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See Jane Read the Bible: Does the Establishment Clause Allow School Choice Programs to Include Sectarian Schools After Agostini v. Felton?

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Ellen M. Wasilausky*

I. Introduction

Aaron Bagley's parents live in the small town of Raymond, Maine, which has too few students to justify operating a public school beyond the elementary level.[1] Consequently, the Bagleys pay an annual tuition of $5500 for their son to attend a Roman Catholic high school.[2] The Bagleys' neighbors bear a lesser financial burden because they are able to take advantage of the state's "tuitioning" program.[3] As part of that program, each town or city that does not maintain a public secondary school pays the tuition (up to the average cost of a public school education) of its residents in grades seven through twelve.[4] The state-wide program allows the residents of Raymond to choose to send their children to any school, public or private, as long as the school is not religiously affiliated.[5] The town pays $4800 per child toward each child's tuition at public and nonsectarian private schools in other districts.[6] These schools have tuition rates comparable to that of local religious schools.[7]

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1. Nicole Garnett, Editorial, *Religious Schools Excluded Unfairly Under Maine Law: The Courts Are Asked to Decide a Church-Sponsored School Should Be an Option When a Town Pays Tuition for Its Children*, PORTLAND PRESS HERALD, July 31, 1997, at 13A, *available in* 1997 WL 12528288.

2. Susan Young, *Lawsuit Challenges Exclusion of Parochial Schools as Choice*, BANGOR DAILY NEWS, Aug. 1, 1997, *available in* 1997 WL 11879734.

3. Garnett, *supra* note 1.

4. *Id.*

5. *Id.*

6. Jason Wolfe & Sarah Ragland, *Raymond Parents Sue for Tuition to Cheverus: Their Case Against the State Could Have National Implications and Even Go to the Supreme Court*, PORTLAND PRESS HERALD, Aug. 1, 1997, at 1A, *available in* 1997 WL 12582286.

7. *Id.*

The school choice program that Maine has implemented is just one of a wide variety of selective education plans included in the term "school choice," all of which encourage or require students and their parents to choose which school the students will attend.[8] The Maine program is an example of interdistrict choice, a type of school choice program in which tuition funds follow students and allow these students to cross school district lines to attend school.[9] It is unique, however, in two ways.[10] First, the Maine legislature chose to include private schools in its program, instead of only public schools in neighboring districts.[11] Second, the state legislature implemented Maine's interdistrict choice program out of necessity.[12] Small towns such as Raymond must employ an interdistrict choice program because Maine law requires these towns to provide an education for their citizens through the secondary school level.[13] Thus, the question the Bagleys present is: Must Maine's necessary interdistrict choice program include religious schools?

In recent years, legal scholars have purported to debate the merits and constitutionality of all school choice programs. However, most of these scholars have addressed only the merits and constitutionality of school voucher programs.[14] School voucher programs provide families with a fixed

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8. *See* PETER W. COOKSON, JR., SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION 14 (1994) (discussing variety of school choice plans and their differences but noting that all "encourage or require students and their families to become actively engaged in choosing schools").

9. *See id.* at 15 (defining interdistrict choice as "[a] plan in which students may cross district lines to attend school").

10. *See infra* notes 11-12 and accompanying text (explaining why Maine's interdistrict choice program is unique).

11. *See* THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, SCHOOL CHOICE: A SPECIAL REPORT 2 (1992) [hereinafter CARNEGIE] (stating that interdistrict, or statewide, choice permits students to attend public schools outside their home district); DAVID HARMER, SCHOOL CHOICE: WHY YOU NEED IT – HOW YOU GET IT 85 (1994) (noting that interdistrict choice allows enrollment in public schools across state).

12. *See* Young, *supra* note 2 (stating that Vermont is "the only other state with a tuition arrangement like Maine's").

13. *See* Garnett, *supra* note 1 (stating that "Maine law requires Raymond to provide for the education of residents through 12th grade").

14. *See, e.g.*, Cynthia Bright, *The Establishment Clause and School Vouchers: Private Choice and Proposition 174*, 31 CAL. W. L. REV. 193, 195 (1995) (stating that article will present Establishment Clause analysis of California's proposed school voucher program); Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37, 43 (1993) (acknowledging that article is primarily concerned with refuting voucher plans but claiming that article's analysis is applicable to other choice programs); Harlan A. Loeb & Debbie N. Kaminer, *God, Money, and Schools: Voucher Programs Impugn the Separation of Church and State*, 30 J. MARSHALL L. REV. 1, 6 (1996) (stating that article "argues that school voucher programs that include religious schools are unconstitutional"); Michael J. Stick, *Educational Vouchers: A Constitutional Analysis*, 28 COLUM. J.L. & SOC. PROBS. 423, 426-27 (1995) (presenting content

subsidy for each school-aged child.[15] The families use these subsidies at the school of the family's choice, public or private, regardless of which schools would otherwise be available to that family.[16] Unlike interdistrict choice programs that arise out of need, voucher programs seek to fulfill certain goals. First, states often propose school voucher programs to promote competition among private and public schools.[17] In theory, such competition results in higher quality education because schools improve as they seek to meet the demands of students and their families.[18] Second, states create school voucher programs to provide educational choices for lower-income families who do not have access to private schools.[19]

Various state legislatures have implemented voucher programs that include sectarian schools.[20] In recent years, state courts have been debating

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of article as dealing with background, policy issues, and constitutional analysis of educational voucher programs); Jo Ann Bodemer, Note, *School Choice Through Vouchers: Drawing Constitutional Lemon-Aid From the Lemon Test*, 70 ST. JOHN'S L. REV. 273, 279-80 (1996) (stating that note deals with proposed school voucher programs, addresses constitutional issues raised by such programs, and demonstrates why these programs will reform our schools); David Futterman, Note, *School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Parochial Schools*, 81 GEO. L.J. 711, 714 (1993) (stating that note "analyzes school choice" but describing contents as debate over constitutionality of "tuition vouchers"); Eric Nasstrom, Casenote, *School Vouchers in Minnesota: Confronting the Walls Separating Church and State*, 22 WM. MITCHELL L. REV. 1065, 1069 (1996) (stating that casenote examines issue of whether religious schools can participate in voucher programs); Peter J. Weishaar, Comment, *School Choice Vouchers and the Establishment Clause*, 58 ALB. L. REV. 543, 544-45 (1994) (stating that comment addresses conflict between "Establishment Clause and school choice programs," but describing contents as "analyz[ing] the vouchers issue").

15. *See* Stick, *supra* note 14, at 427 (defining school voucher plans as involving fixed subsidies).

16. *See id.* (defining school voucher plans as allowing parental choice of any school, public or private).

17. *See* CARNEGIE, *supra* note 11, at 3-4 (discussing reasons for interest in school choice programs).

18. *See, e.g., id.* (discussing belief that competition between schools will result in improvements in education); COOKSON, *supra* note 8, at 5 (discussing school choice advocates and their belief in "the social and educational efficacy of market competition"); Stick, *supra* note 14, at 427 (discussing Milton Friedman's theory that educational vouchers would promote competition between schools and will result in improvements in education).

19. *See* CARNEGIE, *supra* note 11, at 3 (discussing belief that school choice programs give disadvantaged families increased and better educational opportunities); COOKSON, *supra* note 8, at 64-68 (discussing significance of voucher plan implemented in Milwaukee to provide educational choice to children in families at or below 1.75 times federal poverty level).

20. *See* Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583, at *1-*2 (Ohio Ct. App. May 1, 1997) (describing school voucher, or "scholarship," program that Cleveland implemented), *appeal allowed*, 648 N.E.2d 705 (Ohio 1997); Jackson v. Benson, 578 N.W.2d 602, 608-09 (Wis. 1998) (describing school voucher program that Milwaukee implemented), *cert. denied*, 119 S. Ct. 466 (1998).

the constitutionality of these programs.[21] A few scholars have noted that other types of school choice programs besides voucher programs exist. None of these scholars, however, have considered the type of interdistrict choice program implemented out of necessity in rural areas such as Raymond, Maine.[22]

In August 1998, a federal district court in Maine considered a lawsuit by another Maine resident living in the small town of Minot.[23] The town of Minot is one of three towns comprising School Union No. 29, which does not operate its own secondary school.[24] The plaintiffs, like the Bagleys, were unsuccessful in seeking reimbursement for the tuition they paid to a private, Catholic high school and so they brought a lawsuit against the Maine Commissioner of Education.[25] The court declined to answer the question of whether Maine could permit its school districts to provide tuition reimbursement to parents who choose to send their children to sectarian private schools.[26] It did, however, in a cursory two-page opinion, find that Maine is not constitutionally required to extend tuition subsidies to sectarian private schools and granted the defendant's motion for summary judgment.[27] After a careful analysis of the Establishment Clause jurisprudence that deals with aid to religious schools, this Note concludes that the federal district court in Maine erred in granting summary judgment to the Maine Commissioner of Education.

This Note considers the constitutionality of including religious schools in both necessary interdistrict school choice programs and in school voucher

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21. *See Simmons-Harris*, 1997 WL 217583, at *2 (challenging implementation of scholarship program on grounds that it violates Establishment Clause); *Jackson*, 578 N.W.2d at 607 (upholding constitutional challenge to Amended Milwaukee Parental Choice Program, which allowed participation of sectarian schools); Garnett, *supra* note 1 (discussing lawsuit filed in Maine against commissioner of education alleging that state's school choice program violates parents' First Amendment rights because parents cannot choose to send their children to religious schools).

22. *See* Mark J. Beutler, *Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications*, 2 GEO. MASON INDEP. L. REV. 7, 13-16 (1993) (describing several school choice programs including vouchers, scholarships, and property tax abatements, but failing to mention interdistrict choice programs in rural areas); Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 149-60 (1996) (discussing state constitutional law as applied to aid to religious schools and voucher programs in six states and territories, but not discussing other types of school choice programs).

23. Strout v. Commissioner, 13 F. Supp. 2d 112, 113 (D. Me. 1998).

24. *Id.*

25. *Id.*

26. *Id.* at 114.

27. *Id.*

programs.[28] In assessing whether a state may constitutionally include religious schools in a necessary interdistrict school choice program, this Note analyzes the major Establishment Clause cases that discuss aid to religious schools.[29] Previously, scholars have not dealt with these cases in light of this type of school choice program. In considering whether a school voucher program may include religious schools, this Note summarizes scholars' existing arguments both for and against the inclusion of religious schools.[30] This Note also applies the Supreme Court's recent decision in *Agostini v. Felton*[31] to the questions of whether it is constitutional for either or both necessary interdistrict choice programs and voucher programs to include religious schools.[32]

Much of the scholarly and jurisprudential disagreement about the propriety of any school choice program arises from the issue of public funding of

28. *See infra* Parts II-III (discussing constitutionality of including religious schools in interdistrict choice programs and school voucher programs).

29. *See infra* Part II (discussing recent Establishment Clause cases and constitutionality of including religious schools in interdistrict choice programs).

30. *See infra* Part III (summarizing scholars' arguments both for and against inclusion of religious schools in school voucher programs).

31. 117 S. Ct. 1997 (1997).

32. *See* Agostini v. Felton, 117 S. Ct. 1997, 2003 (1997) (holding that federally funded program which sent public school teachers into parochial schools to provide remedial instruction to disadvantaged children is not invalid under Establishment Clause). In *Agostini*, the Supreme Court considered whether the Establishment Clause barred New York City from sending public school teachers into religious schools to provide remedial education to disadvantaged children under Title I of the Elementary and Secondary Education Act of 1965. *Id.* Previously, in *Aguilar v. Felton*, 473 U.S. 402 (1985), the Court had held that such programs created excessive entanglement of church and state and thus violated the Establishment Clause. *Agostini*, 117 S. Ct. at 2004-05. Since that decision, New York City had provided Title I services at leased sites, in mobile units, and via computer, resulting in significant expenditure of funds to comply with *Aguilar*. *Id.* at 2005. The *Agostini* Court found that Establishment Clause cases subsequent to *Aguilar* had eroded that holding because the Court undermined the assumptions on which it had relied in deciding *Aguilar* and its companion case, *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985). *Agostini*, 117 S. Ct. at 2017. First, the Court decided that the assumption that any public employee working on the premises of a religious school inculcated religion in her work was no longer valid. *Id.* at 2010. The presence of public school employees on the grounds of a religious school does not necessarily create a symbolic union between church and state. *Id.* at 2011. Second, the Court reasoned that it previously had departed from the rule relied on in *Ball* that all government aid that assists religious schools is invalid. *Id.* Finally, the Court determined that not all entanglements between church and state have the effect of advancing religion. *Id.* at 2015. The Court stated that if the assumption that public employees in religious schools inculcate religion is no longer valid, then New York City's Title I program no longer requires pervasive monitoring and therefore does not create excessive entanglement. *Id.* at 2016. Consequently, the Court determined that New York City's Title I program did not "run afoul of any of the three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion." *Id.*

religious schools.[33] The constitutional debate over school choice centers largely on Establishment Clause jurisprudence.[34] Accordingly, judges and scholars have argued about the application of the *Lemon* test, the Supreme Court's often-used test for determining whether a publicly-funded program that directly or indirectly aids religious schools violates the Establishment Clause.[35] Nonetheless, the types of programs this Note discusses require separate applications of Establishment Clause jurisprudence because of the difference in the functioning of the programs.[36] Some constitutional analysis applies to all types of school choice programs, such as the assessment of recent changes in Establishment Clause jurisprudence. Even before the Supreme Court's *Agostini* decision became the focus of constitutional debate in 1997,[37] advocates of the inclusion of sectarian schools in school choice programs suggested that earlier Supreme Court decisions redefined the relationship between church and state.[38] These advocates have maintained

33. *See generally* Bright, *supra* note 14 (discussing constitutionality of Proposition 174 that would have allowed government money to flow to religious schools in California school choice program); Loeb & Kaminer, *supra* note 14 (discussing inclusion of religious schools in voucher plans and whether such programs violate both federal and state constitutions); Stick, *supra* note 14 (examining policy and constitutional issues involved in debate over inclusion of sectarian schools in voucher programs).

34. *See* Loeb & Kaminer, *supra* note 14, at 5 (stating that "voucher controversy centers around the First Amendment to the U.S. Constitution and parallel provisions in state constitutions").

35. *See infra* notes 63-68 and accompanying text (discussing test for assessing whether statute violates Establishment Clause created by Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

36. *See infra* Parts II-III (discussing application of Establishment Clause jurisprudence to necessary interdistrict choice programs and to school voucher plans).

37. *See, e.g.*, Leading Cases, 111 HARV. L. REV. 197, 286-89 (1997) (discussing problematic approach of Supreme Court in deciding *Agostini* and further damage that *Agostini* has caused to separation of church and state and to Establishment Clause); Edward Felsenthal, *High Court Rules Public Teachers Can Work in Religious Schools*, WALL ST. J., June 24, 1997, at B8 (stating that Supreme Court's decision in *Agostini* has encouraged school voucher advocates); Art Moore, *Justices Void Ruling on Remedial Teachers*, CHRISTIANITY TODAY, Aug. 11, 1997, at 53, *available in* 1997 WL 8863269 (discussing belief of school voucher advocates that *Agostini* provides "ammunition" for their cause).

38. *See, e.g.*, Phillip E. Johnson, *School Vouchers and the United States Constitution*, *in* THE SCHOOL-CHOICE CONTROVERSY: WHAT IS CONSTITUTIONAL? 51, 65 (James W. Skillen ed., 1993) (stating that United States Constitution supports right to choose either religious or secular education when financial terms are neutral); Viteritti, *supra* note 22, at 116-17 (concluding that tuition assistance programs that allow parents to send their children to religious schools are constitutional); Bodemer, *supra* note 14, at 311 (concluding that Supreme Court's interpretation of Establishment Clause would allow implementation of school voucher programs); Nasstrom, *supra* note 14, at 1092 (asserting that Supreme Court's "current construction and application of *Lemon* to voucher legislation permitting parochial schools' participation would not result in an Establishment Clause violation").

that Agostini confirms that school voucher programs can be constitutional.[39] Opponents of school choice programs that include sectarian schools have asserted that prior Establishment Clause jurisprudence forbids this extensive involvement of church and state[40] and that *Agostini* does not change the constitutionality of such programs.[41] *Agostini* has varying effects on the constitutionality of the different types of school choice programs that include religious schools. It is most significant, however, because it alters the application of the *Lemon* test to the question of whether a government program can aid a religious institution.[42]

Part II of this Note discusses whether the Constitution permits or requires interdistrict choice programs, such as the one implemented in Maine, to include religious schools. Part II's discussion includes an examination of recent Establishment Clause opinions that address the issue of aid to religious schools, particularly the Supreme Court's reasoning in *Agostini*. Part III addresses the more difficult questions of whether the Constitution permits or requires cities to include religious schools in voucher programs. In particular, Part III considers scholars' constitutional arguments for and against voucher programs that include religious schools. Part III also considers how the Supreme Court's reasoning in *Agostini* affects these arguments.

Finally, Part IV concludes that the Constitution not only permits but requires necessary interdistrict choice programs in rural districts that do not maintain public schools to include sectarian schools when the program also

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39. *See* Joan Biskupic & Laurie Goodstein, *Church-State Divide Narrowed; Taxpayer-Funded Teachers Allowed to Tutor in Parochial Schools*, WASH. POST, June 24, 1997, at A1 (stating that advocate of inclusion of religious schools in school voucher programs asserts that *Agostini* "confirms that vouchers can be constitutional"); Daniel Wise, *Parochial School Teaching May Be Paid by Federal Funds*, 217 N.Y. L.J. 1 (1997) (noting advocate's assertion that, through *Agostini*, "the Court has provided states with a 'blueprint' for the adoption of vouchers . . . which can withstand constitutional scrutiny").

