall between church and state, has been reduced to a 'blurred, indistinct, and variable barrier.'"[2] The court had sacrificed predictability for flexibility.[3] While this may be true in some areas of Establishment Clause jurisprudence, it is no longer true in cases involving benefits to religious organizations. If the programs equally benefit both secular and "similarly situated" religious organizations, there is no violation of the Establishment Clause.[4] *Jackson v. Benson* is an expression of this view. The Wisconsin Supreme Court, in upholding a program designed to provide tuition money to students attending private schools, followed the United States Supreme Court's most recent expressions in this area and reached a result that it felt was in accord with the Court's present view of the Establishment Clause. It appears that the Wisconsin court was right, for the Supreme Court recently decided not to grant *certiorari*.[5]

II. FACTS AND HOLDING

In 1988, the Wisconsin legislature enacted the Milwaukee Parental Choice Program (MPCP).[6] This program provided that a certain percentage of students within the Milwaukee Public Schools (MPS) could attend private, non-

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

2. 433 U.S. 229, 266 (1977) (Stevens, J., dissenting).

3. Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

4. *See* Carl H. Esbeck, *Government Regulation of Religiously Based Social Services: The First Amendment Considerations*, 19 HASTINGS CONST. L. Q. 343, 355-58 (1992).

5. Jackson v. Benson, 578 N.W.2d 602 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998).

6. WIS. STAT. § 119.23 (1988). The original program was challenged in *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992). The Wisconsin Supreme Court held in *Davis*: (1) "the original program, when enacted, was not a private or local bill and therefore was not subject to the prohibitions of WIS. CONST. art. IV, § 18" which prohibits such bills from embracing more than one subject; (2) "the program did not violate the uniformity clause in WIS. CONST. art. X, § 3 because the private schools did not constitute 'district schools' simply by participating in the program"; and (3) the program "served a sufficient public purpose and therefore did not violate the public purpose doctrine." *Jackson*, 578 N.W.2d at 608. *See also* Davis, 480 N.W.2d at 465-77.

sectarian schools, paid for by Wisconsin.[7] The legislature placed eligibility requirements on the students and schools participating in the program and required the "State Superintendent of Public Instruction . . . to perform a number of supervisory and reporting tasks."[8] Under this program, the State disbursed public funds directly to the private schools based upon a determination of the cost of public schooling each student for the year.[9] The state then reduced the amount of funds given to the MPS by the amount disbursed to the private schools.[10]

The program was amended in 1995.[11] The amendments removed the requirement that the private schools involved in the program be "nonsectarian."[12] The legislature also amended the procedure used for disbursing funds to the private schools. Instead of paying the private schools directly, the amended program directed payment of funds to the student's parent or guardian, who then endorsed the check over to the private school.[13] The amended MPCP placed no restrictions on the private school's use of the state funds.[14] The amendments also

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7. *Jackson*, 578 N.W.2d at 607.

8. *Id.* at 608. The court stated that:

> To be eligible for the original MPCP, a student (1) had to be a student in kindergarten through twelfth grade; (2) had to be from a family whose income did not exceed 1.75 times the federal poverty level; and (3) had to be either enrolled in a public school in Milwaukee, attending a private school under this program, or not enrolled in school the previous year. . . . [A] private school had to comply with the anti-discrimination provisions imposed by 42 U.S.C. § 2000d and all health and safety laws or codes that apply to Wisconsin public school. The school additionally had to meet on an annual basis defined performance criteria and had to submit to the State certain financial and performance audits.

Id. (citations omitted).

9. *Id.*

10. Jackson v. Benson, 578 N.W.2d 602, 608 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998). For example, the amount paid to the schools through the parents/guardians was $2500 per student for the 1994-95 school year. Eight hundred students participated in the program during that year, attending 12 different nonsectarian schools. The following year, the number of students doubled to 1600 and the number of participating private schools rose to 17. *Id.*

11. WIS. STAT. § 119.23 (1988), *amended by* 1995 Wis. Act 27 §§ 4002-4009.

12. *Jackson*, 578 N.W.2d at 607-08. The legislature also increased the percentage of students eligible for the program to 15% of the Milwaukee Public School membership. The State Superintendent's responsibilities were also reduced. *Id.* at 608-09.

13. *Id.* at 609. The new amendments allowed the "State [to] pay [to the parent or guardian] the lesser of the MPS per student state aid under Wis. Stat. § 121.08 or the private school's 'operating and debt service cost per pupil that is related to educational programming' as determined by the state." *Id.*

14. *Id.* The legislature also removed the percentage cap on the amount of students participating in the program enrolled at one school. Previously, no more than 65% of a school's enrollment could consist of MPCP students. *Id.*

"added an 'opt-out' provision prohibiting a private school from requiring 'a student attending the private school under [the MPCP] to participate in any religious activity if the pupil's parent or guardian submits to the teacher or the private school's principal a written request that the pupil be exempt from such activities.'"[15]

The plaintiffs filed two separate suits in August 1995 challenging the amended MPCP under the Establishment Clause, various provisions of the Wisconsin state constitution,[16] and Wisconsin's public purpose doctrine.[17]

In response, the State filed a petition with the Wisconsin Supreme Court seeking a preliminary declaration that the program was constitutional.[18] Instead, the Wisconsin Supreme Court enjoined Wisconsin from implementing the amendments to the MPCP, but allowed the original program to continue.[19] The court split on the constitutionality of the program, dismissed the case, and remanded it to the circuit court.[20]

The circuit court lifted the preliminary injunction ordered by the Supreme Court, except with respect to the provision allowing the participation of sectarian schools. The circuit court granted the plaintiffs' motion for summary judgment and denied the State's motion for summary judgment, declaring the amendments to the program unconstitutional under Wisconsin law. The circuit court did not address whether the program violated the Federal Constitution.[21]

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15. Jackson v. Benson, 578 N.W.2d 602, 609 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998).

16. *Jackson*, 578 N.W.2d at 607, 623 (referring to WIS. CONST. art. IV, § 18). The suit claimed that the amended MPCP violated Wisconsin's state constitutional prohibition barring the enaction of private or local bills "embracing more than one subject." It also claimed that the amended MPCP violated the uniformity provision of WIS. CONST. art. X, § 3 requiring that district (public) schools be "as nearly uniform as practicable," free of charge, and without "sectarian instruction." *Id.* at 607, 627.

17. The public purpose doctrine, "although not recited in any specific clause in the state constitution, is a well-established constitutional doctrine" requiring that "[p]ublic funds may be expended only for public purposes. An expenditure of public funds for other than a public purpose would be abhorrent to the constitution of Wisconsin." *Id.* at 628. Other parties subsequently joined the suit. *Id.* at 609. Significantly, on August 15, 1996, the National Association for the Advancement of Colored People (NAACP) filed suit claiming that the amended MPCP violated the Fourteenth Amendment's Equal Protection Clause as well as the Equal Protection Clause of the Wisconsin constitution. The NAACP also filed a motion to "consolidate the cases." The circuit court did so, but "bifurcated the proceedings so that the equal protection claims would be heard only if the amended MPCP was upheld." *Id.*

18. *Id.*

19. Jackson v. Benson, 570 N.W.2d 407, 415 (Wis. Ct. App. 1997).

20. Jackson v. Benson, 578 N.W.2d 602, 609 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998).

21. *Id.* at 609-10.

