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Richard T. Weicher

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## NOTE

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### IF A PUBLIC SCHOOL IS LABELED "FAILING," COULD MORE REALLY BE LESS?

*Richard T. Weicher\**

#### INTRODUCTION

In its latest word on permissible forms of government aid to religious educational institutions, *Mitchell v. Helms*,<sup>1</sup> the United States Supreme Court agreed on some of the general principles that should be a part of any analysis of a government aid program under the First Amendment to the United States Constitution.<sup>2</sup> Most important for purposes of this Note, the members of the Court agreed that one significant factor in an analysis of such a program was whether the program distributes aid that reaches religious institutions only through the genuine and independent private choices of individuals.<sup>3</sup>

What it means, however, to have a "true independent and private choice"<sup>4</sup> is not yet completely clear, particularly in the context of

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\* Juris Doctor, Notre Dame Law School, 2001; B.A., The College of the Holy Cross, 1998. I would like to thank Professors Steven Smith and Richard Garnett for their assistance with this Note. I would also like to thank Mary Ann MacLaughlan, my family, and my friends for their support while I worked on this project. Last, many thanks to the members of the *Notre Dame Law Review* for their outstanding work on this Note.

1 530 U.S. 793 (2000).

2 See *infra* Part III.

3 See *Mitchell*, 530 U.S. at 807–08 (plurality opinion). Justice O'Connor, in a concurrence in which Justice Breyer joined, agreed that whether an independent private choice directed government aid to a religious choice was a significant factor for the Court to consider. See *id.* at 841 (O'Connor, J., concurring). Justice Souter dissented, with Justices Stevens and Ginsburg joining, and also recognized the importance of independent and private choices in a First Amendment analysis. See *id.* at 889 (Souter, J., dissenting).

4 This term is from Justice O'Connor's concurring opinion in *Mitchell*. See *id.* at 843 (O'Connor, J., concurring).

school choice voucher programs. Recently, in *Jackson v. Benson*<sup>5</sup> and *Simmons-Harris v. Zelman*,<sup>6</sup> two different courts, one state and one federal, considered the meaning of this phrase when they were evaluating the constitutionality of similar school choice voucher programs. One of the most important similarities between the two programs was that the states' legislatures had designed the programs to give parents the option of sending their children to schools other than "failing"<sup>7</sup> public schools in their school districts.<sup>8</sup> In *Jackson*, the Supreme Court of the State of Wisconsin found its state's program permissible under the First Amendment to the United States Constitution, while in *Zelman*, the Sixth Circuit concluded that Ohio's program was not.<sup>9</sup> Although a number of factors contributed to each decision, the two courts agreed on one general principle: when the government creates voucher programs that give parents the opportunity to send their children to either sectarian schools or non-sectarian schools, a genuine and independent private choice exists for purposes of the First Amendment.

The two courts probably would disagree, however, about whether a genuine and independent choice exists in a specific instance: when, for instance, a government creates a voucher program designed to give parents the option of sending their children to schools other than failing public schools, but the only options under the program are a failing public school (or schools) and sectarian schools. In other words, because of the nature of the schools, there are no *public schools* parents could choose under the program which are also not "failing." From its opinion in *Jackson*, it is likely that Wisconsin's Supreme Court would find that such a school does offer an option, while on the other hand, from its opinion in *Simmons-Harris*, the Sixth Circuit would not count such a school as an option.

Assuming that the existence of a genuine and independent private choice remains an important factor under the Religion Clauses of the First Amendment, whether such a choice exists in the situation

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5 578 N.W.2d 602 (Wis. 1998). Although *Jackson* was decided before *Mitchell*, the similarity of the program the Wisconsin Supreme Court evaluated to the program in *Simmons-Harris* makes it very useful for this discussion, as does its analysis of independent and private choice. See *infra* Part V.

6 234 F.3d 945 (6th Cir. 2000), *cert. granted*, *Zelman v. Simmons-Harris*, No. 00-1751, 2001 WL 575830 (U.S. Sept. 25, 2001).

7 What it means for a school to be "failing" is unclear, as is how such a determination should be made, and by whom. These issues will also be discussed in this note. See *infra* Part V.

8 See *infra* Part V.

9 See *infra* Part V.

described above should be of great significance in determining the constitutionality of many voucher programs for this reason: school choice voucher programs have begun, and probably will continue to be most likely to arise, in areas where a state legislature or other governmental body has concluded that public schools are failing.<sup>10</sup>

This Note will argue that when a voucher program offers only a failing public school and sectarian schools as options, a genuine and independent private choice still exists for purposes of the First Amendment; indeed, a choice clearly exists even though one of the alternatives may be less desirable. Part I of this Note will address two of the primary theories about the meaning of the First Amendment, and the significance that individual and private choice will have for each theory. Part II will describe the emergence and meaning of independent private choice as an important factor under the relevant United States Supreme Court's First Amendment decisions, followed by a discussion of *Mitchell* and its importance in Part III. Relying on the principles developed by the Court, Part IV will compare and contrast *Jackson* and *Simmons-Harris* and will argue that the Sixth Circuit and the Wisconsin Supreme Court disagree about the permissibility of the example discussed above under the First Amendment. Part V will demonstrate that there are a number of reasons to find that such a program provides a genuine and independent private choice under the First Amendment.