40. *See* Bright, *supra* note 14, at 228 (concluding that state funds which flow to religious schools as result of voucher plans reach those religious schools because of state action; there is no guarantee that religious schools will use such funds for only secular purposes; and such programs are unconstitutional); Green, *supra* note 14, at 42-43 (discussing Establishment Clause concerns that arise in school choice programs and asserting that voucher plans and all school choice proposals are unconstitutional).

41. *See, e.g.*, Felsenthal, *supra* note 37, at B8 (noting that voucher opponents viewed *Agostini* as "remain[ing] wary of direct subsidies for religious schools"); Tamara Henry & Lori Sharn, *Schools Decision Could Affect Rulings on Vouchers*, USA TODAY, June 24, 1997, at 3A (noting that voucher opponents "are certain there's no precedent [in *Agostini*] to allow programs that will bridge the separation between church and state"); Wise, *supra* note 39, at 1 (stating that one school voucher opponent believes that *Agostini* "'leaves both sides where we were' on vouchers").

42. *See infra* notes 201-04, 213-15, 315-38 and accompanying text (describing impact of *Agostini* on constitutionality of including religious schools in necessary interdistrict choice programs and school voucher plans).

includes nonsectarian private schools. The Supreme Court's reasoning in *Agostini* impacts and reinforces this conclusion and adds weight to existing Establishment Clause decisions that support the cause of school choice advocates in Maine who desire such a change.[43] Part IV also concludes that the Constitution permits the inclusion of religious schools in school voucher systems. *Agostini* adds significant new support to existing arguments for the constitutionality of permitting religious schools to participate in voucher programs.[44] Constitutional jurisprudence, however, does not *require* that school voucher systems include religious schools, even after the *Agostini* decision.[45]

II. Necessary Interdistrict Choice Programs and the Inclusion of Religious Schools

Maine's necessary interdistrict choice program currently applies to approximately 140 rural towns.[46] During the 1996 school year, a state statute required that these Maine towns pay the tuition of approximately 13,000 students, forty percent of whom attended private, nonsectarian schools.[47] The applicable state statute, Maine Statute title 20-A, § 5204 states that a school district that does not provide a secondary school for its students must pay the tuition required for its students to attend an approved private school, a public school in a neighboring district, or an approved public school in another county or state.[48] Read in isolation, § 5204 permits students to attend any private school.[49] However, Maine Statute title 20-A, § 2951 limits § 5204 because it provides that the state will approve a private school to receive government funds for tuition purposes only if it is not a religious school.[50]

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43. *See infra* Part II.E (analyzing impact of *Agostini* on argument that inclusion of religious schools in necessary interdistrict choice programs is constitutional).

44. *See infra* Part III.C (discussing impact of *Agostini* on existing arguments for constitutionality of permitting religious schools to participate in voucher programs).

45. *See infra* Part III.D (concluding that *Agostini* does not require voucher programs to include religious schools).

46. Young, *supra* note 2.

47. *Id.*

48. ME. REV. STAT. ANN. tit. 20-A, § 5204 (4) (West 1993). Subsection 4 states:

> Secondary students whose parents reside in a unit which neither maintains a secondary school nor contracts for secondary school privileges may attend a private school approved for tuition purposes, a public school in an adjoining unit which accepts tuition students, or a school approved for tuition purposes in another state or country .... The school administrative unit where the students' parents reside shall pay tuition in the amount up to the legal tuition rate as defined in Chapter 219.

Id.

49. *Id.*

50. *Id.* § 2951. Section 2951 states: "A private secondary school may be approved for

On July 31, 1997, the Bagleys and four other families from the town of Raymond filed a lawsuit against Maine's Commissioner of Education challenging Maine's interdistrict school choice law.[51] The Bagleys claimed that the state's school choice plan violates the First Amendment because it excludes parochial schools.[52] Advocates of the inclusion of sectarian schools in school choice programs have asserted that the time was right for such a lawsuit.[53] According to many school choice advocates in Maine, the Bagleys' lawsuit is particularly appropriate because the Supreme Court's decision in *Agostini* signals the blurring of the line separating church and state and provides an ample basis to support their argument that the state should allow Maine residents to use state tuition funds to attend religious schools.[54]

As originally instituted in 1903, Maine's school choice program did include parochial schools.[55] In 1980, however, the Maine Attorney General's Office determined that spending public funds on religious education was an unconstitutional violation of the Establishment Clause of the First Amendment.[56] Accordingly, the Maine legislature amended the law to exclude the expenditure of public funds to religious schools.[57] However, recent United States Supreme Court Establishment Clause cases that deal with public funding of religious education demonstrate that the Constitution permits Maine's interdistrict choice program to include religious schools.[58]

The Establishment Clause of the First Amendment defines the nature of the relationship that is to exist between religion and government: "Congress shall make no law respecting an establishment of religion . . . ."[59] In effect,

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the receipt of public funds for tuition purposes only if it . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution . . . . " *Id.*

51. *See* Wolfe & Ragland, *supra* note 6 (stating that five families filed suit in Cumberland County Superior Court in Maine).

52. *See* Garnett, *supra* note 1 (stating that parents' lawsuit asserts that Maine's practice violates First Amendment).

53. *See id.* (discussing Supreme Court's recent decision in *Agostini* and arguing that Maine should "seize the opportunity" to change its school choice program to include religious schools).

54. *See* Young, *supra* note 2 (discussing *Agostini* and explaining that Supreme Court's decision "indicates the separation of church and state is becoming blurred").

55. *See id.* (discussing Maine school choice law and its inception in 1903).

56. Me. Op. Att'y Gen. No. 80-2 (1980).

57. *See* Garnett, *supra* note 1 (discussing Maine school choice law, which state legislature amended in 1981 after Maine Attorney General wrote opinion finding it unconstitutional to include religious schools in Maine's school choice program).

58. *See infra* notes 80-156 and accompanying text (analyzing Supreme Court's decisions in *Mueller v. Allen*, 463 U.S. 388 (1983), *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993)).

59. U.S. CONST. amend. I, cl. 1. In 1947, this clause became applicable to the states through the Fourteenth Amendment in *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

the Establishment Clause maintains the separation of church and state.[60] Just as then-Maine Attorney General Richard S. Cohen believed when he determined in 1980 that the state's school choice program was unconstitutional,[61] the primary argument against subsidization of religious schools through school choice programs is the belief that such subsidization violates the Establishment Clause.[62]

A. Lemon v. Kurtzman

In 1971, the Supreme Court addressed the issue of aid to religious schools in *Lemon v. Kurtzman*[63] and created its now-famous three-prong test for determining when government funds may properly benefit religious institutions under the Establishment Clause.[64] The Court noted the difficulty

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60. *See* Futterman, *supra* note 14, at 712 (discussing historical background of First Amendment and religion clauses).

61. *See* Me. Op. Att'y Gen. No. 80-2 (concluding that Maine's practice of paying tuition for students at sectarian schools was unconstitutional).

62. *See* Futterman, *supra* note 14, at 714 (noting that debate over school choice has focused primarily on critics' contention that government funding of private religious schools violates Establishment Clause).

63. 403 U.S. 602 (1971).

64. *See* Lemon v. Kurtzman, 403 U.S. 602, 607 (1971) (holding that two state statutes providing aid to religious schools are unconstitutional). In *Lemon*, the Supreme Court considered the constitutionality of a Rhode Island statute under which the state paid teachers in nonpublic schools a supplement equal to 15% of their annual salary if, among other criteria, they agreed to teach only secular subjects. *Id.* at 607-08. The Court also considered the constitutionality of a Pennsylvania statute that provided financial support to nonpublic schools through reimbursement for costs related to secular activities. *Id.* at 609-10. The *Lemon* Court recognized "the absence of precisely stated constitutional prohibitions" against laws "respecting" religion and outlined a three-pronged test for the Court to use in determining the constitutionality of such statutes. *Id.* at 612-13. First, the statute must have a secular purpose; second, its primary effect must not advance nor inhibit religion; and third, the statute must not foster "an excessive government entanglement with religion." *Id.* (quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970)). Applying this test, the Court determined that the legislatures of Rhode Island and Pennsylvania had the valid secular purposes of intending to enhance the quality of secular education through financial support of all schools. *Id.* at 613. The Court declined to decide whether the primary effect of the statutes was to advance or to prohibit religion because both statutes failed the third prong of the test. *Id.* at 613-14. The Rhode Island statute involved excessive entanglement between government and religion because the religious activities of parochial schools gave rise to careful and extensive surveillance and record-keeping by state authorities in order to ensure that state aid benefitted only secular education. *Id.* at 616-17. The Court determined that the state would have to continue such pervasive monitoring because a "dedicated religious person" is likely to experience difficulty in remaining "religiously neutral" even when teaching secular subjects. *Id.* at 618. The Pennsylvania statute also caused excessive entanglement between government and religion because it provided state financial aid directly to religious schools and thus also required extensive monitoring to ensure that secular

in identifying a law "respecting" the establishment of religion; therefore, it articulated three important criteria to identify statutes that do not violate the Establishment Clause.[65] First, a statute must have a secular purpose.[66] Second, the primary effect of the statute must be one that neither aids nor inhibits religion.[67] Third, the statute must not create "excessive government entanglement with religion."[68]

In *Lemon*, the Court found unconstitutional two state statutes that sought to subsidize the costs of private and parochial education through reimbursements for secular activities and teacher salary supplements.[69] Applying its three-prong test, the Court first determined that the statutes had a clearly demonstrated secular purpose of enhancing the quality of secular education.[70] Second, the Court declined to decide whether the statutes had the primary effect of inhibiting or advancing the religious schools.[71] Instead, the Court moved on to the third prong and found that the two statutes resulted in excessive administrative entanglement between church and state because the schools receiving aid had the primary purpose of reinforcing religious faith and because both statutes required extensive surveillance measures to ensure that the schools used state funds only for secular purposes.[72]

The Court's reasoning resulted in a "Catch-22."[73] Although the effects prong requires that the government monitor any program involving aid to religious institutions, monitoring itself constitutes an excessive entanglement and therefore violates the third prong of *Lemon*.[74] In the years immediately

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and religious expenditures were kept separate and that aid went only to secular costs. *Id.* at 621-22. The Court also noted that both state statutes had the potential to cause political divisiveness along religious lines, an "evil" against which the First Amendment was to protect. *Id.* at 622. Consequently, the *Lemon* Court held that the state statutes were in violation of the First Amendment and thus unconstitutional. *Id.* at 625.

65. *Id.* at 612.

66. *Id.*

67. *Id.*

68. *Id.* at 613 (quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970)).

69. *Id.* at 607-10.

70. *Id.* at 613-14.

71. *Id.*

72. *See id.* at 615-25 (discussing entanglement between church and state caused by Rhode Island and Pennsylvania state statutes).

73. *See* Beutler, *supra* note 22, at 22-23 (discussing Supreme Court's reasoning in *Lemon* and effects of establishing three-prong *Lemon* test). In concluding his analysis of *Lemon*, Beutler states: "Aid to sectarian schools must be vigorously policed lest it be put to sectarian use and thereby violate the effects test. Yet this supervision constitutes an impermissible entanglement. That of course leaves only one solution: exclude religious schools from receiving government aid altogether." *Id.*

74. *Id.*

following *Lemon*, this interpretation of the test led the Court to prohibit various types of aid to religious schools.[75] One such case was *Committee for Public Education & Religious Liberty v. Nyquist*,[76] in which the Court struck down three programs that only provided aid to private schools and to parents whose children were attending private schools.[77] Soon after *Nyquist*, however, the Court began to waver in its application of the *Lemon* test in a number of cases that challenged aid to religious education.[78] The Supreme Court's firm

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75. *See* Sloan v. Lemon, 413 U.S. 825, 830-32 (1973) (holding that Pennsylvania's partial tuition reimbursement program for parents with children attending nonpublic schools furnished incentive for parents to send their children to religious schools, advancing religion, and was, therefore, unconstitutional); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 798 (1973) (holding that New York tax programs which provide aid to nonpublic schools have impermissible effect of advancing religion and are unconstitutional); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 481-82 (1973) (finding unconstitutional reimbursement of parochial schools for expenses for services required by state because secular activities receiving aid are not distinguishable from sectarian activities); *see also* Viteritti, *supra* note 22, at 133-35 (discussing Court's opinion in *Nyquist* and its relation to other cases decided during 1973 term).

76. 413 U.S. 756 (1973).

77. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 798 (1973) (holding that New York tax programs which provide aid to nonpublic schools have impermissible effect of advancing religion and are unconstitutional). In *Nyquist*, the Court addressed New York's amendments to the state tax laws that established three financial aid programs for private schools: direct money grants for maintenance, tuition grants, and a tax benefit program. *Id.* at 761-68. The *Nyquist* Court applied the three-part *Lemon* test to the three programs. *Id.* at 772-73. The Court determined that New York's programs had a valid secular purpose in wanting to preserve safe educational environments in its private schools and in being concerned about the overburdened public school system. *Id.* at 773. The maintenance and repair provisions, however, failed to pass the second part of the *Lemon* test because no provision existed to ensure that the school did not use the direct money grants in connection with any religious activity. *Id.* at 774. The provisions constituted direct subsidy of religious institutions and had the primary effect of impermissibly advancing religion. *Id.* The Court found that the tuition reimbursement program also failed the "effect" test because the state could not ensure that schools used the aid for only secular purposes, especially when given to parents instead of schools. *Id.* at 780-83. Also, the Court decided that the tax credits program failed the "effect" test because it had the effect of advancing religion as it provided financial benefit to parents who chose to send their children to sectarian schools. *Id.* at 789-94. The Court decided that it need not consider the entanglement prong because it found that the challenged provisions had the impermissible effect of advancing religion. *Id.* at 794. Consequently, the Court concluded that the New York tax provisions violated the Establishment Clause and were thus unconstitutional. *Id.* at 795-98.

78. *See* Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools – An Update*, 75 CAL. L. REV. 5, 5-6 (1987) (discussing Supreme Court's application of three prongs of *Lemon* test in cases subsequent to *Lemon* and determining that such decisions contain conceptual problems); Bodemer, *supra* note 14, at 297-99 (discussing likelihood of school voucher program satisfying three prongs of *Lemon* test, inconsistencies of Supreme Court in applying *Lemon* test, and inferring from Court dicta that test may be in need of revision).

stand on the strict division between church and state began to soften when, in 1980, the Court upheld a New York law that allocated state funds to both private and parochial schools as a reimbursement for expenditures on required state examinations and on the collection of attendance data.[79]

B. Mueller v. Allen

Three years later, in *Mueller v. Allen*,[80] the Court took an even greater step toward allowing funding of religious education when it upheld a Minnesota statute that granted parents of public, private, and parochial schoolchildren tax deductions for reasonable educational expenses, including tuition.[81]

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79. *See* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 660-61 (1980) (holding New York plan allocating funds to private and parochial schools for administration of state examinations does not suggest excessive entanglement and thus is constitutional).

80. 463 U.S. 388 (1983).

81. *See* Mueller v. Allen, 463 U.S. 388, 390-91 (1983) (holding that Minnesota statute allowing taxpayers to deduct certain expenses incurred in providing for their children's education at nonsectarian and sectarian schools does not violate Establishment Clause and is constitutional). In *Mueller*, the Supreme Court considered a Minnesota statute that permits state taxpayers to deduct from gross income actual expenses related to "tuition, textbooks, and transportation" incurred in the education of their children. *Id.* at 391. The *Mueller* Court considered whether this program bore greater resemblance to the types of assistance that it previously had struck down in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), or to programs that it had upheld, such as in *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Everson v. Board of Education*, 330 U.S. 1 (1947). *Id.* at 393-94. The Court applied the three-part test developed in *Lemon* but acknowledged that the test "provides no more than [a] helpful signpos[t] in dealing with Establishment Clause challenges." *Id.* at 394 (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973) (alterations in original)). The Court declined to spend much time on the question of whether the tax deduction had a secular purpose and quickly decided that "[a] State's decision to defray the cost of educational expenses incurred by parents regardless of the type of schools their children attend evidences a purpose that is both secular and understandable." *Id.* at 395. In addition, the Court noted that a strong public interest existed in having healthy private schools as they provide competition to public schools and relieve some tax burden. *Id.* In determining whether the Minnesota statute had the primary effect of advancing religion, the Court looked to the nature of the tax deduction and noted that it was available to all parents, including those whose children attended public schools. *Id.* at 397. This factor led the Court to believe that the Minnesota statute was "vitally different" from the tax scheme struck down in *Nyquist* and was more similar to the programs upheld in *Allen* and *Everson*. *Id.* at 398. Also, the Court stated that the Minnesota arrangement reduced Establishment Clause concerns because public funds became available to private and parochial schools only as a result of numerous private choices of parents. *Id.* at 399. The Court disagreed with the petitioners' argument that in application the statute primarily benefitted religious institutions because most parents of public school children incurred little, if any, tuition expenses. *Id.* at 400-01. The statute was facially neutral because parents of public school students could take advantage of the statute by making deductions for things such as transportation costs, summer school tuition, and various equipment costs. *Id.* The Court refused to consider whether such parents actually took advantage of the statute. *Id.* Finally, the

The Court applied the *Lemon* test and determined that the Minnesota statute satisfied all three parts of the test.[82] First, the Court determined that the statute clearly served a secular purpose in ensuring that the children of Minnesota were well-educated by defraying costs that parents incurred in providing education.[83] Similarly, the interdistrict choice program implemented in Maine also has a secular purpose in that it serves to provide an education to those children whose parents reside in sparsely populated areas.[84]

Second, the *Mueller* Court found that the Minnesota statute did not have the primary effect of advancing religion because any parent, not just those whose children attended private schools, could benefit from the tax deductions.[85] Thus, this facially neutral statute provided no incentive for parents to send their children to parochial schools rather than nonparochial schools.[86] The Court determined that facial neutrality was enough to satisfy the effects prong, despite the fact that, in reality, parents of children who attended religious schools made ninety-six percent of the Minnesota tax deductions.[87]

As in *Mueller*, the Maine statute that defines the interdistrict program is facially neutral in that all schoolchildren in the relevant area benefit from the opportunity to choose a school in another administrative unit of the state.[88] The Maine statute, like the one in *Mueller*, therefore provides no incentive for a parent to send his or her child to a religious school over a nonreligious

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Mueller Court had "no difficulty" concluding that the Minnesota statute did not involve excessive entanglement because the only surveillance possibly necessary was deciding whether certain textbooks qualified for the deduction, and the Court had already approved of that type of decision in earlier cases. *Id.* at 403. Consequently, the Supreme Court found that the Minnesota statute did not violate the Establishment Clause. *Id.* at 403-04.

