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JACKSON V. BENSON: SCHOOL VOUCHERS—OFFERING AN APPLE TO PRIVATE SCHOOLS; CREATING A SERPENT FOR PUBLIC SCHOOLS

JENNIFER A. HENRIKSON*

Establishment Clause cases are some of the “most perplexing questions to come before [the Supreme] Court.”

—Justice Powell

INTRODUCTION

Last June, the Wisconsin Supreme Court in Jackson v. Benson, upheld the constitutionality of the Milwaukee Parental Choice Program (the “MPCP”), which allows a select group of Milwaukee public school students to use publicly funded school vouchers to attend religious schools. In November 1998, the U.S. Supreme Court declined to hear the case. The Court’s denial of certiorari not only left open the potential for other states to adopt standards that offend the Establishment Clause of the United States Constitution, but also left open the potential of harm to public school education.

Although Supreme Court decisions had considered “firmly rooted” limitations of the Establishment Clause, the denial of certiorari in Jackson threatens to uproot this firm ground. Until the Court reinforces the impermissibility of certain types of state-provided aid to religious schools, courts like Jackson will continue to offend past Court jurisprudence to the detriment of the public schools.

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2. 578 N.W.2d at 608.
4. Nyquist, 413 U.S. at 761.
5. The Supreme Court recently granted certiorari to decide whether instructional materials paid by a state can be used in religious schools. See Helms v. Picard, No. 97-30231, 1998 WL 483916 at *1 (5th Cir. Aug. 17, 1998), cert. granted, 1999 WL 231469 (U.S. June 14, 1999). This could affect the national debate over school vouchers.
The Wisconsin Supreme Court attempted in *Jackson v. Benson* to synthesize past U.S. Supreme Court cases and summarize the Court's position. The *Jackson* court struggled with what it thought was conflicting Supreme Court guidance in holding that "state 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."  

Although this rule is one of the factors courts consider in an Establishment Clause inquiry, proving this rule alone is insufficient. Another rule evident in the Supreme Court decisions examined by the *Jackson* court is the inquiry of whether state aid to religious schools realistically can be separated from the schools' religious functions. By failing to conduct this additional inquiry, the *Jackson* court ruled that state aid for tuition to religious schools is permissible. However, as discussed in this Comment, such a practice violates the Establishment Clause of the United States Constitution. Without Supreme Court guidance, other states are likely to rely on the *Jackson* decision and ratify similarly unconstitutional programs.

Part I of this Comment begins with an overview of the Establishment Clause and the test used to determine a violation of the Clause. It then discusses the Supreme Court cases leading up to the *Jackson* decision. This Comment classifies the cases into three categories based on the type of state-provided aid at issue, including: (1) state aid for specific services and special needs; (2) state aid for instructional materials and equipment; and (3) state aid for tuition reimbursements or tax deductions.

Part II discusses the MPCP enacted in 1989 and amended significantly in 1995. It then discusses the Wisconsin Supreme Court decision in *Jackson v. Benson*, centering on the court's reasoning for finding that the MPCP does not have the primary effect of advancing religion.

Finally, Part III addresses the urgent need for the Court to take a stand on the constitutionality of school voucher programs under the Establishment Clause. It proposes that Establishment Clause inquiry expand to include examining whether the type of aid "realistically" can be separated from religious schools' nonsecular functions. If the

6. *Jackson*, 578 N.W.2d at 613.

7. See *Meek v. Pittenger*, 421 U.S. 349, 365 (1975) (ruling that separating maps, charts and laboratory equipment from use for religious purposes was unrealistic and thus had the primary effect of advancing religion).
aid cannot be realistically separated, the Establishment Clause is violated. Part III then asserts that the MPCP has the primary effect of advancing religion because tuition—unlike textbooks and special services—realistically cannot be applied only to the secular programs of religious schools. Such a conclusion is the only consistent approach given the Supreme Court's earlier jurisprudence.

I. HISTORY OF STATE AID TO RELIGIOUS SCHOOLS

A. The First Amendment Establishment Clause

The First Amendment to the U.S. Constitution provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Establishment Clause provides protection against three main evils: "sponsorship, financial support, and active involvement of the sovereign in religious activity." Accordingly, the Establishment Clause prohibits state legislatures from passing laws that have the purpose or effect of advancing or inhibiting religion through the Fourteenth Amendment. The Supreme Court notes that Establishment Clause cases "raise difficult issues of interpretation" and are some of the "most perplexing questions to come before [the] Court."

B. The Lemon Test

Alleged Establishment Clause violations are analyzed using a three prong test articulated by the Court in Lemon v. Kurtzman. In developing the test, the Court in Lemon stated that "[t]he 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." The Court faced the constitutional question of whether a state could supplement a nonpublic school teacher's annual salary for teaching religious subjects. In reaching its decision, the Court

8. U.S. CONST. amend. I.
9. Jackson, 578 N.W.2d at 612.
10. See id. at 611.
11. Id. at 611 (citing Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 760 (1973)).
13. Lemon, 403 U.S. at 625.
14. See id. at 607.
declared that a statute does not violate the Establishment Clause if (1) it has a secular, legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not create excessive entanglement between government and religion.\textsuperscript{15} Applying this test, the \textit{Lemon} Court first determined that the Rhode Island legislature intended "to enhance the quality of secular education" and not advance religion.\textsuperscript{16} Without addressing the primary effects prong of the test, the Court concluded, based on the third prong, that the statute created excessive entanglement between the church and the state.\textsuperscript{17} The prohibited entanglement included state surveillance of religious teachings, as well as state auditing of the nonpublic school's per pupil spending records.\textsuperscript{18}

\textbf{C. Legal Landscape}

Over the past thirty years, thirteen Supreme Court decisions addressed the issue of separation between religion and public school education, with most of these cases revolving around some sort of state aid to religious schools.\textsuperscript{19} After the \textit{Lemon} decision, the Supreme Court applied the \textit{Lemon} test to many subsequent Establishment Clause cases. However, the definition of the second prong of the test became more unclear over subsequent years. For example, in separate decisions, the Court ruled that the state-provided aid met the effects test if it was: (a) discrete and clearly

\textsuperscript{15} See id. at 612.
\textsuperscript{16} Id. at 613.
\textsuperscript{17} See id. at 619.
\textsuperscript{18} See id. at 620.
identifiable from religious functions of a school;\textsuperscript{20} (b) neutral toward religion;\textsuperscript{21} (c) the result of the private choice of the aid recipient;\textsuperscript{22} (d) not traceable to the coffers of religious schools;\textsuperscript{23} and (e) not providing a financial incentive for students to attend a religious school.\textsuperscript{24} Despite this lack of focus, the Supreme Court declined to hear the \textit{Jackson} case and clarify its definition of the second prong.\textsuperscript{25}

Accordingly, courts must continue to turn to past Supreme Court jurisprudence for guidance. When past Establishment Clause Court decisions are classified by type of state-provided aid a pattern emerges. Organized under this paradigm, past Supreme Court decisions fall into three categories: (1) specific services and special needs; (2) instructional materials and equipment; and (3) tuition or tax relief to parents. These categories may be the key to clarifying what the Supreme Court implicitly considers when deciding Establishment Clause violations.