The State appealed from this order to the court of appeals.[22] The court of appeals struck down the entire amended MPCP as violating Wisconsin's "prohibition against state expenditures for the benefit of religious societies or seminaries."[23] Like the circuit court, the court of appeals decided the case on state law grounds.[24]

On appeal, the Wisconsin Supreme Court upheld the amended MPCP under the Federal Establishment Clause and the named provisions of the Wisconsin constitution. The court reasoned that the program "will not have the primary effect of advancing religion, and it will not lead to excessive entanglement between the State and participating sectarian private schools."[25]

III. LEGAL BACKGROUND

The Establishment Clause has been thoroughly analyzed in both case law and law reviews.[26] For purposes of this Note, however, it is not useful to consider the complete history of the Establishment Clause; however, a discussion of the Supreme Court's jurisprudence in the area of state aid to private schools serves as a useful background to illumine the *Jackson v. Benson* decision.

It is probably an overstatement to refer to a "test" used by the Court for analyzing Establishment Clause cases. Given Justice Stevens comment that the Establishment Clause is a "blurred, indistinct, and variable barrier,"[27] and the Court's admission that Establishment Clause jurisprudence has "sacrifice[d]

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22. *Id.* at 610.

23. *Id.* Note that the court of appeals did not reach the federal constitutional issues.

24. *Id.*

25. Jackson v. Benson, 578 N.W.2d 602, 610-11 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998). This is a very simple statement of the holding. The court's holding should actually be expressed in six parts, and Part IV of this Note will be structured in the manner articulated by the court in its opinion. *See id.* at 607.

26. *See* Andrew A. Adams, *Cleveland, School Choice, and "Laws Respecting An Establishment of Religion,"* 2 TEX. REV. L & POL. 165 (1997); Peter M. Kimball, *Opening the Door to School Choice in Wisconsin: Is* Agostini v. Felton *the Key?*, 81 MARQ. L. REV. 843 (1998); 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 (1996); George M. Macchia, *New Jersey and School Vouchers: Perfect Together. Tuition Vouchers May Provide Interim Relief to New Jersey's Urban School Children* 8 SETON HALL CONST. L. J. 507 (1998); Arval A. Morris, *Public Educational Services in Religious Schools: An Opening Wedge for Vouchers?*, 122 EDUC. L. REP. 545 (1998); Margaret A. Nero, *The Cleveland Scholarship and Tutoring Program: Why Voucher Programs Do Not Violate the Establishment Clause*, 58 OHIO ST. L. J. 1103 (1997); Kristin K. Waggoner, *The Milwaukee Parental Choice Program: The First Voucher System to Include Religious Schools*, 7 REGENT U. L. REV. 165 (1996).

27. Wolman v. Walter, 433 U.S. 229, 266 (1977) (Stevens, J., dissenting).

clarity and predictability for flexibility,"[28] the "test" articulated in *Lemon v. Kurtzman*[29] is really only a set of principles that the Court considers when determining compliance with the Establishment Clause.[30] However, the Court continues to use the *Lemon* test as the primary vehicle for determining whether a state statute unconstitutionally infringes upon religion.[31]

A. The Pre-Lemon Era

Everson v. Board of Education[32] marks the beginning of the Court's treatment of state programs attempting to assist religious schools. *Everson* upheld a New Jersey program which provided transportation for students attending both private parochial and public schools.[33] In doing so, the Court articulated its then current philosophy towards Establishment Clause analysis:

> While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief. . . . [The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.[34]

The Court concluded that while the wall between church and state "must be kept high and impregnable," this law providing transportation to both public and nonpublic school students did not violate the First Amendment.[35]

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28. Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

29. 403 U.S. 602, 612-13 (1971).

30. *See, e.g.*, Hunt v. McNair, 413 U.S. 734 (1973). "With full recognition that [the *Lemon* principles] are no more than helpful signposts, we consider the present statute and the proposed transaction in terms of the three 'tests': purpose, effect, and entanglement." *Id.* at 741.

31. Agostini v. Felton, 501 U.S. 203, 234-35 (1997). The *Agostini* Court stated: "To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion . . . ." *Id.* The Court then articulated the three principles found in the *Lemon* test. *Id.*

32. 330 U.S. 1 (1947).

33. *Id.*

34. *Id.* at 16, 18.

35. *Id.* at 18.

Twenty-three years later, the Court decided *Walz v. Tax Commission.*[36] Walz challenged on First Amendment grounds property tax exemptions given to religious organizations for religious properties.[37] In *Walz*, the Court began its analysis with a threshold question: Does the tax exemption sponsor religion?[38] The Court divided its analysis of this question into two parts: (1) What was the legislative purpose; and (2) Was the effect of the law an excessive entanglement between church and state.[39] This analysis formed the basis for the *Lemon* test, even though the Court in *Walz* relied heavily on historical considerations rather than merely discussing the above framework.[40]

B. The Lemon Test

The Supreme Court formulated the *Lemon* test based on its belief that the Establishment Clause was designed to avoid three main evils: "sponsorship," "financial support," and "active involvement of the sovereign in religious activity."[41] Turning to each, the Court stated: "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.'"[42]

Lemon v. Kurtzman involved Establishment Clause challenges to Pennsylvania and Rhode Island statutes.[43] The Pennsylvania statute provided private elementary and secondary schools with state reimbursement of costs associated with the teaching of certain secular subjects.[44] The Rhode Island statute subsidized fifteen percent of private school teachers' salaries.[45] Both programs provided such reimbursements to religious schools as well.[46] The Supreme Court held that both programs were invalid under the Establishment

36. 397 U.S. 664 (1970).

37. *Id.* at 666. Even though this case does not deal with state benefits to religious schools, it is helpful background to *Lemon*. The case also shows that the Court, prior to *Lemon*, was friendlier to state programs benefitting religious institutions.

38. *Id.* at 674.

39. *Id.*

40. *Id.* at 677-79.

41. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

42. *Id.* at 612-13 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

43. *Id.* at 606.

44. *Id.* at 606-07. The schools were reimbursed for teachers' salaries, textbooks, and instructional materials. *Id.* at 607.

45. *Id.*

46. Lemon v. Kurtzman, 403 U.S. 602, 607 (1971).

Clause,[47] despite the Court's recognition of the valuable contribution of such church-related schools to the nation as a whole. The Court stated:

> The merits and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.[48]

Justice Douglas, concurring in the opinion, stated his view more strongly:

> It matters not that the teacher receiving taxpayers' money only teaches religion a fraction of the time. Nor does it matter that he or she teaches no religion. The school is an organism living on one budget. What the taxpayers give for salaries of those who teach only the humanities or science without any trace of proselytizing enables the school to use all of its own funds for religious training. As Judge Coffin said, we would be blind to realities if we let 'sophisticated bookkeeping' sanction 'almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to 'secular' activities.' And sophisticated attempts to avoid the Constitution are just as invalid as simple-minded ones. In my view the taxpayers' forced contribution to the parochial schools in the present cases violates the First Amendment.[49]

C. *Committee for Public Education & Religious Liberty v. Nyquist*[50]

In *Jackson*, the Wisconsin Supreme Court noted the striking similarities between the MPCP and the programs at issue in *Nyquist*.[51] In *Nyquist*, the Governor of New York signed into law three different financial aid programs for nonpublic schools.[52] The first program, entitled "Health and Safety Grants for

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47. *Id.* at 609, 611. Specifically, the Court held that the Rhode Island and the Pennsylvania statutes fostered an excessive entanglement between the state and religion. *Id.* at 615-21.

48. *Id.* at 626.

49. *Id.* at 641-42 (Douglas, J., concurring) (citations omitted).