82. *See id.* at 394-403 (discussing reasoning of court in determining how statute satisfies all three prongs of *Lemon* test).

83. *Id.* at 395.

84. *See* ME. REV. STAT. ANN. tit. 20-A, § 5204 (West 1993) (stating that students whose parents live in administrative units without public schools can attend school outside their unit).

85. *Mueller*, 463 U.S. at 397.

86. *Id.*

87. *See id.* at 409 (Marshall, J., dissenting) (noting that 96% of total taxpayers who are eligible for tuition deduction send their children to religious schools); *see also* Choper, *supra* note 78, at 9 (contending that Court's reasoning that when government assistance is neutral, effect is not to advance religion "does not survive closer analysis"). Choper argues that in reality, only parents who send their children to nonpublic schools benefit from the tax deductions and that the true primary effect of the statute was to advance religion. *Id.* at 9-10.

88. *See* ME. REV. STAT. ANN. tit. 20-A, § 5204 (stating that all "[s]econdary students whose parents reside in a unit which neither maintains a secondary school nor contracts for secondary school privileges" may attend a school in another unit and "unit where the students' parents reside" will pay tuition); *supra* notes 85-87 and accompanying text (discussing facial neutrality of statute in *Mueller*).

school. Furthermore, the practical result of the statute is not to favor families who send their children to sectarian schools, as it was in *Mueller*.[89] Maine's interdistrict choice program applies to 140 towns that do not provide secondary schools for their residents. However, Maine school choice advocates estimate that the program would affect fewer than one hundred families if it included sectarian schools.[90] Although the Court found similar facial neutrality to be sufficient to support constitutionality in *Mueller*, if the Maine program included religious schools, the statute would also have a neutral practical effect.[91]

In determining that the tax deductions did not have the primary effect of advancing religion, the *Mueller* Court also viewed as important the role of the parent in the distribution of government aid to public, private, and parochial schools.[92] The fact that public funds only become available to religious schools after numerous private choices by parents was a material consideration in the Court's Establishment Clause analysis.[93] The state did not require that parents first decide to send their children to religious schools before they could receive aid and, therefore, did not induce parents to choose religious schools.[94]

Similarly, if the Maine statute included religious schools and allowed those schools to receive state tuition money, that money would reach religious schools only after a private and independent family choice.[95] The current statute clearly states that each student has the option of choosing a private or public school.[96] The same options would be present if the statute included

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89. *See supra* note 87 and accompanying text (discussing practical effect of ruling in *Mueller*).

90. *See* Young, *supra* note 2 (discussing effect of court ruling in Raymond families' favor).

91. *See supra* note 87 and accompanying text (discussing that Court found facial neutrality of statute sufficient).

92. *Mueller*, 463 U.S. at 399.

93. *Id.* (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 781 (1973)).

94. *See id.* (stating that "no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally" by Minnesota statute (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981))); *see also* Choper, *supra* note 78, at 10 (noting that *Mueller* upheld statute because "state is not putting its imprimatur on the parochial school; the parents make the decision, not the state").

95. *See* Garnett, *supra* note 1 (stating that if Maine's tuitioning system included religious schools, state funds would only reach religious school as result of independent choice).

96. *See* ME. REV. STAT. ANN. tit. 20-A, § 5204 (West 1993) (stating that "[s]econdary students . . . may attend a private school approved for tuition purposes, a public school in an adjoining unit which accepts tuition students, or a school approved for tuition purposes in another state or country").

religious schools. The government pays a student's tuition because he or she resides in an area that does not maintain a public school, not because of the type of school the student chooses.[97] Therefore, the statute does not induce the student or parent to make a particular choice.

Finally, the *Mueller* Court quickly determined that the Minnesota statute did not create an excessive entanglement between church and state.[98] There was no need for extensive surveillance and, therefore, the statute satisfied this part of the *Lemon* test.[99] A court might distinguish Maine's interdistrict choice program from the tax deduction plan in *Mueller* with regard to this prong of the *Lemon* test because the Maine statute would provide a greater benefit, in the form of all or most of the students' tuitions, to the families involved.[100] Subsequent cases, however, have altered or virtually dismissed the entanglement prong of the *Lemon* test.[101] Even in *Mueller*, the Court called the *Lemon* test "no more than [a] helpful signpos[t]" in deciding Establishment Clause issues, suggesting that the *Lemon* test is not as definitive as the Court once thought it to be.[102] Although Maine's interdistrict choice program may fail an entanglement prong, this is a moot point if the Court no longer recognizes the efficacy of this prong of the *Lemon* test.[103]

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97. *See id.* (stating that secondary students residing in district that does not maintain public school may attend public or private school and district where student resides shall pay tuition). The statute provides no other requirements that a student must fulfill in order for the district to pay his or her tuition. *Id.*

98. *Mueller*, 463 U.S. at 403.

99. *Id.*

100. *See id.* at 391 (stating that tax deduction under Minnesota statute may not exceed $500 per dependent in elementary school and $700 per dependent in secondary school). The Maine statute provides for a district to pay a student's tuition "up to the legal tuition rate." ME. REV. STAT. ANN. tit. 20-A, § 5204.

101. *See* Agostini v. Felton, 117 S. Ct. 1997, 2010-16 (1997) (discussing erosion of assumptions Supreme Court had relied upon in prior cases and asserting that such erosion leads to conclusion that monitoring of church-state relations, and thus excessive entanglement, is not always present when religious schools and government come into contact); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 489 n.5 (1986) (declining to "address the 'entanglement' issue"). *See generally* Zobrest v. Catalina Foothills Sch. Dist. 509 U.S. 1 (1993) (failing to address excessive entanglement prong of *Lemon* test in majority's opinion).

102. *Mueller*, 463 U.S. at 394 (alterations in original) (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)); *see* Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 168-69 (1987) (discussing impact of *Mueller* on evolution of *Lemon* test and Establishment Clause).

103. *See infra* notes 192-96 and accompanying text (discussing change in application of *Lemon* test by Court in *Agostini*). In *Agostini*, the Court determined that it should treat the entanglement prong of the *Lemon* test as simply an aspect of the effects prong. *Agostini*, 117 S. Ct. at 2015.

C. Witters v. Washington Department of Services for the Blind

In *Witters v. Washington Department of Services for the Blind*,[104] the Supreme Court once again considered the question of indirect aid to religious schools.[105] The Court in *Witters* concluded that the state must provide a visually-impaired student with state aid to attend a religious school and that such aid does not violate the Establishment Clause[106] despite the fact that the state aid clearly supported the student's religious education.[107] In making its decision, the Court purported to use the *Lemon* test.[108] Nonetheless, the Court declined to address the excessive entanglement prong of the test.[109]

First, the program had a clear secular purpose because the state designed it to assist the visually handicapped by providing aid for vocational rehabilitative services.[110] Second, the program did not violate the effects prong simply because state funds reached a religious institution.[111] The Court equated the state aid to a government employee donating his state paycheck to a religious

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104. 474 U.S. 481 (1986).

105. *See* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 489-90 (1986) (determining that extension of aid under state program to finance visually-impaired student's training at Christian college does not advance religion and thus does not violate Establishment Clause). In *Witters*, the Court considered the Washington Commission for the Blind's denial of aid to a visually-impaired student who was attending a bible college in preparation for a career as a pastor or other religious administrator. *Id.* at 483. The *Witters* Court used the three-part *Lemon* test to guide its analysis, noting that in *Lemon* itself the Court called this area of the law "extraordinarily sensitive." *Id.* at 485 (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)). First, the Court found that the Washington program had an "unmistakably secular purpose" in that it assisted the visually-handicapped in receiving vocational training. *Id.* at 485-86. In regards to the second prong, the "primary effect" test, the Court found its analysis to be more difficult. *Id.* at 486. The Court found, however, that the Washington program presented a situation similar to that of a state employee who receives a paycheck from the government and donates all or part of it to a religious institution. *Id.* at 486-87. The Court did not find the aid provided by the Washington program to be similar to direct aid to a religious school in the form of a direct subsidy because it only reached a religious school as a result of an independent and private choice. *Id.* at 488. The granting of aid neither constituted a state endorsement of religion nor created an incentive for students to attend religious schools because the same benefits were available for use at secular schools. *Id.* at 488-89. The Court declined to address the "excessive entanglement" prong based on the record available. *Id.* at 489 n.5. Consequently, the Court rejected the claim that a grant of aid for a visually-impaired student to use toward religious education violated the Establishment Clause of the First Amendment. *Id.* at 489-90.

106. *See id.* (stating that Establishment Clause does not prohibit Washington program).

107. *See* Stick, *supra* note 14, at 447 (discussing Supreme Court's analysis in *Witters* and noting that "state assistance clearly supported religious education").

108. *See Witters*, 474 U.S. at 485 (stating that test set forth in *Lemon* guided Court).

109. *See id.* at 489 n.5 (declining to address excessive entanglement prong of *Lemon* test).

110. *Id.* at 485-86.

111. *Id.* at 486.

institution and stated that the government could issue the paycheck even if it knew that government money would aid religion as a result.[112] The aid did not have the effect of a direct subsidy; rather, state money would flow to a religious school only as a consequence of private and independent choice.[113]

The inclusion of religious schools in Maine's necessary interdistrict choice program would be constitutional under *Witters*. As discussed in Part II.B, if Maine's interdistrict choice program included religious schools, the schools would benefit from state funds only after private and independent choices by students and their families.[114] Although each town or district would be aware that some of its tuition money reached religious institutions, the Maine program, like that in *Witters*, is neutral and based on private choice, and therefore is analogous to the government paycheck donated to a religious institution. The government would have no role in the selection of a school for each child.[115]

Also, the government made the aid in *Witters* available to all students who qualified, based upon their visual impairment and without regard to the type of institution benefitted. Therefore, the program provided no financial incentive for a student to pursue a religious education.[116] The Court made a point of noting that aid recipients had a variety of opportunities and a greater number of secular, rather than sectarian, careers available to them.[117] Finally, the Court determined that because nothing in the record indicated that a large portion of aid would ultimately fund religious education, the program did not function to subsidize religion.[118]

As in *Witters*, Maine distributes tuition funds based upon a specific need. In Maine, the state provides all students who do not have access to a local public secondary school with tuition money for a secondary education at another school. Similarly, Washington's program in *Witters* provided aid to

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112. *Id.* at 486-87.

113. *Id.* at 487-88. In evaluating whether the Washington program had the effect of a direct subsidy, the Court stated: "Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 487.

114. *See* Garnett, *supra* note 1 (stating that if Maine's tuitioning system included religious schools, state funds would only reach religious school as result of independent choice).

115. *See id.* (stating that "[t]he town plays no role in selecting the school, parents are free to select any school . . . as long as it meets basic academic requirements").

116. *Witters*, 474 U.S. at 483, 488-89.

117. *Id.* at 488.

118. *Id.* The Court stated that "nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education. The function of the Washington program is hardly 'to provide desired financial support for nonpublic, sectarian institutions.'" *Id.* (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 (1973)).

all visually handicapped students.[119] In each case, the state did not provide aid based on the type of school; therefore, no incentive existed to choose a religious school. Also, the Maine statute states that a student choosing a secondary school would have a greater number of secular opportunities because the student can choose to attend a nonsectarian private school, a public school in a nearby district, or an approved school in another state or county.[120] The addition of sectarian schools to the list merely creates one additional choice.

The Court in *Witters* found it significant that only a small portion of aid would ultimately fund religious education.[121] In Maine, advocates of the inclusion of religious schools in the state's interdistrict choice program argue that such an addition would affect only a small number of families.[122] Neither program, therefore, functions or would function to promote religion because only a small amount of aid would reach religious schools.

The implementation of the *Witters* program is different than the implementation of Maine's interdistrict choice program. In *Witters*, the Court emphasized that Washington gave the aid directly to the visually handicapped student.[123] In Maine, each school district without a secondary school pays the tuition of its residents directly to the school the family chooses.[124] This distinction, although not central to the *Witters* decision,[125] did aid the majority in deciding that the Washington program was not equivalent to a direct subsidy and therefore did not create a financial incentive to pursue a religious

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119. *See id.* at 483 (discussing authorization of statute to provide education or training to assist visually handicapped persons and petitioner's eligibility); *see also* ME. REV. STAT. ANN. tit. 20-A, § 5204 (West 1993) (stating that those secondary students whose parents reside in district which does not provide secondary school may attend another school).

120. *See* ME. REV. STAT. ANN. tit. 20-A, § 5204(4) (stating that "[s]econdary students . . . may attend a private school approved for tuition purposes, a public school in an adjoining unit which accepts tuition students, or a school approved for tuition purposes in another state or country").

121. *See supra* note 118 and accompanying text (discussing portion of aid that would reach religious education and function of Washington program).

122. *See* Young, *supra* note 2 (discussing effect of positive ruling in Raymond families' case).

123. *Witters*, 474 U.S. at 487 (stating that "vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice").

124. *See* ME. REV. STAT. ANN. tit. 20-A, § 5204 (4) (stating that "[t]he school administrative unit where the students' parents reside shall pay tuition"); Garnett, *supra* note 1 (stating that "[t]he town then pays tuition (up to the average cost of a public education) to the school that the parents choose").

125. *See* Viteritti, *supra* note 22, at 137 (describing Supreme Court's focus in *Witters*). Professor Viteritti states that the Court's reasoning focused on the fact that "the financial aid in question was made available to all students, not just those in sectarian schools." *Id.*

education.[126] Justice Powell, concurring in the judgment in *Witters*, failed to mention the fact that the government pays the student directly under Washington's program and instead focused on the neutrality of the program and the aspect of private choice.[127] The importance of such a distinction in programs that include religious schools is also open to question after analyzing the Court's decision in *Zobrest v. Catalina Foothills School District.*[128]

126. *See Witters*, 474 U.S. at 487-88 (discussing aspects of Washington's program that show aid does not amount to direct subsidy).

127. *Id.* at 490-92 (Powell, J., concurring); *see also* Viteritti, *supra* note 22, at 137-38 (stating that Justice Powell "set a new standard" for cases involving review of state aid to religious education based on facial neutrality of program, equal availability of funds to all public and private schools, and flow of aid to religious schools based on private choice).

128. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13-14 (1993) (holding that Establishment Clause does not prevent school district from providing child with disability with interpreter to facilitate his education at sectarian school). In *Zobrest*, the Court considered a deaf high school student's request for his school district to supply him with an interpreter, pursuant to the Individuals with Disabilities Education Act (IDEA), at his Catholic high school. *Id.* at 3. The *Zobrest* Court first acknowledged that the case presented only constitutional questions and therefore "the prudential rule" of avoiding such questions did not apply. *Id.* at 7-8. Turning to the merits of the constitutional claim, the Court stated that government programs that neutrally provide benefits to a broad group of citizens are not subject to an Establishment Clause challenge just because sectarian institutions also receive a financial benefit. *Id.* at 8. The Court explained its recent holdings in *Mueller v. Allen*, 463 U.S. 388 (1983) and *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), emphasizing that in both of these cases states made public funds available to a broad class of people on a neutral basis and these funds flowed to religious schools only as a result of the private choices of aid recipients. *Id.* at 8-10. Both state programs discussed in *Mueller* and *Witters* did not advance religion and were not inconsistent with the Establishment Clause. *Id.* The *Zobrest* Court decided that the same reasoning that applied to *Mueller* and *Witters* applied to the present case as well. *Id.* at 10. The Court determined that the service sought in this case was part of a government program that distributes aid neutrally to any disabled child under the IDEA, without regard to the nature of the child's school. *Id.* at 10-11. According to *Mueller* and *Witters*, when the government offers aid or a service on a neutral basis as part of a general program, the fact that it reaches a religious school does not mean that the program is "skewed towards religion." *Id.* at 10 (quoting Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 488 (1986)).