1. State Aid for Specific Services and Special Needs

According to several Supreme Court decisions, state aid for specific secular services and special needs does not violate the Establishment Clause.\textsuperscript{26} Specifically, no Establishment Clause violation occurs when a state provides aid for testing,\textsuperscript{27} bus transportation,\textsuperscript{28} and special education.\textsuperscript{29} In determining whether aid in this category is a constitutional violation, the Court focuses on whether the aid is "clearly identifiable" and hence easily separable from a school's religious functions.

For example, in evaluating testing services in both \textit{Committee for Public Education v. Regan}\textsuperscript{30} and \textit{Wolman v. Walter},\textsuperscript{31} the Court held that public funds paid to reimburse sectarian schools for state-

\begin{itemize}
\item \textsuperscript{20} \textit{See Regan}, 444 U.S. at 660.
\item \textsuperscript{21} \textit{See Everson}, 330 U.S. at 18.
\item \textsuperscript{22} \textit{See Witters}, 474 U.S. at 488.
\item \textsuperscript{23} \textit{See Zobrest}, 509 U.S. at 10.
\item \textsuperscript{24} \textit{See Allen}, 392 U.S. at 244.
\item \textsuperscript{25} \textit{See Jackson v. Benson}, 578 N.W.2d 602 (Wis. 1998), \textit{cert. denied}, 199 S.Ct. 466 (1998).
\item \textsuperscript{27} \textit{See Wolman}, 433 U.S. at 244.
\item \textsuperscript{28} \textit{See Everson}, 330 U.S. at 18.
\item \textsuperscript{29} \textit{See Agostini}, 521 U.S. at 203.
\item \textsuperscript{31} \textit{See id.}
\item \textsuperscript{32} 433 U.S. at 229.
\end{itemize}
required testing services did not violate the Establishment Clause. Because the state prepared the tests and nonpublic school personnel merely administered them, the nonpublic schools controlled neither the test's content nor their results. Although the state reimbursed the nonpublic schools directly, the costs were for specific activities also performed in the public schools. Consequently, the state reimbursements for the testing services were "discrete and clearly identifiable." Thus, applying the second prong of the Lemon test, the Court ruled that the testing activity performed by nonpublic school personnel did not have the impermissible effect of advancing religion.

In addition to testing services, the Court has held it to be constitutionally permissible for states to fund bus transportation to religious schools. In Everson v. Board of Education, a taxpayer challenged the constitutionality of a statute granting public schools the right to reimburse parents of parochial school students for the cost of public transportation to school. The same statute also granted the right to reimburse parents of public school students. The Everson Court likened the bus fare reimbursement to policemen protecting school children from traffic hazards. Just as parochial schools would find it very difficult to operate without policemen to protect the children walking to school, such schools' operation would be hampered without transportation being available. The Court noted that the state's role should not handicap religious schools. Because the state contributed no money to the religious schools, the Court found that the state did not support them. The statute did no more than provide a general program to help parents get their

33. See Regan, 444 U.S. at 656.
34. Referring to testing materials, the Regan Court stated that "there does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with State-furnished materials have no such affect." Id. at 658.
35. Id. at 660.
36. Id. at 658.
38. See id. at 3. In Everson, the parochial school curriculum included regular religious instruction conforming to the religious beliefs of the Catholic Church. See id.
39. See id.
40. See id. at 17.
41. See id. at 18.
42. See id.
43. See id.
children to school, regardless of religion, safely.44

The Court also has held several times that specific special education services provided by the state to religious schools do not violate the Establishment Clause.45 For example, in Witters v. Washington Department of Services,46 an eligible blind student at a private Christian college sought vocational educational assistance provided under a state statute.47 Without expressly applying the Lemon test, the Court concluded that assistance provided to the visually handicapped was not a likely vehicle for subsidizing a religious institution.48 No more than a "minuscule amount" of the aid in Witters would likely flow to religious education.49 In addition, the aid flowed to religious institutions as a result of the "private choices of aid recipients."50 The aid went directly to the student and not the educational institution.51

Another example of special education services is Zobrest v. Catalina Foothills School District,52 where a public school invoked the Establishment Clause to refuse to provide a deaf student with a sign language interpreter while attending a Catholic High School.53 The Court concluded that providing a neutral government service on the premises of a sectarian school as a part of a general program does not offend the Establishment Clause.54 The Court emphasized that an interpreter does no more than sign what is being taught in the class.55 Therefore, the interpreter himself does not advance any religious ideals under the second prong of the Lemon test.56 In addition, the Court recognized that no funds traceable to the government ever found their way into the sectarian school.57

A final example of special education services is Agostini v.
Felton, where the Supreme Court overturned its earlier Aguilar v. Felton decision. The Court in Aguilar barred, by injunction, New York City public school teachers from providing remedial education to disadvantaged students in parochial schools using Title I Federal Funds. Title I funds could only be applied to secular and neutral services, and then only to supplement, not replace, services already provided by private schools. Twelve years later, the parties in Aguilar sought relief from the injunction. The Agostini Court overruled Aguilar based, in part, on subsequent Establishment Clause decisions like Zobrest and Witters. The Agostini Court emphasized that it was no longer presumed that public school employees imparted religion in the parochial school setting. In addition, the Title I program was available to all eligible remedial students regardless of the school each chose to attend. Since Title I funds never reached the “coffers of religious schools” there was no financial incentive for parents to choose a sectarian school based on the Title I program. Thus, the second prong of the Lemon test was met.

In contrast to special education services, the Court in Nyquist v. Committee for Public Education held that a maintenance and repair grant to religious schools violated the Establishment Clause. The

59. See id. at 219.
60. See id. Federal Title I funds provide “remedial education, guidance, and job counseling to eligible students.” Id.
61. See id. at 204.
62. See id.
63. However, the Agostini Court specifically noted that this decision is not a green light for lower courts to view earlier Establishment Clause Supreme Court precedent as overruled. See id. at 217.
64. The Zobrest Court rejected the theory that merely placing public school employees in religious school settings promoted religion in students. See Agostini v. Felton, 521 U.S. 203, 216 (1997) (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13 (1993)).
65. The Witters Court viewed any funds that ultimately went to religious schools as a result of the private choices of parents similar to a paycheck of a state employee where the employee donates part of the money to a church. See id. at 211 (citing Witters v. Washington Dep’t of Serv. for the Blind, 474 U.S. 481, 488 (1986)).
66. See id. at 215; see also Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1,13 (1993).
67. See Agostini, 521 U.S. 203, 204. Under this presumption, strict monitoring of public school Title I teachers in the parochial school settings was unnecessary. Accordingly, the Court ruled that the Title I program resulted in no “excessive” entanglement that advanced or inhibited religion. Id.
68. Id. at 213.
69. See id. at 216.
70. 413 U.S. 756 (1973).
71. See id. at 779. A qualifying school must be designated as serving a high concentration
grant did not require that expenditures relating to upkeep be confined to buildings used exclusively for secular purposes.\textsuperscript{72} In fact, a nonpublic school’s entire maintenance and repair budget could be financed from the grant.\textsuperscript{73} The Court viewed barring schools from using the funds to maintain nonsecular parts of the religious schools as impractical, if not impossible.\textsuperscript{74} As a result, the grant violated the second prong of the \textit{Lemon} test. On the other hand, the Court reiterated that where forms of aid can be channeled to support only a religious school’s secular functions, no Establishment Clause violation exists.\textsuperscript{75}