50. 413 U.S. 756 (1973).

51. Jackson v. Benson, 578 N.W.2d 602, 614 n.9 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998).

52. *Nyquist*, 413 U.S. at 761-62.

Nonpublic School Children," gave nonpublic schools direct money grants "to be used for 'the maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.'"[53] To ensure that the money was used properly, the program required each participating school to audit and report its maintenance and repair expenditures for the preceding year.[54] The grant could not exceed either the reported expenses, or fifty percent of the "average per-pupil cost for equivalent maintenance and repair services in the public schools."[55]

The second (a tuition assistance program) and third program (a tax benefit program) both fell under the title "Elementary and Secondary Education Opportunity Program."[56] The tuition assistance program gave tuition reimbursements to low-income parents whose children attended participating nonpublic schools.[57] The tax benefit program, enacted to give assistance to those who did not qualify for the tuition assistance program, provided a graduated tax deduction based upon the income of parents with children attending nonpublic schools.[58]

The Court in *Nyquist* struck down all three of the programs.[59] The Court set out two ground rules for Establishment Clause analysis. First, states may give some direct aid to sectarian schools for those secular functions the schools invariably perform.[60] The Court characterized this as channeling "direct aid to the secular without providing direct aid to the sectarian."[61] Second, "an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law."[62]

With these rules in mind, the Court articulated its reasons for striking down the tuition reimbursement program and the maintenance/repair program.[63] The Court held that a state may not provide funds for maintenance or repair of

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53. *Id.* at 762.

54. *Id.* at 763.

55. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 763 (1973).

56. *Id.* at 764.

57. *Id.*

58. *Id.* at 765-66. For example, if a taxpayer's adjusted gross income was less than $9000, she received a $1000 deduction for up to three dependents. If a taxpayer's adjusted gross income was less than $15,000 but more than $9000, she received a $400 deduction for each dependent attending nonpublic school. *Id.*

59. *Id.* at 769.

60. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 775 (1973).

61. *Id.*

62. *Id.*

63. *Id.* at 776-90. The tax benefit program was struck down because it aided and advanced religious institutions by giving assistance to parents of pupils at the schools. *Id.* at 793.

buildings used for sectarian purposes.[64] The Court reasoned that when maintenance and repair funds are provided to religious schools, the sectarian purposes of the schools are advanced in violation of the Establishment Clause.[65] The Court did not dwell on the "excessive entanglement" prong of the *Lemon* test because it believed that any monitoring systems placed upon the program would constitute "too intrusive and continuing a relationship between Church and State"[66]

The tuition reimbursement program also failed the Establishment Clause analysis.[67] New York argued that because the grants were made to parents and not to schools, the program did not trespass the church-state barrier.[68] The Court dismissed this argument as only one factor in the total analysis.[69] The Court found that the effect of the program was to provide "desired financial support for nonpublic, sectarian institutions."[70] The Court gave no credence to other arguments by New York that (1) the parents have freedom to spend the grant money on a school of their choosing;[71] (2) there is therefore no guarantee that public money will go to sectarian schools;[72] (3) only a small percentage of a student's tuition is paid for by the program;[73] and (4) the program is designed to further the free exercise of religion.[74] Most significant for purposes of this Note is the Court's dismissal of the first two arguments. The Court labeled the grants a subsidy which gave parents an incentive to send their children to private schools.[75]

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64. *Id.* at 777. The Court cites to *Tilton v. Richardson*, 403 U.S. 672 (1971), for this proposition. In *Tilton*, the Court held invalid a federal statute which provided construction grants to colleges and universities, regardless of whether they were sectarian or nonsectarian. *Nyquist*, 413 U.S. at 776. The statute contained a limitation which stated that if a university used the grant to finance a facility designed to advance sectarian purposes (e.g. a chapel), the government could recover some of the grant money. *Id.* However, this limitation expired after 20 years, so nothing prevented a university from converting a federally financed facility to advance sectarian purposes. *Id.* The Court in *Nyquist* reasons from *Tilton* that "[i]f the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair." *Id.*

65. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 779-80 (1973).

66. *Id.* at 780 (citation omitted).

67. *Id.*

68. *Id.* at 781.

69. *Id.* Another factor was whether the program was sufficiently restricted to ensure separation between church and state. *Id.* at 783.

70. *Id.* at 783.

71. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 785-86 (1973).

72. *Id.* at 786.

73. *Id.* at 787.

74. *Id.* at 788.

75. *Id.* at 786.

Nyquist attempted to "firm up" the standards for Establishment Clause analysis.[76] Justice Powell, writing for the majority, stated that while the Religion Clauses are not "free of 'entangling' precedents. . . . the controlling constitutional standards have become firmly rooted and the broad contours of our inquiry are now well defined."[77] Powell, however, qualified his statement by saying:

> The existence, at this stage of the Court's history, of guiding principles etched over the years is [sic] difficult cases does not, however, make our task today an easy one. For it is evident from the numerous opinions of the Court . . . that no 'bright line' guidance is afforded. Instead, while there has been general agreement upon the applicable principles and upon the framework of analysis, the Court has recognized its inability to perceive with invariable clarity the 'lines of demarcation in this extraordinarily sensitive area of constitutional law.' And, at least where questions of entanglements are involved, the Court has acknowledged that, as of necessity, the 'wall' is not without bends and may constitute a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.'[78]

Justice Powell's qualification is instructive. The very difficulties Powell discussed created an environment of instability in the Court's jurisprudence, resulting in a movement away from a no-aid separationism approach[79] to an "evenhandedness"[80] or neutrality-based approach.[81]

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76. *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 797-98 (1973).

77. *Id.* at 761. The wall separating church and state has not "become 'as winding as the famous serpentine wall' [Thomas Jefferson] designed for the University of Virginia." *Id.*

78. *Id.* at 761 n.5 (citation omitted).

79. *See* Carl H. Esbeck, *supra* note 4, at 350-51. No-aid separationism interprets the Establishment Clause to mean "that government must doggedly avoid utilizing its power to grant any benefits to, or incur measurable interaction with, religious organizations."

80. Agostini v. Fulton, 521 U.S. 203, 253 (1997) (Souter, J., dissenting).

81. *See* Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L. J. 1, 19 (1997). Esbeck points out that the neutrality model is only followed in cases where government provides a benefit to all persons or organizations similarly situated. *Id.* Both neutrality and no-aid separationism will be discussed at length in Part IV of this Note.

D. A New Mission

This change in perspective occurred gradually. In *Levitt v. Committee for Public Education & Religious Liberty*,[82] the Court struck down legislation which provided reimbursement of expenses involved in administering state-mandated testing, record-keeping, and preparation of reports for the state.[83] Adhering to *Nyquist*, the Court stated that the program violated the Establishment Clause in that it provided direct money grants to sectarian schools.[84] However, a careful reading of *Levitt* reveals an interesting statement by the Court. The Court says that it was "left with no choice under Nyquist but to hold that [the program] constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities."[85] This statement cracked the door for allowing aid to religious institutions because it narrowed the Court's focus. Instead of looking at religious institutions as a whole—as an entity with a common purpose – the Court divided religious institutions into segments (some clearly religious and some more secular). Therefore, after *Levitt*, a program giving aid directly to religious institutions through a mechanism ensuring that aid goes only toward secular educational purposes would likely be upheld.