## I. TWO FIRST AMENDMENT PERSPECTIVES: "NO AID" AND "NON-DISCRIMINATION"

The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>11</sup> Although many individuals may agree on some of the general concepts embedded in this amendment, the application of these concepts to various real-life circumstances has traditionally involved a good deal of dispute. In particular, it has been difficult for many to agree on the proper

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10 See Michael W. McConnell, *Governments, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847, 847 (1999) ("[E]ducational choice has recently been embraced with particular enthusiasm by inner city parents, as a response to the failure of the public educational establishment to meet their children's needs."); see also David Miles, *Gov. Vows To Keep Pressuring Legislature for School Vouchers*, ALBUQUERQUE J., July 17, 2001, at C3; Leslie Postal & Denise-Marie Balona, *Parents Weigh Broader Use for Vouchers*, ORLANDO SENTINEL, Feb. 20, 2001, at B1.

11 U.S. CONST. amend. I.

application of this amendment to government aid programs.<sup>12</sup> At the outset, therefore, it will be useful to describe two general theories about the meaning of the First Amendment's religion clauses because these perspectives, and the tension between them, have influenced the evolution of First Amendment jurisprudence. The significance and importance of independent and private choice as a factor in a First Amendment analysis of a government aid program depends upon which of these two theories a court is inclined to find more persuasive.

Although there are no definite labels for the two theories, they may be described as the "no-aid" theory and the "non-discrimination" theory.<sup>13</sup> Proponents of the no-aid theory maintain that the First Amendment prohibits "any government conduct that aids religion," and they are particularly concerned with financial aid to religious institutions.<sup>14</sup> In other words, by remaining inactive with respect to religion, government will do nothing that will help or hurt religion and will not violate the First Amendment.<sup>15</sup> Proponents of the non-discrimination theory, on the other hand, maintain that government may not engage in conduct that discriminates "either in favor of religion or against religion."<sup>16</sup> Thus, the State must treat analogous secular activities in the same manner in order to avoid violating the First Amendment.<sup>17</sup>

Depending on the context, time-period, or the facts of the case before the Court, these two perspectives on the meaning of the First

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12 See Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 314-15 (2000) (discussing the difficulty of identifying a "grand unifying theory" for the First Amendment and that at least two theories about the meaning of the First Amendment are the "no-aid" and "non-discrimination" theories).

13 See Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 48 (1997); see also Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 3-4 (1997) (referring to the no-aid theory as a "separationism" theory and the non-discrimination theory as a "neutrality" theory); Marci Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 822 (1999) (describing the nondiscrimination theory as a "non-preferentialist school"); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 231-32 (1994) (describing the no-aid theory as a "separationism" theory and the nondiscrimination theory as a "neutrality" theory); Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 342 (1999) (referring to the no-aid theory as a "no-money flow" theory and the non-discrimination theory as an "equal treatment" theory).

14 See Laycock, *supra* note 13, at 48.

15 See *id.*

16 *Id.*

17 See *id.*

Amendment have received varying degrees of significance when the Court has evaluated government school aid programs.<sup>18</sup> In other words, at times, the no-aid theory has been the prominent and decisive analytical approach, while at other times, the non-discrimination theory has been the prominent and decisive approach. It is important to point out, however, that even in one of the early significant decisions in this area, *Everson v. Board of Education*,<sup>19</sup> both theories played a role in the Court's decisionmaking. In *Everson*, the Court rejected a strict no-aid approach to interpreting the First Amendment, although neither theory has been universally rejected at any point. A strict no-aid approach would prohibit any form of aid to a religious institution under the First Amendment. Instead, in *Everson* the Court concluded that general government services that were indisputably marked-off from the religious functions of an institution were permissible under the First Amendment.<sup>20</sup>

Most important for purposes of this Note is that the significance of independent and private choice as a factor in a First Amendment analysis will vary depending on the degree to which either the no-aid theory or the non-discrimination theory influences a court's decision. For a court concerned that no aid from the government in any way advance religion, the existence of an independent and private choice will be less significant in justifying the program. Even when an individual makes such a choice, a court may believe there will still be forms of impermissible aid because, under a no-aid approach, the goal is to avoid any government activity which somehow favors religion. On the other hand, for a court concerned with nondiscrimination, the existence of an independent and private choice will be very significant, perhaps insulating a government program from First

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18 See Esbeck, *supra* note 13, at 10-11 (summarizing distinctions that influenced whether the Court would reject the no-aid approach when analyzing a government aid program, such as whether the institution was "pervasively sectarian," whether the aid was "indirect" or "direct," and whether the aid was "divertible" to sectarian uses); see also Laycock, *supra* note 13, at 55 (discussing the distinctions described by Professor Esbeck).

19 330 U.S. 1 (1947). For a discussion of *Everson*, see *infra* text accompanying notes 20-26.

