THE MILWAUKEE PARENTAL CHOICE PROGRAM: THE FIRST VOUCHER SYSTEM TO INCLUDE RELIGIOUS SCHOOLS

Today, many are decrying the educational system in this country.[1] Test scores are at an all time low,[2] and parents face a very real fear their children are not being taught the basics of education, such as reading, writing, and arithmetic.[3] Riddled with the problems associated with most inner-city public schools around this nation, the Milwaukee Public Schools serve a largely impoverished minority population of students who consistently perform well below their counterparts in other areas of Wisconsin.[4]

As a result, Wisconsin Governor Tommy G. Thompson and Wisconsin Representative Annette "Polly" Williams introduced the "Milwaukee Parental Choice Program," the first parental choice program in the nation to allow parents to use private schools as an alternative to the pubic school system.[5] Despite receiving mixed reviews, the plan was expanded to include parochial schools in July of 1995. The current Choice Program, by including religious schools, raises significant First Amendment issues and has been the subject of much controversy, including a lawsuit pending in a Wisconsin state court.[6]

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1. Mark J. Beutler, *Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications*, 2 GEO. MASON INDEP. L. REV. 7 (1993) (citing Troy Segal, *Saving Our Schools*, BUS. WK., Sept. 14, 1992, at 70).

2. RON TABER, THE CASE FOR SCHOOL CHOICE xiii (1995) (quoting JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS iv (1990)); *see also* WILLIAM J. BENNETT, THE DEVALUING OF AMERICA (1992).

3. Beutler, *supra* note 1, at 7 (quoting Alec M. Gallup & Stanley M. Elan, *Twentieth Annual Gallup Survey on Public Attitudes Toward the Public Schools*, PHI DELTA KAPPAN, September 1988, at 3).

4. Davis v. Grover, 480 N.W.2d 460, 470 (Wis. 1992) (citing Milwaukee Public Schools, *Indicators of Educational Effectiveness* (1990)).

5. *Id.* at 463 n.2.

6. Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996). Described as the "Armageddon for School Choice," many believe the question is not if, but when, the Milwaukee Parental Choice Program will reach the U.S. Supreme Court. Tony Mauro, THE NATION, August 25, 1995 (quoting Clint Bolick).

Since Milwaukee began its amended Choice Program, numerous states have enacted or are presently considering voucher systems.[7] Legislators have debated the adoption of a voucher system for low income students in the District of Columbia,[8] and Republican presidential candidate, Robert Dole, described the quest for school vouchers as the "civil rights movement of the 1990s."[9] Additionally, Ohio is currently involved in litigation concerning its voucher system

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7. The following states have enacted or are considering substantial educational reform measures: Pennsylvania (considering a five year plan to provide vouchers for low income families at public, private, and parochial schools; *see* Megan O'Matz, *Test Scores Don't Vouch for School Choice But Study of Wisconsin Program Shows Parent Satisfaction and Attendance Are Up*, ALLENTOWN MORNING CALL, Nov. 19, 1995, at A4); New York (resumed discussions on whether the state should allow parents to use public money in sending their children to private schools; *see* Billy House, *Regents to Consider School Vouchers*, GANNET NEWS SERVICE, Oct. 25, 1995); New Jersey (considering a proposal providing vouchers statewide for use at all private schools, regardless of church affiliation; *see* Kathy Barrett Carter, *State Panel Backs School Voucher Plan*, STAR-LEDGER, January 6, 1996); Connecticut (a state commission has been appointed to find a constitutional plan to give parents more freedom in choosing schools; *see* Robert A. Frahm, *School Choice: Is it Legal? Court Fight Likely for State's Plan*, HARTFORD COURANT, Oct. 31, 1995, at A3); California (Governor Pete Wilson introduced a proposal providing 250,000 students with scholarships to attend public or private schools; *see* Jean E. Lee, *Wilson Proposes Voucher Program But Can't Name Schools Affected*, ASSOCIATED PRESS POLITICAL SERVICE, Jan. 9, 1996); Washington (considering two proposals one including nonsectarian schools and the other charter schools; *see* Ross Anderson, *WEA Employs Velvet Glove to Scuttle Charter Schools*, SEATTLE TIMES, Jan. 24, 1996, at B4); and Florida (The Florida Education Commissioner stated that he would propose a pilot voucher program; *see* Ellen Debenport, *A Test for School Vouchers*, ST. PETERSBURG TIMES, Oct. 13, 1995, at 1A). Puerto Rico launched a voucher program but lost it after the Puerto Rico Supreme Court ruled that the Commonwealth's constitution bars sending public money to private institutions, Asociacion v. Torres, No. AC-94-371, 1994 WL 780744 (P.R. Nov. 30, 1994). Also, Republican presidential candidate Bob Dole supports a federal voucher system (*See* Jean E. Lee, *Wilson Proposes Voucher Program But Can't Name Schools Affected*, ASSOCIATED PRESS POLITICAL SERVICE, January 9, 1996). Across the country, about one-third of the states have adopted some form of public school choice policy. Robert A. Frahm, *School Choice: Is it Legal? Court Fight Likely for State's Plan*, HARTFORD COURANT, Oct. 31, 1995, at A3.

8. David A. Vise & DeNeen L. Brown, *House Passes Charter Schools, Vouchers, Other Changes for D.C.*, WASH. POST, Feb. 1, 1996, at B1.

9. Edwin Chen, *Dole Plan Aims to Help Families in School Choice*, L.A. TIMES, July 20, 1996, at A5. Dole had his own school choice proposal that would have allowed states to determine the eligibility criteria and to contribute more funds to the voucher system if they wished. *Id.*

to be implemented in the fall of 1996.[10] When the lawsuit was filed in Ohio, over 6,800 families had sought vouchers. The demand was so overwhelming that the state had to establish a lottery system, and on August 12, 1996, the Ohio Court of Appeals rejected an injunction sought by teachers' unions to halt the voucher plan after the Franklin County Common Pleas Court upheld Cleveland's choice program.[11] Undoubtedly, if the Milwaukee Program does not reach the United States Supreme Court on First Amendment grounds, a similar voucher system will.

Using the Milwaukee Parental Choice Program as a model, this Note addresses the constitutionality of the inclusion of sectarian schools in a state-subsidized voucher system. Part I discusses the educational crisis in Milwaukee, and Parts II and III describe the statutory requirements of the Choice Program. Parts IV and V analyze the Choice Program under the First Amendment, including the Establishment, Free Exercise, and Free Speech Clauses. The conclusion of this Note is that the inclusion of religious schools into Milwaukee's Program is not a violation of the Establishment Clause and may be required to avoid Free Exercise and Free Speech concerns.

I. THE CRISIS IN MILWAUKEE PUBLIC SCHOOLS

> Literally thousands of school children in the Milwaukee public school system have been doomed because of those in government who insist upon maintaining the *status quo*. The sacred cow of *status quo* has led to the terrible problems that manifest themselves [in the Milwaukee schools]. . . . The Wisconsin legislature, attuned and attentive to the appalling and seemingly insurmountable problems confronting

10. The Ohio Legislature approved a $5.25 million dollar government funded voucher program. It will be available to low income Cleveland children in kindergarten through third grade. Recipients may choose between private or parochial schools. Forty-two of the forty-three Cleveland private schools are religious institutions. *A Challenge to Choice*, CINCINNATI POST, Jan. 19, 1996, at 14A.

11. *Id.*; Carol Innerst, *Ohio Court Allows State Vouchers for Religious Schools: Second Win for Educational Choice*, WASH. TIMES, August 13, 1996, at A3. The constitutionality of the state law remains before the state Court of Appeals.

> socioeconomically deprived children, has attempted to throw a life preserver to those Milwaukee children caught in the cruel riptide of a school system floundering upon the shoals of poverty, *status quo* thinking, and despair.[12]

In January 1976, Federal Judge John Reynolds ruled that the Milwaukee Public Schools [hereinafter "MPS"] were unlawfully segregated.[13] MPS responded with a program to integrate the public schools and improve educational achievement.[14] Despite good intentions, real spending per pupil increased by eighty-two percent from 1973 to 1993, while the graduation rate dropped from seventy-nine percent of each freshman class to forty-four percent.[15]

Impelled by rising costs and falling test scores, then Wisconsin Governor Anthony Earl and Superintendent of Public Instruction Herbert Grover named an independent commission to assess educational achievement in 1984.[16] The resulting 16-month study remains the most comprehensive review of public education ever completed in the region.[17]

The Commission found an alarming disparity between low-income students and students from middle to upper-income families. John Witte, the Executive Director of the Study Commission, cited "two very different worlds of educational achievement; worlds separated by but a few miles, yet by much greater distances in terms of acquired

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12. Davis v. Grover, 480 N.W.2d 460, 477 (Wis. 1992) (Ceci, J., concurring).

13. HOWARD L. FULLER & SAMMIS B. WHITE, WIS. POL'Y RES. INST., EXPANDED SCHOOL CHOICE IN MILWAUKEE: A PROFILE OF ELIGIBLE STUDENTS AND SCHOOLS, Vol 8, No. 5, at 3 (July 1995) [hereinafter EXPANDED SCHOOL CHOICE]; *See also* Amos v. Board of Sch. Directors of Milwaukee, 408 F. Supp. 765 (E.D. Wis. 1976).

14. EXPANDED SCHOOL CHOICE, *supra* note 13, at 3.

15. Brief for the State of Wisconsin at 9, Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996).

16. The independent commission was named "The Study Commission on the Quality of Education in the Metropolitan Milwaukee Public Schools." EXPANDED SCHOOL CHOICE, *supra* note 13, at 39 n.4.

17. The Study Commission issued its final report entitled "Better Public Schools" in October 1985. EXPANDED SCHOOL CHOICE, *supra* note 12, at 39 n.5.

skills, institutional success, and future prospects."[18] In 1986, Witte summarized the research at a national education conference:

> The percentages of courses in the Milwaukee schools that ended in failures are staggering . . . . [F]ailing courses must be considered as a threshold that indicates no effective learning. . . . At the high school level the combined evidence of test scores, dropout rates, and failures indicates that a number of the MPS schools are very ineffective and essentially bankrupt institutions.[19]

Understandably, these findings marked a turning point in the public's perception of educational issues in Milwaukee. For years, MPS had informed the public that a majority of students were performing near the national average. What MPS neglected to disclose was that this widely reported conclusion used a since-discarded definition of "average" that included students with scores as low as the twenty-third percentile nationwide.[20]

As a result of the tremendous problems in MPS, many programs were pursued in the name of "educational reform."[21] However, a 1990 research project cited by the Wisconsin Supreme Court revealed even more disturbing results:

> Students of MPS, in general, score below the national average on the basic skills tests, and minority students score dramatically below the average. The grade point average on a scale of 4.0 for MPS students in general is 1.60, whereas

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18. GEORGE A. MITCHELL, WIS. POL'Y RES. INST., THE MILWAUKEE PARENTAL CHOICE PROGRAM, Vol. 5, No. 5 (Nov. 1992) [hereinafter THE MILWAUKEE PARENTAL CHOICE PROGRAM] (quoting THE STUDY COMMISSION ON THE QUALITY OF EDUCATION IN THE METROPOLITAN MILWAUKEE PUBLIC SCHOOLS, STAFF REPORT # 4, METROPOLITAN MILWAUKEE DISTRICT PERFORMANCE ASSESSMENT REPORT 22 (August 1, 1985)).

19. THE MILWAUKEE PARENTAL CHOICE PROGRAM, *supra* note 18, at 25 (quoting John Witte, *Race and Metropolitan Educational Inequalities in Milwaukee; Evidence and Implications*, Presented before the National Conference on School Desegregation Research, University of Chicago at 22-26 (September 5, 1986).

20. EXPANDED SCHOOL CHOICE, *supra* note 12, at 3.

21. *Id.*

> the GPA for African-American students in the MPS is just 1.31. The educational problems that the nation is experiencing are also evident in the Milwaukee Public Schools, where 55-60 percent of MPS students do not graduate from high school or do not graduate in a six-year period of time. . . . Th[e] completion rate is down from 57 percent in 1984. Of those who do graduate from high school, 36 percent graduate with a "D" average.[22]

Clearly, "educational reform" in Milwaukee failed. In fact, a poll conducted by MPS revealed that forty-five percent of Milwaukee residents felt that MPS had "gotten worse" from five years previously. Only thirteen percent believed it had improved.[23]

Meanwhile, in the late 1980s, Wisconsin Representative, Annette "Polly" Williams -- a fiery, fifty-three-year-old African-American and former welfare recipient -- caught a vision for educational reform in Milwaukee. As a Democratic state representative and the Wisconsin chairman for the Rev. Jesse Jackson's previous two presidential campaigns, Mrs. Williams suddenly found herself aligned with conservatives around the country when she called for choice in Milwaukee's public schools. Dubbed the "Rosa Parks of School Choice,"[24] Mrs. Williams firmly believed that school choice was a tool of empowerment for Milwaukee's poor, a way for their children to escape the inner-city public schools.[25] She explained: "Mine is the empowerment of low-income families and specifically black empowerment. I'm for the empowerment of the people on the bottom. We have to be in control of what happens to us."[26]

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22. *Id. See also* Gretchen Schuldt, *Many Black Freshmen at Less than 'D': Others at MPS Fare Better*, MILWAUKEE SENTINEL, Apr. 23, 1991.