The presumption that such a program would be upheld proved true in *Committee for Public Education & Religious Liberty v. Regan*.[86] The program at issue in *Regan* was a modified version of the one before the Court in *Levitt*.[87] Tailoring the program to fit the requirements articulated in *Levitt*, the legislature provided a means for ensuring that the state funds would only go toward paying the costs of secular educational functions.[88] While *Regan* upheld the modified version of the program,[89] the Court first had to dispense with some troublesome precedent that did not coincide with its new mission.

The Court's first task was to deal with *Meek v. Pittenger*.[90] In *Meek*, the Court examined a Pennsylvania program which (1) loaned textbooks to students attending private schools,[91] (2) loaned instructional material and equipment to nonpublic schools,[92] and (3) authorized the Secretary of Education to supply professional staff and supportive materials, equipment, and personnel to

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82. 413 U.S. 472 (1973).
83. *Id.* at 482.
84. *Id.* at 481.
85. *Id.* at 480.
86. 444 U.S. 646 (1980).
87. *Id.* at 650.
88. *Id.* at 651-52.
89. *Id.* at 650, 662.
90. 421 U.S. 349 (1975). They actually tackled this late in the opinion, but it was necessary for them to show how *Meek* and *Wolman* could be reconciled.
91. *Id.* at 359-60.
92. *Id.* at 364.

nonpublic schools to perform certain services.[93] A plurality of the Court upheld the textbook loan provision of the program because it was virtually indistinguishable from a program upheld in a previous case.[94] However, a majority of the Court invalidated the other two portions of the program.[95] According to the Court, the loaning of instructional materials to the religious schools directly aided them in violation of *Nyquist*.[96] The provision allowing the Secretary of Education to send public employees into religious schools was held invalid because "the danger that religious doctrine will become intertwined with secular instruction persists."[97] Given the "dominant sectarian mission" of the schools, the chance that religion would be fostered through the public employees was too great a risk to permit.[98]

At the district court level, the *Regan* program was struck down under the reasoning of *Meek*.[99] The Supreme Court in *Regan* effectively evaded this point by stating that *Wolman v. Walter*[100] controlled the disposition of the case.[101] The Court stated that *Meek* did not control the outcome in *Regan* because *Meek* was to be narrowly construed.[102] Further, the author of *Meek*, who also wrote *Wolman*, at no time suggested that *Meek* and *Wolman* were in conflict with each other.[103] This negative inference, combined with a narrow reading of *Meek*, allowed the Court to state that *Wolman* controlled the disposition in *Regan*.

Wolman dealt with the same program ruled upon in *Meek*, except that it was amended. The Ohio legislature, in an attempt to conform the program to the *Meek* opinion, reworked and amended the statute.[104] The statute allowed Ohio to provide nonpublic school students with books, "instructional materials and equipment, standardized testing and scoring, diagnostic services, therapeutic services, and field trip transportation."[105] A majority of the Court upheld the

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93. *Id.* at 367. The services to be performed were "remedial and accelerated instruction, guidance counseling and testing, speech and hearing services." *Id.*

94. *Id.* at 359-60 (referring to *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968)). *Allen* upheld a program which loaned textbooks directly to students attending nonpublic schools. The Court in *Allen* rejected an argument that such a program would provide an incentive for children to attend religious private schools because a textbook loan program alone does not "demonstrate an unconstitutional degree of support for a religious institution." *Meek*, 421 U.S. at 360 (discussing *Allen*).

95. Meek v. Pittenger, 421 U.S. 349, 373.

96. *Id.* at 364-65.

97. *Id.* at 370.

98. *Id.* at 371-72.

99. Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 652 (1980).

100. 433 U.S. 229 (1977).

101. *Regan*, 444 U.S. at 654.

102. *Id.* at 661-62.

103. *Id.* at 661.

104. *Wolman*, 433 U.S. at 232-34.

105. *Id.* at 239.

provision of "diagnostic services, and therapeutic and remedial services" at the nonpublic schools,[106] but struck down the provision of instructional materials, equipment, and transportation for field trips.[107] A plurality of the Court upheld the textbook loans.[108]

Based upon *Wolman*, the Court in *Regan* upheld the reimbursement of the religious and secular nonpublic schools for costs associated with state-mandated testing and reporting services.[109] The Court held that: (1) the religious schools no longer had any control over the content or grading of the examinations;[110] (2) the reimbursements for record-keeping and reporting were constitutional under the *Lemon* test;[111] and (3) the program did not have the overall effect of "advancing the sectarian aims of the nonpublic schools."[112]

E. Neutrality and Indirectness

The *Regan* decision in 1980 set the tone for the next decade and a half. The Court continued to move away from its decision in *Nyquist* toward a less separationist view of the Establishment Clause. Significantly, the Court utilized the second prong of the *Lemon* test (whether or not a program has the primary effect of advancing religion) to effect the greatest movement.

Throughout the 1980s and early 1990s, the Court increasingly relied on a two-part test for discerning whether a program had the primary effect of advancing religion.[113] First, the Court asked if a program was neutral.[114] The Court extensively discussed neutrality in *Mueller v. Allen*.[115] *Mueller* involved a lawsuit over a Minnesota statute allowing taxpayers to deduct some expenses associated with sending their children to school, irrespective of whether the children attended public or private, sectarian or non-sectarian, school.[116] These expenses included the cost of tuition, books, and transportation.[117] Distinguishing the Minnesota statute from the program at issue in *Nyquist*, the Court upheld the statute because: (1) it was facially neutral in that it provided

106. *Id.* at 255.
107. *Id.*
108. *Id.* at 255-66.
109. Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 656 (1980).
110. *Id.*
111. *Id.* at 656-62.
112. *Id.* at 662.
113. Jackson v. Benson, 578 N.W.2d 602, 614 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998).
114. *Id.* at 614 n. 8 (citing Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970)).
115. 463 U.S. 388 (1983).
116. *Id.* at 390.
117. *Id.* at 391.

the benefit to parents of children attending both public and nonpublic schools,[118] (2) the assistance to sectarian schools was indirect as the schools were only benefitted following numerous private choices by the parents,[119] and (3) the fact that the majority of persons taking advantage of the program were parents of children attending private, religious schools did not make the program unconstitutional as applied.[120]

Witters v. Washington Department of Services for the Blind[121] followed on the heels of *Mueller*. In *Witters*, the Court tackled part two (whether or not aid was distributed indirectly) of its test for discerning whether a program had the primary effect of advancing religion.[122] In *Witters*, the Court upheld a program which provided "vocational rehabilitation assistance" to blind persons.[123] The commission supervising the program denied Witters assistance because he was attending a Christian school.[124] Witters challenged the ruling by the commission, and eventually the Supreme Court granted *certiorari* to determine whether providing assistance to Witters would violate the Establishment Clause.[125] The Supreme Court ruled that such assistance would not violate the Establishment Clause because any aid to a religious institution would be indirect.[126] The aid only reached the college after it was channeled through Witters's private choice, and not as a result of the state sponsoring the institution.[127]

The Court finally tied the two-part test of neutrality and indirectness in *Zobrest v. Catalina Foothills School District*.[128] In *Zobrest*, the Court ruled that a program providing sign-language interpreters to hearing-impaired students applied to Zobrest, a student attending a Roman Catholic high school. The program, according to the Court, was both (1) neutral in that it provided assistance to students in both private and public, sectarian and non-sectarian schools, and (2) indirect because the aid flowed to a school through the private choices of a private individual.[129]

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118. *Id.* at 398.

119. *Id.* at 399.