2. State Aid for Instructional Materials and Equipment

The Supreme Court generally has held that aid in the form of textbooks loaned to religious schools and used for subjects also taught in the public schools is permissible under the Establishment Clause.\textsuperscript{76} On the other hand, the Court has rejected the direct loan of other equipment and instructional materials.\textsuperscript{77}

For example, in \textit{Board of Education v. Allen}, the board challenged the constitutionality of a New York statute that required local school boards to loan textbooks free of charge to all students in the district regardless of whether the school was public or private.\textsuperscript{78} Under the statute, only secular textbooks approved by public school authorities could be loaned.\textsuperscript{79} Accordingly, no funds or books were furnished directly to parochial schools. The Court ruled that the loan of secular textbooks to private schools did not violate the Establishment Clause.\textsuperscript{80} In reaching its decision, the Court emphasized that the financial benefit provided in this case was to parents and children, not the religious schools.\textsuperscript{81} The Court also emphasized the neutrality of the statute by stating that “[t]he law merely ma[de] available to all children the benefits of a general
program to lend school books free of charge. Since the statute was neutral, the Court ruled that the state aid met the second prong of the *Lemon* test.

Similarly, in *Meek v. Pittenger*, the Court addressed the constitutionality of a state program loaning textbooks, equipment and other instructional materials to nonpublic schools. The state limited textbook loans to only those texts used in the public schools. The Court ruled that the program did not violate the Establishment Clause. Like the textbook program in *Allen*, the *Meek* textbook loan program extended to all school children free of charge. In theory, the textbook loan program benefited the parents and children, not the nonpublic schools. As a result, the Court ruled that the textbook loan program met the second prong of the *Lemon* test.

On the other hand, the *Meek* Court ruled that the direct loan of equipment and other instructional materials to sectarian schools failed the second prong of the *Lemon* test by having the primary effect of advancing religion. Although the statute earmarked the equipment and materials for secular purposes, separating secular uses from uses for religious purposes was unrealistic. The material and equipment included maps, charts and laboratory equipment. The Court recognized that the materials might indeed initially be used exclusively for secular purposes; however, there was no guarantee that use would not change to religious purposes in the future.

The Court in *Wolman v. Walter* also found the loan of instructional materials and equipment to nonpublic schools to be unconstitutional. Although in theory the state loaned the materials

82. *Id.* at 243.
83. *See id.* at 248.
84. 421 U.S. 349 (1975).
85. *Id.* at 354. Instructional materials included “periodicals, photographs, maps, charts, sound recordings, films, or any other printed and published materials of a similar nature.” *Id.* at 355. Equipment included “projection equipment, recording equipment, [and] laboratory equipment.” *Id.*
86. *See id.* at 354.
87. *See id.* at 360-61.
88. *See id.* at 361.
89. *See id.*
90. *See id.* at 362.
91. *See id.* at 363.
92. *See id.* at 365.
93. *See id.* at 355.
94. *See id.*
96. *See id.* at 251. The Court had no difficulty determining that the statute’s purpose was
to parents and children, the Court saw the program in substance as the same as the one at issue in *Meek.* Like the situation in *Meek,* it was impossible to separate secular from sectarian educational functions. Thus, part of the aid flowed to the school’s religious function and failed the *Lemon* effects test.

3. State Aid for Tuition Reimbursements or Tax Deductions

The Supreme Court has addressed the issue of tuition reimbursement in only two cases: *Committee for Public Education v. Nyquist* and *Mueller v. Allen.* Based on these opinions, it appears that the Supreme Court viewed state aid for tuition as impermissible because it was not reasonably separable from the school’s religious functions.

For example, in *Nyquist,* the Court ruled that the New York tuition reimbursement program violated the Establishment Clause. New York’s 1972 amendments to its education and tax laws included aid for tuition to low-income parents of children attending nonpublic schools. Each parent submitted a receipted tuition bill to the Commissioner of Education, and the commissioner reimbursed the parent directly. For parents failing to qualify for the tuition grant, the aid program allowed a tax deduction up to a maximum adjusted gross income based on a formula unrelated to the actual tuition paid by parents to the nonpublic schools.

The Court held that the tuition grant failed the “effects” test of the *Lemon* inquiry. Echoing its concerns regarding maintenance grants, the *Nyquist* Court held that it was impossible to guarantee that secular. The legislature’s legitimate interest was to provide a “fertile educational environment for all the schoolchildren of the State.” *Id.* at 236.

97. *See id.* at 250.
98. *See id.*
99. *See id.*
100. 413 U.S. 756 (1973).
102. *See Nyquist,* 413 U.S. at 798.
103. *See id.* at 761.
104. *See id.* at 764.
105. *See id.*
106. *See id.* at 765.
107. *See id.* at 780. In addressing the first prong of the *Lemon* test, the *Nyquist* Court acknowledged the public school’s concern of an overburdened public school system in the event that nonpublic school children abandoned them for the public school system. *See id.* at 773. However, the Court concluded that even though the legislature did not intend for the amendment to promote religion, evaluating the amendment against the other two prongs of the *Lemon* test was essential. *See id.*
use of the tuition grants would be exclusively for "secular, neutral, and nonideological purposes." The Court went on to evaluate whether it was significant that the grants were paid directly to parents rather than to the schools. The Court noted that by reimbursing parents for tuition to nonpublic schools, the state relieved parents financially and thus kept open their option to select religion-oriented schools. Although the purpose of the assistance was to protect the overburdened public schools, the effect was to provide financial support to sectarian schools, and hence was impermissible. For these same reasons, the Nyquist Court also concluded that the tax deductions assisting parents who send their children to sectarian schools were also impermissible.