The *Zobrest* Court also found that this case is not analogous to the situations in *Meek v. Pittenger*, 421 U.S. 349 (1975) and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), in which the Court struck down statutes that provided religious schools with teaching equipment and materials and personnel to teach on private school premises, respectively. *Id.* at 11. The *Zobrest* Court first reasoned that the *Meek* and *Grand Rapids* programs were different because they relieved the schools of costs that they otherwise would have borne and constituted "direct and substantial advancement of religious activity" and subsidized the functions of the religious schools. *Id.* at 12 (quoting Meek v. Pittenger, 421 U.S. 349, 366 (1975)). The Court then distinguished *Meek* and *Grand Rapids* by reasoning that the role of a sign-language interpreter is different than that of a teacher. *Id.* at 13. The Court determined that a sign-language interpreter would do nothing more than interpret any material presented to the class and would "neither add to nor subtract from" the pervasively sectarian environment chosen for the student by his parents. *Id.* Consequently, the *Zobrest* Court held that the Establishment

D. Zobrest v. Catalina Foothills School District

In *Zobrest*, the Supreme Court addressed the question of whether a school district must provide a deaf student with an interpreter pursuant to the Individuals with Disabilities Education Act (IDEA) if that student chooses to attend a religious school.[129] The Court noted that such a service is part of a general government program that gives aid to any child who qualifies as "disabled" under the IDEA.[130] The Court ultimately held that the Establishment Clause did not prevent the school district from providing interpreters because the IDEA created a neutral government program that provided aid to students with disabilities, not to schools.[131] In *Zobrest*, however, the Court did not apply the *Lemon* test to the question of the constitutionality of this particular type of aid to religious schools, but instead relied on the underlying reasoning of prior cases.[132]

First, the Court asserted that it had never barred religious institutions from participating in social welfare programs or from receiving general government benefits such as those granted under the IDEA.[133] The Establishment Clause allows government programs to provide benefits on a neutral basis to broad groups of people and to religious institutions without consideration of religion.[134] Discussing *Mueller* and *Witters*, the Court pointed out that both cases relied on two factors: neutrality and private choice.[135] Both cases also demonstrated that aid allocated on a neutral basis did not create an incentive for students to pursue a religious education.[136] The same reasoning applied to the IDEA because, under that program, the government distributed aid on a neutral basis to a group of people classified as handicapped without regard to their religious preferences.[137] Furthermore, such aid would reach a sectarian school only as a result of the private choice of a student or

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Clause does not prevent a school district from supplying a sign-language interpreter to a student at a sectarian school who is receiving such aid. *Id.* at 13-14.

129. *Id.* at 3.

130. *Id.* at 10.

131. *Id.* at 13-14.

132. *See id.* at 8-13 (discussing Court's reasoning in earlier cases of *Mueller*, *Witters*, *Meek*, and *Grand Rapids*, and applying this reasoning to Court's analysis of whether school district should provide deaf student with interpreter at sectarian school). The Court does not mention the *Lemon* test, which the Court typically applies to such cases involving aid to religious schools, except to state that the court of appeals did apply the three-part test created in *Lemon*. *See id.* at 5.

133. *Id.* at 8.

134. *Id.*

135. *Id.* at 8-10.

136. *Id.*

137. *Id.* at 10-11.

parent.[138] The Court concluded that the IDEA did not create a financial incentive for families to choose a religious school and that the presence of a government-provided interpreter did not violate the Establishment Clause.[139]

Second, the Court decided that the IDEA program was not analogous to direct aid in the form of educational materials, equipment, and teaching personnel.[140] The Court determined that the interpreter provided in *Zobrest* was not equivalent to direct aid because the interpreter had not effectively subsidized religious schools.[141] Aid such as government-provided educational materials, equipment, and teachers relieved the religious schools of expenses for which the school otherwise would have paid.[142] In *Zobrest*, the student, not the school, would have paid for the interpreter, and therefore government support would not amount to a direct subsidy because there would be no relief to the religious school of a necessary cost.[143]

The Court's reasoning in *Zobrest* emphasized the importance that *Mueller* and *Witters* placed on neutrality and private choice in the allocation of funds under government programs providing aid to religious schools.[144] As in *Witters*, the *Zobrest* Court upheld a program that provided aid on a neutral basis to a student with a specific need.[145] Through Maine's interdistrict choice program, school districts also allocate funds on a neutral basis – the specific need of students who do not have access to a local school.[146] Although both

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138. *Id.* at 10.

139. *Id.* at 10-11.

140. *Id.* at 11-13 (citing Meek v. Pittenger, 421 U.S. 349, 372 (1975); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 368-89 (1985)).

141. *Id.* at 12.

142. *Id.* at 11-12.

143. *Id.* at 12.

144. *See supra* notes 80-128 and accompanying text (discussing Supreme Court's reasoning in *Mueller* and *Witters* and applying these cases to argument regarding inclusion of religious schools in necessary interdistrict choice program in Maine). Because Parts II.B and II.C analyze the Court's reasoning in *Mueller* and *Witters* and apply these cases to the constitutionality of including religious schools in Maine's interdistrict choice program, there is no need to present an analysis and application of the principles of neutrality and private choice once again in discussing *Zobrest* in Part II.D.

145. *See Zobrest*, 509 U.S. at 10 (describing government program as distributing benefits "neutrally" to any disabled child without consideration of nature of school); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 483 (1986) (describing statute in question as providing aid to all persons with visual handicaps for education and vocational training); *see also* Green, *supra* note 14, at 66 (stating that Chief Justice Rehnquist noted in *Zobrest* "that the petitioner had qualified for the assistance for reasons completely unrelated to his attendance at any particular school" and that, as in *Witters*, "the triggering of the benefit" bore no relation to selection of school).

146. *See* ME. REV. STAT. ANN. tit. 20-A, § 5204 (West 1993) (stating that students who live in school district "which neither maintains a secondary school nor contracts for secondary school privileges" may attend another school).

Witters and *Zobrest* addressed neutrally-based aid programs, *Zobrest* specifically involved a secondary school student, not a college student, thus eliminating any concern that the age distinction might have provided a dividing line between acceptable and unacceptable aid.[147] The reasoning of *Zobrest* further provides support for arguments favoring the inclusion of religious schools in Maine's interdistrict school choice program by the very absence of certain factors that aided the Court's decision in *Witters*.

Unlike the *Witters* decision, *Zobrest* failed to note a distinction between benefits paid directly to religious schools and aid given to students.[148] The government-provided interpreter at issue in *Zobrest* constituted direct aid in that the school district paid for and supplied the interpreter to the student at the religious school.[149] Arguably, after *Zobrest*, the fact that the necessary interdistrict choice program in Maine involves the payment of government funds directly to the school of the student's choice is no longer of fundamental importance.[150] Instead, the *Zobrest* decision focused on the question of whether the aid had the effect of a direct subsidy or provided an individual benefit.[151] The question became whether the program served to relieve a religious school of a cost the school would have otherwise incurred, or if the student reaped the benefit of the aid.[152]

Under the *Zobrest* analysis, the inclusion of religious schools in Maine's necessary interdistrict choice program would not affect the neutrality of the program, despite the school district's direct payment of tuition to the sectarian school. Just as the petitioner in *Zobrest* would have had to pay for the interpreter if the Court had not decided in his favor, the families in Maine have had

147. *See Zobrest*, 509 U.S. at 3 (stating that petitioner requested interpreter to accompany him to high school classes); *Witters*, 474 U.S. at 483 (stating that petitioner was college student); Bright, *supra* note 14, at 215 (stating "*Zobrest* presented the issue of whether the distinction that *Witters* involved aid to a university instead of a [sic] elementary or secondary school outweighed the importance of the private individual choice in directing aid to the religious institution; it does not").

148. *See Zobrest*, 509 U.S. at 9-11 (applying *Witters* Court's reasoning to present situation and failing to discuss distinction between aid to students and direct payments to religious schools mentioned by *Witters* Court); *Witters*, 474 U.S. at 488 (stating that Washington program distributes aid directly to student and therefore decision to pursue religious education must be independent).

149. *See Zobrest*, 509 U.S. at 4 (stating that petitioners asked school district to provide interpreter to deaf student at Catholic school).

150. *See* Garnett, *supra* note 1 (stating that in Maine's interdistrict school choice program town pays tuition to school that parents choose).

151. *See Zobrest*, 509 U.S. at 12-13 (discussing differences between providing direct grants of government aid to religious schools and dispensing aid to individual children with disabilities).

152. *See id.* at 12 (distinguishing *Meek* and *Grand Rapids* as cases that involve aid that relieves religious schools of necessary cost, thus amounting to subsidy, and stating that interpreter provided under IDEA does not relieve religious school of necessary cost).

to pay for the education of their children at religious secondary schools.[153] The extension of Maine's interdistrict choice program to include religious schools would not relieve those schools of an otherwise necessary expense, as the students' parents, not the schools, would have to continue funding the children's education.

Finally, the *Zobrest* Court fails to mention another important distinction in *Witters*. The Washington program passed constitutional muster partially because it did not result in a significant amount of aid flowing to religious institutions.[154] Instead, the government gave only a small fraction of the total aid it distributed to a religious group or institution.[155] The inclusion of religious schools in Maine's interdistrict choice program currently would affect relatively few families. Even if school districts did begin to pay a more substantial amount of tuition to religious schools, the program would still be constitutional under *Zobrest*.[156]

E. Agostini v. Felton

Four years after the Supreme Court decided, without applying the *Lemon* test, that under a neutral aid program the government must provide an interpreter to a deaf student who had chosen to attend a religious school,[157] the Court built on the reasoning of both *Witters* and *Zobrest* to alter substantially the application of the *Lemon* test. In *Agostini v. Felton*, the Court overturned two prior decisions, returned to the *Lemon* test, and then altered the application of the test to the question of whether a government program can aid

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153. *See id.* (stating that religious high school "is not relieved of an expense that it otherwise would have assumed in educating its students"); Garnett, *supra* note 1 (noting that parents who send children to Catholic high school must pay students' tuition).

154. *See* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 488 (1986) (stating that "importantly, nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education"); Bright, *supra* note 14, at 216 (stating that "after *Zobrest*, the Court allows aid to flow to religious education regardless of . . . the substantiality of aid to the school").

155. *See Witters*, 474 U.S. at 485-86 (discussing state aid program and asserting that "no more than a minuscule amount of the aid awarded under the program is likely to flow to religious education").

156. *See supra* notes 121-22 and accompanying text (noting *Witters* Court's discussion that Washington program does not result in significant portion of aid flowing to religious institutions and suggesting that inclusion of religious schools in Maine's interdistrict choice program would likewise not result in large portion of aid flowing to religious institutions).

157. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8-14 (1993) (discussing relevant case law in determining constitutionality of government program providing interpreter to deaf student but not including analysis of *Lemon* test); *see also supra* notes 129-43 and accompanying text (discussing Court's decisions in *Zobrest*).

religious institutions.[158] The Court in *Agostini* also determined that *Witters* and *Zobrest* had changed Establishment Clause jurisprudence.[159] *Agostini* contributes to the trend in Establishment Clause case law that supports the inclusion of religious schools in the necessary interdistrict choice program implemented in Maine.

In this controversial opinion, the Supreme Court revisited a question of aid to religious schools that it had previously decided in 1985.[160] At issue was the prior ruling in *Aguilar v. Felton*,[161] in which the Court held that the Establishment Clause prohibited New York City from sending public school teachers into religious schools to provide remedial instruction for disadvantaged students pursuant to Title I of the Elementary and Secondary Education Act of 1965.[162] In deciding whether they should grant to New York City

158. *See* Agostini v. Felton, 117 S. Ct. 1997, 2008-10 (1997) (discussing Court's application of *Lemon* test in *Grand Rapids* and *Aguilar* and stating that Court has not changed these general principles but Court has undermined earlier assumptions and has changed its understanding of criteria used).

159. *See id.* at 2010 (stating that "[o]ur more recent cases have undermined the assumptions" that Court relied upon in applying *Lemon* test to earlier cases). The Court then proceeded to discuss *Zobrest* and *Witters* in depth and demonstrated how these decisions had modified the presumptions on which it had previously relied in deciding *Aguilar v. Felton* and *School District of Grand Rapids v. Ball*. *Id.* at 2010-14.

160. *See Agostini*, 117 S. Ct. at 2003-05 (discussing facts of *Aguilar v. Felton*, questions presented by that case in 1985, and Court's 1985 decision).

161. 473 U.S. 402 (1985).

162. *See* Aguilar v. Felton, 473 U.S. 402, 408 & n.7 (1985) (affirming court of appeals's decision that New York City's program providing federally supported instructional services to disadvantaged children on premises of parochial schools violates Establishment Clause and is unconstitutional). In *Aguilar*, the Court considered the constitutionality of instructional services provided to disadvantaged parochial school students by New York City and funded by Title I. *Id.* at 406. Public school teachers conducted this instruction on the premises of parochial schools while field supervisors closely supervised them to ensure that the teachers avoided any involvement with religious activities within the parochial schools and did not use religious materials. *Id.* at 406-07. The *Aguilar* Court found that New York City's Title I program was similar in nature and operation to the programs that the Court struck down earlier that day in *School District of Grand Rapids v. Ball*. *Id.* at 408-09. The appellant had argued that the Court could not distinguish *Aguilar* from *Grand Rapids* because New York City's program had adopted a monitoring system to review the content of Title I classes. *Id.* at 409. However, the Court found that the monitoring system caused the government to become closely entangled with religion. *Id.* at 409-10. The *Aguilar* Court looked to the third part of the *Lemon* test, in which the Court had held that supervision necessary to ensure that teachers did not incorporate religion into their teaching constituted excessive entanglement of church and state. *Id.* at 410. As in *Lemon*, New York City's program involved aid in a "pervasively sectarian environment" and required "ongoing inspection . . . to ensure the absence of a religious message." *Id.* at 412. The program also necessitated frequent contacts between public school and parochial school employees. *Id.* at 414. Consequently, the Court determined that New York City's program necessitated excessive entanglement, failed the *Lemon* test, and was thus "constitutionally flawed." *Id.*

injunctive relief from this prohibition under Rule 60(b)(5),[163] the Court recognized that it is appropriate to grant such relief when significant changes have occurred in either the relevant statutory or decisional law.[164] The Court then reviewed the rationale upon which *Aguilar* and its companion case, *School District of Grand Rapids v. Ball*,[165] had relied and considered whether there had been a significant change in decisional law.[166] In each case, the Court applied the *Lemon* test and determined that the programs considered failed the test, thereby violating the Establishment Clause.[167] The Court asserted that the Shared Time program implemented in *Grand Rapids* had the impermissible effect of promoting religion because the public school teachers who instructed remedial secular courses on parochial school grounds could indoctrinate religion in their work.[168] Additionally, the mere presence of these teachers created a "symbolic union" of church and state.[169] The Shared Time

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163. FED. R. CIV. P. 60(b)(5). This subsection states: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding . . . [when] it is no longer equitable that the judgment should have prospective application." *Id.*

164. *Agostini*, 117 S. Ct. at 2006.

165. 473 U.S. 373 (1985).

166. *See* School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 375 (1985) (holding that programs in which public schools financed classes for nonpublic students, taught by public school teachers, and conducted in the nonpublic schools violate the Establishment Clause). In *Grand Rapids*, the Court considered two programs that used public funds to provide remedial and enrichment classes to nonpublic school students in classrooms leased from and located in nonpublic schools and taught by public school employees. *Id.* at 375-77. The Court noted that 40 of the 41 nonpublic schools which held the programs were sectarian and that only nonpublic school students attended the programs. *Id.* at 378-79. The *Grand Rapids* Court recognized that the Establishment Clause is more than just a guarantee against a state-sponsored religion; it also functions to guard the right of individuals to worship and requires the government to remain neutral in regards to religion. *Id.* at 382. In applying the *Lemon* test, the Court noted that while the test serves as only a guideline, the Court should measure state action alleged to violate the Establishment Clause according to the *Lemon* criteria. *Id.* at 383. The Court found that the programs were primarily secular. *Id.* However, the programs had the potential of impermissibly advancing religion in three ways. *Id.* at 385. First, the teachers, many of whom taught or had taught in the religious schools, may have inculcated religious beliefs in their teaching, resulting in state-sponsored religious instruction. *Id.* at 385-88. Second, the programs may have created a symbolic link between government and religion, thus presenting an image of state endorsement of religion, especially in the minds of children. *Id.* at 389-92. Finally, the programs may have had the effect of promoting religion because they directly subsidize sectarian institutions, just as a cash subsidy would, by taking over a portion of the responsibility for teaching certain subjects. *Id.* at 392-97. Consequently, the Court held that the programs the School District of the City of Grand Rapids implemented did not pass the "primary or principal effect" prong of the *Lemon* test because they had the primary effect of advancing religion and therefore violated the Establishment Clause and were unconstitutional. *Id.* at 397-98.

167. *Agostini*, 117 S. Ct. at 2008-10.

168. *Id.* at 2008-09.