20 See *id.* at 18. In *Everson*, there were two dissents. See *id.* at 18-28 (Jackson, J., dissenting); *id.* at 28-74 (Rutledge, J., dissenting). Both dissents rejected a strict no-aid approach to interpreting and applying the First Amendment. See *id.* at 25-26 (Jackson, J., dissenting) (agreeing that the First Amendment permitted the government to provide police and fire protection to religious institutions); *id.* at 49-58 (Rutledge, J., dissenting) (acknowledging that there are exclusively public services that aid religion). Instead, both dissents disagreed with the majority's factual conclusions. See *id.* at 19-20 (Jackson, J., dissenting); *id.* at 44-49 (Rutledge, J., dissenting).

Amendment attack. In this instance, because the goal is to avoid government discrimination in favor of religion, when an individual makes an independent and private choice to direct aid towards religion, government is not responsible for the advancement of religion.

## II. ESTABLISHMENT CLAUSE JURISPRUDENCE

The tension between the theories discussed in the previous section, as indicated above, is important to understanding the development of Establishment Clause doctrine. Part of that development, as this Section will explore, is the development of Establishment Clause jurisprudence as it applies to government aid programs. Most important, this Section will describe the way "genuine and independent private choices" became important under the First Amendment, and the meaning the Court has given this phrase as it has evolved over the course of a little more than fifty years.

### A. *General Applicability and Secular Content*

The Court's initial decisions about the permissibility of aid to religious institutions under the First Amendment may be characterized as primarily concerned with two principles: the general applicability of government aid programs and the content of the aid these programs distributed. These early decisions did not establish a definitive test for analyzing government aid programs under the First Amendment. The first influential decision to establish the importance of the above principles under the First Amendment was *Everson*. In *Everson*, a township board of education authorized reimbursements to parents of money the parents spent for the bus transportation of their children on buses operated by the public transportation system.<sup>21</sup>

Justice Black, writing for the Court, concluded that the reimbursement program did not violate the First Amendment.<sup>22</sup> The Court agreed that the Fourteenth Amendment made the First Amendment applicable to the states.<sup>23</sup> Black concluded that under the First Amendment a state or the federal government must be neutral in its relations with groups of religious believers and non-believers and that

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21 See *id.* at 3.

22 See *id.* at 17-18.

23 See *id.* at 8. Interestingly, there was little discussion, and no dispute, about whether the Establishment Clause of the First Amendment applied to the states through the Fourteenth Amendment. See Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 318 (1986).

the State may not use its power to handicap or favor religions.<sup>24</sup> The reimbursement program satisfied these conditions. First, the bus service was a service like fire protection in that it was "so indisputably marked off" from the religious functions of the schools that its content was secular.<sup>25</sup> Second, the State was providing a general service to all parents, regardless of their religions.<sup>26</sup>

About twenty years later, this understanding of the Establishment Clause influenced the Court's decision in *Board of Education v. Allen*.<sup>27</sup> In *Allen*, a New York state law required local public school authorities to lend textbooks free of charge to all students in grades seven through twelve, including students at private, sectarian schools.<sup>28</sup> The Court concluded that the program was permissible under the First Amendment because, under *Everson*, a state does not violate the Establishment Clause when it neutrally extends the benefits of state laws to all citizens regardless of their religious affiliation.<sup>29</sup>

The Court stated that when assessing the validity of legislation under the Establishment Clause, it would consider whether the purpose and primary effect of legislation was to advance or inhibit religion.<sup>30</sup> The Court concluded that the purpose of the legislation was to "further the educational opportunities available to the young," and that there was nothing that demonstrated any effects different from the stated purpose of the legislation.<sup>31</sup> Demonstrating its concern for the principles established in *Everson*, the Court considered both the general applicability of the program and the content of the distributed books. According to the Court, the benefits of the program were generally available because regardless of religion, any student who requested the books could receive them.<sup>32</sup> With regard to the books' content, the Court acknowledged that books are different from buses, but stated that the record gave it no reason to conclude that either the sectarian schools had received anything other than secular books or

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24 See *Everson*, 330 U.S. at 18.

25 *Id.* at 17-18.

26 *Id.* at 18.

27 392 U.S. 236 (1968).

28 See *id.* at 238.

29 See *id.* at 242, 248.

30 See *id.* at 243.

31 *Id.*

32 See *id.* at 243-44.



that sectarian schools were using the books for religious instruction.<sup>33</sup> Thus, the program was permissible under the First Amendment.<sup>34</sup>

### B. *The Lemon Test*

In the early 1970s in *Lemon v. Kurtzman*,<sup>35</sup> the Court relied on the principles developed in cases like *Everson* and *Allen* to articulate the now well-known "*Lemon test*." In *Lemon*, the Court considered two similar programs, one in Pennsylvania and another in Rhode Island. Essentially, the programs reimbursed nonpublic schools for some of the costs they incurred for teachers' salaries, textbooks, and instructional materials in secular subjects.<sup>36</sup> The Court held that both statutes were unconstitutional.<sup>37</sup>