23. Brief for the State of Wisconsin, at 9, Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996).

24. Carol Innerst, *Idiosyncrasies of a School Choice Icon*, WASH. TIMES, Sept. 24, 1995, at B3.

25. "Choice is the best thing that has come around for my people since I've been born. It allows poor people to have those choices that all those other people who are fearing it already have." Donald Lambro, *Liberal Embraces Vouchers*, WASH. TIMES, April 2, 1990, at A8 (quoting Wisconsin Representative Polly Williams).

26. *Id.*

Claiming that the Milwaukee Public Schools failed their purpose, Mrs. Williams and Governor Thompson persuaded Wisconsin to reform Milwaukee's schools through a school voucher system. In April 1990, the Wisconsin Legislature enacted the Milwaukee Parental Choice Program [hereinafter "MPCP"]. With the adoption of the MPCP, Wisconsin became the first state in the nation to implement a parental choice program involving the use of private schools as an alternative to public schools.[27] In recounting the victory, Mrs. Williams, the chief sponsor of the legislation, said, "We finally won when we got 200 parents to testify for three hours in favor of my bill. In good conscience, my colleagues could not vote against those parents."[28]

II. THE ORIGINAL MILWAUKEE PARENTAL CHOICE PROGRAM: A WISCONSIN EXPERIMENT

The Milwaukee Parental Choice Program was enacted as part of a larger budget bill on April 27, 1990.[29] Beginning in the 1990-91 school year, qualifying Milwaukee residents could choose among three of four educational options for their children: neighborhood public schools, public magnet schools, and nonsectarian private schools. Only private sectarian schools were excluded.[30]

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27. *Davis*, 480 N.W.2d at 462 n.2.

28. John H. Fund, *Champion of Choice: Shaking Up Milwaukee's Schools*, REASON, Oct. 1990, at 39.

29. WIS. STAT. ANN. § 119.23 (West Supp. 1990), *amended by* § 119.23 (West Supp. 1995). As approved by the Legislature, the Program was both limited and experimental. It was to terminate in five years. Governor Tommy Thompson vetoed the five-year limitation, thus making the program permanent. The Act also limited the Program to cities of the first class. Milwaukee is the only Wisconsin city in this class, despite the fact that Madison is also eligible. To qualify as a first class city, a city must have a population of 150,000 or more and have proclaimed itself as among the class. *Davis*, 480 N.W.2d at 464.

30. WIS. STAT. ANN. § 119.23(2)(a) (West Supp. 1990), *amended by* § 119.23(2)(a) (West Supp. 1995).

A. Statutory Requirements of the Original Milwaukee Parental Choice Program

The primary purpose of the MPCP was to improve the quality of education for low-income children through parental choice.[31] To achieve this goal, the legislation limited eligibility to students whose family income did not exceed 1.75 times the federal poverty level.[32] Approximately 65,000 to 70,000 Milwaukee families met this standard.[33] Initial enrollment in the Program was only 341 students at seven private schools. By the 1992-93 school year, enrollment was up to 617 students in eleven participating schools.[34]

A private school had to meet a number of requirements to qualify and remain in the Program. A participating school was prohibited from discriminating on the basis of race, color, or national origin and was required to accept applicants on a random basis.[35] Schools were also obligated to supply certain information to the Superintendent of Public Instruction.[36] Lastly, no additional tuition besides the voucher could be charged to participating students.[37]

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31. *Davis*, 480 N.W.2d at 462.

32. § 119.23(2)(a)(1) (West Supp. 1990), *amended by* § 119.23(2)(a) (West Supp. 1995). For example, a family of four qualified if its monthly income was at or below $1,853. Wisconsin Department of Public Instruction, *A Background Paper on Private School Choice*, Aug. 1990.

33. EXPANDED SCHOOL CHOICE, *supra* note 13, at 25. Qualifying students were required to submit an application for inclusion into the Choice Program. § 119.23(3) (West Supp. 1990), *amended* by § 119.23(3)(a) (West Supp. 1995). The statute also excluded students who were enrolled in a private school the previous year unless it was under the MPCP. § 119.23(2)(a)(2) (West Supp. 1990), *amended by* § 119.23(2)(a) (West Supp. 1995).

34. THE MILWAUKEE PARENTAL CHOICE PROGRAM, *supra* note 18, at 7.

35. WIS. STAT. ANN. § 119.23(3) (West Supp. 1990), *amended by* § 119.23(2)(a) (West Supp. 1995).

36. *Id.* § 119.23(5)(d) (West Supp. 1990) *repealed by* WIS. STAT. ANN. § 119.23 (West Supp. 1995). The superintendent was required to submit a report to the legislature and appropriate committees comparing the academic achievement, daily attendance record, percentage of dropouts, percentage of pupils suspended and expelled, and parental involvement activities of pupils attending the participating private schools. *Id.*

37. § 119.23(2)(a) (West Supp. 1990), *amended by* § 119.23(5)(d) (West Supp. 1995). Other requirements included the school meeting all health and safety laws applicable and notification to the superintendent of intent to participate. Initially, no more than one percent of the school district's membership and only fifty-one percent of the

The Superintendent of Public Instruction administered the Program. Upon receiving proof of a student's enrollment, he was required to pay the private school with funds that would otherwise go to the public school district.[38] The statute also obligated the superintendent to ensure that Milwaukee citizens were informed annually of participating schools[39] so that students could meet application deadlines.[40]

The Milwaukee Parental Choice Program was an attempt to improve Wisconsin's quality of education. Many hoped the reform would not only expand the educational choices available for low-income students, but that the alternatives would engender academic success as well. Although few would dispute that the Milwaukee Public Schools were greatly in need of reform, some believed parental choice was the wrong way to accomplish such a worthy goal.[41]

B. Challenged At Its Inception: Davis v. Grover

No sooner had the Program been enacted, then the Department of Public Instruction was criticized by private schools and parents for its

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private school's enrollment could consist of MPCP pupils. In 1993, the Wisconsin Legislature amended the statute to permit 1.5 percent of the district's membership and up to sixty-five percent of a participating school's enrollment to participate in the Program. Each school also had to have met one of the following standards:

1. At least 70 percent of the pupils in the Program had to advance one grade level each year;
2. The private school's average attendance rate for the pupils in the Program had to be at least 90 percent;
3. At least 80 percent of the pupils in the Program had to demonstrate significant academic progress; or
4. At least 70 percent of the families of pupils in the Program had to meet the parent involvement requirement. *Id.* § 119.23(2)(a)(5), *amended by* § 119.23(2)(a) (West Supp. 1995); § 119.23(2)(a)(3), *amended by* § 119.23(2)(a) (West Supp. 1995); § 119.23(2)(b)(1), *amended by* § 119.23(2)(b) (West Supp. 1995); § 119.23(2)(b)(2) (West Supp. 1990), *amended by* § 119.23(2)(b) (West Supp. 1995).

38. § 119.23 (5)(a)(West Supp. 1990), *amended by* § 119.23 (West Supp. 1995).

39. § 119.23 (5)(c)(West Supp. 1990), *amended by* § 119.23 (West Supp. 1995).

40. The school board provided transportation to each private school under WIS. STAT. ANN. § 119.23 (6)(West Supp. 1990), *amended by* § 119.23 (West Supp. 1995).

41. This is demonstrated by the legal challenge asserted in *Davis*, 480 N.W.2d 460.

implementation of the plan. The problem arose when Herbert Grover, the Superintendent of Public Instruction, began to vehemently oppose the Choice Program.[42] Despite a statutory requirement to ensure that both pupils and parents were informed of the Program, Grover waited until two weeks before the enrollment deadline to issue press releases announcing both the deadline for schools to apply and students to participate.[43]

To further subvert the MPCP, the Superintendent conditioned eligibility on the completion of a "Notice of the School's Intent to Participate" form. By submitting the form, private schools agreed not only to comply with the requirements established by the Wisconsin Legislature, but also to a variety of statutory and regulatory provisions that Grover imposed on his own initiative.[44] Included in this massive blizzard of regulations was the entire array of federal handicap regulations – any one of which would have bankrupted most private schools. While slapping the regulations on participating schools even though not required by federal or state law to do so, Grover neglected to extend additional funding to enable schools to meet the extensive requirements.[45]

Although unable to meet Grover's demands, six private schools submitted a notice of intent to participate in the MPCP. Grover declared that each school was ineligible.[46] This refusal resulted in a

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42. Commenting on the inception of the MPCP, Grover stated: "It's a disgrace . . . . Has the citizenry in Wisconsin lost its common sense?" Steven Walters & Gloria Howe, *Grover Raps Bush for Bucking Choice*, MILWAUKEE SENTINEL, Aug. 8, 1990. In responding to the "Wisconsin Policy Research Institute Report" suggestion that Grover was trying to sabotage the Program, the Deputy State Superintendent Lyle Martens responded: "We have been up front in our opposition to the program, which takes tax dollars from the Milwaukee Public Schools to give to private schools, but we have administered the program fairly. . . ." Carol Innerst, *Teachers, Bosses Undercut Choice*, WASH. TIMES, Nov. 30, 1992, at A1.

43. THE MILWAUKEE PARENTAL CHOICE PROGRAM, *supra*, note 18, at 6; *see also* § 119.23(5)(b) (West Supp. 1990), *amended by* § 119.23 (West Supp. 1995).

44. *Davis*, 480 N.W.2d at 465 n.6 (1992).

45. Clint Bolick, The Wisconsin Supreme Court's Decision on Education Choice: A First-of-its-Kind Victory for Children and Families, Lecture (March 25, 1992), in HERITAGE FOUNDATION REPORTS, No. 390, at 6 [hereinafter Bolick]. *See also Davis*, 480 N.W.2d at 465.

46. Earlier legislative proposals permitted the superintendent to make rules for the implementation and administration of the MPCP. 1987 Wis. A.B. 866, sec. 237, § 119.23(5). However, the final statute expressly limited the superintendent's authority.

lawsuit filed by the schools and several students and parents seeking to participate in the Program.[47] Around the same time period, opponents of the Choice Program filed a petition to commence an action claiming that the Program violated the Wisconsin Constitution.[48] The opponents of the Program intervened in the supporters' suit.[49]

Timothy T. Blank, Note, *The Milwaukee Parental Choice Program, Its Policies, and Its Legal Implications*, REGENT L. REV. 107, 121 (1991). § 119.23 (5)(c), *amended by* § 119.23 (West Supp. 1995); § 119.23(5)(d), *repealed by* WIS. STAT. ANN. § 119.23 (West Supp. 1995); § 119.23 (7)(b), *amended by* § 119.23(7) (West Supp. 1995).; § 119.23 (9)(a)(West Supp. 1990), *repealed by* § 119.23 (West Supp. 1995).

46. *Davis*, 480 N.W.2d at 465-66.

47. *Id.* at 460. When the case came before the Circuit Court, low-income Milwaukee residents packed the courtroom wearing red, white, and blue school choice buttons. The day of the Wisconsin Supreme Court argument, low income parents and children planned to ride a bus to the hearing. However, the bus was late and by the time the kids reached the courtroom, it was filled to capacity. Mr. Clint Bolick, attorney for supporters of MPCP, described what happened:

> Most of the seats were occupied with bureaucrats who had taken the day off to come and see the argument. Most of the people in the audience were white and most of them had a vested interest in the *status quo*. Around two minutes to ten, when the argument started, I looked to the back to see whether the kids had arrived. The doors have glass panes, and I looked at the door, and sure enough, I saw this row of faces with their noses pushed against the windows -- these beautiful innocent little faces. I thought to myself, what a metaphor for what is going on in our society. All of these little faces on the outside, always looking in on our society. Well, I am proud and pleased to say that they are in the inside now, and together we will make sure that they will always be on the inside.

Bolick at 6.

48. When the teachers' unions filed suit against the Program, Representative Polly Williams said:

> There is an interesting fact that a lot of people don't know. The teachers are in court trying to keep these low-income kids out of [private] school. But it so happens that 60 percent of the public school employees in Milwaukee send their kids to private schools -- 60 percent. . . . If the public schools are good enough for these low-income kids, they are good enough for their kids.

Then Mrs. Williams "announced she was going to introduce legislation in the Wisconsin Legislature that would require public school teachers as a condition of their employment to send their children to public schools. What happened? She got death threats on her telephone answering machine." Bolick at 3-4.

49. *Id.* The intervening parties included Grover, the Superintendent of Public Instruction; the Wisconsin Association of School District Administrators Inc.; Wisconsin

By a 4-3 margin, the Wisconsin Supreme Court upheld the MPCP in 1992.[50] The majority and concurring opinions appeared to be extremely supportive of the Program. The majority opinion stated:

> The first feature [of the program] empowers selected low-income parents to choose the educational opportunities that they deem best for their children. Concerned parents have the greatest incentive to see that their children receive the best education possible. Parental choice allows parents to send their children to nonsectarian private schools which, except for the statutory responsibilities of the State Superintendent, are autonomously operated free from the bureaucracy of the public school system. In so providing, the program will engender educational success and competition between the public and private educational sectors for students of low-income families.[51]

Association Council; NAACP Milwaukee Branch, Assoc. of Wisconsin School Administrators; Wisconsin Congress of Parents and Teachers, Inc.; Milwaukee Administrators and supervisors Council, Inc.; and Wisconsin Federation of Teachers.