169. *Id.* at 2009.

program also effectively subsidized the sectarian schools' religious mission by relieving schools of necessary expenses.[170] These factors were also present in New York City's Title I program that *Aguilar* examined.[171] *Aguilar* involved the additional aspect of a monitoring system that sought to ensure the secular content of Title I instruction, which the Court found to create an excessive entanglement between government and religion.[172]

Justice O'Connor, writing the opinion for the Court in *Agostini*, assessed the reasoning of *Grand Rapids* and *Aguilar* in light of the Court's more recent decisions in *Witters* and *Zobrest*.[173] The Court determined that these cases had undermined the assumptions that it relied upon in *Grand Rapids* and *Aguilar*.[174] The *Agostini* Court did note a change in the first prong of the *Lemon* test – the assessment of the government's purpose in implementing a program that aids religious schools.[175] However, the Court decided that prior cases had altered the criteria used to determine whether a program has the primary effect of advancing religion and thus violates *Lemon*'s second prong.[176] The *Zobrest* Court had refused to presume that the state-provided interpreter, who also had an opportunity to inculcate religion through the act of translating, would do so simply because he or she was in a sectarian setting.[177] Therefore, the *Agostini* Court determined that it could no longer assume that any public employee would inculcate religion in his or her work; nor could it assume that the mere presence of a public employee on sectarian school grounds necessarily created a symbolic link between church and state.[178]

Furthermore, a review of *Witters* and *Zobrest* demonstrated that the Court had abandoned its rule that all government programs that directly aid the function of religious schools are invalid.[179] Although the aid recipients in each case clearly would use state aid at religious schools, they did so only as a result of private choice.[180] In following *Witters* and *Zobrest*, the *Agostini* Court determined that it should not deem programs, such as New York City's Title I program, to have the primary effect of advancing religion simply

170. *Id.*
171. *Id.*
172. *Id.* at 2009-10.
173. *Id.* at 2010-16.
174. *Id.*
175. *Id.* at 2010.
176. *Id.*
177. *Id.* at 2010-11.
178. *Id.* at 2010-12.
179. *Id.* at 2011-12.
180. *Id.*

because religious schools benefit from government aid as a result of the program.[181] The Court recognized that Title I aid, like aid to a student who is visually impaired or an interpreter for a deaf student, was also only available to eligible recipients.[182] The Court noted a difference between the aid provided to one student with a disability and the Title I services that the government provides to several students at once. It did not find a meaningful distinction, however, particularly because *Zobrest* did not turn on the fact that the petitioner was, at the time of the lawsuit, the only student using a state-provided interpreter at a religious school.[183] The *Agostini* Court also did not find it important that the school district provided Title I services directly to the students without a formal, individualized application process.[184]

Just as the Court no longer presumes that New York City's Title I program has the primary effect of advancing religion simply because it provides direct aid to religious schools, a court should not presume that the inclusion of religious schools in Maine's interdistrict choice program would advance religion. As with Title I instruction and aid to disadvantaged students, Maine's interdistrict choice program provides aid only to eligible students – those without access to a public secondary school.[185] Also, the *Agostini* Court continued to emphasize an important point set forth in *Zobrest*: The number of students that benefit from a particular program is not important in determining whether that program advances religion.[186] Although school choice advocates anticipate that only a small number of families would benefit from the inclusion of religious schools in Maine's interdistrict choice program,[187] such a fact is insignificant under the Court's reasoning in *Agostini*.

The *Agostini* Court also stressed the neutrality of the Title I program at issue in *Aguilar* and referred back to the neutrality of the programs the Court had upheld in *Mueller*, *Witters*, and *Zobrest*.[188] The majority asserted that a government program does not provide a student with an incentive to pursue a religious education when the government allocates aid on a neutral, secular basis that does not consider or favor religion and the government makes the

181. *Id.* at 2012-13.

182. *Id.* at 2012.

183. *Id.* at 2013.

184. *Id.*

185. *See* ME. REV. STAT. ANN. tit. 20-A, § 5204 (West 1993) (stating that secondary students who reside in school district that neither maintains nor contracts for privileges at public school may attend another school and district will pay tuition).

186. *Agostini*, 117 S. Ct. at 2013.

187. *See* Young, *supra* note 2 (stating that including religious schools in Maine's interdistrict choice program would apply to 140 towns and about 100 families).

188. *Agostini*, 117 S. Ct. at 2014.

aid available to religious and nonreligious beneficiaries alike.[189] The Court had not considered this factor when it struck down the programs in *Grand Rapids* and *Aguilar*, but the *Agostini* opinion makes it clear that New York City's Title I program allocated services on the basis of neutral criteria provided by statute and therefore the Court should not have struck down New York's program in 1985.[190] Maine's necessary interdistrict choice program also allocates aid on the basis of eligibility under neutral statutory criteria, and, therefore, the inclusion of religious schools would not provide an incentive for a student to select a religious school over a public or secular private school.[191]

In addressing the third prong of the *Lemon* test, the Court's opinion in *Agostini* concluded that the factors used to assess whether a government program necessitated excessive entanglement were the same as the factors used to examine the effect of the program.[192] The Court determined that the factors used in assessing both entanglement and effect have been as follows: (1) the character of the institution that receives aid, (2) the nature of that aid, and (3) the relationship between the recipient of the aid and the government.[193] Thus, it reasoned, the entanglement prong of the *Lemon* test should be treated as simply an aspect of the effects prong.[194] In reviewing the *Aguilar* Court's determination that New York City's Title I program caused excessive entanglement, the *Agostini* Court concluded that the assumptions which the Court made about the nature of the program had required the monitoring of the program.[195] These assumptions, the Court stated, were the same ones that *Witters*, *Zobrest*, and other Establishment Clause cases had rendered invalid.[196] This led the Court to conclude that the program did not have the primary effect of advancing religion.[197] It then reasoned that if it does not presume that a program does not have the primary effect of advancing religion, the Court also will not presume that the program requires government monitoring and that excessive entanglement follows from that monitoring.[198]

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189. *Id.*

190. *Id.*; *see* 20 U.S.C. § 6315(b) (1994) (setting forth neutral criteria for eligibility for Title I instruction).

191. *See* ME. REV. STAT. ANN. tit. 20-A, § 5204 (West 1993) (setting forth neutral criteria for eligibility for tuition grant to another school).

192. *Agostini*, 117 S. Ct. at 2015.

193. *Id.*

194. *Id.*

195. *Id.* at 2015-16.

196. *Id.*

197. *Id.* at 2016.

198. *Id.*

The *Agostini* Court's blend of the excessive entanglement prong into the primary effects prong of the *Lemon* test[199] is important to the constitutionality of the inclusion of religious schools in Maine's necessary interdistrict choice program in two ways. First, the *Agostini* decision makes it clear that the entanglement prong disappears because the Court no longer presumed that government programs that provide aid to religious schools have the primary effect of advancing religion.[200] Therefore, the Court will never require pervasive monitoring, which was seemingly the only type of entanglement the Court found to be excessive.[201] Likewise, a court cannot presume that the interdistrict choice program in Maine has the primary effect of advancing religion because it allocates tuition on a neutral basis, according to statutory eligibility, does not serve to provide an incentive to attend a religious school, and benefits the students involved rather than the religious schools.

Second, the elimination of *Lemon*'s third prong as a separate test suggests a conclusion that interaction, or entanglement, between the government and the religious schools involved in a program is not of primary significance and has not been for some time. Prior to *Agostini*, the Court had failed to address the entanglement issue in both *Witters* and *Zobrest*.[202] These three cases allow one to conclude that a court can find that a government program which aids religious schools is constitutional as long as it has a secular purpose and does not have the primary effect of advancing religion. Once the state legislature includes religious schools in Maine's necessary interdistrict choice program, some interaction between those religious schools receiving tuition payments and the school districts providing such payments will occur.[203] According to

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199. *See id.* at 2015 (stating that Court has addressed same factors in assessing both effects prong and entanglement prong and therefore "it is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect").

200. *See id.* at 2015-16 (asserting that *Aguilar* Court's finding that New York City's Title I program resulted in excessive entanglement rested on now invalid presumption that program had primary effect of advancing religion).

201. *See id.* at 2015 (discussing entanglements, or interactions between church and state, that are not excessive and that Court traditionally has found to be tolerable such as government review, periodic visits to program, and annual audits).

202. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8-13 (1993) (discussing Court's reasoning in earlier cases and applying reasoning to question of whether school district should provide deaf student with interpreter at sectarian school, instead of applying any of three prongs of *Lemon* test); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 489 n.5 (1986) (declining to address entanglement prong of *Lemon* test).

203. *See* ME. REV. STAT. ANN. tit. 20-A, § 5204 (West 1993) (stating that school district in which students' parents reside pays tuition). The school district paying the tuition will inevitably have some contact with the school receiving the tuition because the district pays the school directly. *Id.*

the Court's reasoning in *Zobrest*, *Witters*, and *Agostini*, however, this interaction is neither consequential nor dispositive.[204]

F. Summary of Case Law as Applied to Maine's Necessary Interdistrict Choice Program

The inclusion of religious schools in a necessary interdistrict choice program such as the one that Maine implemented is constitutionally permissible following the Supreme Court's decisions in *Mueller*, *Witters*, and *Zobrest*.[205] Although the Court has altered the *Lemon* test over the years, it continues to apply aspects of that test to some Establishment Clause inquiries.[206] Maine's necessary interdistrict choice program can provide aid to religious schools because it would continue to satisfy certain criteria outlined in the Court's recent opinions.

The program clearly serves a secular purpose by ensuring that the children of Maine receive a secondary education.[207] Maine's interdistrict choice program is neutral because the school district in which the parents reside pays all eligible students' tuition regardless of their choice of school.[208] The addition of religious schools to the Maine statute would not affect this neutrality. A student is eligible for aid when he or she has a specific need,[209] in this

204. *See Agostini*, 117 S. Ct. at 2015-16 (stating that Court has "always tolerated some level of involvement" between church and state); *Zobrest*, 509 U.S. at 8-14 (discussing Court's reasoning in earlier cases and holding that Establishment Clause does not prevent school district from providing deaf student with interpreter at sectarian school but failing to address possible resulting interaction between government and religious school); *Witters*, 474 U.S. at 489 & n.5 (declining to address entanglement prong of *Lemon* test but nevertheless determining that extension of aid used at religious school does not violate Establishment Clause).

205. *See supra* notes 80-156 and accompanying text (analyzing *Mueller*, *Witters*, and *Zobrest* and concluding that each case permits inclusion of religious schools in Maine's interdistrict choice program).

206. *Compare Zobrest*, 509 U.S. at 8-14 (discussing Court's reasoning in earlier cases for purposes of assessing constitutionality of government program but failing to discuss applicability of *Lemon* test) *with* Agostini v. Felton, 117 S. Ct. 1997, 2010-16 (1997) (discussing effects prong of *Lemon* test and entanglement prong as "an aspect of the inquiry into" effects prong of *Lemon* test).

207. *See* Mueller v. Allen, 463 U.S. 388, 394-95 (1983) (stating that Minnesota statute clearly served secular purpose in ensuring that children of Minnesota are well-educated).

208. *See* ME. REV. STAT. ANN. tit. 20-A, § 5204 (stating generally that secondary students without access to public school may attend nearby public school, approved private school, or school in another state or country and that district in which students' parents reside will pay tuition). No language in the statute indicates that the district's payment of tuition is in any way dependent on the family's choice of school. *Id.*

209. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993) (stating that under IDEA, government allocated aid on neutral basis to group of people classified as disabled); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 483 (1986) (stating that aid is available under Washington program to all those classified as visually impaired).

instance, when the student resides in a school district that does not maintain a secondary school. The program's neutrality does not provide an incentive for a parent to choose to send his or her child to a religious school. Thus, the program does not advance religion.[210] Of primary importance is that any government aid that would reach a religious school would do so only as a result of the private and independent choices of parents and families, which demonstrates that the state does not intend to promote religion through the interdistrict choice program.[211] The inclusion of religious schools in Maine's interdistrict choice program would not serve to relieve those schools of an otherwise necessary cost because the students' parents would otherwise pay the students' tuition. Instead, the individual students would reap the benefits of a revised interdistrict choice program.

The Supreme Court's recent decision in *Agostini* reinforces the fulfillment of these criteria as essential for a government program that results in the provision of aid to religious institutions to survive constitutional scrutiny.[212] The *Agostini* Court concluded that it cannot presume that all government programs which directly aid religious schools are invalid.[213] In fact, if a program is neutral and aid reaches religious schools only as a result of private choice, as Maine's interdistrict choice program does, no presumption exists that the program has the primary effect of advancing religion simply because it incidentally aids religious schools.[214] After *Agostini*, this is the end of the inquiry because the Court has deemed the entanglement prong unimportant and subsumed by the effects prong.[215]

Not only does the inclusion of religious schools in Maine's necessary interdistrict choice program pass constitutional muster, but Establishment Clause jurisprudence *requires* the program to include religious institutions. This is apparent under the child benefit theory that the Supreme Court adopted

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210. *See Witters*, 474 U.S. at 488 (stating that neutral statute creates "no financial incentive for students to undertake sectarian education"); *Mueller*, 463 U.S. at 397 (stating that facially neutral statute applied to all families regardless of school preference).

211. *See Witters*, 474 U.S. at 488-89 (stating that one aspect of Washington's program central to Establishment Clause inquiry is that aid only flows to religious institutions as result of private and independent choice); *Mueller*, 463 U.S. at 399 (discussing importance of parents' role in distributing aid to schools).

212. *See supra* notes 179-84 and accompanying text (discussing *Agostini*'s reliance on and reinforcement of *Witters* and *Zobrest*).

213. Agostini v. Felton, 117 S. Ct. 1997, 2011 (1997).

214. *See supra* notes 168-69, 174-79 and accompanying text (discussing concepts of private choice and neutrality and how they undermine presumption that programs that aid religion have primary effect of advancing religion in *Agostini*).

215. *See supra* notes 192-98 and accompanying text (discussing blending of entanglement prong of *Lemon* test into effects prong).

in *Witters*, *Zobrest*, and other recent case law.[216] This theory emphasizes that the government provides aid to schools not for the benefit of the school, but for the benefit of the individual.[217] The child benefit theory applies best to government aid that is need-based and therefore the Court's use of the theory in deciding *Witters* and *Zobrest* was appropriate.[218] Both cases emphasized the neutrality of the service that the government provided to a class of citizens based upon a particular need.[219] In each case, one member of the eligible class of citizens whom the government excluded from the aid program brought the lawsuit because of the individual's private and independent choice to use that aid to attend a religious institution.[220] The question these cases asked, therefore, was not whether the Establishment Clause permitted the program to extend aid to that person, but whether the Establishment Clause required the program to do so. The answer in both *Witters* and *Zobrest* was a resounding yes.[221] A government program that provides aid to a class of persons based upon need must not exclude an eligible person from that program simply because the aid will reach a religious institution as the result of a private and independent choice.[222]

Professor Joseph P. Viteritti has noted that *Witters* and *Zobrest* advance religious tolerance because the Court refuses to apply the Establishment Clause in such a way that will disadvantage individuals because of their

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216. *See* Viteritti, *supra* note 22, at 116 (identifying child benefit theory as "adopted by the Supreme Court in several major cases"). Viteritti identifies these cases as including, among others, *Witters* and *Zobrest*. *Id.* at 116 n.7.

217. *Id.* at 128-30 (discussing assertion that schoolchildren and state, not schools, are beneficiaries of aid).

218. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993) (describing government program at issue as distributing benefits "to any child qualifying as disabled under the IDEA"); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 483 (1986) (stating that petitioner suffered from progressive eye condition and therefore "was eligible for vocational rehabilitation assistance" under Washington statute).

219. *See supra* notes 116-18, 144-47 and accompanying text (discussing neutrality of need-based programs in *Witters* and *Zobrest*).

220. *See Zobrest*, 509 U.S. at 3 (stating that petitioner asked school district to provide interpreter for use at religious school and that school district denied request); *Witters*, 474 U.S. at 483 (stating that petitioner had applied for vocational aid to use at bible college and Commission denied aid).

221. *See Zobrest*, 509 U.S. at 13-14 (holding that under Establishment Clause, deaf student is entitled to interpreter provided by school district); *Witters*, 474 U.S. at 489 (determining that extension of aid under state's vocational rehabilitation program to qualified student at religious school is not inconsistent with Establishment Clause).

222. *See supra* notes 110-13, 129-32 and accompanying text (discussing neutral programs based upon need and element of private choice in programs that aid religious institutions).

religious affiliation or will deny them of necessary entitlements.[223] Regardless of whether the Court advances religious tolerance, the Court in both *Witters* and *Zobrest* emphasized the neutrality of the need-based government programs over the directness of the aid involved. The Court also determined that the government cannot deny an eligible person his aid because of a private choice that the recipient makes.[224] Therefore, it follows that when an interdistrict school choice program is need-based, it must also include religious schools. Also, the government cannot refuse to pay the tuition of an eligible student who independently chooses to use his or her aid at a religious school.[225]

Arguably, the Court's decision in *Agostini* supports this proposition as well. The aid granted under Title I is also need-based in that, to be eligible, a student must reside in a low-income area and he or she must be failing or at risk of failing his or her classes.[226] The government does not grant the aid on an individual basis, but rather it grants the aid to students as a group.[227] The Court in *Agostini* followed its previous decisions in that it refused to interpret the Establishment Clause in such a way as to prevent eligible students who independently chose to attend a religious school from receiving remedial instruction.

Thus, under the Court's recent Establishment Clause decisions, including *Agostini*, the state government must include religious schools in Maine's need-based interdistrict choice program. Such is not the case, however, for school voucher programs. States do not implement these programs out of necessity, and scholars have been debating the merits of these programs since

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223. *See* Viteritti, *supra* note 22, at 138 (asserting that Rehnquist Court has interpreted Establishment Clause not to deny aid to some that is made available to others as matter of public policy). Viteritti states:

> The hallmark of the Rehnquist Court, however, has been to advance religious tolerance based on the precept that the Establishment Clause not be misapplied to encumber or disadvantage individuals or groups because of their religious orientation. This Court strives to assure that religious affiliation will not serve to deny entitlements to some that are made available to all as a matter of general public policy.