By contrast, in Mueller, Minnesota taxpayers challenged the constitutionality of a state statute that allowed taxpayers a deduction for their children's tuition, textbook, and transportation expenses in attending elementary or secondary school. Even though tuition realistically could not be separated from use for religious purposes, the Court upheld the aid as constitutional. The Court stressed the neutrality of the tax benefit to all families regardless of type of school. Even though the Court admitted that financial assistance provided to parents had the ultimate economic effect of aid given directly to schools, it found no constitutional violation. The Court clearly considered the form of the aid important in this case by

108. Id. "In short, the Nyquist Court condemned all funds distributed to sectarian schools that could be used without restriction." Peter M. Kimball, Opening the Door to School Choice in Wisconsin: Is Agostini v. Felton the Key?, 81 MARQ. L. REV. 843, 856 (1998).
110. See id.
111. See id. at 793. Whether a parent is offered a direct tuition reimbursement or a tax deduction, both involve a payment by the state for the purpose of religious education. See id. at 765.
112. The amendment provided tax benefits to low-income parents whose children attended nonpublic schools. See id. at 790. In reaching its decision, the Court considered that the tax deductions were unrelated to actual tuition paid by parents. See id. at 766.
113. See id. at 793. "However great our sympathy, for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of 'conscience and discipline' and notwithstanding the 'high social importance' of the State's purposes, neither may justify an eroding of the limitations of the Establishment Clause now firmly implanted." Id.
115. See id. at 404. In looking to the first prong of the Lemon test, the Court found that the statute had a secular legislative purpose by stating that a state's decision to defray the cost to parents of educational expenses was both secular and understandable. See id. at 395. The statute has a secular purpose of "ensuring that the state citizenry is well-educated." Id.
116. See id. at 397.
117. See id. at 399.
emphasizing that the taxpayer deduction was not a direct payment to the schools.\textsuperscript{118} Thus, it ruled that the state's financial assistance met the second prong of the \textit{Lemon} test.

\section*{II. State Aid Via School Vouchers}

\subsection*{A. The Milwaukee Parental Choice Program}

In response to the declining achievement of black students in the Milwaukee Public Schools, the Wisconsin legislature enacted the MPCP in 1989 and amended it in 1993.\textsuperscript{119} The program, as amended, permitted up to 1.5\% of eligible Milwaukee Public School pupils to attend, free of charge, any nonsectarian private school in the City of Milwaukee.\textsuperscript{120} Eligibility requirements limited program participation to pupils from families having an income less than 1.75 times the federal poverty level.\textsuperscript{121}

In 1995, the Wisconsin legislature once again significantly amended the MPCP.\textsuperscript{122} The biggest change removed the limitation

\begin{itemize}
  \item \textsuperscript{118} See \textit{id}.
  \item \textsuperscript{119} See \textit{Jackson v. Benson}, 578 N.W.2d 602, 607 (Wis. 1998), \textit{cert denied}, 119 S.Ct. 466 (1998). Milwaukee Public School statistics showed that only 23\% of 10th grade black children read at or above the national average in the 1988-89 school year; see David Nicholson, \textit{Schools In Transition; Parents and Educators Try Three New Approaches; Neighborhood Control, a University Affiliation and Parental Choice}, WASH. POST, Aug. 5, 1990, at R01. Black students also accounted for 71\% of those suspended although they only made up 50\% of the student population. See \textit{id}.
  \item \textsuperscript{120} See \textit{Jackson}, 578 N.W.2d at 607.
  \item \textsuperscript{121} \textit{See id.} at 608. Under the original MPCP, the private schools received payments directly from the state "equal to the amount of state aid per student" that the Milwaukee Public Schools would have been entitled to under school aid distribution formulas. \textit{Id}. Consequently, the state reduced the amount of aid paid to the Milwaukee Public Schools by the amount paid to private schools under the program. See \textit{id}.
  \item \textsuperscript{122} \textit{See id.} at 608. Significant amendments to the MPCP statute include:

\begin{itemize}
  \item \textsuperscript{(2)(b)} any pupil in grades kindergarten to 12 who resides within the city may attend, at no charge, any private school located in the city if all of the following apply:
    \begin{itemize}
      \item The pupil is a member of a family that has a total family income that does not exceed an amount equal to 1.75 times the poverty level . . .
    \end{itemize}
  
  \item \textsuperscript{(5)(b)} No more than 15\% of the school district's membership may attend private schools under this section.

  \item \textsuperscript{(4)} Upon receipt from the pupil's parent or guardian of proof of the pupil's enrollment in the private school, the state superintendent shall pay to the parent or guardian . . . an equal amount to the total amount to which the school district is entitled under §121.08 divided by the school district membership, or an equal amount to the private school's operating and debt service cost per pupil that is related to educational programming . . .
\end{itemize}
that participating private schools be “nonsectarian.” Additionally, instead of paying the private school directly, the state paid the pupil’s parent or guardian. However, the amendment directed the Department of Public Instruction to send the check directly to the private school, where the parent or guardian then “restrictively endorse[d] the check for the use of the private school.”

The amendment also changed the amount paid to the lesser of the Milwaukee Public School’s per student state aid or the private school’s “operating and debt service cost per pupil.” However, the majority of sectarian private schools’ tuition for non MPCP students is less than both the state-provided aid and the operating and debt service cost per pupil. Consequently, in some cases, the state payment for MPCP students covered the full cost of their education at the private school. Moreover, the MPCP did not restrict the private sectarian schools in their use of these funds. Thus, payment of salaries to employees affiliated with the school’s religious mission, purchase of religious materials, and maintenance of schools used for religious purposes were all allowed under the MPCP.

Finally, the amendment allowed MPCP participants to “opt-out” of participating in religious activities at the sectarian school. With whichever is less. The department shall send the check to the private school. The parent or guardian shall restrictively endorse the check for the use of the private school.

A private school may not require a pupil attending the private school under this section to participate in any religious activity if the pupil’s parent or guardian submits to the pupil’s teacher or the private school’s principal a written request that the pupil be exempt from such activities. WIS. STAT. § 119.23 (1997).

For example, at Blessed Trinity School in Milwaukee, the 1998-99 MPCP state payment covers the full cost of education for the student. See Tamara Henry, The Voucher Divide Education Issue is in States’ Hands, USA TODAY, Jan. 5, 1999, at 1D.

Some participating sectarian private schools’ mission statement included: “We believe our school exists to carry out the Savior’s command to ‘go and make disciples’ (Matthew 28:19).” Jackson, 570 N.W.2d at 413. “Our curriculum offerings place Christ as the focal point for all study.” Id. “The Bible forms the core and center upon which all instruction is based . . . All subjects are taught by a Christian teacher in the light of God’s Word, emphasizing God’s love...
this amendment, the program expanded not only the number of students allowed to participate, but also the number of eligible private schools.

B. Jackson v. Benson

In August 1995, just six days after Governor Tommy Thompson signed the amended MPCP into law, the Milwaukee Teacher’s Education Association filed suit challenging the amended MPCP statute on both state and U.S. constitutional grounds. The Wisconsin trial court invalidated the amended program on state constitutional grounds and, as a result, did not address the alleged violation of the Federal Establishment Clause.

In August 1997, the Wisconsin Court of Appeals upheld the trial court decision, but also failed to address whether the MPCP violated the Establishment Clause. The Wisconsin Supreme Court granted the state’s petition for review. The court addressed both the state and federal constitutional challenges; however, the scope of this Comment addresses only the federal constitutional challenge on First Amendment grounds.

for all men through Jesus.” Id. According to MPCP officials, no student has “opted out” of prayer services. See Joe Loconte, Schools Learn that Vouchers Can Have a Hidden Cost, WALL ST. J., Jan. 26, 1999, at A18. However, future religious school participation in the MPCP and similar programs around the nation may be hindered by an opt-out provision. For example, a U.S. Department of Education Report revealed that of the nation’s urban religious schools, 86% would not admit public school voucher students if they could be exempted from religious activities. See id. Joseph McTighe, a member of the Council of American Private Education, explained that the religious classrooms “marry the sacred and the secular” and these schools do not want to compromise their religious mission. Id.