When Felmers Cheney, the head of the NAACP, was asked by the "Milwaukee Community Journal," the largest African-American newspaper in Milwaukee, why he was challenging the program, he answered: "[C]hoice is just a subterfuge for segregation, like it was in the South." The Milwaukee Community Journal responded, "Don't you realize that 85 percent of the kids in this choice program are black?" Cheney responded: "Well, I haven't actually read the plan." Some say this is dramatic evidence of a division between the leaders and the led in the black community of the United States. Bolick at 4.

50. *Davis*, 480 N.W.2d 460. *Davis* involved three Wisconsin constitutional issues: (1) was the act void because of the state education clause, (2) did the program violate Wisconsin's public purpose doctrine, and (3) did the statute violate the required legislative process for enacting such a piece of legislation? The action also questioned Grover's authority in the implementation of the act. *Id.* at 462-63.

51. *Id.* at 471. The court also noted a Brookings Institution study that evaluated both public and private schools. It stated:

> Recently, researchers have attempted to discover the reasons underlying inadequate public instruction. . . . The study concluded that the three most important factors that affected student achievement were student ability, school organization, and family background. The factor which is most amenable to legislative efforts appears to be school organization. In this respect, . . . autonomy from bureaucracy is capable of making the difference between effective and ineffective organization - organizations that would differ by a year in their contributions to student achievement. We find especially interesting the study's

Noting the safeguards to ensure a quality education and the small amount of public funds needed for the Program, the Wisconsin Supreme Court ruled that the Milwaukee Parental Choice Program did not violate the Wisconsin Constitution and participating schools were required to comply with Section 119.23 only and not Superintendent Grover's additional demands.[52]

C. *The Original Milwaukee Program: A Success Within Its Limits*

In carrying out his statutory responsibility for evaluating the Program, Grover appointed John Witte to conduct the necessary research required under the statute. Witte released the "First Year Report" of the MPCP in November 1991.[53] The study indicated that choice engendered parental involvement and most Milwaukee parents and students were pleased with the Program.[54] Standardized test scores did not produce such positive results. Witte wrote:

> Preliminary outcomes after the first year of the Choice Program were mixed. Achievement test scores did not register dramatic gains and the Choice students remained approximately equal to low-income students in MPS. . . .

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conclusion that the educational credentials of teachers, teachers' scores on competency tests, how teachers are paid and other formal qualities do not make a significant difference on student achievement.

Id. at 470-71 (citations omitted).

52. Explaining the impact the Program would have on the use of public funds, the Court stated:

> [T]he cost of education and the funds available for education are dependent upon the taxpayers' ability to fund an intensive public educational program. The amount of money allocated to a private school participating in the MPCP to educate a participating student is less than 40 percent of the full cost of educating that same student in MPS. [The total] amount of public funds appropriated to fund this experimental program is inconsequential when compared to the total expenditures for public education allocated to schools throughout the state of Wisconsin.

Id. at 513-514.

53. FIRST YEAR REPORT (1991).

54. *Id.* at 18, 23.

> The Choice students were clearly behind the average MPS student and also behind a large random sample of low-income MPS students. There was not a dramatic change in those results . . . . The Choice students clearly are not yet on par with the average MPS student in reading and math skills. [55]

However, Witte's conclusions concerning test results have been criticized by numerous independent evaluations. Wisconsin's Legislative Audit Bureau concluded that "too few students have taken tests or have participated in the program for enough years to draw meaningful conclusions about the program's effect on academic performance,"[56] while Harvard University Professor Paul E. Peterson found the Witte evaluation to be "biased against finding choice schools effective."[57] A study released in August 1996 explained that "Mr. Witte's study isn't just bad science -- it's actually *harmful* to the underprivileged children who most need the opportunities vouchers would provide."[58]

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55. *Id.*

56. Brief for the State of Wisconsin, at 14, Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996) (quoting a Wisconsin Legislative Audit Bureau Report).

57. Kathy Walt, *Milwaukee Offers Learning Window on Voucher Plan*, HOUSTON CHRONICLE, Apr. 30,1995, at 1 (citing Paul E. Peterson, *A Critique of the Witte Evaluation of Milwaukee's School Choice Program*, Occasional Paper 95-2, Center for American Political Studies, Harvard University 160-204 (Feb. 1995)); Jay P. Greene & Paul E. Peterson, *School Choice Data Rescued From Bad Science*, WALL ST. J., Aug. 14, 1996.

58. The 1996 study explained the flaws apparent in Witte's analysis:

> Mr. Witte's study made inappropriate comparisons between low-income, minority students in the choice program and a much less disadvantaged cross-section of public-school students. In the Witte study:
>
> – Ninety-seven percent of choice students were black or Hispanic vs. only 60% of the comparison group.
>
> – Choice parents reported an average family income of $11,330, compared with $20,040 for all Milwaukee public-school families. Only 24% of choice parents were married, as against 47% of parents in the comparison group.
>
> – Fifty-eight percent of choice students' mothers were on welfare, compared with 40% of mother in the comparison group.

Jay P. Greene & Paul E. Peterson, *School Choice Data Rescued From Bad Science*, WALL ST. J., Aug. 14, 1996.

The initial findings concerning the satisfaction of Choice parents were echoed in Witte's three subsequent studies.[59] The 1994 study reported: "Parental attitudes toward choice schools, opinions of the Choice Program and parental involvement were very positive for choice parents over the first four years. Attitudes toward choice schools and the education of their children were much more positive than their evaluation of their prior public schools."[60]

A study performed in 1996 analyzed the success of Choice students after three and four years in the Program. It explained:

> After three and four years in the Milwaukee choice program, reading scores of low-income minority students receiving vouchers were, respectively, an average of three and five percentage points higher than those of comparable public-school students. Math scores were five and 12 points higher for third- and fourth-year students, respectively.
>
> These differences are substantively significant. If similar success could be achieved for all minority students nationwide, it could close the gap between white and minority test scores by at least a third, possibly more than half.[61]

Although proven later, the academic success of the MPCP was initially uncertain. However, the Choice Program clearly engendered student satisfaction and parental involvement from its inception. Perhaps it was the Program's limited achievements that sparked the next round of litigation. Regardless, Milwaukee residents filed suit to expand the Milwaukee Choice Program in 1993.

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59. Brief for the State of Wisconsin at 14, Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996).

60. *Id.* (quoting FOURTH YEAR REPORT, MILWAUKEE PARENTAL CHOICE PROGRAM, John Witte, Dec. 1994).

61. Greene, *supra* note 58.

D. Challenged Again - This Time for an Expanded Program: Miller v. Benson

One hundred low-income families filed a lawsuit in the federal courts desiring to include parochial schools in the Choice Program.[62] The parents claimed the Program's exclusion of parochial schools deprived them of their right to free exercise of religion in violation of the First Amendment and equal protection under the law in violation of the Fourteenth Amendment of the United States Constitution.[63]

Although the District Court noted that the future of Establishment Clause jurisprudence was uncertain, it, nevertheless, held that the inclusion of sectarian schools in the Milwaukee Parental Choice Program would violate the First Amendment.[64] This violation would serve as a compelling state interest to overcome Free Exercise and Equal Protection concerns.[65] While the decision might have dimmed hope that low-income children would attend religious schools under the Choice Program, Milwaukee citizens continued to rally support for expanding the voucher system.[66]

III. THE AMENDED MILWAUKEE PARENTAL CHOICE PROGRAM: THE INCLUSION OF RELIGIOUS SCHOOLS

Four years after implementation of the Milwaukee Choice Program, Milwaukee Public Schools were still performing well below other Wisconsin schools. In 1994, the high school dropout rate was 15% in MPS, compared to 1.9% statewide and 0.6% in private Milwaukee schools. Even more amazing, the MPS graduation rate was half as low as statewide figures.[67] Due to this academic failure

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62. Miller v. Benson, 878 F. Supp. 1209 (E.D. Wis. 1995).

63. *Id.* at 1212.

64. *Id.* at 1216. The court explained that the Program would provide a direct subsidy to religion. *Id.*

65. *Id.* at 1215.

66. *See* Miller v. Benson, 878 F. Supp. 1209 (E.D. Wis. 1995) (suit brought to expand voucher system).

67. Brief for the State of Wisconsin at 15, Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996). Two statistics reveal the reality of the MPS failure: The first is that about 33 percent of all MPS teachers with school-age children enrolled them in private and parochial

and pleas for expansion, Governor Thompson signed into law the 1995-96 Budget Act, which dramatically increased the potential of the Milwaukee Parental Choice Program by including parochial schools. It is this expansion that has created the largest amount of controversy.

A. Statutory Modifications to the Amended Milwaukee Choice Program

The amended Choice Plan made several changes to the Original Program designed to ensure the effectiveness and neutrality of the Program. Most significantly, the Budget Act[68] extended the Program to parochial schools in Milwaukee and increased the number of students eligible for the Program. Currently, seven percent of the Milwaukee school district's membership may participate in the Program, and beginning in the 1996-97 school year, up to fifteen percent of the student population may attend private schools under the MPCP.[69]

The Legislature also modified the method by which the State Superintendent compensates private schools participating in the Choice Program. Disbursed from Wisconsin's general purpose revenues, the Superintendent will issue the checks payable to the pupil's parent or guardian and sends the voucher to the school selected by the parent.[70] The parent then restrictively endorses the check for the school's use.[71]

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schools. *Id.* (citing Dennis P. Doyle, *Where Connoisseurs Send Their Children to School: An Analysis of 1990 Census Data to Determine Where Teachers Send Their Children to School*, Table 19, Center for Education Reform (1995)). The second interesting fact is that a survey of Milwaukee's Black community found that 70 percent believed private and parochial schools provide a better education than MPS, and only 21 percent believed that MPS had improved in the past five years. *Id.* at 16.

68. WIS. STAT. ANN. § 119.23(2)(a) (West Supp. 1995).

69. *See id.* § 119.23(2)(b) (West Supp. 1995). This would have allowed roughly 7,000 students to participate in the MPCP in the 1995-96 school year and 15,000 in future years. Plaintiff's Brief, at 4-5 (Dane County Cir. Ct., 1995) (No. 95CV1982), Motion for Preliminary Injunction. The Act also repealed the forty-nine percent limitation on a private school's enrollment. WIS. STAT. ANN. § 119.23(2) (West Supp. 1993), *amended by* § 119.23(2) (West Supp. 1995).

70. Plaintiff's Brief, at 6 (Dane County Cir. Ct., 1995) (No. 95CV1982). The amount of the voucher was amended. Participating schools will receive the lesser of the

While the details of the statutory modifications may appear insignificant, they most likely will be a primary factor in evaluating the constitutionality of the Program. Many hope that with each amended provision, the Wisconsin Legislature further separated the link between the state of Wisconsin and participating religious institutions in order to avoid an Establishment Clause violation.

B. One More Attempt to Defeat the Milwaukee Program: Thompson v. Jackson

The newly amended Milwaukee Parental Choice Program was immediately challenged.[72] Parties to the suit against the Milwaukee Program included the A.C.L.U., N.A.A.C.P., and various teachers' unions.[73] They filed suit in the Dane County Circuit Court claiming that the Program violated both Article 1, Section 18 of the Wisconsin Constitution[74] and the Establishment Clause of the United States Constitution.[75] Before the Circuit Court heard the case, it was

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per-pupil state aid to the MPS or an amount equal to the private school's cost per pupil as determined by the Department of Public Instruction (DPI). WIS. STAT. ANN. § 119.23(4) (West Supp. 1995). Other statutory modifications include the alteration of reporting duties and an opt-out provision for students. Previously, the Superintendent was responsible for preparing a report and submitting it to the legislature. WIS. STAT. ANN. § 119.23(5)(d) (West 1990), *amended by* WIS. STAT. ANN. § 119.23 (1995). Under the amended Program, the Superintendent and DPI are required to ensure that pupil selection occurs on a random basis, determine the correct amount of funds distributed to each participating school, establish uniform financial accounting standards, and accept independent financial audits from each private school annually. WIS. STAT. ANN. § 119.23(7) (West Supp. 1995). The Legislative Audit Bureau is responsible for conducting a financial and performance evaluation audit on the program to submit to the legislature and appropriate standing committees by January 2000. WIS. STAT. ANN. § 119.23(9) (West Supp. 1995). Section 119.23 also provides students with an opt-out provision. A private school may not require a pupil to participate in any religious activity if the pupil's parent or guardian submits a written request that he or she be exempted. WIS. STAT. ANN. § 119.23(7)(c) (West Supp. 1995).

71. WIS. STAT. ANN. § 119.23(4) (West Supp. 1995).

72. Jackson v. Benson (Dane County Cir. Ct., 1995) (No. 95CV1982).

73. *Id.*

74. "[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." WIS. CONST. art. 1, §18.

75. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I; Plaintiff's Brief (Dane County Circuit Court 1995) (No. 95CV1982).

petitioned for removal to the Wisconsin Supreme Court by Governor Thompson. On August 25, 1995, the court prevented about 2,600 Choice students from attending religious schools when it issued a preliminary injunction order halting the inclusion of parochial schools.[76] Less than a week after the order, supporters of the Program raised over $1.8 million dollars to enable the students to remain in their parochial schools while the court ruled on the plan's constitutionality.[77] Although the Dane County Circuit Court ruled the Program unconstitutional, the suit is pending and "widely expected" to reach the Wisconsin Supreme Court soon.[78]

If the Wisconsin plan reaches the United States Supreme Court, the Court's holding would have wide-ranging effects. Numerous states have enacted voucher systems, and Ohio is currently involved in similar litigation.[79] Many teachers' unions perceive choice programs as unnecessary threats to the *status quo*,[80] while parents consider it crucial in determining their ability to direct their child's education.[81] Some minority groups consider a voucher system a validation of their right to a quality education, which would include attending a school in proximity to their home,[82] and those in the legal profession question to what extent the Court will permit a state to benefit religious

76. Ellen Debenport, *A Test for School Vouchers*, ST. PETERSBURG TIMES, Oct. 13, 1995, at 1A.

77. Curtis Lawrence, *Choice Debate Expands to Fees, Fund-Raising: Critics Say Changes in Program Would Foster School Disunity*, MILWAUKEE J. SENTINEL, Dec. 24, 1995, at 3. Supporters actually raised over $3.6 million during the past year. Besides the 2,596 students locked out of the Choice Program, supporters provided private scholarships for 1,904 additional students to attend private schools. *Id.*

78. Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996); *A Decision: Judge Rules on Vouchers for Religious Schools*, AMERICAN POLITICAL NETWORK, Jan. 17, 1997.

79. *See supra* note 7, at 9.

80. *Saving City Schools*, WALL ST. J., May 22, 1995, at A12 (Howard Fuller, the Superintendent of Milwaukee Public Schools until April 1995, stated: "Powerful forces conspire to protect careers, contracts and current practices before tending to the interests of our children. . . . Real reform will only come from pressure from outside the system, generated by empowered parents with expanded school choice."); Ross Anderson, *WEA Employs Velvet Glove to Scuttle Charter Schools*, SEATTLE TIMES, Jan. 24, 1996, at B4.

81. Lisa Polacheck, *Williams Sells Benefits of Expanded School Choice to Waukesha Parents*, MILWAUKEE J., Oct. 20, 1994, at TWJ6.

82. John Malicsi, *Norquist and Benson Agree to Talk More*, MILWAUKEE J., July 23, 1994, at A6.

institutions. Make no mistake about it, the Milwaukee Parental Choice Program is an innovative, hotly-contested plan.

IV. THE MILWAUKEE PARENTAL CHOICE PROGRAM: A BREACH IN THE "WALL OF SEPARATION" OR NEUTRAL BENEFIT TO PARENTS?

> "Congress shall make no law respecting an establishment of religion . . . ."[83]

Not surprisingly, the Establishment Clause has become the central controversy of the Milwaukee Parental Choice Program.[84] Opponents argue the Wisconsin voucher system will directly fund religious activity, violating the separation of church and state.[85] Proponents claim the Program is neutral in its benefits and will enable low income parents to escape the Milwaukee public education system that is failing their children.[86] While the constitutionality of a school voucher system has never been addressed by the United States Supreme Court, many believe such a program, if written properly, would pass constitutional muster.[87] Due to the unpredictable nature of the Court's decisions in this area of law, the outcome is by no means certain.

A. *Establishment Clause Jurisprudence: Before* Lemon v. Kurtzman

Everson v. Board of Education[88] was the first case to hold the Establishment Clause applicable to the states by the Fourteenth

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83. U.S. CONST. amend. I, cl. 1.

84. Brief for the State of Wisconsin at 3, Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996). There are various state issues involved in the litigation. Chief among them is Article I, sec. 18, of the Wisconsin Constitution which reads: "[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." WIS. CONST. art. I, §18.

85. Plaintiff's Brief on Motion for Preliminary Injunction at 21 (Dane County Cir. Ct. 1995) (No. 95CV1982). In this article, "separation of church and state" refers to the Supreme Court's interpretation of the Establishment Clause.

86. Brief for the State of Wisconsin at 6-8, Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996).

87. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §14-9, at 845 n.33 (1978).

88. 330 U.S. 1 (1947).

Amendment.[89] The *Everson* Court upheld a New Jersey statute permitting state reimbursement to parents for the expense of busing their children to and from school, regardless of whether they attended private or public schools.[90] In doing so, the Supreme Court fervently maintained that a state was forbidden from using tax revenues to support a religious institution.[91] However, the Court also noted that a state was equally prohibited from excluding individuals from receiving the benefits of public welfare legislation on the basis of their faith or lack thereof.[92] Because the legislation did no more than provide a general program to help parents, regardless of their religion, it did not breach the Court's "high and impregnable" wall of separation.[93]

Twenty-one years after *Everson*, the Supreme Court considered *Board of Education v. Allen*.[94] In *Allen*, a public school board lent textbooks to all students, including those attending private schools. In upholding this textbook loan program, the Court explained that the law "merely [made] available to all children the benefits of a general program to lend school books free of charge."[95] *Everson* and *Allen* laid the foundation of Establishment Clause jurisprudence. Each case indicated that direct aid to religious institutions was unconstitutional, but when general welfare legislation benefited individuals, the effect on religion was incidental.

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89. *Id.* at 8.
90. *Id.* at 3.
91. Discussing the implications of the Establishment Clause, the Court stated:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

Id. at 15-16.
92. *Id.* at 16.
93. *Id.* at 18.
94. 392 U.S. 236 (1968).
95. *Id.* at 243-44.

B. Lemon v. Kurtzman

The Supreme Court has explained that the Establishment Clause was intended to afford protection against three perceived evils: sponsorship, financial support, and active involvement of the sovereign in religious activity.[96] Recognizing that the wall of separation was not actually a wall, but a "blurred, indistinct, and variable barrier,"[97] the Supreme Court in *Lemon v. Kurtzman* devised a three-part test to avoid an Establishment Clause violation. 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" . . .; [and] finally, the statute must not foster "an excessive government entanglement with religion."[98]

Lemon involved a Rhode Island statute supplementing parochial teacher salaries[99] and a Pennsylvania statute providing reimbursement for expenses, including textbooks and instructional materials, to religious schools.[100] The Court found the purpose of the statutes was to improve the quality of secular education and, as such, passed the first prong of the *Lemon* test.[101]

Instead of applying the second prong of the test, the Court relied on the excessive entanglement prong to overturn the statutes.[102] Because a state would be required to engage in "comprehensive, discriminating and continuing state surveillance"[103] to ensure that parochial teachers did not inculcate religion, government would be excessively entangled with religion.[104] The Court also cited a broader base of entanglement presented by the divisive political potential of a

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96. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (citing Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

97. *Lemon*, 403 U.S. at 614.

98. *Id.* (internal citations omitted). The Court cited *Allen*, 392 U.S. at 243, in support of the primary effect prong and *Walz*, 397 U.S. at 674, for the excessive entanglement prong.

99. *Lemon*, 403 U.S. at 602.

100. *Id.* at 606-07.

101. *Id.* at 613.

102. *Id.* at 613-14.

103. *Id.* at 619.

104. *Id.*

state program. It reasoned that partisans of parochial schools would champion their cause and the resulting division would be one of the evils the First Amendment was intended to prohibit.[105] Therefore, state aid, in the form of teacher salaries, violated the Establishment Clause because it required continuing surveillance and engendered political division along religious lines.[106]

In dissent, Justice White explained that application of *Lemon* prohibited states from financing even secular functions of education if a possibility of religious influence existed. Yet, if the state adopted procedures to ensure no religious influence, it would foster excessive entanglement and violate *Lemon's* third prong. As demonstrated by subsequent case law, Justice White accurately predicted this "insoluble paradox."[107]

C. *Confusion and Inconsistency: Hallmarks of the* Lemon *Test*

> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; . . . when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.[108]

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105. *Id.* at 622 (citing Paul A. Freund, Comment, *Public Aid to Parochial Schools,* 82 HARV. L. REV. 1680, 1692 (1969)).

106. *Lemon,* 403 U.S. at 622-23. Although the *Lemon* Court required uncompromising certainty that no government funds granted to parochial schools be used to promote religion, the Court was more willing to tolerate the risk in private colleges. *See* Tilton v. Richardson, 403 U.S. 672, 686-87 (1971), *reaff'd in* Hunt v. McNair, 413 U.S. 734 (1973).

107. *Id.* at 668 (White, J., concurring in judgment, dissenting in part).

108. Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141, 2150 (1993) (Scalia, J., concurring) (internal citations omitted).

One commentator recently noted "perhaps no other constitutional provision has engendered as much confusion and controversy as the Establishment Clause."[109] The Court itself has expressed displeasure with its jurisprudence in this area.[110] Chief Justice Rehnquist's dissent in *Wallace v. Jaffree*[111] illustrates the Supreme Court's unpredictable decisions in school aid cases using *Lemon*:

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109. Eric J. Segall, *Parochial School Aid Revisited: The* Lemon *Test, the Endorsement Test and Religious Liberty*, 28 SAN DIEGO L. REV. 263 (1991). Another commentator referred to the Court's jurisprudence as a "hodge-podge" of decisions derived from "Alice's Adventures in Wonderland." *Id.* (quoting Philip B. Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U. L. REV. 1, 10 (1984)). The Court itself has recognized the confusion encountered in distinguishing its opinions. "We have acknowledged before, and we do so again here, that the wall of separation that must be maintained . . . is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship. " Wolman v. Walter, 433 U.S. 229, 236 (1977) (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)). The Court explained:

> Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility.
> . . .

Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

110. *See, e.g.*, Rosenberger v. Rector and Visitors of Univ. of Virginia, 115 S. Ct. 2510, 2532 (1995) (Thomas, J., concurring) ("[O]ur Establishment Clause jurisprudence is in hopeless disarray . . . ."); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2149-2150 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District."); Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2515 (1994) (Scalia, J. dissenting) ("[The Court has a] convenient relationship with *Lemon*, which it cites only when useful. . . . The problem with (and the allure of) *Lemon* has not been that it is 'rigid' but rather that in many applications it has been utterly meaningless, validating whatever result the Court would desire."); Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 655-657 (1989) (Kennedy, J., concurring in part and dissenting in part); Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part and dissenting in part) ("Our decisions in this troubling area draw lines that often must seem arbitrary.").

111. 472 U.S. 38 (1985) (Rehnquist, J., dissenting).

> A State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher prepared tests on secular subjects. Religious instruction may not be given in public school, but the school may release students during the day for religious classes elsewhere, and may enforce attendance at those classes with its truancy laws.[112]

Clearly, the *Lemon* test has produced confusing results.[113] To make matters worse, the Court has completely ignored *Lemon* in

112. *Id.* at 110-111.

113. For criticism of the *Lemon* test, *see Viewpoint Discrimination: Funding for Religious Publications*, 109 HARV. L. REV. 210, 217 (1995) ("Claiming that the *Lemon* test has proved unwise as a matter of policy and unfaithful as a matter of constitutional interpretation is like claiming that the Berlin Wall has developed a slight crack."); Mark E.

recent decisions, yet refused to explicitly overrule it.[114] Because the *Lemon* test has not been formally overruled, it must be considered in relation to the Milwaukee Choice Program.

The secular purpose and entanglement prongs of *Lemon* are no longer significant hurdles in Establishment Clause controversies. Rather, the Court has seemingly condensed *Lemon* into a neutrality test, largely concentrating on the effect prong.[115] Accordingly, this note will briefly discuss the Choice Program under the first and third prongs of *Lemon*, followed by a more detailed discussion evaluating whether the voucher system impermissibly advances religion.

1. Secular Legislative Purpose

The first element of the *Lemon* test asks whether a statute has a legitimate secular purpose. Courts are reluctant to look beyond the stated purpose of a statute and attribute unconstitutional motives to the states.[116] The following secular legislative purposes served in

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Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645, 654 (1992).

114. The Court has at times referred to the factors enumerated in *Lemon* as "no more than helpful signposts." Hunt v. McNair, 413 U.S. 734, 741 (1973). At other times, it has ignored *Lemon* and its test completely. *See, e.g.*, Rosenberger v. Rector and Visitors of the Univ. of Virginia, 115 S. Ct. 2510 (1995); Capitol Square Rev. and Advis. Bd. v. Pinette, 115 S. Ct. 2440 (1995); Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993); *but see Lamb's Chapel*, 113 S. Ct. at 2148 (citing *Lemon*); Lee v. Weisman, 112 S. Ct. 2649, 2654 (1992) (the Court avoided using the test but also expressly declined an invitation to repudiate it.).