Id.

224. *See supra* notes 113-15, 123-27, 144-52 and accompanying text (discussing importance of neutrality and lesser importance of directness of aid in programs that aid religious institutions).

225. *See supra* notes 110-20, 153-56 and accompanying text (discussing conclusions of *Witters* and *Zobrest* and application of each case to other need-based government programs, such as Maine's interdistrict choice program, in which aid reaches religious schools as result of private choice).

226. Agostini v. Felton, 117 S. Ct. 1997, 2003-04 (1997).

227. *See id.* at 2004-05 (discussing implementation of Title I services and stating that teachers provide services to classrooms of students).

before the Supreme Court's decision in *Agostini*.[228] Therefore, these programs require a separate analysis of the constitutional arguments and the effect of the Supreme Court's decision in *Agostini*.

III. School Voucher Programs and the Inclusion of Religious Schools

Recently, two school voucher programs that include sectarian schools have been the subjects of litigation in the state courts of Ohio and Wisconsin.[229] In Cleveland, Ohio, the city enacted the "Pilot Program" in response to an acute educational problem in the Cleveland City School District.[230] The Pilot Program includes a scholarship program that enables low-income students, chosen by lottery, to attend "alternative schools" registered with the state.[231] The alternative schools for the 1996-97 school year included fifty-three private schools, approximately eighty percent of which were sectarian.[232] When a scholarship recipient chooses to use his or her scholarship at any private school, the state gives the chosen private school a check made payable to the student's parents.[233] The parents then endorse the check over to the school.[234]

In Milwaukee, Wisconsin, the Milwaukee Parental Choice Program, as amended in 1995,[235] provides state funds to 15% of the student population of the Milwaukee Public School system to enable those students to attend both sectarian and nonsectarian private schools.[236] Previously, the program allowed only 1.5% of the student population to participate and limited the choice of schools to only nonsectarian private schools.[237] In addition to extending the program to sectarian schools, the 1995 amendments also expanded the number of students eligible to participate and the number of schools that could accept students in the program.[238] Unchanged, however, is

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228. *See supra* notes 37-38 and accompanying text (discussing school voucher debate before Supreme Court decided *Agostini*).

229. *See* Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583, at *1-*2 (Ohio Ct. App. May 1, 1997) (describing school voucher, or "scholarship," program that Cleveland implemented), *appeal allowed*, 684 N.E.2d 705 (Ohio 1997); Jackson v. Benson, 578 N.W.2d 602, 608-09 (Wis. 1998) (describing school voucher program that Milwaukee implemented), *cert. denied*, 119 S. Ct. 466 (1998).

230. *Simmons-Harris*, 1997 WL 217583, at *1.

231. *Id.*

232. *Id.* at *2.

233. *Id.* at *1.

234. *Id.*

235. Jackson v. Benson, 578 N.W.2d 602, 608-09 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998).

236. *Id.* at 608.

237. *Id.* at 607.

238. *Id.* at 608-09.

the limitation on eligibility based on the students' family's income level.[239] Only those students whose family's income does not exceed 1.75 the federal poverty level are eligible for state funds.[240] The state delivers the aid in the form of a check to the private school.[241] However, the student's parent or guardian, to whom the check is made payable to, must restrictively endorse the check to the school.[242]

The Court of Appeals of Wisconsin struck down the amended Milwaukee program in August 1997[243] without taking into consideration the Supreme Court's recent decision in *Agostini v. Felton*.[244] In May of the same year, the Court of Appeals of Ohio struck down the Cleveland program in *Simmons-Harris v. Goff*.[245] The parties who sought to continue to include religious

239. *Id.* at 608. The court, in listing the changes to the program as implemented through the 1995 amendments, does not note a change in the requirement that the students' family's income not exceed 1.75 times the federal poverty level. *Id.* at 609-10.

240. *Id.* at 608.

241. *Id.* at 609.

242. *Id.*

243. *See* Jackson v. Benson, 570 N.W.2d 407, 415 (Wis. Ct. App. 1997) (determining that trial court reached correct result that Milwaukee program is inconsistent with Wisconsin and U.S. Constitutions and thus cannot operate as it currently exists), *rev'd*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998).

244. *See id.* at 421 (noting briefly that *Agostini* was decided while parties were briefing this appeal). In its majority opinion, the Court of Appeals of Wisconsin only referenced the *Agostini* decision once. *Id.* The court merely stated that it had been decided and pointed out that it had not reinstated all of Michigan's education programs at issue when it overturned parts of *School District of Grand Rapids v. Ball*. *Id.* A discussion of the rationale of *Agostini* or its interpretation of the *Lemon* test did not follow. *See generally id.* In his dissent, however, Judge Roggensack did include a detailed discussion of the Supreme Court's opinion in *Agostini*. *Id.* at 431-34 (Roggensack, J., dissenting).

245. *See* Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583, at *16 (Ohio Ct. App. May 1, 1997) (reversing trial court and concluding that Ohio Pilot Scholarship Program is unconstitutional), *appeal allowed*, 684 N.E.2d 705 (Ohio 1997). In *Simmons-Harris*, the Court of Appeals of Ohio considered the Pilot Scholarship Program, which the Ohio state legislature had enacted in Cleveland to give state funds to students from low-income families to attend participating "alternative" schools, 80% of which were sectarian in the 1996-97 school year. *Id.* at *1-*2. The court analyzed Cleveland's program under the three-part *Lemon* test because the test has guided the Supreme Court since its inception. *Id.* at *4. First, the court determined that the program has a secular purpose because it seeks to provide low-income families with varied educational opportunities. *Id.* In determining whether the program has the primary effect of advancing religion, the court looked to two factors: neutrality towards religion and directness of the aid. *Id.* The court concluded that the scholarship program was not neutral because little opportunity existed for students to apply scholarship money toward a secular education, the benefits of the scholarship program outweigh the benefits available under the component tutorial program, and the program creates an incentive for parents to send their children to religious schools. *Id.* at *7-*9. In assessing the directness of the aid, the court found that lack of public school participation in the program left parents with few choices; therefore,

schools in the Milwaukee program appealed to the state supreme court, and those in support of the inclusion of religious schools in the Cleveland voucher program have requested to appeal the decision of the court of appeals.[246] Although no further action has been noted regarding the appeal of the Court of Appeals of Ohio decision, in June 1998 in *Jackson v. Benson*,[247] the Supreme Court of Wisconsin reversed the decision of the Court of Appeals of Wisconsin and found that the Milwaukee program does not violate either the Establishment Clause of the United States Constitution or the state constitution.[248] The Supreme Court's decision in *Agostini*, considered in conjunction with other relevant Establishment Clause cases, influenced the Supreme Court of Wisconsin's decision and provided important rationale that enabled the court to reverse the appellate court decision.[249] This demonstrates that the Supreme Court's decision in *Agostini* not only adds to the line of Establishment Clause case law that allows the inclusion of religious schools in neces-

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the parents' decisions had not been genuine or independent. *Id.* at *10. Also, the amount of aid that flowed to sectarian schools through the program is substantial. *Id.* Consequently, the court determined that Cleveland's program has the primary effect of advancing religion and thus violates the United States Constitution. *Id.* Additionally, the Cleveland program violates the Ohio Constitution, as it provides at least as much protection against state funding of religious institutions as the Establishment Clause. *Id.* at *12.

246. *See* Simmons-Harris v. Goff, 684 N.E.2d 705, 705 (Ohio 1997) (allowing discretionary appeals); Jackson v. Benson, 578 N.W.2d 602, 607 (Wis. 1998) (appeal of Court of Appeals of Wisconsin decision to strike down Milwaukee program as unconstitutional), *cert. denied*, 119 S. Ct. 466 (1998).

247. 578 N.W.2d 602 (Wis. 1998).

248. *See* Jackson v. Benson, 578 N.W.2d 602, 607 (Wis. 1998) (concluding that amended Milwaukee program does not violate Establishment Clause or Wisconsin Constitution). In *Jackson*, the Supreme Court of Wisconsin considered the validity of the amended Milwaukee Parental Choice Program, a voucher program for low-income families that includes religious schools in its voucher recipients. *Id.* at 607-09. First, the court addressed whether the program violates the Establishment Clause of the First Amendment to the United States Constitution. *Id.* at 610-20. In doing so, the court analyzed all prongs of the *Lemon* test and all of the recent Establishment Clause cases. *Id.* Second, the court addressed whether the program violates the state constitution and its version of the Establishment Clause. *Id.* at 620-23. Third, the court looked at whether the amended program is a private or local bill enacted in violation of the procedural requirements of the Wisconsin Constitution. *Id.* at 623-27. Fourth, the court considered whether the program violates the uniformity provision of the Wisconsin Constitution. *Id.* at 627-28. Fifth, the court addressed the issue of whether Milwaukee's program violates Wisconsin's public purpose doctrine. *Id.* at 628-30. Finally, the court considered the equal protection claim the NAACP raised. *Id.* at 630-32. The court concluded that the Milwaukee program did not violate any federal or state constitutional provisions or the Wisconsin public purpose doctrine and it dismissed the NAACP's equal protection claim. *Id.* at 632.

249. *See id.* at 616-18 (discussing *Agostini* and its application to assessment of Milwaukee's voucher program).

sary interdistrict choice programs, but it also lends support to the inclusion of such schools in voucher programs.[250]

Prior to *Agostini*, scholars have considered the constitutionality of school voucher programs that include religious schools and have analyzed the issue in light of existing Establishment Clause jurisprudence.[251] Such scholarship has taken two positions.[252] Some scholars have proposed that the inclusion of religious schools in voucher programs passes constitutional muster,[253] while others have asserted that such programs are unconstitutional.[254]

This Part summarizes the constitutional arguments made and the cases that scholars have considered before the Supreme Court decided *Agostini*, both for and against the inclusion of religious schools in school voucher programs such as those that Cleveland and Milwaukee have implemented. It then explains how *Agostini* applies differently in the school voucher context. This Part concludes that the *Agostini* decision allows voucher programs to include religious schools, but does not require such inclusion.

A. The Constitutional Arguments in Favor of the Inclusion of Religious Schools in School Voucher Programs

Many scholars have argued that school voucher programs which provide aid to both sectarian and nonsectarian private schools are constitutional under the Establishment Clause.[255] Such scholars have made five major points, most

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250. *See infra* notes 333-57 and accompanying text (discussing application of Supreme Court's decision in *Agostini* to school voucher programs).

251. *See supra* notes 37-38 and accompanying text (noting that scholars discussed issue of constitutionality of school voucher programs that include religious schools before Supreme Court decided *Agostini*).

252. *See supra* note 38 and accompanying text (discussing scholars' constitutional arguments for inclusion of religious schools before Supreme Court's decision in *Agostini*); *supra* notes 40-41 and accompanying text (discussing opponents' arguments against school voucher programs that include sectarian schools).

253. *See supra* note 38 and accompanying text (discussing scholars' constitutional arguments for inclusion of religious schools before Supreme Court's decision in *Agostini*).

254. *See supra* notes 40-41 and accompanying text (discussing opponents' arguments against school voucher programs that include sectarian schools).

255. *See* Beutler, *supra* note 22, at 9 (arguing that programs that "provide nondiscriminatory aid to private sectarian and nonsectarian schools do not violate the Establishment Clause"); Choper, *supra* note 78, at 12 (asserting that constitutionality of voucher programs that include religious schools "was apparently resolved in 1986" after Court's decision in *Witters*); Viteritti, *supra* note 22, at 116 (arguing that "tuition assistance provided to parents who choose to send their children to schools with religious affiliations" is constitutional); Bodemer, *supra* note 14, at 280 (arguing that school voucher programs can withstand constitutional challenges); Nasstrom, *supra* note 14, at 1115 (asserting that Supreme Court would find voucher program that included benefits to religious schools to be constitutional).

of which center around particular Establishment Clause cases already discussed in Part II,[256] but which are also important to advocates' arguments for the inclusion of religious schools in voucher programs. This Part addresses these arguments as well.[257] First, scholars have recognized that the Supreme Court has used the *Lemon* test to strike down statutes that provided aid to religion, but they have distinguished *Nyquist*, which did just that.[258] Second, many scholars have relied on *Mueller* in support of the theory that the elements of private choice and neutrality contribute to the constitutionality of a voucher program.[259] Third, commentators have pointed to *Witters* as providing direct support for the inclusion of religious schools in voucher programs.[260] Fourth, scholars have asserted that under *Zobrest*, a court will not deny aid to an individual based on his or her religious beliefs when that person is otherwise eligible for the aid.[261] Finally, these scholars have maintained that school voucher programs that include religious schools can pass the *Lemon* test.[262]

First, scholars have recognized the *Lemon* test as a standard for assessing statutes that may provide aid to religious schools.[263] These scholars have noted that in the years immediately following the *Lemon* test's creation, the Supreme Court used it to strike down statutes that provided aid to religion,[264]

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256. *See supra* Parts II.A-D (analyzing *Lemon*, *Nyquist*, *Mueller*, *Witters*, and *Zobrest* and applying these cases to necessary interdistrict choice programs).

257. *See infra* notes 263-96 and accompanying text (discussing scholars' analyses of *Lemon*, *Nyquist*, *Mueller*, *Witters*, and *Zobrest* in light of constitutionality of school voucher programs that include religious schools).

258. *See* Viteritti, *supra* note 22, at 133-35 (discussing problems with Court's decision in *Nyquist*); *infra* notes 267-70 and accompanying text (discussing school voucher advocates' views of *Nyquist*).

259. *See* Beutler, *supra* note 22, at 41 (asserting that *Mueller* Court decided that aspect of parental choice in statute reduced Establishment Clause objections); *infra* notes 271-76 and accompanying text (discussing school voucher advocates' reliance on *Mueller*).

260. *See* Choper, *supra* note 78, at 12 (asserting that "[t]he constitutionality of vouchers was apparently resolved in 1986" in the *Witters* decision); *infra* notes 277-85 and accompanying text (discussing scholars' analyses of *Witters* in light of inclusion of religious schools in school voucher programs).

261. *See* Viteritti, *supra* note 22, at 138 (asserting that under *Zobrest* courts will not deny entitlements); *infra* notes 286-91 and accompanying text (discussing impact of *Zobrest* on scholars' arguments).

262. *See* Beutler, *supra* note 22, at 62 (concluding that programs that aid religious schools can pass *Lemon* test); *infra* notes 292-96 and accompanying text (discussing scholars' assessment of school voucher programs under *Lemon* test).

263. *See* Beutler, *supra* note 22, at 20-62 (analyzing *Lemon* test and Establishment Clause opinions that deal with aid to religious schools); Nasstrom, *supra* note 14, at 1081-92 (analyzing *Lemon* test and recent Establishment Clause opinions).

264. *See* Beutler, *supra* note 22, at 23-28 (discussing cases such as *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), *Meek v. Pittenger*, 421 U.S.

such as the statute at issue in *Nyquist*.[265] However, *Nyquist* involved three programs that only provided aid to private schools and to parents whose children were attending private schools.[266] Advocates of the inclusion of religious schools in school voucher programs have distinguished the statutes in *Nyquist* from programs that are similar to voucher systems, such as programs in which the government provides aid to all parents or schools.[267] These advocates also have contended that state programs neutrally allocate vouchers[268] and have relied heavily on the Court's changes in its application of the *Lemon* test in more recent opinions, which allow neutrally distributed aid to reach religious schools.[269] Voucher plan advocates also note the Court's failure to rely on *Lemon* in other opinions involving the funding of sectarian schools.[270]

Second, scholars have cited the Supreme Court's decision in *Mueller* for the proposition that a program that provides aid to religious schools only as a result of parental choice is constitutional.[271] In *Mueller*, the Court upheld a statute that granted parents of all schoolchildren, regardless of the school the parents chose, tax deductions for reasonable educational expenses.[272] Similarly, school voucher programs also implement parental choice, and public

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349 (1975), *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and *Aguilar v. Felton*, 473 U.S. 402 (1985), which struck down statutes that provided aid to religious schools and thus failed *Lemon* test); Viteritti, *supra* note 22, at 133-35 (discussing *Nyquist* and other decisions from early 1970s that prevented aid to religious schools); Nasstrom, *supra* note 14, at 1084-85 (analyzing *Nyquist*).

265. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 762-68 (1973) (discussing New York tax programs that provide aid to nonpublic schools and have impermissible effect of advancing religion and are thus unconstitutional).

266. *Id.*

267. *See* Viteritti, *supra* note 22, at 133-35 (discussing Court's opinion in *Nyquist* and noting that "a problem in this case was that financial aid was made available only to private schools"); Nasstrom, *supra* note 14, at 1084-85 (describing programs that Supreme Court struck down in *Nyquist* and asserting that "the statutes' benefits were available only to parents with children attending private schools, whereas constitutionally-permissible statutes allowed all parents to avail state benefits").

268. *See* Nasstrom, *supra* note 14, at 1093 (noting that voucher programs available to all parents at specified income level are neutral).

269. *See* Viteritti, *supra* note 22, at 136 (discussing Justice Rehnquist's suggestion to relax primary effect prong of *Lemon* test in *Mueller*); Nasstrom, *supra* note 14, at 1087-88 (discussing Court's change in analysis of *Lemon*'s effects prong in *Mueller* and opinions that follow).

270. *See* Beutler, *supra* note 22, at 30 (noting that Supreme Court "curiously failed to rely on *Lemon*" in *Zobrest*, which involved sectarian school funding).