Prior to the injunction suspending the amended MPCP, 4000 Milwaukee Public School pupils had applied to attend private schools. See Jackson, 570 N.W.2d at 414.

Eighty-nine sectarian schools were added to the original MPCP eligible list of 33 non sectarian schools. See id. In a study of 3000 nonpublic urban schools around the nation, only 13% are non sectarian. See Ed Doerre, Having Cake and Eating It, Too, HUMANIST, Mar. 1, 1999, at 34, 34.


The plaintiffs included Warner Jackson, as citizens and taxpayers of Wisconsin, American Civil Liberties Union Foundation, Americans United for Separation of Church and state, Milwaukee Teachers’ Education Association, and NAACP. See Jackson v. Benson, 578 N.W.2d 602, 605 (Wis. 1998), cert denied, 119 S.Ct. 466 (1998).

132. See id. at 609.
133. See id. at 610.
134. See id.
135. See id. at 610.
136. See id.
137. See id. at 609.
138. See id.
139. See id.
140. See id.
The Wisconsin Supreme Court concluded that the amended MPCP did not violate the Establishment Clause because it "ha[d] a secular purpose, ... [would] not have the primary effect of advancing religion, and ...[would] not lead to excessive entanglement between the State and participating sectarian private schools."\(^{141}\) In reaching its decision, the court used the three-prong Lemon test.\(^{142}\) Under the first prong of Lemon, the court held that the purpose of the amended MPCP was secular in nature because the statute's purpose was to provide low-income families the opportunity of educating their children outside the Milwaukee Public School system.\(^{143}\)

The court began its analysis of the second prong of the Lemon test by synthesizing past Supreme Court decisions into a single underlying theory that "state 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."\(^{144}\) Applying this theory to the MPCP, the court recognized first the neutrality of the program in offering neutral benefits to all children chosen on religion-neutral criteria.\(^{145}\) Second, the court recognized that the aid flowed to sectarian schools only as a result of the private choices of parents.\(^{146}\) Therefore, the court held that the MPCP met the second Lemon test prong.

Finally, the court found that the MPCP satisfied the third prong of the Lemon test since the MPCP did not require the state's involvement in any day-to-day activities.\(^{147}\) Therefore, the program did not create any excessive entanglement between the state and religious school.\(^{148}\)

On August 31, 1998, the Teacher's Union filed a petition to the U.S. Supreme Court challenging the constitutionality of the MPCP.\(^{149}\) On November 9, 1998, the Court in an 8-1\(^{150}\) vote declined to hear the

\(^{141}\) Id. at 611.
\(^{142}\) See id. at 612.
\(^{143}\) See id.
\(^{144}\) Id. at 613.
\(^{145}\) See id. at 617.
\(^{146}\) See id.
\(^{147}\) See id. at 620.
\(^{148}\) See id.
case, thereby refusing to get involved in the "increasingly heated national debate" about voucher programs.\(^{151}\)

III. SEPARATING STATE AID FROM USE FOR RELIGIOUS FUNCTIONS

A. The Supreme Court's Refusal to Hear Jackson Spells Disaster for Public School Education

Many states will view the Court's refusal to hear Jackson as an invitation to ratify a voucher plan similar to the MPCP. For example, the senior advisor to the Mayor of New York City recently stated that the Wisconsin Supreme Court's decision was "very helpful" and that New York's program would be modeled after it.\(^ {152}\) In addition, Clint Bolick of the Washington-based Institute for Justice predicts "more legislative activity on school choice in 1999 than in any previous year."\(^ {153}\) According to Bolick, the governors of Texas, Florida and Pennsylvania are making vouchers a top priority in their state legislatures.\(^ {154}\) In addition, last year Congress approved a voucher plan for the District of Columbia that was vetoed by President Clinton.\(^ {155}\) After the veto, Clinton stated that "[w]e must strengthen our public schools, not abandon them. This bill is fundamentally misguided and a disservice to those children."\(^ {156}\) It is expected to be revived again this year.\(^ {157}\)

Some view the Court's denial of certiorari in Jackson as "simply a statement that they [the justices] are waiting for another day."\(^ {158}\) In fact, the state Supreme Courts of Arizona, Vermont, and Ohio are hearing cases about whether programs similar to the MPCP violate the Establishment Clause.\(^ {159}\) Parties on both sides indicate that they

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151. Greenburg, supra note 3, at 1.
153. See Henry, supra note 128, at 1D.
154. See id.
156. Id.
157. See id.
158. Greenburg, supra note 3, at 1 (quoting Barry Lynn, Executive Director of Americans United for the Separation of Church and state).
159. See id. Ohio passed vouchers that let parents send their children to public or private schools, including religious schools; See Matthew Robinson, National Issue School Choice Goes to Court, INVESTOR'S BUS. DAILY, June 11, 1998, at A1. For towns in Maine and Vermont without public schools, students attend non religious private schools with vouchers. See id. In
will ask the U.S. Supreme Court to review the eventual rulings.\textsuperscript{160} If the Court rules any of these voucher programs unconstitutional, "it could dismantle Milwaukee's program."\textsuperscript{161}

Unless the Supreme Court clarifies its position on school voucher programs and the Establishment Clause, public school education could be in serious trouble. In addition to violating the Establishment Clause and offending earlier Supreme Court jurisprudence, voucher programs divert money from public schools. The money is then pumped into private schools that not only have the ability to turn students away, but also accommodate only a limited number of students.\textsuperscript{162} For example, the MPCP program is capped at fifteen percent of public school enrollment.\textsuperscript{163} Thus, eighty-five percent of Milwaukee public school students are not granted vouchers.\textsuperscript{164} These students are left in a public school with less money and fewer resources\textsuperscript{165} as the Milwaukee Public School system is expected to lose up to twenty-five million dollars with the MPCP in place.\textsuperscript{166} One Milwaukee parent stated that this likely means that classes will continue to have too many children, and books will continue to be old.\textsuperscript{167}

Some proponents of school vouchers argue that allowing a school choice to parents will force the public schools to improve their deteriorated conditions in order to remain competitive in the school

Arizona, the state provides tax credits to people who give money to scholarship funds. See id. Parents may choose any school, including religious schools. See id.

\textsuperscript{160} See id.

\textsuperscript{161} Williams, supra note 149, at 1 (quoting Clint Bolick of the Institute for Justice).

\textsuperscript{162} See Lauren Marks, Vouchers: A Threat to Public Education, COURIER J., (Louisville, Ky.), Feb. 28, 1999, at 1D.

\textsuperscript{163} See id.

\textsuperscript{164} See id.

\textsuperscript{165} "[V]ouchers serve only as a Band-aid to a few individuals, at the expense of the greater good of the community." Id.