115. School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971).

116. Mueller v. Allen, 463 U.S. 388, 394-95 (1983). There are only two notable cases where the Supreme Court has held a statute violated the purpose prong. The first was Wallace v. Jaffree, 472 U.S. 38 (1985), where Alabama enacted a statute for a moment of silence "for prayer or meditation." After the bill passed in the Alabama legislature, the sponsoring legislator said he believed the purpose of the legislation was to return voluntary prayer to the public schools. Seemingly ignoring the fact that the entire Legislature passed the bill, and not just one man, the Court took the single legislator at his word and ruled the bill unconstitutional for failing to state a secular purpose. *Id.* at 43 n.17. The second case was Edwards v. Aguillard, 482 U.S. 578 (1987). *Edwards* concerned Louisiana's Creationism Act. The Act prohibited public school teachers from teaching either evolution

funding religious education have been upheld: (1) improving the quality of secular education;[117] (2) preserving a healthy and safe educational environment, promoting pluralism, and alleviating an overburdened public school system;[118] and (3) defraying the cost of educational expenses incurred by all parents, whether their children attended nonsectarian or sectarian schools.[119] While the Court has not completely forsaken consideration of the secular purpose prong, the inquiry has often been overshadowed by the Court's emphasis on a statute's effect upon religion.

Recognizing the academic failures plaguing MPS, Wisconsin Representative Polly Williams said, "If you keep giving money to the same doctor and the patient stays sick, you've got to make the decision to get a second opinion."[120] It appears that is exactly what the Wisconsin Legislature intended to do by implementing the Choice Program. The 1995 expansion added ninety-three schools with the capacity to enroll several thousand more students into the Program.[121] At the same time, the Legislature increased the number of students allowed to participate.[122] Keeping in mind the Court's usual deference to legislative decisions, it is completely logical to conclude that the Legislature desired to further improve educational quality by expanding both the number of schools and students eligible.[123] Therefore, it would appear that the Milwaukee Parental Choice Program has a legitimate secular purpose.[124]

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or creationism unless both were taught. The Supreme Court found that the Act violated the secular purpose prong and unconstitutionally advanced a religious doctrine. *Id.* at 596-597.

117. *Lemon*, 403 U.S. at 613.

118. *Nyquist*, 413 U.S. at 773.

119. *Mueller*, 463 U.S. at 395.

120. Suzanne Fields, *Winning Friends for School Choice*, WASH. TIMES, April 5, 1990, at F1.

121. EXPANDED SCHOOL CHOICE, *supra* note 13, at 27.

122. *Id.*

123. Additionally, supporters of the Program argue that if the Court decides to consider only the secular purpose in the recent expansion, the amendments demonstrate a valid goal of promoting government neutrality toward religion. Brief for the State of Wisconsin, at 36, Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996).

124. Although some might argue the Wisconsin Legislature's inclusion of parochial schools into the Choice Program was motivated by a religious purpose, the Court will likely disagree. Bowen v. Kendrick, 487 U.S. 589 (1988), addressed similar arguments. A group

2. Excessive Entanglement

The third prong of *Lemon* requires the Court to consider whether a statute will result in excessive entanglement between church and state. There are two general types of entanglement: administrative entanglement and political divisiveness.[125] Over the last twenty-five years, the excessive entanglement prong has undergone much criticism. Beginning with *Lemon* itself, the inquiry has been referred to as an "insoluble paradox," "catch-22," "curious and mystifying," "redundant," "superfluous," and without "constitutional foundation."[126] In recent cases applying the *Lemon* test, the importance of the entanglement prong has waned.

a. Administrative Entanglement

Administrative entanglement refers to state involvement in the administration of a program. Such involvement is evidenced when a "comprehensive, discriminating, and continuing state surveillance" would be required to ensure that aid does not impermissibly advance religion.[127] It has also been referred to as a "kind of continuing day-

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of federal taxpayers challenged the constitutionality of the Adolescent Family Life Act under the Religious Clauses. The Act authorized federal grants to public or nonprofit private organizations for services and counseling in the area of premarital adolescent sexual relations and pregnancy. *Id.* at 591. The taxpayers contended that because Title VI was amended to increase the role of religious organizations and Congress expressly recognized that "religious organizations had a role to play" in addressing certain problems the legislation was intended to cure, the statute lacked a secular purpose. *Id.* at 605. The Court briefly explained that Congress recognized religious organizations could help solve the secular problem and this recognition alone did not render the statute unconstitutional. *Id.* at 603. *Bowen* indicates that expansion of a funding program furthers the program's original secular objectives.

125. *Lemon*, 403 U.S. at 622.

126. *See* Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 768-69 (1976) (White, J., concurring) (quoting earlier opinion); Bowen v. Kendrick, 487 U.S. 589, 615 (1988); *Lemon*, 403 U.S. at 661-71 (White, J., concurring in judgment, dissenting in part); Aguilar v. Felton, 473 U.S. 402, 430 (1985) (O'Connor, J., dissenting) (joined by Rehniquist, J.); Wallace v. Jaffree, 472 U.S. 38, 109-110 (1985) (Rehnquist, J., dissenting).

127. *Lemon*, 403 U.S. at 619.

to-day relationship which the policy of neutrality seeks to minimize."[128]

Under the Milwaukee Parental Choice Program, Wisconsin is required to ensure that pupil selection occurs on a random basis, establish uniform financial accounting standards, and accept independent financial audits from each private school annually.[129] Further, the Legislative Audit Bureau is responsible for conducting a financial and performance evaluation audit for submission in January of 2000.[130] The statute requires Wisconsin to do little more than ensure that private schools meet the minimal standards required of all schools in the state.[131] Therefore, if the voucher system survives the Court's emphasis on the statute's effect, the Choice Program will not violate the administrative entanglement prong.

b. Political Divisiveness

The second type of entanglement discussed in *Lemon* was that of political divisiveness. The Court has recognized that church and state relationships are emotional issues and often engender division along

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128. Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970). In Aguilar v. Felton, 473 U.S. 402 (1985), the Secretary of Education was authorized to fund a program taught by public employees on the premises of religious schools. The city enacted a monitoring system to prevent funds from being used to promote religion. *Id.* at 406-407. Citing the pervasively sectarian environment, the Court held that the program violated the administrative entanglement prong of *Lemon* precisely because of the surveillance required. *Id.* at 412. In another case, heard the same day as *Aguilar*, two programs that funded remedial classes for nonpublic school students at public expense were reviewed. School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985). Because the program did not have any provisions to ensure that religion would not be advanced in an impermissible manner, the program was unconstitutional. *Id.* at 387. *Ball* and *Aguilar* demonstrate the "catch-22" of the *Lemon* test. *Wallace*, 472 U.S. at 109-110 (Rehnquist, J., dissenting).

129. WIS. STAT. ANN. § 119.23(7) (West Supp. 1990), *amended by* § 119.23(7) (West. Supp. 1995).

130. WIS. STAT. ANN. § 119.23 (9)(West Supp. 1990), *amended and repealed in part by* § 119.23(9) (West. Supp. 1995).

131. As Pierce v. Society of Sisters, 268 U.S. 510 (1925), stated: "If the state must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function." Further, the one report the State must provide on the Program involves all participating schools and is a one time occurrence. *Allen*, 392 U.S. at 247.

religious lines.[132] However, *Mueller v. Allen* confined the political divisiveness element to cases involving direct financial subsidies paid to parochial schools or to teachers in parochial schools.[133] Because Milwaukee's program creates a financial subsidy to parents, rather than religious schools, this factor is inapplicable. If the aid were paid directly to schools, the Program would impermissibly advance religion as well, rendering it unconstitutional.[134]

D. The Neutrality Principle: Focusing on a Statute's Effect

A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion . . . favoring neither one religion over others nor religious adherents collectively over nonadherents.[135]

Rather than examining a legislator's purposes or a law's propensity for entanglement -- with the accompanying subjectivity, vagueness, and implicit hostility toward religion -- the Court has attempted to apply a principle of neutrality that focuses almost exclusively on a statute's effect.[136] To determine the neutrality of an aid program, the Court asks whether the funding primarily advances religion.[137] The difficulty with this inquiry is that the Court must decide which of a statute's many effects is primary and which is secondary. In making this distinction, the Court has relied on three major criteria: (1) whether the government aid can be separated from the school's religious activities, (2) whether the class of beneficiaries under a program includes a broad number of persons that will use the funds for nonreligious purposes, and (3) whether religious schools are funded directly by the government or receive an attenuated benefit from funds distributed to parents or students attending the religious

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132. *Nyquist*, 413 U.S. at 797.

133. 463 U.S. 388, 403 (1983).

134. The prospect of political divisiveness has never alone warranted the invalidation of a state law. *Nyquist*, 413 U.S. at 778.

135. Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2487 (1994) (quoting *Nyquist*, 413 U.S. at 792-93).

136. *Viewpoint Discrimination: Funding for Religious Publications*, *supra* note 111, at 218.

137. *Lemon*, 403 U.S. at 612-13.

school.[138] However, the weight attributed to each criterion has varied, and what is pivotal in one case often becomes irrelevant in the next.

1. Separability of Aid from a School's Religious Function

The Court frequently has inquired whether the aid given directly to the school is separable from the school's religious functions. Because the purpose of many religious schools is to provide an integrated secular and religious education, the Court has reasoned that the two functions may be "inextricably intertwined."[139] As a result, the Court has used careful scrutiny to ensure that aid is not used to advance the religious component of education.[140]

More recently, lack of separability has not proven fatal. The Court upheld a program providing a tax deduction to parents for their children's educational expenses, including tuition, in *Mueller v. Allen*[141] and later approved a grant funding an individual's education at a Bible college in the state of Washington, despite the school's religious nature.[142] In *Zobrest v. Catalina Foothills School District*, James Zobrest requested a publicly employed sign language interpreter to accompany him to his private school under both federal and state statutes.[143] The parties agreed that the Catholic school was pervasively sectarian.[144] Nevertheless, the Court upheld the program as it primarily aided Zobrest, rather than the religious school.[145] Finally, *Rosenberger v. Rector and Visitors of the University of Virginia*, decided in 1995, upheld a provision allowing a public university to pay printing costs to a printer for a pervasively sectarian

138. Beutler, *supra* note 1, at 38.

139. *Lemon*, 403 U.S. at 657.

140. Bowen v. Kendrick, 487 U.S. 589, 609-610 (1988). Examples of aid programs found unconstitutional due to the lack of separability include construction and repair grants for parochial schools, tuition reimbursement for parents, salary supplements for parochial school teachers, and instructional equipment and materials capable of being used for religious purposes. *Nyquist*, 413 U.S. at 756; *Lemon*, 403 U.S. 602 (1971); *Wolman*, 433 U.S. 229; Meek v. Pittenger, 421 U.S. 349 (1975).

141. 463 U.S. 388 (1983).

142. Witters v. Washington Dept. of Serv. for the Blind, 474 U.S. 481 (1986).

143. 113 S. Ct. 2462 (1993).

144. *Id.* at 2464.

145. *Id.* at 2469.

student publication known as "Wide Awake."[146] For various reasons, the Court recently has upheld many different aid programs without ensuring that the aid was completely separate from the religious function of that educational institution.

One-hundred-twenty-two private schools were eligible to participate in the amended Choice Program during the 1995-96 school year. Of those, 89 were sectarian, and approximately eighty-four percent of the pupils who attended private schools during the 1994-95 school year attended religious schools.[147] If the Court relies on earlier cases and deems the aid a direct benefit to religious schools, the separability issue will doom the Program. However, should the Court continue to apply its current rationale focusing upon the class of recipients and individual choice, the Milwaukee Choice Program, which closely resembles the grant programs upheld in *Witters* and *Zobrest*, should survive this inquiry.

2. The Breadth of the Benefited Class

The Court has inquired whether the benefited class includes a wide spectrum of organizations. In *Committee for Public Education and Religious Liberty v. Nyquist*,[148] where tuition reimbursements were granted to parents with children attending private schools, the Court determined that the class of recipients was too narrow. Because the benefits excluded parents with children attending public schools and the majority of the private schools benefiting from the aid were church-affiliated, the deduction unconstitutionally advanced religion.[149] Similarly, in *Meek v. Pittenger*, the Court held that lending textbooks to students was constitutional, although the state was prohibited from lending instructional materials to private schools.[150] Relying heavily upon the fact that seventy-five percent of the schools benefiting from

146. 115 S. Ct. 2510 (1995).

147. Brief for the Respondents Warner Jackson at 8-9, Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996).

148. 413 U.S. 756 (1973).

149. *Id.* at 765. Eighty-five percent of the participating private schools were religious.

150. 421 U.S. 349, 361-62 (1975).

the program concerning instructional materials were sectarian, the Court ruled that the funds had an impermissible effect of advancing religion.[151]

Mueller, *Witters*, *Zobrest*, and *Rosenberger* also examined the class of beneficiaries. *Mueller* was distinguished from *Nyquist* as the tax deduction was available for all parents, regardless of where their children attended school.[152] In *Witters*, the Court again stressed the "sectarian-nonsectarian, or public-nonpublic nature of the institution benefited",[153] while *Rosenberger* affirmed that "[t]he [Establishment] Clause does not compel the exclusion of religious groups from government benefit programs that are generally available to a broad class of participants."[154]

Clearly, the breadth of the benefited class is an important consideration. The Court has used this component in evaluating aid given directly to schools and aid that only incidentally benefits religious organizations. In cases involving direct aid, the Court appears to be more attentive to the precise number of sectarian schools benefiting.[155] Where the aid is distributed to the parent or child attending the sectarian school, it examines the number of eligible recipients more closely.[156]

Milwaukee will likely survive this consideration as well. The financial benefit is generally available to all low-income parents and allows them to choose between public schools, magnet schools, private schools, or parochial schools. Also, while the majority of schools participating in the Program are religious and perhaps even "pervasively sectarian," the Program is open to all private schools, regardless of their religious affiliation.