In reaching its conclusion, the Court reasoned that there are three tests to consider: (1) whether a statute has a secular legislative purpose; (2) whether a statute's principal or primary effect either advances or inhibits religion; and (3) whether a statute fosters excessive government entanglement with religion.<sup>38</sup> The Court concluded that both statutes had appropriate secular legislative purposes.<sup>39</sup> Instead of considering the effects of each statute under the second test, however, the Court reasoned that because both statutes created excessive

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33 See *id.* at 244–49. The board also contended that the program violated their Free Exercise rights. See *id.* at 248. The Court rejected this claim because the board failed to show the "coercive effect of the enactment as it operates against [it] in the practice of [its] religion." *Id.* at 248–49. This suggests an interesting problem. As discussed by Professor Paulsen, by appearing to acknowledge that there are two "types" of claims, an "Establishment" claim and a "Free Exercise" claim, the opinion may demonstrate an important misunderstanding of the First Amendment; that is, they are the *same* claim. See Paulsen, *supra* note 23, at 325 ("[T]he establishment clause is best understood as providing for the equal protection of the free exercise of religion."); see also Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 492 (1991) ("A single coherent provision that on its face seemed to protect freedom of religion by forbidding Congress to establish religion or otherwise burden free exercise became two 'clauses' with free exercise regularly subordinated to a broad notion of nonestablishment."). Such a claim should probably be stated something like: "the government is 'establishing' one religion (or 'religion') through this program, thus infringing upon the board's right to freely exercise its religious beliefs."

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

35 403 U.S. 602 (1971). Although described as a "test," the Court may not have thought it was establishing a bright-line test, but rather, gathering previously used factors together. See Hamilton, *supra* note 13, at 809.

36 See *Lemon*, 403 U.S. at 606–07.

37 See *id.* at 607.

38 See *id.* at 612–13.

39 See *id.* at 613.

entanglements between government and religion, consideration of the second test was unnecessary.<sup>40</sup>

Shortly after *Lemon*, one of the first decisions to apply the *Lemon* test was *Committee for Public Education Religious Liberty v. Nyquist*.<sup>41</sup> In *Nyquist*, the Court began to discuss the way in which individual choice in the use of aid affects the permissibility of a government aid program under the First Amendment. The State of New York had enacted a statute that provided (1) direct money grants to nonpublic schools for maintenance and repair of school facilities, (2) tuition reimbursements to qualifying parents of children attending elementary or secondary non-public schools, and (3) tax deductions to parents who did not qualify for the reimbursement, limited to parents earning below a set level of annual income.<sup>42</sup> The Court held that all three forms of aid violated the Establishment Clause.<sup>43</sup>

In assessing the tuition reimbursement program, the Court considered the element of individual choice, but other factors were ultimately more persuasive. According to the Court, that the State disbursed the aid directly to parents was "only one among many factors to be considered."<sup>44</sup> Even though the aid went directly to parents, the reimbursements were different from the permissible forms of aid in both *Everson* and *Allen*.<sup>45</sup> The reimbursements differed from the bus fare program in *Everson* because the bus fare program was aid that the State "provided in common to all citizens" that could "fairly be viewed as [a] reflection[ ] of a neutral posture toward religious institutions."<sup>46</sup> The reimbursements in *Nyquist*, however, went primarily to those who chose to attend religious institutions and, therefore, were not generally available to all.<sup>47</sup> The reimbursements were also

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40 See *id.* at 613-14.

41 413 U.S. 756 (1973). *Nyquist* has been described as a "smart-bomb" because opponents of voucher programs have often argued that undesired programs resemble the programs in *Nyquist*, thus rendering the undesired program unconstitutional. See Garnett & Garnett, *supra* note 12, at 320 & n.89. For an example of this, see Hamilton, *supra* note 13, at 838 ("To be true to the Establishment Clause's fundamental political presuppositions, the courts would do best to adopt the Court's approach in *Nyquist*"). But see McConnell, *supra* note 10, at 856 ("Th[e] reasoning [in *Nyquist*] is obviously at odds with later decisions.").

42 *Nyquist*, 413 U.S. at 762-66 (citation omitted).

43 See *id.* at 798.

44 *Id.* at 781.

45 See *id.* at 782-83.

46 *Id.* at 782. This statement also applied to the other forms of aid mentioned in *Everson*, such as police and fire protection, sewage disposals, highways, and sidewalks for parochial schools. See *id.* at 781-82.