271. *See id.* at 41 (asserting that in *Mueller*, Court decided that aspect of parental choice in statute reduced Establishment Clause objections); Viteritti, *supra* note 22, at 136 (noting that Court's decision in *Mueller* "reinforced the notion of parental choice").

272. Mueller v. Allen, 463 U.S. 388, 390-91 (1983).

funds only aid religious education as a result of parents' private choices.[273] One commentator also has noted that the services in *Mueller* were available to all parents, regardless of whether their children attended a sectarian or a nonsectarian school, and thus were neutrally available.[274] School voucher programs are similarly neutral, in that they often make aid available to all parents at a specific income level, but without regard to religious preferences.[275] Professor Viteritti has asserted that the *Mueller* opinion also proposes a relaxation of the *Lemon* test, thus reducing the obstacles confronting school voucher programs.[276]

Third, some scholars have pointed to the Supreme Court's decision in *Witters* as dispositive on the issue of whether or not the government can subsidize a student's tuition at a sectarian school.[277] In *Witters*, the Court considered whether the state must provide a visually impaired student with state aid to attend a religious school.[278] Professor Jesse H. Choper has pointed out that as with a voucher program, the aid in *Witters* went to the student, not to the school, and the institution benefitted only as a result of the private and independent choice of the recipient.[279] Also, the aid distributed in *Witters* was available for expenditure in all schools, both sectarian and nonsectarian.[280] Furthermore, Professor Choper has contended that the concurring opinions in *Witters* support the constitutionality of voucher programs.[281] Justice Powell concurred with the majority's opinion and specifically noted that when state programs are entirely neutral in offering aid to a class of persons without regard to religion, that aid does not have the primary effect of advancing religion.[282] Justices White and

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273. *See* COOKSON, *supra* note 8, at 64 (discussing school voucher programs and noting that they "allow families to enroll their children in a private or public school of their choice").

274. *See* Nasstrom, *supra* note 14, at 1086 (noting that *Mueller* provided neutral aid through tax deductions available to all parents).

275. *See id.* at 1093 (discussing voucher programs in which aid is neutral because it is made available to all parents at specified income level).

276. *See* Viteritti, *supra* note 22, at 136 (noting that *Mueller* opinion proposed relaxing of "primary effects" prong of *Lemon* test). Professor Viteritti has stated that in *Mueller*, Justice Rehnquist called the *Lemon* test "no more than 'a helpful signpost in dealing with Establishment Clause challenges.'" *Id.* (quoting *Mueller*, 463 U.S. at 393).

277. *See* Beutler, *supra* note 22, at 17 (contending that *Witters* sets forth proposition that no constitutional violation occurs when government subsidizes tuition at religious school); Choper, *supra* note 78, at 12 (asserting that "[t]he constitutionality of vouchers was apparently resolved in 1986" in *Witters* decision).

278. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 483 (1986).

279. *See* Choper, *supra* note 78, at 12 (discussing Court's rationale in *Witters*).

280. *Id.*

281. *Id.* at 13. Professor Choper stated that "[i]t is in concurring opinions . . . that the voucher issue is resolved." *Id.*

282. *Id.*

O'Connor also wrote concurring opinions in which they agreed with Justice Powell.[283] Professor Choper has argued that the concurrences of the three Justices describe a situation that includes voucher plans.[284] The Justices emphasized the neutrality of the aid in that it went to all parents who have children in any school, noted that if the aid went to religious schools it would be the product of private choice, and decided that such aid is constitutional.[285]

Fourth, scholars who advocate the inclusion of religious schools in voucher programs also have asserted that *Zobrest* represents the Supreme Court's departure from the *Lemon* test.[286] In *Zobrest*, the Supreme Court did not implement the *Lemon* test[287] in considering whether a school district must provide a deaf student attending religious school with an interpreter pursuant to the IDEA.[288] The Court in *Zobrest* relied on the principle that the general program distributed funds neutrally to any eligible child, without regard to the religious affiliation of that child's school.[289] Also, Professor Viteritti has suggested that, under *Zobrest*, the Court will not deny aid to one person because of his or her religious beliefs when that person is otherwise eligible for the aid.[290] Similarly, a court should not deny a voucher to a student who chooses to attend a religious school when that student is otherwise eligible for the voucher based on his or her family's income level.[291]

Finally, even when courts apply the *Lemon* test, scholars have noted that school voucher programs that include religious schools can pass the test.[292]

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283. *Id.*

284. *Id.*

285. *Id.*

286. *See* Beutler, *supra* note 22, at 30 (noting that Supreme Court failed to apply *Lemon* test in deciding *Zobrest*).

287. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8-13 (1993) (analyzing question of whether to grant interpreter to deaf student who has chosen to attend religious school in light of *Mueller*, *Witters*, *Meek*, and *Grand Rapids*). The Court did not mention the *Lemon* test in its assessment of the question at hand. *Id.*

288. *Id.* at 3.

289. *See* Bright, *supra* note 14, at 215 (asserting that *Zobrest* Court "explicitly relied on the principle that the state funds sent to religious schools were part of a general program distributing funds neutrally to any child without regard to any religious affiliation of the school the student attends").

290. *See* Viteritti, *supra* note 22, at 138 (discussing impact of *Zobrest*, neutrality of aid, and government refusal to deny entitlements).

291. *See id.* at 190-91 (concluding that Court would uphold school voucher plan involving sectarian schools and, therefore, low-income students would have opportunity to receive quality education and exercise religious freedom).

292. *See* Beutler, *supra* note 22, at 62 (concluding that "[v]irtually any result can be achieved under the Court's elastic application" of *Lemon* test); Bodemer, *supra* note 14, at 291-

First, voucher programs have the same valid secular purposes that other constitutional programs funding religious education have had – aiding education, creating competition between schools, and relieving financial burdens of schools.[293] Second, voucher programs do not have the primary effect of advancing religion when the government provides aid on a neutral basis and it flows to a religious school only as a result of private choice.[294] Third, Professor Mark J. Beutler has noted that concern over entanglement is not important in the context of such aid to religious schools because any audit would impose a burden on only the school, not the government.[295] Also, another commentator has asserted that the omission of any discussion of the entanglement prong in the *Witters* and *Zobrest* decisions implies that an analysis of school voucher programs can avoid that prong of the *Lemon* test.[296]

In sum, scholars have asserted that voucher programs that provide aid to students on a neutral basis can constitutionally include sectarian schools.[297] Advocates of the inclusion of religious schools in voucher programs have demonstrated how past Supreme Court decisions support the constitutionality of such voucher plans.[298] These scholars, however, have yet to consider the Supreme Court's decision in *Agostini.* Accordingly, Part III.C explains how the Court's most recent decision regarding aid to religious schools impacts the arguments presented here.[299]

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300 (determining that school voucher programs pass all three prongs of *Lemon* test); Nasstrom, *supra* note 14, at 1097 (asserting that Court would uphold as constitutional under *Lemon* test school voucher programs that include religious schools).

293. *See* Beutler, *supra* note 22, at 30-31 (noting that Court has always found secular purposes in programs that fund religious education).

294. *See* Nasstrom, *supra* note 14, at 1092-95 (asserting that voucher programs are constitutional when aid is neutrally provided and private choices direct aid to religious schools).

295. *See* Beutler, *supra* note 22, at 59 (asserting that "[i]n the context of parochial school aid, the irrelevance of entanglement as an Establishment Clause concern is also apparent").

296. *See* Nasstrom, *supra* note 14, at 1096 (suggesting that after *Witters* and *Zobrest*, school vouchers are not subject to entanglement prong).

297. *See* Beutler, *supra* note 22, at 9 (asserting that school voucher programs that "provide nondiscriminatory aid" do not violate Establishment Clause); Viteritti, *supra* note 22, at 192 (concluding that voucher programs allow religious freedom, provide educational opportunities for lower-income families, "mak[e] such alternatives available to all," and do not violate First Amendment).

298. *See supra* notes 263-96 and accompanying text (discussing scholars' assessment of *Lemon*, *Nyquist*, *Mueller*, *Witters*, and *Zobrest* as they have argued that inclusion of religious schools in voucher programs is constitutional).

299. *See infra* Part III.C (discussing impact of *Agostini* on arguments both for and against inclusion of religious schools in school voucher programs).

B. The Constitutional Arguments Against the Inclusion of Religious Schools in School Voucher Programs

Although various scholars have made strong arguments in support of the constitutionality of the inclusion of religious schools in voucher programs,[300] other scholars have presented Establishment Clause case law that addresses aid to religious education and the *Lemon* test in a different light. These scholars have contended that voucher programs which include religious schools impermissibly aid such schools and that recent Supreme Court decisions involving aid to religious education do not support such programs.[301] Scholars who oppose the inclusion of religious schools in voucher plans have set forth five major arguments to support their contention that such programs are unconstitutional.[302]

First, scholars who oppose school vouchers have contended that any aid to religious schools is per se invalid.[303] Second, some commentators have looked to *Nyquist* as authority and have refuted the private choice theory that other scholars have advocated.[304] Third, scholars who have not supported the inclusion of religious schools in voucher plans do not accept that *Mueller*, *Witters*, and *Zobrest* clearly indicate that such voucher plans are constitutional.[305] Fourth, some scholars have looked to *Grand Rapids* as presenting a strong argument against voucher systems that include religious schools.[306]

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300. *See supra* notes 255-98 and accompanying text (presenting arguments in support of inclusion of religious schools in school voucher programs).

301. *See* Bright, *supra* note 14, at 228 (asserting that aid provided to religious schools through voucher programs is not permissible simply because parental choice directs aid); Green, *supra* note 14, at 62-65 (contending that *Mueller* and *Witters* do not permit inclusion of religious schools in voucher programs); Loeb & Kaminer, *supra* note 14, at 6-10 (discussing recent Supreme Court opinions involving aid to religious schools and determining that voucher plans do not distribute aid neutrally when compared to other programs' distribution of aid in recent cases).

302. *See infra* notes 303-30 and accompanying text (discussing scholars' arguments in support of contention that inclusion of religious schools in school voucher programs is unconstitutional).

303. *See* Loeb & Kaminer, *supra* note 14, at 37 (concluding that "any money given to [religious] schools has the primary effect of advancing religion" and violates separation of church and state); *infra* notes 309-11 and accompanying text (discussing argument that all aid to religious schools is invalid).

304. *See* Green, *supra* note 14, at 57-60 (arguing that private choice theory should be struck down according to *Nyquist* and its companion case, *Sloan*); *infra* notes 312-18 and accompanying text (discussing *Nyquist* and refuting private choice theory).

305. *See* Loeb & Kaminer, *supra* note 14, at 7-9 (discussing other scholars' questionable interpretation of *Mueller*, *Witters*, and *Zobrest*); *infra* notes 319-22 (discussing voucher opponents' interpretation of *Mueller*, *Witters*, and *Zobrest*).

306. *See* Bright, *supra* note 14, at 217-18 (asserting that under *Grand Rapids*, school

Finally, and not surprisingly, opponents of the inclusion of religious schools in voucher programs have contended that such programs fail the *Lemon* test.[307] In sum, these scholars have asserted that the inclusion of religious schools in voucher plans renders such plans unconstitutional under the Establishment Clause.[308]

First, opponents of the inclusion of religious schools in voucher systems have asserted that any amount of public funds given to religious schools, regardless of their superficial channeling through parents, have the primary effect of advancing religion and thus fail to maintain the separation between church and state in violation of the Establishment Clause.[309] Professor Cynthia Bright has asserted that this failure to maintain such a separation is a result of the religious indoctrination that inevitably exists at religious schools and the religious mission that teachers intertwine with every aspect of education.[310] Voucher opponents also have argued that a court can distinguish cases such as *Witters* and *Zobrest* from the school voucher situation because the amount of aid that flows to religious schools as a result of voucher programs creates an establishment of religion.[311]

Second, opponents of the inclusion of religious schools in voucher systems also have refuted the private choice theory.[312] The state's act of

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voucher programs that involve religious schools serve to subsidize religion); *infra* notes 323-26 and accompanying text (discussing scholars' arguments regarding *Grand Rapids*).

307. *See* Weishaar, *supra* note 14, at 572 (concluding that voucher programs fail *Lemon* test because they have impermissible effect of advancing religion); *infra* notes 327-30 and accompanying text (explaining argument that voucher plans that include religious schools fail *Lemon* test).

308. *See* Bright, *supra* note 14, at 228-29 (concluding that school voucher programs do not avoid violating Constitution through notion of parental choice); Green, *supra* note 14, at 73 (concluding that voucher programs violate Establishment Clause); Loeb & Kaminer, *supra* note 14, at 37 (concluding that school voucher programs that provide aid to religious schools are unconstitutional); Weishaar, *supra* note 14, at 572-74 (concluding that voucher programs that include religious schools violate Establishment Clause).

309. *See* Bright, *supra* note 14, at 209 (stating that Supreme Court has acknowledged that when government aid reaches religious institutions, such aid raises Establishment Clause concerns); Loeb & Kaminer, *supra* note 14, at 37 (concluding that "any money given to [religious] schools has the primary effect of advancing religion," even when funneled through parental choice, and thus violates separation of church and state).

310. *See* Bright, *supra* note 14, at 209 (asserting that "[r]eligious indoctrination forms an essential part of the curricula at religious schools, and the religious mission of religious institutions permeates every aspect of education").

311. *See id.* at 218 (arguing that amount of aid that flows to religious schools as result of school voucher programs can be important factor).

312. *See id.* at 228 (refuting private choice theory); Green, *supra* note 14, at 57-58 (arguing that Court should strike down private choice theory according to *Nyquist* and its companion case).

giving parents the power to choose their children's schools, as a state does when it implements a voucher program, does necessarily circumvent the Establishment Clause because the state cannot delegate an action that it is forbidden to take at all.[313] Professor Steven K. Green has contended that *Nyquist* and its companion case should direct any inquiry into the constitutionality of private choice programs.[314] Both cases involved programs that provided tax benefits or tuition reimbursements for parents who chose to send their children to private schools.[315] Professor Green has noted that the Court struck down both programs as unconstitutional because they had the impermissible effect of advancing religion.[316] *Nyquist* asserts that the disbursement of funds through parents has the same effect as the direct disbursement of funds.[317] Therefore, private choice is insignificant and does not make a voucher program that distributes funds through parents valid.[318]

Third, unlike the scholars who argue for the inclusion of religious schools in voucher programs, scholars who oppose such programs have not accepted that *Mueller*, *Witters*, and *Zobrest* are clear indications that vouchers are constitutional.[319] Some scholars have pointed out that besides the neutral availability of the aid and the element of private choice in both the *Mueller* and *Witters* programs, the Supreme Court considered other factors, such as the fact that the programs did not involve outright grants, which the Court would not have deemed constitutional.[320] Also, some scholars have determined that *Zobrest* does not support the school voucher argument because the opinion relies on the neutrality of the service and the absence of any mention of religion in the IDEA, which created the aid.[321] Voucher programs, on the other hand, do not provide a neutral service in that they expressly send stu-

313. *See* Bright, *supra* note 14, at 228 (asserting that "[p]rivate choice theory flounders" in assuming that giving individuals power to choose school to which it will send state funds will avoid conflict with Establishment Clause because "state cannot delegate an action it cannot take").

314. Green, *supra* note 14, at 57.

315. *See id.* at 57-58 (summarizing facts of *Nyquist* and *Sloan v. Lemon*, 413 U.S. 825 (1973)).

316. *See id.* at 58 (discussing why Court struck down programs in both *Nyquist* and *Sloan*).

317. *See id.* at 59-60 (asserting that *Nyquist* shows that disbursing benefits through parents is not different from directly disbursing benefits).

318. *See id.* at 59 (stating that Court in *Nyquist* implies that program violates Establishment Clause regardless of whether actual funds ever reach sectarian schools and rule applies to all types of grants).

319. *See* Loeb & Kaminer, *supra* note 14, at 7-9 (discussing other scholars' questionable interpretation of *Mueller*, *Witters*, and *Zobrest*).

320. *See id.* at 8 (noting that in *Mueller*, Justice Rehnquist expressed doubts about constitutionality of "outright grants to low-income parents").

321. *See id.* at 9-10 (asserting that *Zobrest* involves neutral statute).

dents to religious schools, if the students so choose, and therefore contain a bias toward religion.[322]

Fourth, Professor Bright has asserted that the strongest argument against school voucher systems follows the reasoning of the Court in *Grand Rapids*.[323] In *Grand Rapids*, the Court held that two programs through which the state provided teachers and classes to nonpublic school students were unconstitutional.[324] According to *Grand Rapids*, a benefit to a religious school is indistinguishable from a direct grant of aid because, regardless of how the school received the aid, that aid relieved the school of otherwise necessary costs and thereby allowed additional expenditure of funds for religious purposes.[325] Under this analysis, voucher programs would provide indirect aid to schools and would similarly subsidize their religious function by dispersing funds for the benefit of sectarian activities. Therefore, it would violate the Establishment Clause.[326]

Finally, other scholars have contended that a school voucher program that includes religious schools might very well fail the *Lemon* test.[327] A voucher program might have trouble passing the effects prong if the program does not have a genuine element of private choice because the program has limited nonsectarian opportunities to use school vouchers.[328] Also, scholars note that voucher programs which provide aid to religious schools may not pass the entanglement prong of the *Lemon* test.[329] Religious schools are pervasively sectarian, thus making it impossible for a state to have a nonentangling aid program because a school could not separate out its secular activities from the other activities of the school for the purpose of receiving funding.[330]

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322. *See id.* (asserting that school voucher programs are "heavily skewed towards religion" and therefore not comparable to aid program in *Zobrest*).