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151. *Id.* at 364.

152. *Mueller*, 463 U.S. at 396-398.

153. *Witters*, 474 U.S. at 487 (citing *Nyquist*, 413 U.S. at 782-83). *Witters* also pointed out that it was unlikely many students would choose to use their entitlement to further a religious education.

154. *Rosenberger*, 115 S. Ct. at 2532 (Thomas, J., concurring).

155. *See, e.g.*, School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); *Wolman*, 433 U.S. 229; Meek v. Pittenger, 421 U.S. 349 (1975); *Nyquist*, 413 U.S. 756.

156. *See supra* notes 146-150.

3. Direct Versus Indirect Aid

It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. . . . It is equally well settled, on the other hand, that the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is "that of a direct subsidy to the religious school" from the state."[157]

Beginning with *Everson v. Board of Education*[158] in 1947, the Court has consistently examined the directness of government aid. In doing so, the Court has often made fine distinctions between direct aid and "attenuated" financial benefits given to religious schools. These blurred distinctions are illustrated in cases such as *Wolman v. Walter*[159] and *School District of Grand Rapids v. Ball.*[160] In *Wolman*, the Supreme Court applied the *Lemon* test and upheld textbook loan provisions, while striking down loans of instructional materials to parents and children.[161] Although the Ohio legislature formally *lent* the materials to the students, the Court refused to "exalt form over substance" and concentrated on the type of aid given rather than its directness.[162] Likewise, *Ball*, involving government funding of remedial classes, expressly stated that an indirect subsidy will "evoke[] Establishment Clause concerns when the public funds flow to 'an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission.'"[163] While *Ball* and *Wolman* seemed to pose a threat to such programs, later holdings of the Court minimize their impact.

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157. *Witters*, 474 U.S. at 486-87 (citing *Ball*, 473 U.S. at 394).

158. 330 U.S. 1 (1947).

159. 433 U.S. 229 (1977).

160. 473 U.S. 373 (1985).

161. *Wolman*, 433 U.S. at 233. The Ohio Legislature appropriated $88,800,000 for the program. The legislation provided private school students with books, instructional equipment, standardized tests and scoring, diagnostic services at the private schools, therapeutic services on public property, and field trip transportation.

162. *Id.* at 250.

163. *Ball*, 473 U.S. at 394 (quoting Hunt v. McNair, 412 US 734, 743 (1973)). The Shared Time Program offered remedial classes taught by public school teachers during the regular school day on the religious school's premises. In the Community Education Program, private school teachers conducted the remedial classes after hours. *Id.* at 374-378.

Perhaps the strongest case supporting the claim that the Wisconsin voucher system violates the Establishment Clause is found in *Nyquist*.[164] Although the tuition reimbursements and income tax benefits in *Nyquist* were clearly distributed to parents rather than to schools, this was "only one among many factors to be considered."[165] Because most of the institutions benefiting from the programs were religious,[166] the provisions were restricted to parents whose children attended private schools,[167] and a financial incentive was provided to parents to send their children to private schools, all provisions of the statute were unconstitutional.[168]

Nyquist was distinguished in *Mueller*, which upheld a Minnesota statute that allowed taxpayers to deduct expenses incurred in providing for the education of their children.[169] *Mueller* marks the beginning of the Court's current emphasis upon the importance of parental choice and the manner of payment distribution.[170] Chief

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164. 413 U.S. 756 (1973).

165. *Nyquist*, 413 U.S. at 781. "[T]he fact that [the reimbursements] are delivered to the parents rather than the schools does not compel a contrary result, as the effect of the aid is unmistakably to provide financial support for nonpublic, sectarian institutions." *Id.* at 757-58.

166. *Id.* at 768. Approximately eighty-five percent of the schools in the program were parochial. *Id.*

167. *Id.* at 762-64. The Court reasoned that the grants to parents of private schoolchildren are given in addition to the right that they already have to send their children to public schools completely at state expense. *Id.* at 782.

168. *Id.* at 756. *Nyquist* used *Lemon* to strike a New York statute providing direct money grants for maintenance and repairs at religious schools, tuition reimbursements to parents of low income students attending religious schools, and income tax benefits directed exclusively to parents with children in private schools. *Id.*

169. *Mueller*, 463 U.S. at 390. The legislation permitted state taxpayers to claim a deduction from gross income for actual expenses incurred for the tuition, textbooks, and transportation of dependents attending schools. A deduction could not exceed $500 per dependent in kindergarten through sixth grade and $700 per dependent in grades seven through twelve. *Id.* *Ninety-five percent* of the students in the private schools attended sectarian schools. Nevertheless, the Court upheld the program. *Id.* at 391.

170. *Id.* at 399 (quoting *Nyquist*, 413 U.S. at 781). The Court stated:

> It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children. It is also true, however, that under Minnesota's arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children. It is noteworthy that all but one of our

among the *Mueller* distinctions was the fact that the *Nyquist* reimbursements were only available to private schools students, as opposed to all students, regardless of whether they attended public or private schools.[171] Petitioners also argued that under *Nyquist*, the Court should consider that the bulk of deductions would be taken by those attending religious schools. The Court responded that it "would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which . . . citizens claimed benefits . . . ." [172] As a result of these differences, the *Mueller* tax deduction, unlike the *Nyquist* reimbursement, provided merely an "attenuated financial benefit" to religious schools.[173] Further, "[w]here aid to parochial schools is available only as a result of the decision of individual parents, no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." [174]

Continuing its examination into the directness of aid, the Court recently has placed substantial weight on the direct/indirect classification. In both *Witters*[175] and *Zobrest*[176] the Court emphasized two principal features in aid programs: the aid was given directly to individuals, and the state did not discriminate among eligible recipients on the basis of religion. In *Witters*, where the Court upheld an educational grant used to attend a Bible college, Justice Marshall described the Court's current rationale by analogizing the state aid to a paycheck. "[A] state may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so

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recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the State to the schools themselves. The exception, of course, was *Nyquist*, which . . . is distinguishable from this case.

Id.

171. *Id.* at 398. Another distinction was found in the fact that the *Nyquist* tax benefit was made to be compatible with an entire school aid program and, therefore, could not be considered a "genuine tax deduction." *Id.* at 396 n.6.

172. *Id.* at 401.

173. *Id.* at 399.

174. *Id.* (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981)).

175. 474 U.S. 481 (1986).

176. 113 S. Ct. 2462 (1993).

even knowing that the employee so intends to dispose of his salary."[177] Similarly, individual recipients may dispose of state benefits in any manner they desire without violating the separation of church and state.

Closely following the paycheck rationale, the *Zobrest* Court focused on the directness of aid and availability to students when it allowed a publicly employed sign language interpreter to accompany a student at a Catholic school.[178] The Court stated:

> 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 an attenuated financial benefit. Nowhere have we stated this principle more clearly than in *Mueller v. Allen* and *Witters v. Department of Services for the Blind* . . . .[179]

In 1995, the Court cautioned that when enforcing the prohibition against laws respecting the establishment of religion, the state may not exclude individuals from general state benefits because of religious belief.[180] *Rosenberger* continued the Court's trend stressing the neutrality required in government programs: "We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[181] Even in dissent, Justice Souter noted the difference between direct and indirect aid. He argued that when direct funding is given, regardless of whether the

177. *Witters*, 474 U.S. at 486-87 (citing *Ball*, 473 U.S. at 394).

178. *Zobrest*, 113 S. Ct. at 2462.

179. *Id.* at 2466. The dissenting opinion disagreed with the basic premise of the majority. The opinion explained that the graphic symbol of the concert of church and state that results when a public employee mouths a religious message is likely to "enlist at least in the eyes of impressionable youngsters the power of government to the support of the religious denominations." *Id.* at 2474 (Blackmun, J., dissenting opinion).

180. *Rosenberger*, 115 S. Ct. at 2521.

181. *Id.*

program is evenhanded, it strikes at the very heart of what the Establishment Clause was intended to prohibit.[182]

The amended Milwaukee Choice Program is not a direct payment to the participating private schools. Rather than making the check payable to the school as under the Original Program, the Superintendent will make the checks payable to the pupil's parent or guardian. The checks are sent to the private school selected by the parents, where the parent endorses the check over to the school.[183]

Recognizing these are not technically direct payments to schools, opponents of the Milwaukee Program urge the Court to evaluate the "true" effect of the aid. They argue that the payment method should not be dispositive of a program's constitutionality[184] as the state funds pass instantaneously through the hands of parents to the private schools with the parent having little control over the aid.[185] With over 7,000 students eligible for the Program in the 1996-97 school year, the Program will dramatically benefit many of the participating schools.[186]

While these arguments are valid, if the totality of the circumstances is dispositive, then other factors must also be considered. When the Court evaluates the directness of the aid, the formal method of payment is not the only inquiry. Although the aid quickly passes through the parents' hands, the money is payable only to the parent and the school cannot receive the aid without the parent's approval. Also, if one is assessing the real effect of the aid, he or she cannot minimize the impact of the voucher on Milwaukee's impoverished minority students at the hands of a failing public school system. The primary benefit is to Milwaukee citizens. The aid only benefits an institution if a parent and child have decided to attend there. Without that parent's choice, the school receives *nothing*.

It is difficult to predict whether the Choice Program will survive the Court's neutrality standard. As analyzed above, the Court's line of

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182. *Id.* at 2534 (Souter, J., dissenting).

183. WIS. STAT. ANN. § 119.23(4) (West. Supp. 1990), *amended by* WIS. STAT. ANN. § 119.23(4) (West. Supp. 1995).

184. Brief for the Respondents Warner Jackson, at 42-44, Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996).

185. *Id.*

186. *Id.* at 39.

decisions suggests that an aid program will survive constitutional scrutiny where three factors are present: (1) the state makes a direct payment to a parent or child, who then remits the aid to the school of his choice; (2) the program does not provide an incentive to attend a religious institution over a secular one; and (3) aid is available to all children without regard to whether a religious institution benefits.[187] More than likely, the Court will hold that the Milwaukee Parental Choice Program meets all three requirements.

E. Alternative Establishment Clause Tests

1. The Endorsement Test

The endorsement test is an emerging approach in First Amendment jurisprudence. Although it has not been applied in school funding cases, the Court has referred to it in its Establishment Clause analysis. In *Lynch v. Donnelly*,[188] a case involving religious symbols displayed in a public forum, Justice O'Connor introduced the theory. She expanded it in *Wallace v. Jaffree*,[189] where the Court struck down a statute enacted to provide a period of silence "for meditation or voluntary prayer."[190]

In her concurring opinions in both *Lynch* and *Wallace*, Justice O'Connor reformulated the purpose and effect prongs of *Lemon*. The purpose requirement would forbid government from purposefully endorsing or disapproving religion,[191] with the Court's review of legislative intent being both deferential and limited.[192] Concluding that the Establishment Clause prohibits government from making adherence to a religion relevant to a person's standing in the political community,[193] O'Connor explained that the effect prong would

187. *See Rosenberger*, 115 S. Ct. at 2521; *Zobrest*, 113 S. Ct. at 2467; *Witters*, 474 U.S. at 487-88; *Mueller*, 463 U.S. at 398-99.
188. 465 U.S. 668 (1984) (O'Connor, J., concurring).
189. 472 U.S. 38 (1985).
190. *Id.* at 61.
191. *Lynch*, 465 U.S. at 690-91.
192. *Wallace*, 472 U.S. at 74-75.
193. *Lynch*, 465 U.S. at 687.

prohibit the government from creating the perception that it is endorsing or disapproving religion.[194] O'Connor would retain the administrative entanglement element, but eliminate the inquiry into political divisiveness.[195] In determining whether the government endorsed religion, "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement"[196] of religion.

In a recent decision, the Supreme Court upheld the right of the Ku Klux Klan to place a cross on a public square in Columbus, Ohio.[197] A plurality of the Court in *Pinette* rejected the proposition that a neutral law would be invalid under the endorsement test. It stated that "[i]t has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may -- *even reasonably* -- confuse an incidental benefit to religion with state endorsement."[198] Nevertheless, five of the Justices appear to have accepted the endorsement test in that particular circumstance.[199] However, there remains a question of whether the test would be applied by the Court in cases other than those involving religious symbols.[200]

The Milwaukee Parental Choice Program would pass an endorsement test. The reasonable observer acquainted with the operation of the Program would not draw an inference that Wisconsin is endorsing a religious practice. Instead, one would understand that the Program applies to all low income parents and includes all private schools, regardless of any religious affiliation. Further, he or she would understand that the aid only indirectly benefits the religious institutions because of individual choice. As the plurality stated in *Pinette*, "[W]e have consistently held that it is no violation for

194. *Id.* at 692.
195. *Id.* at 689.
196. *Wallace*, 472 U.S. at 76.
197. *Pinette*, 115 S. Ct. at 2444.
198. *Id.* at 2449-2450.
199. *Id.* at 2451 (O'Connor, J., concurring); *Id.* at 2475 (Ginsburg, J., dissenting).
200. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2496 (1994) (O'Connor, J., concurring).

government to enact neutral policies that happen to benefit religion."[201] Likewise, the Milwaukee Parental Choice Program is a neutral program that directly funds a child's education which includes, by happenstance, religious organizations.