120. Mueller v. Allen, 463 U.S. 388, 401 (1983). The Court also explicitly discussed policy considerations which led it to believe that the program did not violate the spirit of the Establishment Clause. *Id.* at 398-402.

121. 474 U.S. 481 (1986).

122. Jackson v. Benson, 578 N.W.2d 602, 615 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998).

123. *Witters*, 474 U.S. at 483.

124. *Id.* at 483-84.

125. *Id.* at 484-85.

126. Witters v. Washington Dep't of Servs., 474 U.S. 481, 488-89 (1986).

127. *Id.*

128. 509 U.S. 1 (1993).

129. *Id.* at 9-11.

F. *Agostini v. Felton*[130]

Agostini marked the culmination of the 1980s and early 1990s cases which had slowly moved away from constrained notions regarding separation of church and state. *Agostini* really began in 1985 when the Court, in *Aguilar v. Felton*,[131] struck down a New York program which attempted to send public school teachers into nonpublic, sectarian schools to provide remedial educational services to underprivileged youth.[132] The Court remanded the case to the New York District Court, which issued a permanent injunction barring New York from instituting the program.[133] Twelve years later, the injunction was challenged at the Supreme Court in *Agostini*. In keeping with its prevailing theme of expansiveness, the Court lifted the injunction and overruled *Aguilar* as inconsistent with subsequent Establishment Clause decisions.[134]

In order to overrule *Aguilar*, the Court dispensed with *School District of Grand Rapids v. Ball*.[135] The Court noted that *Ball* struck down a "Shared Time" program very similar to the one at issue in both *Aguilar* and the present matter.[136] According to the Court, *Ball*'s "Shared Time" program violated the Establishment Clause for three reasons.[137] First, the public school teachers could potentially become vehicles for the transmission of a religious message.[138] Second, the program created symbolic union between church and state that would be perceived by children as the state endorsing religion.[139] Third, the program had the impermissible effect of "subsidizing 'the primary religious mission of the institutions affected.'"[140]

The Court overruled *Ball* because, while the general principles for analysis (the *Lemon* test) had not changed since *Aguilar*, the presumptions upon which *Ball* and *Aguilar* were based no longer applied.[141] The Court identified and overruled the following two presumptions. First, the Court no longer presumed,

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130. 521 U.S. 203 (1997).

131. 473 U.S. 402 (1985).

132. *Agostini*, 521 U.S. at 209.

133. *Id.*

134. *Id.*

135. Agostini v. Felton, 521 U.S. 203, 218 (1997) (discussing Sch. Dist. v. Ball, 473 U.S. 373 (1985)).

136. *Id.* The state provided funds for remedial and "enrichment" classes, taught by public school teachers, at nonpublic schools. This program was "designed to supplement the 'core curriculum' of the nonpublic schools." *Id.*

137. *Id.*

138. *Id.* The *Agostini* Court analogized the *Ball* program to *Meek v. Pittenger*, 421 U.S. 349 (1975).

139. *Agostini*, 521 U.S. at 220.

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

141. *Id.* at 222. The Court stated: "What has changed since we decided *Ball* and *Aguilar* is our understanding of the criteria used to assess whether aid to religion has an impermissible effect." *Id.* at 223.

as in *Meek* and *Ball*, that "the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."[142] Second, the Court abandoned "the rule . . . that all government aid that directly aids the educational function of religious schools is invalid."[143] In abandoning these two presumptions, the Court armed itself for the task of upholding the New York program contested in *Agostini*.

The Court then adopted two presumptions to be applied in Establishment Clause challenges, and specifically defined "effect of advancing religion." First, programs providing assistance to both sectarian and non-sectarian schools through aid given to persons based on neutral and secular criteria do not create a financial incentive for persons to attend sectarian institutions.[144] Second, even though a program requires "administrative cooperation" between church and state or might "increase the dangers of 'political divisiveness,'" these two facts do not "by themselves . . . create an 'excessive' entanglement."[145] Finally, to effect an advancement of religion, a program must: (1) result in government indoctrination, (2) "define its recipients by reference to religion," or (3) create an excessive entanglement.[146]

The Court ended its discussion of the Establishment Clause in *Agostini* with the following statement:

> We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion.[147]

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142. *Id.*

143. *Id.* It is worth noting that the Court cites to *Witters v. Washington Dep't of Servs.*, 474 U.S. 481 (1986) to support its proposition here. Recall that *Witters* allowed the state to provide a grant to a blind student attending a Christian college. The state analogized this grant to the state issuing a paycheck to an employee who then turns around and donates the money to a religious institution. The analogy is a stretch at best, for the state in a paycheck setting receives services from an employee to whom it pays a wage. In *Witters*, the state helps pay for the sectarian education of a blind student. Hopefully, the state is not paying for the sectarian education in the same manner that it is paying its employees.

144. *Id.* at 230.

145. Agostini v. Felton, 521 U.S. 203, 233 (1997).

146. *Id.* at 234.

147. *Id.*

The Court remarked that "the mere circumstance that [an aid recipient] has chosen to use neutrally available state aid to help pay for [a] religious education [does not] confer any message of state endorsement of religion"[148]

G. Conclusion

Looking at the general direction of the Court since *Everson*, it is likely that the Court began this "discussion" with a view towards neutrality or even-handedness. However, the Court was interrupted by jurisprudential hiccups. The first came in *Lemon v. Kurtzman*, lasting until *Nyquist* and *Levitt*. The second occurred in *Ball* and *Aguilar*. The second hiccup was eradicated in *Agostini*, but no decision has specifically overruled the first one. But, beginning with *Mueller* and ending with the refusal to grant *certiorari* in *Jackson*, the Court has significantly weakened *Lemon* and *Nyquist*'s no-aid separationism. All that remains from the first hiccup is a framework within which the Court analyzes the Establishment Clause, and through which it can implement its current "evenhandedness" approach to that Clause.

IV. THE INSTANT DECISION

Relying on the Supreme Court's present interpretation of the Establishment Clause, the Wisconsin Supreme Court in *Jackson* ruled that the amended MPCP did not violate the Establishment Clause "because it has a secular purpose, it will not have the primary effect of advancing religion, and it will not lead to excessive entanglement between the State and participating sectarian private schools."[149]

A. Secular Purpose

The *Jackson* court, discussing the first prong of the *Lemon* test, stated that "courts have been 'reluctan[t] to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute.'"[150] The court determined that the purpose of the program was "to provide low-income parents with an opportunity to have their children educated outside of the embattled Milwaukee Public School system."[151] *Jackson* said that such a purpose was clearly secular.[152]

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148. *Id.* (quoting Witters v. Washington Dep't of Servs., 474 U.S. 481, 488-89 (1986)).

149. Jackson v. Benson, 578 N.W.2d 602, 611 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998).

150. Mueller v. Allen, 463 U.S. 388, 394-95 (1983).

151. *Jackson*, 578 N.W.2d at 612.

152. *Id.* (citing Mueller v. Allen, 463 U.S. 388, 395 (1983)).