47 See *id.*

different from the books provided in *Allen* because unlike the books, the reimbursements were not subject to restrictions that would guarantee that state aid only supported secular educational functions.<sup>48</sup> The Court rejected the argument that the aid was permissible because there was no element of coercion attached to the reimbursements after parents had already paid tuition, stating that the absence of coercion was "irrelevant to questions arising under the Establishment Clause."<sup>49</sup>

Last, the Court rejected an argument that the reimbursements did not violate the First Amendment because they were designed to promote the free exercise of religion.<sup>50</sup> The Court recognized that the State may not interfere with parents' rights to educate their children in sectarian schools.<sup>51</sup> However, because the Establishment and Free Exercise Clauses were inevitably in tension, "it may often not be possible to promote the former without offending the latter."<sup>52</sup> Because of this, the State must remain neutral, neither advancing nor inhibiting religion.<sup>53</sup> The reimbursement program advanced religion and was therefore impermissible, even though it provided opportunities for the poor to choose between public and nonpublic education.<sup>54</sup> Apparently, paying public school taxes at the same time individuals support other schools is a burden they must bear so as not to erode the limitations of the Establishment Clause.<sup>55</sup>

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48 See *id.* at 782–83. During the discussion of *Allen* the Court included footnote 38, that indicated one of the problems with the program in *Nyquist* was that the class of beneficiaries did not include all school children. This probably supports the position that neutrally available aid is likely to be permissible under the First Amendment. See *id.* at 782 n.38; McConnell, *supra* note 10, at 856.

49 *Nyquist*, 413 U.S. at 786. It is difficult to understand how the absence of coercion could be "irrelevant" under the Establishment Clause when it seems clear that the First Amendment was meant to prevent the government from forcing citizens to adopt a particular position with respect to religion. See Volokh, *supra* note 13, at 367 ("[T]he Court's Establishment Clause cases suggest that the government may no more discriminate against religion than discriminate in its favor."). For the government to be "establishing" religion it necessarily must be coercing individuals into accepting a particular position with regards to religion. Cf. *id.* at 371–72 ("[The Establishment Clause's] core meaning is no special benefit for religion—'establishing' something must necessarily mean treating it better than its rivals.").

50 See *Nyquist*, 413 U.S. at 788.

51 See *id.*

52 *Id.* Again, this may reflect an important misunderstanding of the First Amendment. See Paulsen, *supra* note 23, at 324–25; see also *supra* note 33 and accompanying text.

53 See *Nyquist*, 413 U.S. at 788.

54 See *id.*

55 See *id.* at 788–89.

C. *The Emergence of "Independent and Private Choice" as a Significant Factor*

Changing course from decisions like *Lemon* and *Nyquist*, the last twenty years have witnessed the Court produce four decisions, *Mueller v. Allen*,<sup>56</sup> *Witters v. Washington Department of Services for the Blind*,<sup>57</sup> *Zobrest v. Catalina Foothills School District*,<sup>58</sup> and *Agostini v. Felton*,<sup>59</sup> among others, that have brought considering whether genuine and independent private choices existed under government aid programs to the forefront of constitutional analyses.<sup>60</sup> These decisions began to define this phrase for purposes of First Amendment analyses, making them an important foundation for the decision in *Mitchell*.

1. *Mueller v. Allen*

In *Mueller*, the State of Minnesota permitted taxpayers to deduct actual expenses incurred for the "tuition, textbooks, and transportation" of dependents who attended elementary or secondary schools.<sup>61</sup> The Court held that the deductions did not violate the Establishment Clause.<sup>62</sup> The Court analyzed the program under the *Lemon* test and concluded that the deductions had an acceptable secular purpose because they were meant to defray the cost of parents' educational expenses, regardless of the schools their children attended.<sup>63</sup> The Court

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56 463 U.S. 388 (1983).

57 474 U.S. 481 (1986).

58 509 U.S. 1 (1993).

59 521 U.S. 203 (1997).

60 See Garnett & Garnett, *supra* note 12, at 321-24; Hamilton, *supra* note 13, at 831. Other decisions considered relevant to and responsible for this change include: *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 845-46 (1995) (holding that it does not violate the Establishment Clause when the University of Virginia authorizes payments for printing a student-run religious newspaper when the same payments are available to other student-run papers); *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) (holding constitutional under the Establishment Clause a federal grant program that provided neutrally available funding for services related to adolescent sexuality and pregnancy); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (holding that the Establishment Clause does not prohibit a policy of granting religious groups equal access to university facilities generally available to other student groups); and *Wolman v. Walter*, 433 U.S. 229, 255 (1977) (holding constitutional under the Establishment Clause an Ohio statute which authorized the state to provide educational materials and services to nonpublic and mostly sectarian schools).

61 *Mueller*, 463 U.S. at 391.

62 See *id.* at 404.

63 See *id.* at 394-96. Even before analyzing the program under the *Lemon* test, the Court asserted that it has consistently rejected the notion that "any program which in some manner aids an institution with a religious affiliation violates the Establishment Clause." *Id.* at 393 (citations omitted). This is similar to the argument advanced by

also concluded that the deductions did not have the primary effect of advancing sectarian aims of religious institutions, thus satisfying the second part of the *Lemon* test.<sup>64</sup> According to the Court, a number of reasons supported the decision. Of those reasons, it was important that "numerous private choices of individual parents" determined how, and how much, financial assistance arrived at religious institutions.<sup>65</sup> The opinion did not discuss what it meant for a choice to be independent and private.