\textsuperscript{166} See Henry, supra note 128, at 1D. Ironically, Santa Fe, New Mexico, Archbishop Michael Sheehan seems to have recognized the devastating impact that a full-blown school vouchers system would have on the public schools. See Loie Fecteau, Voucher Plan Loses Ally, ALBUQUERQUE J., Jan. 29, 1999, at A1. He stated that he no longer supported the New Mexico Governor's school voucher plan because he believed it would take money away from the public schools. See id. Sheehan stated that the voucher system could cause "very serious difficulties for [the schools] to continue their educational task. We are partners with the public schools and we're their friends." Id.

\textsuperscript{167} See Henry, supra note 128, at 1D. Moreover, a battle is brewing over opening the MPCP to higher incomes. Even the MPCP's creator, State Representative Annette Polly Williams, is preparing to battle the Wisconsin legislature to block support of extending the program to other income classes. See Tamara Henry, 'Rosa Parks' of Choice Sits Out Voucher Fight, USA TODAY, Jan. 5, 1999, at 6D. She wants to retain the original intent of the program, which was for poor people of every race to have school choice. See id.
choice market.\textsuperscript{158} Although plausible in theory, this argument is flawed since the public and private schools are not equal in terms of public accountability.\textsuperscript{169} The public schools must not only adhere to curriculum standards and anti-discrimination practices, but public schools must also admit every student that wishes to attend.\textsuperscript{170} On the other hand, private schools are less accountable to the community. Thus, they have more power to choose who to educate.\textsuperscript{171} If they choose not to help children with discipline problems, they can turn those students away.\textsuperscript{172} As one opponent to school choice programs stated, "I have an uncomfortable vision of the public schools left only with children with disabilities, children of parents who do not care if, or where, their children attend and children who have been kicked out of all the private schools."\textsuperscript{173} Without Supreme Court guidance, states will continue to implement school voucher programs that violate the Establishment Clause and hasten the demise of the public school system.\textsuperscript{174}

\textbf{B. The MPCP has the Primary Effect of Advancing Religion}

The \textit{Jackson} court attempted to define the second prong of the \textit{Lemon} test by synthesizing various Supreme Court decisions into a

\begin{footnotesize}
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\item 158. See Marks, \textit{supra} note 162, at 1D. In theory, voucher proponents argue that because public schools will compete with the private schools for students, the competition will raise the standards of public schools. \textit{See id}.\textsuperscript{169}

\item 169. \textit{See id}. Sam Carmen, Executive Director of the Milwaukee Teachers Education Association expressed concern about the public accountability of the MPCP. \textit{See Bobby Ross, Jr., Vouchers Await Final Grade Inner-City Choice Important, Supporters Say, DAILY OKLAHOMAN, Jan. 25, 1999, at 01. "Private schools that accept vouchers don't have to give state achievement tests, don't have to follow anti-discrimination laws and don't have to account for their finances." \textit{Id}.\textsuperscript{170}

\item 170. \textit{Id}. On the other hand, most nonpublic schools use admission procedures not permitted in public schools including: written applications (75%), student discipline reports (73%), interviews with student (77%), interviews with parents (87%), standardized achievement tests (58%), ability to perform at grade level (74%). \textit{See Ed Doerr, Having Cake and Eating It, Too, HUMANIST, Mar. 1, 1999, at 34}. In addition, "68 percent of nonpublic schools are either "definitely" (41%) or "probably" (27%) "not interested" in accepting “special needs” children with physical or mental problems or disabilities." \textit{Id}.\textsuperscript{171}

\item 171. \textit{See id}.\textsuperscript{172}

\item 172. \textit{See id}.\textsuperscript{173}

\item 173. Ross, \textit{supra} note 169 at 01 (commenting on a proposed school choice program in Oklahoma).\textsuperscript{174}

\item 174. Ed Doerr, the President of American Humanist Association and Executive Director of Americans for Religious Liberty, summarized the voucher remedy: "It would harm public education, spur social fragmentation, subsidize sectarian indoctrination, dilute public control over public spending, cost a great deal of money that could be better spent building new public schools and rehabilitating old ones, further entangle religion and politics, and create a gigantic administrative nightmare." \textit{Doerr, \textit{supra} note 170, at 34}.\textsuperscript{175}

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neat statement that "state 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."\textsuperscript{175} Without doubt, most Establishment Clause decisions handed down by the Supreme Court square with this neutrality statement quoted in Jackson.\textsuperscript{176}

However, as evidenced in Part I of this Comment, the Supreme Court's determination of an Establishment Clause violation also depends on the type of state-provided aid at issue in a case. Past Supreme Court decisions fall into three distinct categories of aid: (1) aid for specific services and special needs; (2) aid for instructional materials and equipment; and (3) aid for tuition reimbursement or tax deductions.

By analyzing Supreme Court decisions in terms of the type of aid at issue, it becomes apparent that the second prong of the \textit{Lemon} test really requires making a two-step inquiry. When analyzing whether a statute has the primary effect of advancing religion, a proper inquiry asks: (1) whether the statute is wholly neutral in offering educational assistance directly to citizens without reference to religion, and if so, (2) whether the aid "realistically" can be separated from the religious functions of the nonsecular schools.\textsuperscript{177} Some forms of aid are easily separable from religious functions while others are not.\textsuperscript{178}

\textsuperscript{175} Jackson v. Benson, 578 N.W.2d 602, 613 (Wis. 1998), cert. denied, 119 S.Ct. 466 (1998).
\textsuperscript{176} See Wolman v. Walter, 433 U.S. 229, 236 (1977) (holding secular purpose of statute was to create healthy educational environment); see also Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 773 (1973) (finding secular purpose of statute was to not overburden public schools).
\textsuperscript{177} Commenting on the MPCP in Wisconsin, Peter M. Kimball found three factors that in his view stood out in past Establishment Clause Court decisions: (1) the extent to which a statute is neutral in offering aid to all eligible pupils; (2) the aid flowing to religious schools must be the result of "genuinely independent and private choices of aid recipients," and (3) the state's aid cannot provide a "financial incentive for students to undertake sectarian education." Kimball, supra note 108, at 863. Although Kimball's first two factors are important considerations, he misses the most important factor: Is the aid realistically separable from the religious functions of a religious school? In fact, if Kimball had included this factor, his third factor is unnecessary. If the aid is earmarked strictly for the secular portion of a child's education, no financial incentive to attend a religious school exists. Michael J. Stick proposed two questions that a court should consider when determining whether aid to religious schools has the primary effect of advancing religion: (1) Does the aid to sectarian schools exceed the amount expended for the secular courses in the schools? and (2) Does the aid have a long tradition of being provided to religious schools? See Stick supra note 12, at 469-72. Stick's first question may be one way to quantify if aid can be realistically separated from religious teachings. But how easy is it to accurately quantify the amount of money expended on secular courses? In addition, there is no guarantee the money will not be spent on religious teachings unless the limitation is specifically written into the statute.
Although the *Jackson* court was correct in starting its analysis by inquiring into the neutrality of the program, the court incorrectly stopped there. Without looking further to whether it was realistically possible to prevent the tuition from being used for religious purposes, the court reached a wrong decision in this case.