B. Primary Effect of Advancing Religion

Next, *Jackson* asked whether the statute has the primary effect of advancing or inhibiting religion.[153] The analysis under the second prong is one of degree. The question that must be asked and answered is whether there is sufficient separation between church and state.[154] To answer this question, the court engaged in a historical discussion of the criteria used by the Supreme Court in evaluating government programs benefitting religious schools.[155] The *Jackson* court articulated that the "effect" prong of the *Lemon* test really consists of two considerations: (1) whether a program distributes benefits neutrally or equally among secular and religious schools, and (2) whether the aid is distributed indirectly to the schools.[156] "[S]tate programs that are wholly neutral in offering educational assistance directly to citizens in a class defined without reference to religion do not have the primary effect of advancing religion."[157] The Establishment Clause was not intended to "inadvertently prohibit [the Government] from extending its general State law benefits to all its citizens without regard to their religious belief."[158]

The court justified its conclusion that the MPCP is constitutional by identifying the program's neutrality. First, the selection of both student and school participants in the program was based on religion-neutral criteria.[159] The

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153. *Id.* (citing Agostini v. Felton, 521 U.S. 203, 222 (1997); *Mueller*, 463 U.S. at 396; Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).

154. Jackson v. Benson, 578 N.W.2d 602, 613 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998) (citing Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

155. *Id.*

156. *Id.*

157. *Id.* (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993)) ("Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive attenuated financial benefit.")

158. *Id.* at 614 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1946), which held that the Establishment Clause does not prevent New Jersey from reimbursing with tax dollars parents of students attending sectarian schools for their bus fares as part of a tax benefit program doing the same for all pupils attending both public and other types of schools). In *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), the Supreme Court stated:

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

Id. at 669.

159. Jackson v. Benson, 578 N.W.2d 602, 617 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998).

schools could not choose certain students over others, except that preference could be given to a sibling of a child presently attending that school.[160] Also, the children could not be required by a school to participate in any religious activities at the school.[161] Furthermore, the amended MPCP provided a standard amount of aid to the parents of the participating children. This amount did not vary depending upon the school the children chose to attend.[162] Finally, the most important benefit of the program was secular in nature—it allowed parents the opportunity to afford better education for their children.[163] Therefore, the amended MPCP is neutral because it does not favor or disfavor religion in any way.[164]

The court also identified a number of ways in which the program is indirect. First, the aid flowed to sectarian institutions only after "numerous private choices of individual parents of school-age children."[165] The court stated further:

> [T]he program was amended so that the State will now provide the aid by individual checks made payable to the parents of each pupil attending a private school under the program. Each check is sent to the parents' choice of schools and can be cashed only for the cost of the student's tuition. Any aid provided under the amended MPCP that ultimately flows to sectarian private schools, therefore, does so "only as a result of genuinely independent and private choices of aid recipients."[166]

The court acknowledged that the aid checks were sent directly to the school. But, the school could not cash the checks until endorsed by the parent to whom the check was made out. The court pointed out that it is irrelevant whether the aid ends up in sectarian or non-sectarian schools. The real issue is who determines the ultimate destination of the money. Because private individuals chose to spend their aid at sectarian schools, rather than at secular schools, the state did not discriminate on the basis of religion.[167] The court concluded by stating:

> The amended MPCP, therefore, places on equal footing options of public and private school choice, and vests power in the hands of

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160. *Id.*

161. *Id.* This is known as the "opt-out" provision of the statute.

162. *Id.*

163. *Id.*

164. Jackson v. Benson, 578 N.W.2d 602, 617 (Wis.), *cert. denied*, 119 S. Ct. 466 (1993).

165. *Id.* at 618.

166. *Id.* (quoting Witters v. Washington Dep't of Servs., 474 U.S. 481, 487 (1986)).

167. *Id.* at 618-19.

> parents to choose where to direct the funds allocated for their children's benefit. We are satisfied that the implementation of the provisions of the amended MPCP will not have the primary effect of advancing religion.[168]

Jackson also distinguished the MPCP from the program in *Nyquist*.[169] Rather than singling out children in private schools as beneficiaries of the program,[170]

> [T]he only financially-qualified Milwaukee students excluded from participation in the amended MPCP are those in the fourth grade or higher who are already attending private schools. The amended MPCP, viewed in its surrounding context, merely adds religious schools to a range of pre-existing educational choices available to MPS [Milwaukee Public School] children. This seminal fact takes the amended MPCP out of the *Nyquist* construct and places it within the framework of neutral education.[171]

The *Jackson* court stated that its decision was controlled not by *Nyquist*, but by the following line of cases: *Mueller v. Allen*,[172] *Witters v. Washington Department of Services for the Blind*,[173] *Zobrest v. Catalina Foothills School District*,[174] *Rosenberger v. Rector & Visitors of University of Virginia*,[175] and

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168. *Id.* at 619. The court dismisses the argument by Respondents that the law has the primary effect of advancing religion because a substantial amount of the money from the program ends up in the accounts of sectarian schools. *Id.* at 619 n.17.

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

170. Jackson v. Benson, 578 N.W.2d 602, 615 n.9 (Wis.), *cert. denied*, 119 S. Ct. 466 (1993).

171. *Id.*

172. *Jackson*, 578 N.W.2d at 614-15 (citing Mueller v. Allen, 463 U.S. 388, 401-02 (1983). In *Mueller*, the Court allowed taxpayers to deduct some educational expenses from their state income taxes, even though most of those utilizing the deductions sent their children to religious or sectarian schools. *Id.*

173. *Jackson*, 578 N.W.2d at 615 (citing Witters v. Washington Dep't of Servs., 474 U.S. 481 (1986)). In *Witters*, the Court reaffirmed the principle that the Establishment Clause is no bar on public aid eventually used at a sectarian institutions for indirect and neutral purposes. The Court relied on the fact that the aid only went to the religious institutions because of private individual choices of the recipients of the aid. *Id.*

174. *Jackson*, 578 N.W.2d at 616 (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13-14 (1993), which held that a school district providing a sign-language interpreter to a deaf student under the Individuals with Disabilities Education Act did not violate the Establishment Clause even though "the interpreter would be a mouthpiece for religious instruction").

175. Jackson v. Benson, 578 N.W.2d 602, 616 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998) (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995), which held a university action of giving student organization publication funds even

Agostini v. Felton.[176] Relying on the above cases, *Jackson* perceived that a program which is both neutral and indirect in its application of aid to sectarian institutions satisfies the requirements of the Establishment Clause. As the *Jackson* court explained:

> The Supreme Court, in cases culminating in *Agostini*, has established the general principle that state educational programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor or disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children.[177]

Jackson concluded that the amended MPCP was "precisely such a program."[178]

C. *Excessive Entanglement between the Church and State*[179]

Essentially, this test required the court to determine whether the government must monitor the amended MPCP closely in order to ensure compliance with the Establishment Clause.[180] The court stated that not all interaction between the government and sectarian institutions unconstitutionally advances or inhibits religion.[181] In other words, complete separation between church and state is

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though the student organization was a newspaper with a Christian perspective. The Court allowed this because the key to Establishment Clause analysis is not who receives the funds, but whether the "state conferred a benefit which . . . inhibited [or] promoted religion."). The Establishment Clause requires neutrality, not that state funds never end up in the coffers of religious organizations. *Id.*

176. *Jackson*, 578 N.W.2d at 616 (citing Agostini v. Felton, 521 U.S. 203 (1997), which held that a "federally funded program providing supplemental, remedial instruction on a neutral basis to disadvantaged children at sectarian schools is not invalid under the Establishment Clause when sufficient safeguards exist").

177. *Jackson*, 578 N.W.2d at 617.

178. *Id.*

179. The *Jackson* court begins its analysis of the third prong of the *Lemon* test with the recognition that the Supreme Court in *Agostini* merged this third prong with the second prong, creating an overall "effect" test. *Id.* at 619 n.18. The court in *Jackson* felt more comfortable applying the traditional *Lemon* test because it determined that this test was not overruled by the United States Supreme Court, and therefore still controls Establishment Clause jurisprudence. *Id.* at 612 n.5.