## 2. *Witters v. Washington Department of Services for the Blind*

Much like *Mueller*, in *Witters* the Court continued to elevate the level of importance it accorded the existence of private individual choices under the First Amendment's Religion Clauses. In *Witters*, a Washington statute authorized the Washington Commission for the Blind to provide aid for professional training or education to visually handicapped individuals.<sup>66</sup> The Supreme Court concluded that it would not advance religion in a manner inconsistent with the First Amendment if the Commission financed an applicant's studies at a Christian college under the Washington statutory program.<sup>67</sup>

Under the *Lemon* test, the Court concluded that the program did not have the principal or primary effect of impermissibly advancing religion.<sup>68</sup> The Court reasoned that previous decisions required it to analyze whether extension of aid to the applicant was like the aid in *Lemon* and *Nyquist* and thus impermissible, or like the aid a religious institution would receive if a state paid its employees when the state knew they would donate all or part of their salary to a religious institution and thus permissible.<sup>69</sup> According to the Court, through Washington's program the State provided assistance directly to students, who then chose which institution would receive the assistance.<sup>70</sup>

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Professor Volokh, discussed above. See Volokh, *supra* note 13, at 371-72; see also *supra* note 49 and accompanying text.

64 See *Mueller*, 463 U.S. at 396.

65 See *id.* at 399.

66 *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 483 (1986).

67 See *id.* at 489.

68 See *id.* at 486. The first and third prongs of the *Lemon* analysis received little discussion in the opinion. Under the first prong, whether a statute had a legislative purpose, there was no dispute. See *id.* at 485-86. As for the third prong, the Court declined to consider whether the program excessively entangled the government and religion, stating that it would be inappropriate for the Court to address this issue with an incomplete record. See *id.* at 489 n.5.

69 See *id.* at 487.

70 See *id.*

Therefore, any aid a religious institution received under the program reached the institution only as result of "genuinely independent and private choices of aid recipients," which supported the conclusion that the program was permissible under the First Amendment.<sup>71</sup> The choices were genuinely independent and private because benefits were available regardless of the nature of the institution benefited; thus, the program did not create any financial incentives to undertake sectarian education by providing greater or broader benefits for those who chose to apply their aid to religious education.<sup>72</sup>

### 3. *Zobrest v. Catalina Foothills School District*

Following its opinions in *Mueller and Witters*, in *Zobrest* the Court continued to treat independent choice as a significant factor. In *Zobrest*, a deaf student and his parents requested a sign-language interpreter for the student's classes at a Roman Catholic high school under the Individuals with Disabilities Act<sup>73</sup> (IDEA).<sup>74</sup> The Court held that the school district could provide the student with an interpreter on school premises without violating the First Amendment.<sup>75</sup> As a general principle, the Court stated that the government does not violate the Establishment Clause when it operates programs that "neutrally provide benefits to a broad class of citizens defined without reference to religion."<sup>76</sup> The Court explained that when assessing a program's neutrality, *Mueller and Witters* established that two important factors under the First Amendment are whether the aid is available to all members of class defined without reference to religion and whether aid ultimately reaches religious institutions because of individuals' independent and private choices.<sup>77</sup> Relying on *Mueller and Witters*, the Court stated that choices are independent and private when the government does not create a financial incentive to "undertake sectarian education."<sup>78</sup>

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71 *See id.*

72 *See id.* at 487-88.

73 20 U.S.C. §§ 1400-1491 (1994).

74 *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3 (1993).

75 *See id.* at 13-14.

76 *See id.* at 8. The Court argued that religious institutions must be able to receive general government benefits because otherwise there would be "absurd results," like the government being unable to provide things like police and fire protection. *See id.*

77 *See id.* at 9.

78 *Id.* at 10. The Court stated that when these two factors are satisfied a program does not "advance religion in a manner inconsistent with the Establishment Clause." *Id.* This is important because it reflects an understanding of the First Amendment under which "advancement," in and of itself, is not prohibited. *See Volokh, supra* note

The Court concluded that providing the interpreter would not run afoul of these factors.<sup>79</sup> As part of a general program, any "handicapped" child could receive an interpreter, regardless of whether the school a child attended was sectarian.<sup>80</sup> Parents, thus, were free to choose the school their children would attend because there was no financial incentive to choose one school over another—their children could receive an interpreter no matter where they chose to send them.<sup>81</sup> Therefore, interpreters were only on sectarian school premises due to the private and independent decisions of parents, and their presence there would not violate the First Amendment.<sup>82</sup>

#### 4. *Agostini v. Felton*

After the development of independent and private choice, laid out in *Mueller*, *Witters*, and *Zobrest*, in *Agostini* the Court revisited its decision in *Aguilar v. Felton*,<sup>83</sup> when it had held that the City of New York could not send public school teachers into parochial schools to provide remedial education to disadvantaged children under a congressionally mandated program.<sup>84</sup> The Court concluded that *Aguilar* was inconsistent with subsequent decisions under the First Amendment.<sup>85</sup>

The Court reasoned that *Aguilar*, and its companion case *School District v. Ball*,<sup>86</sup> had rested on assumptions that subsequent decisions had undermined.<sup>87</sup> One of these assumptions was that "any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking."<sup>88</sup>

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13, at 371–72 ("'[E]stablishing' something must necessarily mean treating it better than its rivals.").