1. Is the statute wholly neutral?

The Wisconsin Supreme Court correctly began its analysis by looking to the neutrality of the MPCP. The MPCP clearly is neutral. All children in the city of Milwaukee whose parents meet the income guidelines are eligible.\(^{179}\) In addition, the MPCP makes aid available to parents without regard to the nature of the school the child attends.\(^{180}\) To support its position, the court cited Supreme Court decisions involving aid for services by sign language interpreters,\(^{181}\) services by remedial education instructors,\(^{182}\) the cost of transportation,\(^{183}\) assistance to a blind student,\(^{184}\) and textbook loans.\(^{185}\) In each case, the aid was offered neutrally to all children without regard to the type of school the child attended. Thus, the Wisconsin Supreme Court was satisfied that the neutral program did not violate the Establishment Clause. However, the Wisconsin Supreme Court prematurely ended its analysis and failed to analyze the next critical question: Can the aid realistically be separated from the school's religious functions?

2. Can the aid be realistically separated from the religious functions?

The Wisconsin Supreme Court should have addressed whether the aid provided by the MPCP realistically would be used for only the school’s secular functions. By classifying the type of aid into three categories: (1) special services; (2) instructional materials and equipment and; (3) tuition reimbursements or tax deductions, it becomes clear what type of aid realistically can be separated from a contents of tests and thus prevents any religious teachings as part of test); Meek v. Pittenger, 421 U.S. 349, 362 (1975) (finding textbooks could only be used for purely secular purposes).  
179. WIS. STAT. §119.23, at (2)(b).  
180. See id.  
a. State aid for specific services and special needs

Unlike tuition aid offered in the MPCP, aid for specific secular services and special needs generally can be realistically separated from a school's religious functions. Consequently, this type of aid does not offend the Establishment Clause. These services include testing, bus transportation, and special education. For example, in Regan, state reimbursements for testing services were clearly identifiable, and hence separable. The nonpublic schools controlled neither the test's content nor its results. The Regan Court stated that its holding would likely have been different if there were "no effective means for insuring that the cash disbursements [for testing services] would cover only secular services." Similarly, in Everson bus transportation was easy to separate from the religious purposes of a school.

In the special education services arena, aid to a blind student in Winters resulted in only a "minuscule amount" of aid flowing to the religious part of the student's education. A sign language interpreter in Zobrest did no more than sign what was being taught. The interpreter advanced no religious ideals. The Court in Agostini presumed that the remedial education teacher, guidance and job counselors, all remained neutral in their teachings and did not impart religion in the religious schools. Once again, the aid was fairly traceable to only the secular educational functions of the religious schools.

On the other hand, aid for maintenance and repair of religious schools in Nyquist was not easy to separate from the secular functions of the school. It was impractical to expect that the aid could be used to maintain only secular parts of the building. Thus, the Court ruled that kind of aid a violation of the Establishment Clause.

187. See id. at 656.
188. Id. at 659.
189. See Everson, 330 U.S. at 17.
190. Witters, 474 U.S. at 486.
193. See Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 774 (1973) (stating that "[n]o attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible").
194. See id.
b. State aid for instructional materials and equipment

Unlike tuition aid offered in the MPCP, many forms of aid for instructional materials can be realistically separated from a school’s religious functions, and thus does not offend the Establishment Clause. For example, the Court in *Allen* reasoned that only secular textbooks approved by public school authorities were allowed as a part of the loan program.\(^{195}\) Specific textbooks for teaching math, reading, and spelling could realistically be used for teaching only the secular portion of a religious school’s program.\(^{196}\) In contrast, the Court in *Meek* and *Wolman* decided that separating the secular uses from religious uses of loaned equipment and other instructional materials, like maps and film projectors, was unrealistic.\(^{197}\)

c. State aid for tuition reimbursements or tax deductions

The *Jackson* case falls within the category of state aid for tuition reimbursements. *Nyquist* is the only United States Supreme Court case directly addressing aid through tuition reimbursements to parents of children in nonpublic schools. Thus, the *Jackson* court should have followed the *Nyquist* holding.

Although the *Mueller* Court upheld tuition reimbursement via tax deductions to parents, the facts are distinguishable from *Nyquist* in several ways.\(^{198}\) First, the *Mueller* Court upheld state income tax deductions to parents for a combination of tuition, transportation and secular textbook expenses.\(^{199}\) The *Mueller* holding may have been different if the statute had only allowed a tax deduction for tuition. But since the Court held in *Meek* and *Everson* that textbooks and transportation were permissible, the tuition portion may have slipped through with the other deductions. The Court’s attempt to reconcile

195. See *Meek* v. Pittenger, 421 U.S. 349, 362 (1975) (stating that the statute did not suggest that loaned textbooks would be used for anything other than purely secular purposes); See Board of Educ. v. Allen, 392 U.S. 236, 245 (1968) (holding that loaned textbooks are not to be used to teach religion).

196. See *Allen*, 392 U.S. at 248.

197. See *Meek*, 421 U.S. at 365 (stating that material and equipment used for nonideological purposes is simply ignoring reality); see also *Wolman* v. Walter, 433 U.S. 229, 250 (1977) (stating that separating the secular education part of using equipment from the sectarian is impossible). It seems unrealistic to separate lab equipment or a film strip projector consistently apart from the religious teachings of the school. For example, would the projector be labeled “for secular films only?”


199. See id.
its holding in *Nyquist* simply stated that the *Mueller* statute "bears less resemblance to the arrangement struck down in *Nyquist* than it does to prior assistance programs upheld in our prior decisions." Moreover, the *Mueller* Court chose not to question *Nyquist* as good law.

Second, Professor Edward A. Zelinsky proposed that *Mueller* and *Nyquist* are distinguishable because one form of aid is a tax deduction as opposed to a tuition reimbursement. Zelinsky reasons that *Mueller*’s tax deduction is “constitutional even if it benefits parochial school parents as long as it retains important tax-type characteristics” like being part of a standing tax code that allows deductions for a variety of expenditures. In contrast, *Nyquist*’s tuition reimbursement to parents crosses the line into “forbidden territory” where the aid resembles direct spending by the state to benefit religious schools.

Finally, the *Mueller* decision may simply be incorrect based on the Court’s earlier holding in *Nyquist*. States that cannot directly reimburse parents should not be allowed to indirectly reimburse parents through a tax benefit. *Nyquist* remains good law whether the *Mueller* decision is incorrect or distinguishable from *Nyquist*. Since the MPCP most resembles *Nyquist*’s tuition reimbursement program, the *Jackson* court should have followed that decision.