180. Jackson v. Benson, 578 N.W.2d 602, 619 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998) (citing Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)).

181. *Id.*

impossible.[182] Therefore, the court had to determine what kind of interaction constitutes "excessive entanglement."[183]

The court concluded that the amended MPCP did not implicate excessive entanglement between church and state. The monitoring required by the statute was minimal, consisting of "performance, reporting and auditing requirements, as well as . . . [compliance with] applicable nondiscrimination, health, and safety obligations."[184] The State Superintendent had to ensure that the quality of secular education complied with state standards. This was nothing new to the Superintendent, whose regular duties included a similar monitoring function.[185] The court, therefore, held:

> The program does not involve the State in any way with the school's governance, curriculum, or day-to-day affairs. The State's regulation of participating private schools, while designed to ensure that the program's educational purposes are fulfilled, does not approach the level of constitutionally impermissible involvement.[186]

D. Conclusion

The court in *Jackson* concluded that the amended MPCP was valid because it complied with the *Lemon* test. It was both neutral and indirect and did not "run afoul" of the criteria articulated in *Lemon*.[187]

V. COMMENT

Jackson v. Benson rests on the foundation of *Agostini v. Felton* and its predecessors. The Wisconsin Supreme Court was perceptive to point out that it was controlled not by *Nyquist*, but by *Mueller*, *Witters*, *Zobrest*, and *Agostini*. These cases forged a path away from strict separationism toward evenhandedness or neutrality.

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182. *Id.*

183. *Id.*

184. *Id.*

185. Jackson v. Benson, 578 N.W.2d 602, 619 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998).

186. *Id.* at 620. The court cites to *Hernandez v. Comm'r*, 490 U.S. 680, 696-97 (1989), for the proposition that "routine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no 'detailed monitoring and close administrative contact' between secular and religious bodies, does not of itself violate the nonentanglement command."

187. *Id.*

A. Changing Notions of Neutrality . . . Back to Everson

The Court has historically operated on a principle of neutrality, demanded by the relationship between the Free Exercise Clause and the Establishment Clause in the First Amendment.[188] Neutrality meant that a state could neither advance religion, nor restrict its exercise by the people.[189] This restrictive neutrality scrutinized the overall "effect" of a program to see if it advanced religion in any way. However, the meaning of government neutrality has evolved over the period of twenty to twenty-five years into an entirely different concept. This evolution is primarily responsible for the shift in the Court's perspective to a more expansive interpretation of the "effect" prong of the *Lemon* test.

The evolution ironically began in *Nyquist*. In *Nyquist*, the Court left open for later consideration the possibility of a program "involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted."[190] The Court in *Mueller v. Allen*[191] felt this statement constituted the *Nyquist* Court's definition of a neutral program. This development was subtle but powerful. Instead of being prohibited from taking actions having the effect of advancing religion, the government was allowed to benefit religion if it also benefitted similarly situated secular interests. In other words, neutrality came to be defined as equality.

This shift in the Court's concept of neutrality points back to *Everson v. Board of Education*.[192] *Everson*'s definition of neutrality required states to distribute benefits equally.[193] The following language made that clear: ". . . we do not . . . prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious beliefs."[194] *Lemon* articulated a much more restrictive view:

> Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.[195]

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188. Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).

189. *Walz*, 397 U.S. at 694 (Harlan, J., concurring).

190. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782 n.38 (1973).

191. 463 U.S. 388 (1983).

192. 330 U.S. 1 (1947).

193. *Id.* at 18.

194. *Id.* at 16.

195. Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) (citations omitted).

By the time the Court reached *Agostini*, the questions about neutrality centered on whether the program was equally available, irrespective of religion.

B. The Implementation of Neutrality—Jackson v. Benson

Jackson is important because of its implementation of a neutrality principle, and because it set out in coherent fashion the case law developing this principle. In so doing, *Jackson* recognized some statements articulated by the Court are a subterfuge, an attempt to disguise equality-neutrality as something less broad than it really is. *Jackson* illustrates this in the following:

> A student qualifies for benefits under the amended MPCP not because he or she is a Catholic, a Jew, a Moslem, or an atheist; it is because he or she is from a poor family and is a student in the embattled Milwaukee Public Schools. To qualify under the amended MPCP, the student is never asked his or her religious affiliation or beliefs; nor is he or she asked whether the aid will be used at a sectarian or nonsectarian private school. Because it provides a neutral benefit to beneficiaries selected on religious-neutral criteria, the amended MPCP neither leads to "religious indoctrination," nor "creates [a] financial incentive for students to undertake sectarian education.[196]

This conclusion does not follow from the proposition that students are selected on the basis of religion-neutral criteria. This reasoning illustrates the nature of the neutrality principle. It shifts the focus away from the overall effect of the program and instead scrutinizes the application of benefits. As long as persons of all types of faiths (or persons without any sort of religious ties) are benefitted, the program is neutral. What this reasoning fails to take into account is the true effect of the program. No longer are courts concerned with whether a benefits program, although neutral on its face, has the effect of advancing religion by providing money to religious schools. The statement that payment of tuition for students at eighty-nine sectarian schools does not lead to religious indoctrination is a falsehood. The opt-out clause in the program does not save the MPCP from this conclusion. The truth be known, the state no longer is concerned with whether or not its children are being religiously indoctrinated at its expense as long as (1) the state is not making that choice for the student, and (2) the state is not preferring one religious group over another.

The other subterfuge present in this statement in *Jackson* is that there is no financial incentive to attend a religious school. Again, this is false. The majority of private schools eligible to participate in the program are sectarian. This program creates a financial incentive to attend private school in general, and in

196. Jackson v. Benson, 578 N.W.2d 602, 618 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998) (citations omitted).

most cases, that financial incentive is for students to attend a religious school. Instead of utilizing this statement to buttress its analysis, the *Jackson* court should have simply argued that it does not matter whether a program creates a financial incentive to attend a religious school as long as neutral criteria exist for selecting students and schools for participation in the program.

These two subterfuges illustrate the movement away from an "as applied," or a no-aid separationist, Establishment Clause analysis. Facial neutrality is more important than whether a program like the MPCP has the primary effect of advancing religion. The second prong of the *Lemon* test has been phased out. This renders the *Lemon* test ineffective in dealing with Establishment Clause analysis. The purpose of the *Lemon* test was to prevent three evils: sponsorship, financial support, and active involvement of the sovereign in religious activity.[197] Undeniably, the result of the MPCP is financial support of eighty-nine religious schools out of one hundred twenty-two private schools eligible to participate in the program.[198] Under the traditional *Lemon* test, such an effect violates the Establishment Clause. This is no longer true. Financial support of religious institutions is no longer an evil for purposes of the Establishment Clause.

It was, therefore, only natural for *Agostini* to reformulate the test. The test, as it now stands, is (1) whether a program has a secular purpose, and (2) whether a program has the effect of advancing religion.[199] To analyze whether a program has the effect of advancing religion, the Court now looks at three factors: (1) whether a program results in government indoctrination; (2) whether a program defines the beneficiaries with religion-neutral criteria; and (3) whether the program creates an excessive entanglement between Government and religion.[200] Notably missing is any requirement which would block financial support of a religious institution. The reliance by the *Jackson* court on the *Lemon* framework is yet another subterfuge, for the court was operating within the *Agostini* opinion's analysis.[201]

C. Strict-Separationism or Even-Handedness: Is There a Choice?

Justice Brennan, in his concurring opinion in *Walz*, identified the three evils which he believed the Establishment Clause should prevent:

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197. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

198. *Jackson*, 578 N.W.2d at 619 n.17.