79 See *Zobrest*, 509 U.S. at 10.

80 See *id.*

81 See *id.*

82 See *id.*

83 473 U.S. 402, 414 (1985) (holding the City of New York's remedial education program unconstitutional under the Establishment Clause).

84 See *Agostini v. Felton*, 521 U.S. 203, 208 (1997). On remand from the decision in *Aguilar*, a district court in New York entered a permanent injunction that prohibited public school teachers from providing services in parochial schools. See *id.*

85 See *id.* at 209.

86 473 U.S. 373, 397–98 (1985) (holding unconstitutional under the Establishment Clause two Michigan programs which financed classes in nonpublic and mostly sectarian schools which were taught by teachers who had been hired by the public school system).

87 See *Agostini*, 521 U.S. at 222 (citations omitted).

88 *Id.*

Relying on *Witters* and *Zobrest*, the Court concluded that when an individual chooses to direct government aid to a religious institution, even direct aid may be permissible.<sup>89</sup> Consistent with previous decisions, the Court stated that impermissible incentives are not present when there are no financial incentives to choose a sectarian school due to neutral and secular allocation criteria that neither favor nor disfavor religion and that make aid "available to both religious and secular beneficiaries on a nondiscriminatory basis."<sup>90</sup>

### III. THE SIGNIFICANCE AND MEANING OF "INDEPENDENT AND PRIVATE CHOICE" IN *MITCHELL V. HELMS*

Moving forward from *Agostini*, in *Mitchell v. Helms*,<sup>91</sup> the Court returned to the principle of independent and private choice. It held that a local governmental unit could provide materials and equipment to religiously affiliated private schools under Chapter 2 of the Education Consolidation and Improvement Act<sup>92</sup> without violating the Establishment Clause of the First Amendment.<sup>93</sup> Justice Thomas, writing for three other members of the Court, began by explaining the way in which *Agostini* had revised the criteria by which the Court would analyze a statute's effect. Under *Agostini* and the cases upon which it relied, the Court will consider three primary criteria: (1) whether the statute results in governmental indoctrination; (2) whether the statute defines its recipients by reference to religion; and (3) whether the statute creates an excessive entanglement.<sup>94</sup>

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89 See *id.* at 225–26.

90 *Id.* at 231. Also important from *Agostini* is that the Court "modified" the *Lemon* test. The Court concluded that because analyzing whether a program excessively entangled government and religion entailed considering the same factors as analyzing a program's "effect," the excessive entanglement inquiry should now be treated as an aspect of the "effects" analysis. See *id.* at 233.

91 530 U.S. 793 (2000).

92 20 U.S.C. §§ 7301–7373 (1994). Chapter 2 provides aid "for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials." *Id.* § 7351(b)(2).

93 See *Mitchell*, 530 U.S. at 801 (plurality opinion). The materials and equipment were, among other items, library books, computers, computer software, slide and movie projectors, overhead projectors, television sets, tape recorders, VCRs, projection screens, laboratory equipment, maps, globes, filmstrips, slides, and cassette recordings. *Id.* at 803 (plurality opinion).

94 See *id.* at 808 (plurality opinion). Because there was no challenge as to the statute's purpose, the Court only addressed Chapter 2's effect. See *id.* at 808 (plurality opinion).



According to Justice Thomas, when aid is offered to a broad range of groups or individuals, without regard to their religion, no one will reasonably conclude that the government is participating in religious indoctrination, thus making it possible to conclude that the aid is neutral.<sup>95</sup> In considering whether the government is neutrally providing aid, it is significant that the aid reaches religious institutions through the genuine and independent private choices of individuals.<sup>96</sup>

The Court concluded that the program did not have the effect of advancing religion.<sup>97</sup> First, the government was neutrally distributing the aid because the statute required distribution to be on a per capita basis, with the amount allocated to private schools equaling the amount allocated to public schools.<sup>98</sup> Second, the statute did not result in government indoctrination because the aid was available to a broad array of schools without regard to their religious affiliations, it reached the schools only due to private decisionmaking, and it did not have impermissible content.<sup>99</sup>

Justice Thomas relied on *Mueller*, *Witters*, *Zobrest*, and *Agostini* to conclude that individual choices are not independent when financial incentives to undertake religious education exist.<sup>100</sup> In *Mitchell*, such financial incentives did not exist because the aid was distributed through a per capita allocation system, thus creating no financial incentive for parents to choose one school over another because the aid would "follow" their children.<sup>101</sup> Of consequence to the plurality, therefore, was that parents had made an independent and private decision to send their children to a particular school not, however, where the parents directed this particular aid. In addition to financial incentives, in general, there may not be other incentives for individuals to choose religious education for an aid program to remain constitutionally permissible.<sup>102</sup> The plurality opinion did not discuss the existence of any other impermissible incentives in *Mitchell*.

The opinion made two other important points related to the issue of independent and private choice. First, based on *Allen*, *Everson*, and *Mueller*, Justice Thomas concluded that an impermissible "incentive" for parents to choose a religious education does not exist when

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95 See *id.* at 809–10 (plurality opinion).