323. *See* Bright, *supra* note 14, at 217 (asserting that strongest argument against California school voucher system is Court's reasoning in *Grand Rapids*). Although Professor Bright specifically addresses a voucher program that the California state legislature proposed, her arguments pertain to school voucher programs in general. She asserts that the California program is one of many that legislatures are proposing across the nation. *Id.* at 194-96.

324. School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 375 (1985).

325. *See* Bright, *supra* note 14, at 217-18 (discussing Court's reasoning in *Grand Rapids*).

326. *See id.* (asserting that under *Grand Rapids*, school voucher programs serve to subsidize religion).

327. *See* Weishaar, *supra* note 14, at 561-70 (assessing school voucher programs according to *Lemon* test and pointing out how voucher programs that include religious schools can fail test).

328. *See id.* at 565-66 (noting that if aid recipient only has limited number of choices, recipient may have to choose religious education and will not have made independent choice).

329. *See id.* at 569 (asserting that difficulties arise when assessing school voucher programs under entanglement prong of *Lemon* test).

330. *See id.* (determining that religious schools are pervasively sectarian and cannot easily distinguish secular functions for purposes of separate funding).

Scholars cannot fully assess the constitutionality of including religious schools in school voucher programs under the *Lemon* test, however, without another look at the Court's recent decision in *Agostini*.[331] In *Agostini*, the Court altered its application of the *Lemon* test and emphasized certain points that it had made in earlier opinions.[332] At least to some degree, the Supreme Court's recent *Agostini* decision affected much of what scholars have said about school voucher programs.

C. *The Application of* Agostini *to the Constitutional Arguments For and Against the Inclusion of Religious Schools in School Voucher Programs*

As discussed above, the Supreme Court in *Agostini* altered the application of the *Lemon* test to the question of whether a government program can aid religious institutions. The Court also determined that *Witters* and *Zobrest* had contributed to a significant change in Establishment Clause jurisprudence.[333] The Court's decision in *Agostini* lends support to many of the ideas that scholars have set forth in support of the inclusion of religious schools in school voucher programs. It also eliminates many of the arguments that scholars make asserting that the inclusion of religious schools in school voucher programs is unconstitutional.

Agostini emphasized the notion that a program is constitutional if it provides aid to a class of students on a neutral basis and if that aid reaches religious schools only as a result of the independent and private choice of the individual.[334] The Court relied on *Witters* and *Zobrest* in its decision in *Agostini*, departing from its previous rule that all government funds that directly aid the function of religious schools are invalid.[335] This is similar to the contention that many school voucher advocates have raised – that the principles of neutrality developed in *Mueller*, *Witters*, and *Zobrest* support the constitutionality of voucher programs.[336] Those scholars who have refuted the

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331. *See infra* notes 333-57 and accompanying text (analyzing *Agostini* in light of school voucher programs).

332. *See supra* notes 157-204 and accompanying text (discussing *Agostini* and its impact on *Lemon* test and various Supreme Court decisions).

333. *See supra* notes 157-204 and accompanying text (discussing Supreme Court's changes to Establishment Clause jurisprudence through its decision in *Agostini*).

334. *See* Agostini v. Felton, 117 S. Ct. 1997, 2011-12 (1997) (asserting that Court has "departed from the rule . . . that all government aid that directly aids the educational function of religious schools is invalid" because, in *Witters* and *Zobrest*, government distributed aid on neutral basis and recipient used aid at religious school only as result of private choice).

335. *Id.* at 2011.

336. *See supra* notes 271-91 and accompanying text (discussing scholars' views on *Mueller*, *Witters*, and *Zobrest* and how these decisions support constitutionality of including religious schools in voucher programs).

private choice theory and assert that private choice has the same effect as the direct disbursement of funds, however, do not get any support from *Agostini*.[337] The Court's decision follows from the reasoning in *Witters* and *Zobrest* that the element of private choice prevents aid to religious schools from being attributed to government decisionmaking.[338]

Some opponents of school vouchers have asserted that if any amount of public funds reach religious schools, that aid has the primary effect of advancing religion.[339] The Supreme Court used this reasoning in *Grand Rapids*.[340] Professor Bright has asserted that according to that decision, a benefit to a religious school is indistinguishable from a grant of direct aid because the aid simply frees up funds for sectarian use, therefore rendering vouchers just another form of invalid direct aid.[341] The Court in *Agostini*, however, overruled parts of *Grand Rapids*, including the notion that all government aid that directly aids the function of religious schools is invalid and has the primary effect of advancing religion.[342]

Most importantly, the Court's decision in *Agostini* significantly alters the *Lemon* test and therefore discredits any argument that the inclusion of religious schools in school voucher programs is unconstitutional because it fails the *Lemon* test.[343] First, in cases prior to *Agostini*, the Court found the secular purpose prong to be of little importance when addressing aid to religious schools and therefore it has readily found a secular purpose in all such cases.[344] The Court in *Agostini* did not alter the first prong in any way; it merely acknowledged that it had been addressed in the *Grand Rapids* deci-

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337. *See supra* notes 293-98 and accompanying text (discussing school voucher opponents' arguments that aid that reaches religious schools as result of private choice is no different from aid distributed directly).

338. *See Agostini*, 117 S. Ct. at 2011-12 (affirming that private choice present in *Witters* and *Zobrest* caused Court to depart from rule that all government funds that aids function of religious schools is invalid).

339. *See supra* note 303 and accompanying text (discussing school voucher opponents' contention that any amount of funds reaching religious school has primary effect of advancing religion).

340. *See supra* notes 323-26 and accompanying text (discussing Court's reasoning in *Grand Rapids*).

341. *See* Bright, *supra* note 14 (asserting that under *Grand Rapids*, any benefit to religious school is indistinguishable from direct aid, and therefore vouchers constitute direct aid).

342. Agostini v. Felton, 117 S. Ct. 1997, 2011 (1997). The Court stated that "we have departed from the rule . . . that all government aid that directly aids the educational function of religious schools is invalid." *Id.*

343. *See supra* notes 327-30 and accompanying text (noting that scholars have contended that school voucher program that includes religious schools might fail *Lemon* test).

344. *See* Stick, *supra* note 14, at 434 (asserting that Court has always found secular purpose in programs that provide aid to religious schools).

sion.[345] School voucher programs have a valid secular purpose in that they seek to improve the quality of education and provide opportunities for all children, despite their income level.[346]

Second, according to the Court in *Agostini*, a government program that provides aid to religious education can satisfy the effects prong if the program distributes aid on a neutral basis.[347] The Court reinforced the idea of neutrality by referring back to the neutrality of the programs that the Court upheld in *Witters* and *Zobrest*.[348] When the government allocates aid on a neutral basis, without reference to religion, and makes it available to all beneficiaries, the aid does not have the primary effect of advancing religion.[349] The Court noted that, in both *Witters* and *Zobrest*, aid was allocated to all eligible beneficiaries based on their handicap, without regard to religion.[350] It recognized that in *Grand Rapids* and *Aguilar*, the Court mistakenly had not considered that the programs at issue provided aid on a neutral basis.[351] Therefore, a school voucher program that distributes aid on a neutral basis, without regard to religious preferences, would not create an incentive for a student to pursue a religious education and thus would not advance religion.

Third, the Court in *Agostini* makes it clear that the effects prong subsumes the entanglement prong, and therefore the entanglement prong is of little importance when assessing a school voucher program.[352] The Court determined that the factors it used in assessing both the second and third prongs of the *Lemon* test were substantially the same.[353] Therefore, it was easiest to consider a statute's entanglement as an aspect of that statute's effect.[354] Also, the *Agostini* Court overruled *Aguilar* and parts of *Grand*

345. *See Agostini*, 117 S. Ct. at 2008 (noting that Court had found program to have secular purpose in *Grand Rapids*).

346. *See* Stick, *supra* note 14, at 435 (asserting that attempt to improve quality of education is enough to satisfy secular purpose prong of *Lemon* test); Nasstrom, *supra* note 14, at 1092 (asserting that vouchers have secular purpose of "improving education through parental choice and increased competition among schools").

347. *See supra* notes 334-38 (discussing *Agostini* and emphasis on neutrally allocated aid).

348. *See* Agostini v. Felton, 117 S. Ct. 1997, 2014 (1997) (stating that when "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis," no incentive exists to pursue religious education).

349. *Id.*

350. *Id.*

351. *Id.*

352. *See id.* at 2015 (discussing factors used to assess effects prong and assess entanglement and concluding that it is easiest to treat entanglement "as an aspect of the inquiry into a statute's effect").

353. *Id.*

354. *Id.*

Rapids because the assumptions it previously relied upon in determining that the government aid programs had the primary effect of advancing religion were now invalid.[355] The entanglement prong disappears even when a government program provides aid to religious schools because the Court no longer presumes that the program has the primary effect of advancing religion.[356] In *Agostini*, the Court found that the monitoring of New York City's Title I program caused the religious institution and the government to communicate extensively, which created an excessive entanglement the Court deemed unnecessary because it did not presume the program to advance religion.[357] Therefore, a voucher system that distributes public funds to religious schools, but that does not have the primary effect of advancing religion because it allocates funds on a neutral basis, does not have to undergo a separate test for excessive entanglement.

D. School Voucher Programs and the Inclusion of Religious Schools

After *Agostini*, school voucher programs that include religious schools pass the revised *Lemon* test.[358] The Court's decision in *Agostini* also reinforces the concepts of neutrality that many scholars address as they argue that the inclusion of religious schools in voucher programs is constitutional.[359] The Court developed these concepts of neutrality in *Witters* and *Zobrest*, cases in which government programs allocated funds on a neutral basis and distributed aid to a religious school only after an individual made a private choice.[360] The Court in *Agostini* upheld these two cases[361] and overruled *Aguilar* and

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355. *See id.* at 2015-16 (describing assumptions and explaining how they have been undermined).

356. *See id.* (asserting that Court's finding in *Aguilar* that New York City's Title I program resulted in excessive entanglement rested on now-invalid presumption that program had primary effect of advancing religion).

357. *See id.* (asserting that New York City's Title I program was no longer presumed to advance religion because three underlying assumptions had been abandoned in subsequent Supreme Court opinions, and therefore did not require pervasive monitoring that would constitute excessive entanglement).

358. *See supra* notes 343-57 and accompanying text (explaining three prongs of *Lemon* test and how school voucher program passes each part of test).

359. *See supra* notes 334-38 and accompanying text (discussing how Court's decision in *Agostini* emphasized neutrality concepts developed in *Mueller*, *Witters*, and *Zobrest*).

360. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993) (describing neutrality of program in that state distributes benefits without regard to religion and parents have freedom to choose school at which to use benefits); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 488 (1986) (describing neutral aspects of Washington's program, such as element of private choice and program's availability to all eligible persons without regard to religion).

361. *See* Agostini v. Felton, 117 S. Ct. 1997, 2011-16 (1997) (relying on reasoning of

parts of *Grand Rapids*,[362] dispensing with the idea that all government aid that directly benefits a religious school is invalid.[363] Therefore, a school voucher program that includes religious schools is constitutional if it allocates aid on a neutral basis and distributes public funds to a religious school after a family makes a private and independent decision, just as the programs upheld in *Witters* and *Zobrest* did.

The voucher programs in both Cleveland and Milwaukee allocate funds on a neutral basis because each program provides aid to students with parents at low-income levels, without regard to their religious preferences.[364] Also, the students who participate in both the Cleveland and Milwaukee programs choose the school they wish to attend, and public funds do not reach a religious school until the student makes an independent choice and the parent signs the check.[365] When the Supreme Court of Ohio considers Cleveland's voucher program, the reasoning of *Agostini* should be considered and the program upheld as constitutional. Also, the Supreme Court of Wisconsin already has recognized that the Supreme Court's decision in *Agostini* has an impact on the issue of school voucher programs, as that court decided to uphold Milwaukee's Parental Choice Program.[366]

In assessing the constitutionality of the inclusion of religious schools in the Milwaukee program, the Supreme Court of Wisconsin considered the Supreme Court's opinion in *Agostini* and how that Court explained that the understanding of the criteria used to evaluate the Establishment Clause inquiry had changed in recent years.[367] The *Jackson* court acknowledged the *Agostini* Court's view that the unchanged principle under the Establishment Clause is neutrality and decided to follow the three criteria set forth in *Agostini* for evaluating whether a program has an "impermissible effect."[368] The court in *Jackson* determined that the inclusion of religious schools in the Milwaukee

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Court in *Witters* and *Zobrest* in undermining previously believed assumptions and overruling *Aguilar* and parts of *Grand Rapids*).

362. *See id.* at 2016 (stating that Court can recognize change in law and overrule *Aguilar* and inconsistent portions of *Grand Rapids*).

363. *See id.* at 2011 (stating that Court has "departed from the rule . . . that all government aid that directly aids the educational function of religious schools is invalid").

364. *See supra* notes 231, 239-40 and accompanying text (describing income-based eligibility for Cleveland and Milwaukee scholarship programs).

365. *See supra* notes 233-34, 241-42 and accompanying text (stating that in both Cleveland and Milwaukee programs, family chooses school that student will attend and then signs check over to school).

366. *See* Jackson v. Benson, 578 N.W.2d 602, 607 (Wis. 1998) (concluding that Milwaukee program does not violate Establishment Clause or Wisconsin Constitution), *cert. denied*, 119 S. Ct. 466 (1998).

367. *Id.* at 616.

368. *Id.* at 617.

program did not (1) result in governmental indoctrination, (2) define its recipients by reference to religion, or (3) create an excessive entanglement under *Agostini*.[369] After applying to the Milwaukee program the criteria that the Supreme Court developed in Establishment Clause cases up to *Agostini*, the *Jackson* court concluded that the program provides aid to both sectarian and nonsectarian schools on the basis of neutral, secular criteria only as a result of numerous private choices of individual parents.[370] It is "precisely such a program" that the Supreme Court meant to protect.[371]

A city or state, however, could choose to implement a school voucher program that does not include religious schools and such a program would withstand constitutional scrutiny. A state legislature does not implement a school voucher plan out of necessity and, therefore, the child benefit theory discussed in Part II.F that mandates the inclusion of religious schools in need-based interdistrict choice programs does not apply to voucher programs.[372] As discussed in Parts I and II, Maine's interdistrict choice program has been operating for many years and is a necessary solution to the problem faced by the state's rural areas that do not have enough residents to support a secondary school.[373] Although largely implemented in Cleveland and Milwaukee to provide educational opportunities to low-income students, voucher programs are not entirely need-based. The Ohio and Wisconsin state legislatures began these programs because the public schools in Cleveland and Milwaukee are not of high quality[374] and few low-income families can afford private schools.[375] They are not need-based, however, in the sense that the children who participate would have other educational options, such as attending public school, without the voucher program.

IV. Conclusion

The opinions of the Supreme Court and its interpretations of the controversial *Lemon* test have changed Establishment Clause jurisprudence regarding aid to religious education. The Supreme Court's decision in *Agostini* has

369. *Id.*

370. *Id.*

371. *Id.*

372. *See supra* notes 216-20 and accompanying text (explaining child benefit theory and how it applies to situations in which government aid is need-based).

373. *See supra* notes 1-13 and accompanying text (describing Maine's interdistrict choice program).

374. *See* ALAN BONSTEEL & CARLOS A. BONILLA, A CHOICE FOR OUR CHILDREN: CURING THE CRISIS IN AMERICA'S SCHOOLS 40 (1997) (stating that Cleveland and Milwaukee are among cities where "schools are so bad that public school teachers send their own children to private schools").

375. *Id.* at 92 (asserting that "few low-income families can now afford private schools").

had a significant impact on this change in jurisprudence. Under the Supreme Court's current interpretation of the Establishment Clause, Maine courts should rule in favor of the Bagleys because the change in jurisprudence not only permits but also *requires* the inclusion of religious schools in necessary interdistrict school choice programs. However, on April 20, 1998, the Cumberland County Superior Court concluded that the denial of tuition funds to the Bagleys does not violate the Establishment Clause or any other provision of the United States or Maine Constitutions.[376] The trial court, however, dedicates only two sentences of analysis to the Supreme Court's changing Establishment Clause jurisprudence and mentions *Agostini* only in a citation.[377] The court does not elaborate on the Supreme Court's current interpretation of the Establishment Clause following its decision in *Agostini*.[378] When the Supreme Court of Wisconsin considered the Milwaukee program in light of *Agostini* and other Establishment Clause case law, it reversed the state court of appeals's decision that had not relied on the most recent Supreme Court jurisprudence. It seems that if the state court of appeals hears this case and actually applies recent Establishment Clause case law, a different outcome might result.

Agostini has impacted scholars' arguments in support of and in opposition to the constitutionality of including religious schools in school voucher programs. *Agostini* makes it clear that school voucher programs that include religious schools are constitutional, as evidenced in the decision of the Wisconsin Supreme Court. Establishment Clause jurisprudence, however, does not require that voucher programs include religious schools. Therefore, a Bagley-like lawsuit would not be successful in a state that has implemented a school voucher system that excludes religious schools; but, when a state chooses to include nonsectarian private schools in a necessary interdistrict school choice program, that state must extend its program to religious private schools as well.

376. Bagley v. Maine Dep't of Educ., No. CV-97-484, slip op. at 4 (Cumberland Sup. Ct. Apr. 20, 1998) (on file with the *Washington and Lee Law Review*).

377. *Id.* at 3.

378. *Id.* at 3-4.

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