Based on the *Nyquist* holding, it seems clear that the type of aid provided by the MPCP violates the Establishment Clause. Unlike textbooks, sign language interpreters, and bus transportation, tuition to nonpublic schools realistically is not separable from a religious school’s nonsecular functions. The MPCP does not limit the purposes for which sectarian schools may use tuition funds. Therefore the funds could be used for employee salaries, purchase of religious

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201. See *Kimball*, *supra* note 108, at 859.
202. See *Zelinsky*, *supra* note 198, at 431.
203. *Id.*
204. *Id.* In addition, the court in *Mueller* only addressed the part of *Nyquist*’s ruling related to the tax deduction, not the tuition reimbursement in *Nyquist* made directly to parents. See *Mueller*, 463 U.S. at 396. *Mueller* characterized the tax deduction in *Nyquist* as a sham given that it was based on a formula rather than directly related to the actual tuition paid by parents. See *id.* On the other hand, the tax deduction in *Mueller* was directly related to actual educational expenses incurred by parents. See *id.*
materials, or maintenance of its building.\textsuperscript{207} Such types of aid have been struck down in previous U.S. Supreme Court decisions.

In \textit{Nyquist}, the Court rejected the tuition reimbursement plan as unconstitutional mainly because it was impossible to guarantee that the funds would be used exclusively for "secular, neutral, and nonideological purposes."\textsuperscript{208} Similarly, with the MPCP it is impossible to guarantee that funds are used only for secular purposes.

In reaching its decision, the Wisconsin Supreme Court emphasized the neutrality of the statute through parental choice and the payment of tuition to parents rather than directly to schools.\textsuperscript{209} Although a statute's parental choice is relevant to establishing a statute's neutrality, the court must still inquire about the \textit{type} of aid the statute is providing. The MPCP dollars ultimately fall into the coffers of the religious schools whether the check is written directly to the school or made out to the parent and endorsed over to the school. The state account is debited by the cashing of the check by the religious school.

It is both impractical and unrealistic to separate out that portion of the tuition, which funds only the secular activities of the school. It would be different if the state check was to reimburse the parent or school for the transportation expenses of the children or for a sign language interpreter. Both of these are permissible uses under U.S. Supreme Court jurisprudence because the services can be attributed to secular functions of a religious school. Tuition in general realistically cannot be applied solely to a religious school's secular functions.

The word "realistically" could also be replaced with the word "reasonably." State-provided aid that a reasonable person considers separable from religious functions of a school is certainly permissible. A reasonable person likely considers secular textbooks and special education services fairly easy to separate from religious teachings. A math or reading book borrowed from the public schools is a likely resource used to teach secular subjects. A special education teacher who is helping a child with speech is also a likely resource that is neutral toward religion.

On the other hand, a reasonable person would not likely

\textsuperscript{207} See id.

\textsuperscript{208} \textit{Nyquist}, 413 U.S. at 780.

consider tuition to a religious school easy to separate from the religious functions. This is especially true if no limitations are written into the statute as to how the tuition may be used by the school. Lacking restraints, tuition could be applied to updating a religious school's facilities, paying a religious teacher's salary, or funding the purchase of religious materials. Attempting to track and account for general tuition broken by secular and nonsecular expenditures is not only impractical, but also inefficient. No reasonable person would expect these procedures to be accurate or even possible for every child whose tuition is paid by the state.

Some scholars suggest that "over the last fifteen years, the Supreme Court has adopted a more accommodationist approach" to cases involving state aid to religious schools. And indeed, recent Supreme Court decisions favored some types of state aid to religious schools. However, like the Jackson court, the scholars failed to adequately consider the type of aid allowed by the Court in each case including assistance to a blind person, an interpreter for a deaf person, and public school teachers providing remedial education. No recent case before the Court resembled tuition reimbursement. The Court's decision twenty-six years ago in Nyquist is the only case on point with the MPCP. Nyquist is still good law and the Jackson

210. Joseph P. Viteritti, Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law, 21 HARV. J.L. & PUB. POL'Y 657, 718 (1998); Kimball, supra note 108, at 871 (stating that based on recent precedent established by Agostini, "it is apparent that the Choice Program has as strong a case as ever under the Supreme Court's Establishment Clause jurisprudence."); see also Margaret A. Nero, The Cleveland Scholarship and Tutoring Program: Why Voucher Programs Do Not Violate the Establishment Clause, 58 OHIO ST. L.J. 1103, 1134 (1997) (stating that the Court's "non-alarmist" position on state-aid to religious schools in the recent Agostini ruling signaled that schools vouchers are constitutional); Doug Roberson, The Supreme Court's Shifting Tolerance for Public Aid to Parochial Schools and the Implications for Educational Choice: Agostini v. Felton, 117 S. Ct. 1997, 21 HARV. J.L. & PUB. POL'Y 861, 864 (1997) (stating that in recent years the Supreme Court's Establishment Clause jurisprudence reveals a willingness to uphold public aid to parochial schools); Ronald D. Rotunda, The Constitutional Future of the Bill of Rights: A Closer Look at Commercial Speech and State Aid to Religiously Affiliated Schools, 65 N.C. L. REV. 917, 931 (1987) (stating that "it is not difficult to find Supreme Court case law which concludes that no aid (to parochial schools) is allowed. Yet if we look at the recent case law more carefully, it seems that the opposite conclusion is equally tenable.")


212. See Witters, 474 U.S. at 483.
214. See Agostini, 521 U.S. at 204.
CONCLUSION

Unless the Supreme Court clearly states whether and how school voucher programs are limited by the Establishment Clause, states will continue to flounder, with the ultimate victim being the nation’s public school systems. Over the last forty years, the Supreme Court has addressed many Establishment Clause cases involving a variety of state aid to religious schools including bus transportation, special education teachers, textbooks, equipment, testing services, building maintenance, tuition reimbursement, and tax deductions to parents.

Past Supreme Court decisions point to two inquiries that a court must address when deciding Establishment Clause violations: (1) whether the statute is wholly neutral in offering educational assistance directly to citizens without reference to religion, and if so (2) whether the aid “realistically” can be separated from the nonsecular functions of the religious school. Generally, aid that realistically can be separated from the religious purposes of the school does not violate the Establishment Clause. However, some forms of aid realistically cannot be separated.

Jackson correctly held that the MPCP is offered neutrally to all children without regard to the type of school attended. However, Jackson failed to address the second inquiry of whether tuition could “realistically” be separated from the nonsecular functions of the religious school. If the Jackson court had inquired about the ease of applying tuition to only the secular functions of the religious school, its holding likely would and should have been different. With the preservation of the nation’s public schools system at stake, the Supreme Court needs to “rise above the tremendous mess it has created and meaningfully interpret and apply the Establishment Clause.”

216. In support of this, the Harvard Law Review stated that, “Since Nyquist, the Court has tended to uphold neutral and indirect educational aid programs against Establishment Clause challenges. But the Court has never upheld a program when it has been clearly foreseeable that it would substantially aid religious schools. Nyquist remains good law, and the Jackson court should have applied it.” Establishment Clause—School Vouchers—Wisconsin Supreme Court Upholds Milwaukee Parental Choice Program, 112 HARV. L. REV. 737, 740-41 (1999).

217. Stick, supra note 12, at 473.