2. The Coercion Test

In *Lee v. Weisman*,[202] the Court declined to apply the *Lemon* test and instead administered a new coercion test.[203] *Lee* held that nonsectarian prayer at public school graduation ceremonies violated the Establishment Clause by coercing students to participate in prayer. The Court reasoned that the prayers were directed and controlled by the state and students were compelled to attend. This attempt by the state to exact religious conformity from students was unconstitutional.[204]

It has been suggested that a voucher system would violate the coercion test by compelling students to attend private schools in order to receive a better education.[205] This argument hardly merits a response. First, it has not been established that the academic progress of Choice students far surpasses MPS children.[206] Second, it is absurd to argue that giving citizens the means to improve themselves equates to coercion. There is little risk that parents would feel coerced into enrolling their children in religious schools solely for academic reasons.

Others have argued that students enrolled in the religious schools would be compelled to participate in religious activities.[207] Yet, Milwaukee students choose what school to attend[208] and, even if they select a sectarian school, the statute allows students who wish to

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201. *Pinette*, 115 S. Ct. at 2447.
202. 505 U.S. 577 (1992).
203. *Id.* at 587.
204. *Id.* at 578.
205. Michael J. Stick, *Educational Vouchers: A Constitutional Analysis*, 28 COLUM. J. L. & SOC. PROBS. 423, 454 (1995).
206. *See supra* notes 55-58.
207. *Id.*
208. WIS. STAT. ANN. § 119.23 (West Supp. 1990), *amended by* § 119.23 (West. Supp. 1995).

decline participation in religious activities to be excused during that time period.[209] The coercion test does not pose a substantial threat to the Choice Program.

The Milwaukee Parental Choice Program makes a direct payment to a parent who is then able to make his or her own decision regarding the school for the child. All low-income children may participate in the voucher system, and all private schools are eligible as long as they meet the state's minimum educational requirements. Further, a reasonable observer who is familiar with the manner in which the Program operates would understand that the Program is a neutral benefit, offered without regard to religious preferences. Lastly, no child can be coerced into attending a religious school. This voucher system is *completely* driven by individual choice. The Choice Program primarily aids children suffering in the Milwaukee school system -- and at best, provides a secondary benefit to religious schools. Wisconsin's voucher system should pass constitutional muster.

V. OTHER FIRST AMENDMENT ISSUES: THE FREE EXERCISE OF RELIGION AND RIGHT TO FREE SPEECH

> The right of parents to choose a religious upbringing for their children is older than America, and ought to stand as an unshakable fundament of national life. Nobody talks seriously about taking that right away. . . . And yet the right is under pressure of another kind, the pressure exerted by an educational system that is too often unresponsive to the needs or desires of parents concerned about their children's religious upbringing, and by a legal and political system reluctant to take any steps that might be seen as "supporting" religion -- and, as a result, burdening parents who seek religious educations for their children with costs that other parents, even those sending their children to private schools, need not bear. That battles over the proper interaction between religion and education are so heated is painful, but

209. *See id.* § 119.23(7)(c) (West Supp. 1990), *amended by* § 119.23(7) (West. Supp. 1995).

> should not be surprising. After all, religion and education share a characteristic that so many human activities lack: *they matter*.[210]

The Establishment Clause controversy is undoubtedly the most debated issue surrounding the Milwaukee Program, and as such, is the primary focus of this note. However, two other First Amendment claims have been raised: the free exercise of religion and free speech. These rights have been asserted on behalf of Milwaukee's religious schools, as well as one hundred low income Milwaukee parents, the so-called "the Miller Intervenors."[211] These two First Amendment claims will be briefly discussed in relation to the Choice Program.

In light of recent decisions, the Court appears to be construing the First Amendment in a more cohesive manner, with neutrality as the overarching principle. The premise of the neutrality standard is that government may not impose special disabilities on the basis of religious views or affiliation.[212] While it might seem optimistic to conclude that the Court will uphold both a Free Exercise and Free Speech claim in the Milwaukee case, this is the likely result if the Court remains faithful to its most recent decisions interpreting the First Amendment.

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210. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 184 (1993).

211. As mentioned in Part II of this note, the Miller Intervenors filed suit in 1993 alleging that the exclusion of religious schools in the Original Choice Program violated their free exercise of religion. The Wisconsin Supreme Court permitted the Miller Intervenors to intervene in the present suit after the Seventh Circuit Court of Appeals vacated and mooted the District Court's decision. Miller v. Benson, 878 F. Supp. 1209 (E.D. Wis. 1995).

212. Board of Educ. v. Mergens, 496 U.S. 226, 248 (1990) (quoting McDaniel v. Paty, 435 U.S. 618, 641 (1978)) (Brennan, J., concurring) ("The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.").

A. The Exclusion of Religious Schools from the Milwaukee Parental Choice Program: A Violation of the Free Exercise Clause?

1. The Shifting Standard in Free Exercise Jurisprudence

Broadly categorized, there are two interpretations regarding the reach of the Free Exercise Clause. One claims that the Free Exercise Clause protects worshipers only from intentional discrimination and disparate treatment.[213] The other holds that where a neutral law burdens the exercise of religion, the Court must balance the burden against the interest of the state.[214] Both interpretations have been used by the United States Supreme Court.[215]

The Court originally adopted the intentional discrimination view in the 1878 case *Reynolds v. United States.*[216] However, in 1963, the Court began to balance the claimant's burden against the state's compelling interest when it decided *Sherbert v. Verner.*[217] Applying strict scrutiny, the Court often "demonstrated its ambivalence toward religious exemption by according inordinate weight to the government's interest."[218] Twenty-seven years later, the Court returned to its original prohibition of intentional discrimination in the 1990 decision, *Employment Division v. Smith.*[219] By a 5-4 margin, the Court rejected the balancing view and explained, "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[220]

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213. *See* Michael McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1413 nn.33-34 (1990); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (state could not deny unemployment compensation to employees who lose their jobs for religious reasons); Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

214. *See* Douglas Laycock, *The Remnants of the Free Exercise Clause*, 39 DEPAUL L. REV. 993, 1011-1018 (1990); Sherbert v. Verner, 374 U.S. 398 (1963).

215. *See supra* notes 204-05.

216. 98 U.S. 145 (1878).

217. 374 U.S. 398 (1963).

218. Beutler, *supra* note 1, at 65.

219. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

220. *Id.* at 878-89.

The *Smith* Court's repudiation of the *Sherbert* balancing test evoked a harsh response from many.[221] In an attempt to return the *Sherbert* test, the United States Congress adopted *The Religious Freedom Restoration Act of 1993* [hereinafter "RFRA"].[222] As a result, the Court currently permits both a Free Exercise claim as well as a statutory claim under RFRA. Because the Miller Intervenors did not assert a statutory claim in *Benson v. Jackson*, RFRA will not be considered in this article.

2. The Neutral and Generally Applicable Requirement

> The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. [Nevertheless, there are laws] enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom.[223]

A religion-neutral and generally applicable law does not violate the Free Exercise Clause despite its incidental effect upon religious practice.[224] In determining whether a law impermissibly suppresses religious conduct, the Court will first examine the text of the law for facial discrimination.[225] However, the Free Exercise Clause extends beyond facial neutrality and prohibits even "subtle departures from neutrality."[226] "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[227] A law which is neither neutral

221. Beutler, *supra* note 1, at 66.
222. 42 U.S.C. §2000bb (1996).
223. Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2222 (1993).
224. *Smith*, 494 U.S. at 878-89; *Lukumi*, 113 S. Ct. at 2226.
225. *Lukumi*, 113 S. Ct. at 2226.
226. *Id.* at 2227 (quoting Gillette v. United States, 401 U.S. 437, 452 (1971)).
227. *Id.* at 2226.

nor of general applicability must be justified by a compelling state interest and narrowly tailored to advance that interest if it burdens religious practice.[228]

Opponents of a Free Exercise claim suggest that a Milwaukee Choice Program excluding religious schools would be a neutral and generally applicable law.[229] The argument is that the Wisconsin vouchers are available to all low-income parents, without regard to one's religious preference. Recipients who neglect to use the aid due to a religious conviction suffer only an incidental and indirect burden upon their beliefs. At first blush, *Bowen v. Roy* appears to support this contention: "[G]overnment regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons."[230]

Further, despite the fact that the Court has recognized a fundamental parental liberty interest in directing the education of one's children and that this interest includes the decision of whether to pursue a religious education,[231] the Court has rejected the contention that states must fund religious schools simply because they support a public school system.[232] *Brusca v. Missouri* held that "[a] parent's right to choose a religious private school for his child may not be equated with the right to insist that the state is compelled to finance his child's non-public school education . . . in order that he may obtain a religious education."[233] Relying heavily upon *Brusca*, opponents of the Free Exercise claim suggest that Wisconsin is not required to subsidize the Miller Intervenors' right to provide a religious education for their children.

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228. *Id.*

229. Brief for the Respondents Warner Jackson, at 45-48, Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996).

230. Bowen v. Roy, 476 U.S. 693, 706 (1986).

231. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

232. Brusca v. Missouri, 332 F. Supp. 275, 277 (E.D. Mo. 1971), *aff'd* 405 U.S. 1050 (1972).

233. *Id.* at 277 (citing Everson v. Board of Educ. 330 U.S. 1 (1947)).

A Milwaukee Program that excludes religious schools, however, *purposefully discriminates* against religion, both facially and in effect. On its face, the statute would limit the choice of private schools to "nonsectarian." Thus, at the same time Wisconsin is expending millions of dollars specifically to allow parents to choose both public and nonsectarian private schools, those parents whose school choice decisions are influenced by religious belief are denied that benefit. This is not an indirect and incidental burden. It imposes a substantial penalty on the Miller Intervenors. As the Court explained in *Lyng v. Northwest Indian Cemetery Protective Association*: "[I]ndirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment. Thus, for example, ineligibility for unemployment benefits, based solely on a refusal to violate the Sabbath, has been analogized to a fine imposed on Sabbath worship."[234]

The Free Exercise Clause exists to protect religiously motivated persons, such as the Miller Intervenors, against intentional unequal treatment by the state.[235] Clearly, Wisconsin had no legal obligation to bestow a government benefit providing for funding of private schools. However, once it began funding both public and nonsectarian schools, under *Lyng*, it could not exclude similar benefits to religious schools with similarly situated children. Such an exclusion would essentially impose a "fine" upon otherwise eligible families who must enroll their children in parochial schools to comport with their religious convictions. While this burden may be justified by a compelling state interest, it, nonetheless purposely targets religion for discriminatory treatment.

3. A Test to Determine a Compelling State Interest

"A law burdening religious practice that is not neutral or not of general application must undergo *the most rigorous* of scrutiny."[236]

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234. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988) (citing Sherbert v. Verner, 374 U.S. 398, 401 (1963)).

235. Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 148 (1987) (Stevens, J. concurring).

236. *Lukumi*, 113 S. Ct. at 2233.

Because the exclusion of religious schools from Milwaukee's system discriminates against religion, Wisconsin must provide a compelling state interest. *Church of the Lukumi Babalu Aye v. City of Hialeah*, the Court's most recent Free Exercise decision, explained the scrutiny involved in the compelling interest test:

> To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests. . . . A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.[237]

The compelling state interest test places a heavy burden upon the state to uphold discriminatory treatment based on religion.[238] The compelling interests asserted in the Milwaukee Program lie in the Establishment Clause and state constitutional concerns. While an Establishment Clause concern might suffice as a compelling interest and override Free Exercise concerns,[239] Part IV of this article demonstrates that inclusion of religious schools within the Milwaukee Choice Program does not violate the separation of church and state as the Supreme Court has defined it.

Similarly, a violation of the Wisconsin Constitution cannot defeat a Free Exercise claim under the United States Constitution. In *Widmar v. Vincent*,[240] the Court rejected an argument that a state constitutional establishment clause provided a compelling interest to justify the abridgment of First Amendment rights.[241] *Widmar* seemed to imply that a "[v]alidly enacted federal law trumps conflicting state

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237. *Id.* at 2233.

238. *Id.*

239. Doe v. Village of Crestwood, 917 F.2d 1476 (7th Cir. 1990); Goodall v. Stafford County Sch. Bd., 930 F.2d 363, 370 (4th Cir. 1991).

240. 454 U.S. 263 (1981).

241. Jay Alan Sekulow, et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1052 (1995) (citing *Widmar*, 454 U.S. at 276) (However, the Court limited its holding to the case before it.).

law, [and] where the United States Constitution or a constitutional federal statute grants certain rights, conflicting state law cannot take away those rights."[242] Therefore, it would appear that neither the federal Establishment Clause nor provisions of the Wisconsin Constitution provide a sufficiently compelling interest to exclude religious schools from the Milwaukee Program.