199. Agostini v. Felton, 521 U.S. 203 (1997). The Court in *Agostini* does not mention secular purpose in connection with its summary of the "primary criteria . . . use[d] to evaluate whether government aid has the effect of advancing religion . . . ." *Id.* But, given that the *Lemon* test has not specifically been overruled by the Court, presumably the Court will continue to analyze secular purpose.

200. *Id.*

201. Jackson v. Benson, 578 N.W.2d 602, 612-20 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998).

> [T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment. What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers—as much to church as to state—which the Framers feared would subvert religious liberty and the strength of a system of secular government. On the other hand, there may be myriad forms of involvements of government with religion which do not import such dangers and therefore should not, in my judgment, be deemed to violate the Establishment Clause.[202]

At this point, the question becomes whether the MPCP draws Wisconsin (a secular institution) into a relationship prohibited by the Establishment Clause, at least in Justice Brennan's perspective.

Is Wisconsin's involvement with religious schools serving the essentially religious mission of religious institutions? This depends upon one's perception of the religious mission of a religious school. In *Levitt*, the Supreme Court relied on a distinction between the secular educational aspect of a religious school and the sectarian mission of a religious school to buttress its belief that state financial support of a religious school does not effect the advancement of religion.[203] The Court in *Levitt* felt that it was "left with no choice under *Nyquist* but to hold that [the program] constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities."[204] The inference which follows is that if the Court could have discerned a mechanism which separated the sectarian and secular functions of the school such that the program would only aid the secular function, then the program would have survived the Establishment Clause challenge. Such a mechanism was put in place by the New York legislature, and the program was upheld when the *Levitt* program came back in *Regan*.[205] This distinction is troubling. Neutrality-theory

202. Walz v. Tax Comm'n, 397 U.S. 664, 680-81 (1970) (Brennan, J., concurring) (citations omitted).

203. Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973).

204. *Levitt*, 413 U.S. at 480.

205. Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980).

advocates argue that absolute separationism is no longer plausible given the nature of our world today because separationism assumes that "church-related social services take place within discrete and clearly defined boundaries easily segregated from the charitable organization's sectarian beliefs and practices."[206] Substituting "church-related social services" with religious schools makes for an interesting analogy.[207] If strict separationists assume that religious schools' educational function can be separated from their "sectarian beliefs and practices," then neutrality theorists assume the same thing. Justice Brennan's first prohibited relationship illustrates the necessity of severing from the religious orientation of the schools their religious function, for otherwise the MPCP serves the "essentially religious activities of religious institutions."[208]

The third prohibition involves the use of religious means to advance government ends when secular means would suffice.[209] Again, to argue that the MPCP does not use religious means to advance government ends requires distinguishing between the secular educational function and the religious orientation of a religious school. The same difficulties inherent in the first prohibited relationship apply here. But Justice Brennan's description of the third relationship gives rise to the most troubling of conclusions—the state is using religious schools to educate the children of Wisconsin when secular schools would accomplish the same end. Of course, the MPCP was enacted because secular public schools were not accomplishing the same end. The Milwaukee Public Schools failed to effectively educate the children in its system. The better solution for Establishment Clause purposes might be reformation of the public school system instead of creation of a voucher system allowing children to attend religious schools at their (or their parents') choosing.

VI. CONCLUSION

Justice Brennan correctly points out that some government involvement in religion is inescapable.[210] This is especially true in an era where government has grown to an enormous size, influencing virtually every area of our lives.[211] The challenge lies in identifying those relationships between government and religious institutions which are acceptable and prohibiting those relationships which are unconstitutional. The MPCP, for now, is considered by the Supreme

206. Esbeck, *supra* note 4, at 352-53.

207. Granted, the analogy is not perfect. But I think that church-related social services/charitable organizations and religious schools share a commonality which makes the analogy fitting. Both institutions separate themselves from other institutions by their statement: "We are religiously motivated."

208. Walz v. Tax Comm'n, 397 U.S. 664,680-81 (1970) (Brennan, J., concurring).

209. *Id.* Given that the second prohibited relationship is inapplicable here, I move to the third.

210. *Walz*, 397 U.S. at 680-81.

211. Esbeck, *supra* note 4, at 352-53.

Court to be an acceptable relationship between Wisconsin and religious institutions.[212]

Of course, the consequences of the neutrality principle have so far been beneficial. The fact that governments may now use tax dollars to assist religious institutions increases vastly the choices people have with regard to schooling, counseling programs, and other religiously-affiliated programs and institutions. The hope in Wisconsin is that the MPCP will provide educational opportunities that would not otherwise be available to underprivileged children. Also, public schools might be forced to think differently about the way they educate the children in Wisconsin. There is a desperate need for such reform in the education of underprivileged children. Nonetheless, one may be concerned about the means used to effectuate these consequences.

Justice Rutledge, in *Everson*, articulated similar concerns in his dissent. Discussing James Madison's perspective on the Establishment Clause, he stated:

> Madison opposed every form and degree of official relation between religious and civil authority. For him religion was a wholly private matter beyond the scope of civil power either to restrain or to support. Denial or abridgement of religious freedom was a violation of rights both of conscience and of natural equality. State aid was no less obnoxious or destructive to freedom and to religion itself than other forms of state interference. 'Establishment' and 'free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom. . . . In no phase was he more unrelentingly absolute than in opposing state support or aid by taxation. Not even 'three pence' contribution was thus to be exacted from any citizen for such a purpose.[213]

Madison, if appropriately characterized by Justice Rutledge, would no doubt have opposed the MPCP because of its financial support of religious schools. For now, the Supreme Court is content to allow programs like the MPCP to survive Establishment Clause analysis. But Justice Breyer's lone dissent in the denial of *certiorari* probably signals to potential litigants that this issue is not yet foreclosed.[214]

In conclusion, the *Jackson* court illustrates the direction the United States Supreme Court has been heading since its decision in *Everson*. It cannot be said that the Supreme Court has ever advocated strict no-aid separationism. Perhaps *Nyquist* was the closest that the Court has come to such a view. But if the

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212. Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998). The denial of *certiorari* represents tacit support of the program, despite the fact that such denials technically have no value as precedent.

213. Everson v. Bd. of Educ., 330 U.S. 1, 40 (1947) (Rutledge, J., dissenting).

214. Jackson v. Benson, 578 N.W.2d 602 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998).

Court's present direction is benevolent neutrality, it is appropriate to ask where benevolent neutrality is taking the Establishment Clause. After all, if states can now subsidize tuition payments for religious schools, are we not moving a step closer to a weak Establishment Clause? Or are such questions premature and alarmist? Many would argue the beneficial effects of the program involved in *Jackson* far outweigh any Establishment Clause concerns.

It is not my purpose to try to predict the future. However, we are clearly not moving toward a stronger Establishment Clause. We as a country must query whether this is something we want. For now, it appears that such programs, like the MPCP, present one answer to the growing educational crisis in this country. But these programs are not the only answer. Careful thought should be given to the consequences, beyond the stated educational goals, of such programs. Benevolent neutrality may end up forcing the Nation's courts to draw increasingly fine and arbitrary lines in a vain attempt to reconcile precedent with benevolent neutrality. The real question remains whether the Establishment Clause will be whittled away to nothingness, or whether neutrality and separation between church and state can co-exist.

BRYAN D. LEMOINE