Previous holdings, often cited by opponents of school choice, create a significant hurdle by placing a heavy burden upon religious beliefs and reducing the compelling interest test to almost a reasonableness standard.[243] The Court's most recent decisions have not supported such a minimal level of scrutiny. They indicate a closer examination into the neutrality of a law, rather than requiring direct coercion upon the claimant. [244] Ultimately, although the Free Exercise claim is less certain than the result under the Establishment and Free Speech Clauses, the Miller Intervenors have a strong possibility of success if the Court continues to safeguard against government hostility toward religion.

B. The Exclusion of Religious Schools from the Milwaukee Choice Program: A Violation of the Free Speech Clause?

> [T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids,

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242. Sekulow, *supra* note 241, at 1052 (interpreting *Widmar*, 454 U.S. at 276); *see also* Garnett v. Renton Sch. Dist. No. 403, 987 F.2d 641, 646 (9th Cir. 1993) ("States cannot abridge rights granted by federal laws"); *cf.* Northwest Pipeline v. Kansas Corp. Comm., 489 U.S. 493, 509 (1989) (federal statute preempts state laws where state law conflicts with federal law leaving it impossible to comply with both).

243. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (The Free Exercise Clause did not prohibit the state from harvesting timber, despite tribal religious beliefs that the land was necessary to practice their religion.); Bob Jones Univ. v. United States, 461 U.S. 574, 603-04 (1983) (Non-profit private schools cannot qualify for tax exempt status because of racial discrimination, despite the fact that religious beliefs mandated such discrimination.); Bowen v. Roy, 476 U.S. 693, 706 (1986) (Court upheld the use of a social security number in disbursing government aid, over religious objections that the number would rob the spirit of the recipient child).

244. *Smith*, 494 U.S. 872; *Lukumi*, 113 S. Ct. 2217.

and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.[245]

Supporters of the Choice Program argue that the exclusion of religious schools from a general funding program, designed to facilitate parental choice and improve Milwaukee's education system, would constitute impermissible viewpoint discrimination.[246] While government may choose to advance permissible goals, discriminating against religion treats those practicing religion as subject to certain disabilities based upon their religious belief. This viewpoint discrimination overcomes any interest in avoiding Establishment Clause concerns and mandates the inclusion of sectarian schools in the Milwaukee Parental Choice Program.[247]

1. "Forum Analysis" under the Milwaukee Program

When the government chooses to facilitate private speech by providing or paying for a forum, it may not distinguish between those granted and denied access on the basis of viewpoint.[248] The Supreme Court developed a "forum analysis" regime to determine when the government's limitations on the use of its resources outweighs the interest of private parties desiring to benefit from those resources. The right to use government property or subsidies for one's private expression depends upon whether the aid in question has by law or tradition been given the status of a public forum or has been reserved for specific official use.[249]

The Court has developed several types of fora. The first is the traditional public forum, which is a place that by tradition or law has been devoted to assembly and debate. Because the purpose of a public

245. *Pinette*, 115 S. Ct. at 2448 (quoting Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990)) (emphasis added).

246. Brief for the State of Wisconsin, at 5, Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996).

247. *Id.* at 10.

248. Grossbaum v. Indianapolis-Marion County Bldg. Auth., 63 F.3d 581, 586 (7th Cir. 1995).

249. *Pinette*, 115 S. Ct. at 2446 (citing Cornelius v. NAACP Legal Defense Fund & Educ. Fund, 473 U.S. 788, 802-03 (1985)).

forum is to facilitate the free exchange of ideas, speakers may be excluded only when necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.[250] The second type of forum is the limited public forum which is "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for discussion of certain subjects."[251] The same test is applied for limited public fora as for public fora.[252] The last forum available is a nonpublic forum. This forum allows the most governmental regulation. "[C]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."[253]

A forum is not limited to government property, such as school gymnasiums or public streets. In *Rosenberger*, the University of Virginia, a state entity, denied authorization for paying the printing costs of a student publication solely because the paper promoted religion. Finding viewpoint discrimination, the Court explained that a forum may exist, even if "more in a metaphysical sense than in a spatial or geographic sense."[254]

Wisconsin was not constitutionally required to enact the Parental Choice Program. However, when it began funding private schools in addition to Milwaukee's public school system, a forum was created in which private entities were able to express themselves through education. Whether this forum is limited or non-public, it is a state-sponsored facilitation of private speech.[255]

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250. *Cornelius*, 473 U.S. at 800.

251. *Id.* at 802 (quoting Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45-46 (1983)).

252. *Id.* at 800.

253. *Lamb's Chapel*, 113 S. Ct. at 2147 (quoting *Cornelius*, 473 U.S. at 806 (citing *Perry*, 460 U.S. at 49)).

254. *Rosenberger*, 115 S. Ct. at 2517.

255. Some may argue that Wisconsin did not create a forum, but simply desired to convey a governmental message through private entities. In Rust v. Sullivan, 500 U.S. 173 (1991), the Court explained: "To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect."

2. Viewpoint Discrimination

Regardless of the type of forum, government may not discriminate on the basis of a speaker's viewpoint.[256] The distinction between subject matter and viewpoint is not a precise one.[257] The *Lamb's Chapel* decision struck down a restriction on speech due to impermissible viewpoint discrimination.[258] In that case, a school district refused to allow a church to rent facilities after school hours to show a film series discussing contemporary family problems from a Christian perspective. Finding it unnecessary to decide the nature of the forum, the Court explained the meaning of viewpoint discrimination, stating: "[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."[259]

In 1995, the Court expanded its holding in *Lamb's Chapel*. The University of Virginia had created a limited forum by providing funding for various student groups. Although all religious students groups were officially excluded from receiving aid, the *Rosenberger* decision further defined what constitutes an impermissible state regulation:

> Discrimination against speech because of its message is presumed to be unconstitutional. . . . [T]he government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. When the government targets not subject matter

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Id. at 194. However, the exclusion of religious schools in this particular case would not facilitate the government's goal of providing educational choice. Sectarian schools, provided they meet the same standards as other private schools, produce the same value to the public and foster parental choice. In fact, by expanding the Program, Wisconsin increased the number of participating schools by almost seventy-five percent, thereby allowing more students to participate. Wisconsin is permitting private speakers to educate its citizenry in the hope that parental choice will facilitate greater academic success than that achieved in the Milwaukee Public Schools. It is not conveying a message of its own. *See also Rosenberger*, 115 S. Ct. at 2512, 2518-19.

256. *Grossbaum*, 63 F.3d at 587.

257. *Rosenberger*, 115 S. Ct. at 2517.

258. *Lamb's Chapel*, 113 S. Ct. at 2149.

259. *Id.* at 2147 (citing *Cornelius*, 473 U.S. at 806).

> but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.[260]

The Court also addressed the dissent's claim that a state may permissibly exclude an entire class of viewpoints rather than only one. It responded:

> Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as the exclusion of only one. It is as objectionable to exclude both a theistic and atheistic perspective on the debate as it is to exclude one, the other, or yet another political economic or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.[261]

Rosenberger clearly holds that a state may exclude religion as a subject matter in a limited or nonpublic forum, but may not prohibit a specific perspective upon which a variety of subjects may be discussed. The exclusion of all religious viewpoints, rather than a specific perspective, will not render the discrimination permissible.

Whether Wisconsin creates a limited or nonpublic forum, it may not engage in viewpoint discrimination. A Milwaukee Choice Program funding all private and public schools, with the exception of religious schools, would discriminate based solely upon the fact that subjects such as history, science or grammar are taught from a religious perspective. Such exclusion of religious schools would

260. *Rosenberger*, 115 S. Ct. at 2516 (citations omitted).
261. *Id.* at 2518.

evidence hostility towards religion and unconstitutional viewpoint discrimination.

As with Free Exercise claims, when abridging free speech, the state is required to provide a compelling interest.[262] However, noting the overriding importance of the freedom of expression, the Court has been much more reluctant to find an Establishment Clause concern that justifies the abridgment of free speech.[263] "The Supreme Court's recent decisions make it clear that a governmental position of neutrality of access and evenhanded treatment of speakers is a significant factor in assessing a concern that the presence of religious expression in the government-created forum amounts to a violation of the Establishment Clause."[264]

Furthermore, the Supremacy Clause of the United States Constitution prevents states from abridging rights granted by federal law. A state constitutional concern cannot trump a right to free speech. As there is no Establishment Clause violation under the Program and all state constitutional concerns are subject to federal constitutional rights, Wisconsin has impermissibly engaged in viewpoint discrimination and must include sectarian schools in the Parental Choice Program.[265]

V. CONCLUSION

A. First Amendment Analysis of the Choice Program

This comment has analyzed the Milwaukee Parental Choice Program under the Establishment, Free Exercise, and Free Speech Clauses. The Choice Program does not violate the Establishment Clause. Wisconsin vouchers are transferred directly to the parent, and the voucher system is *completely* driven by individual choice. Religious schools do not benefit from the aid unless a Choice student enrolls in the particular school. The Milwaukee Program provides an

262. *Lamb's Chapel*, 113 S. Ct. at 2148.

263. *Rosenberger*, 115 S. Ct. 2510; *Pinette*, 115 S. Ct. 2440; *Mergens*, 496 U.S. 226; and *Widmar*, 454 U.S. 263.

264. *Grossbaum*, 63 F.3d at 593.

265. *See* Part IV.

essential benefit to low-income families and does not breach the wall of separation of church and state.

Furthermore, not only does the Program avoid an Establishment Clause violation, but the inclusion of religious schools may be *constitutionally necessary*. The Miller Intervenors have asserted that if Wisconsin excludes religious schools from its Program, it will substantially burden their religious beliefs and violate their free exercise of religion. Although Wisconsin was not required to fund private education, once it began funding both public and nonsectarian schools in Milwaukee, it could not impose an indirect penalty upon qualifying parents whose convictions mandate their children receive a religious education.

Lastly, exclusion of Milwaukee's religious schools from the Milwaukee Program discriminates on the basis of viewpoint. Despite meeting all requirements placed upon schools by the state of Wisconsin, sectarian schools would be excluded from the voucher system solely because of the curriculum's perspective. As the *Rosenberger* Court stated, "[T]he government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression."[266] If Wisconsin excludes religious schools from the Milwaukee Choice Program, it will engage in unconstitutional viewpoint discrimination.

After reviewing many of the Court's First Amendment decisions, it is evident that the Court is striving for an interpretation of the First Amendment that has as its foundation a principle of neutrality. The Court's most recent opinions remind one of the majority decision in *Everson v. Board of Education*, the first Supreme Court decision to apply the Establishment Clause to the states. The *Everson* Court explained that the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. . . ."[267] The Milwaukee Parental Choice Program, with its inclusion of religious schools, evidences neutrality toward religion and benefits all citizens of Milwaukee.

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266. *Rosenberger*, 115 S. Ct. at 2516.
267. *Everson*, 330 U.S. at 28.

B. The Milwaukee Parental Choice Program: A Tool of Empowerment

> Education, ... beyond all other devices of human origin, is a great equalizer of conditions of men -- the balance wheel of the social machinery.[268]

Twenty years ago, the thought of a voucher system including religious schools being upheld by our Supreme Court would have seemed almost impossible. Today, not only is it possible, it is likely. For Milwaukee residents, this opportunity has come none too soon. Despite efforts at improving the Milwaukee Public Schools, the Wisconsin Supreme Court recognized in 1992 that "[a]s demonstrated by dropout rates, welfare statistics and population data, the MPS District has significantly greater education and poverty problems than any other district in the state."[269] Since that time, test scores are lower, drop-out rates higher, and over one-third of all MPS students fail each course.[270] When over thirty percent of Milwaukee's public school teachers enroll their own children in private schools and over fifty percent claim they would not place their children in the school in which they teach, something must be done.[271] The Milwaukee Parental Choice Program is a genuine, good faith attempt to improve educational quality for low income residents, particularly minority families.[272]

> [The Choice Program] grabs power away from the educrats in Madison and gives it to parents in Milwaukee. It grabs power from the entrenched status quo and gives it to

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268. HORACE MANN, EDUCATION AND PROSPERITY 6 (1848).

269. Davis v. Grover, 480 N.W.2d 460, 528-29 (Wis. 1992).

270. Brief for the State of Wisconsin at 8 and 15, Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996).

271. *Id.* at 15; Bolick at 3-4.

272. Sixty-five percent of all MPS students are from low income families and seventy-five percent are minority students. *Id.* at 8 (citing ANNUAL REPORT TO THE COMMUNITY: THE MILWAUKEE PUBLIC SCHOOLS, Nov. 1994).

> educational pioneers and reformers. It grabs power from the teachers' union and gives it to children intent on getting the best education possible wherever it is offered, be it a public school, private school or parochial school.[273]

All members of society should be equally free to decide their destiny. Milwaukee is a common illustration of a public school monopoly forsaking liberty and equality. Many argue that the public school system should be fixed, rather than abandoned. But in the meantime, is it right to produce a generation of citizens who cannot read or do not possess a meaningful high school diploma? The Milwaukee Parental Choice Program is a tool of empowerment. It allows the have-nots to exercise responsibility and choice in deciding their future. It is not an impermissible subsidy to religion, but a much needed lifeline for individual students.

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273. Ray Archer, *Wisconsin Breakthrough: End of the Beginning of School Reform?*, ARIZONA REPUBLIC, July 10, 1995, at B4 (quoting the majority leader of the Wisconsin Assembly, Scott Jensen).