96 See *id.* at 810 (plurality opinion).

97 See *id.* at 829 (plurality opinion).

98 See *id.* (plurality opinion).

99 See *id.* at 830 (plurality opinion).

100 See *id.* at 813–14 (plurality opinion).

101 See *id.* at 830 (plurality opinion).

102 See *id.* at 813–14 (plurality opinion).

religious schools receive a benefit that reduces the cost of securing a religious education.<sup>103</sup> Second, for an independent and private choice to exist, the aid does not literally need to pass through the hands of the parents or children.<sup>104</sup> When aid does, it merely makes it easier to see the independent and private choice.<sup>105</sup>

Justice O'Connor wrote separately, concurring in the judgment with Justice Breyer.<sup>106</sup> According to the concurrence, however, the plurality opinion assigned almost singular importance to the "neutrality" factor for future Establishment Clause adjudication.<sup>107</sup> The concurrence contended that in *Zobrest* and *Agostini* the Court considered other factors in previous decisions, making neutrality alone insufficient to qualify aid as permissible under the First Amendment.<sup>108</sup>

According to the concurrence, and important for purposes of this Note, it was significant that the aid in these two cases went directly to the students or their parents, who then decided to which purpose they would direct the aid.<sup>109</sup> Justice O'Connor disagreed with Justice Thomas, contending that a true private choice program only exists when a student may attend a religious school and still retain control over whether secular government aid will be applied toward religious education.<sup>110</sup> Based on this difference, the concurring opinion would treat per capita aid programs differently from "true" private choice

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103 See *id.* at 814 (plurality opinion).

104 See *id.* at 815–17 (plurality opinion). As will be discussed, this is an important point, one with which the concurring Justices had a different view. See *infra* text accompanying notes 111–13, 118–19.

105 See *Mitchell*, 530 U.S. at 816 (plurality opinion). Justice Thomas rejected two additional arguments as inconsistent with recent case law. First, he concluded that it can be permissible for the government to provide direct, nonincidental aid to the primary educational missions of religious schools under *Mueller*, *Witters*, and *Agostini*. See *id.* at 814–15 (plurality opinion). Second, he rejected an argument that divertible aid should be prohibited, concluding that aid must merely be suitable for use in a public school based on its content. See *id.* at 820–21 (plurality opinion).

106 See *id.* at 836 (O'Connor, J., concurring).

107 See *id.* (O'Connor, J., concurring).

108 See *id.* at 847–49 (O'Connor, J., concurring). The concurrence argued that whether there was evidence of inculcation by publicly funded teachers, requirements that aid be supplemental existed, and public funds ever reached the "coffers" of religious schools were all important factors. See *id.* at 847–48 (O'Connor, J., concurring); see also Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 IND. L.J. 167, 187–90 (2000) (arguing that individual choice alone is not enough to prevent an Establishment Clause violation when the state gives direct financial support to religious institutions).

109 See *Mitchell*, 530 U.S. at 846 (O'Connor, J., concurring).

110 See *id.* at 842–44 (O'Connor, J., concurring).

programs.<sup>111</sup> For Justices O'Connor and Breyer the difference was important because when the student retains control over where to direct the aid, the choice being made is more visible and less likely to cause a reasonable observer to perceive an aid program as government support for the advancement of religion.<sup>112</sup> Therefore, the concurring opinion does not directly address the existence of impermissible incentives created by an aid program; rather, it addresses the visibility of the choice to direct particular aid.

Justice Souter dissented, an opinion in which both Justices Stevens and Ginsburg joined.<sup>113</sup> According to the dissent, a majority of the Court gave too much weight, if not inappropriately exclusive weight, to whether a government aid program evenhandedly distributed aid that individuals ultimately directed to religious institutions through independent and private choices.<sup>114</sup> Instead, the dissent argued that the Court should also have considered other issues.<sup>115</sup> The Court needed to evaluate the directness or indirectness of the distribution, which includes whether individuals made independent and private decisions.<sup>116</sup>

Like the concurrence, the dissent was concerned with the way the per capita distribution affected the existence of an independent and private choice.<sup>117</sup> The dissent would also distinguish a per capita aid program from other types of aid programs, because per capita aid programs do not give particular recipients the "right and genuine opportunity" to direct particular aid where they choose, including away from religious organizations of which they are members.<sup>118</sup> There-

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111 See *id.* at 842 (O'Connor, J. concurring).

112 Justice O'Connor is responsible for articulating what has been called the "endorsement test," which generally asks whether a government aid program creates a symbolic link between the government and religion. See Underkuffler, *supra* note 108, at 172 & n.26. For a useful description and critique of the test, see Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987).

113 See *Mitchell*, 530 U.S. at 867 (Souter, J., dissenting).

114 See *id.* at 900 (Souter, J., dissenting).

115 In addition to its concern with the issues related to independent and private choice, the dissent also argued that the Court should have considered the nature of the institutions to which the aid was directed and the characteristics of the aid itself. See *id.* at 885 (Souter, J., dissenting). According to Justice Thomas, consideration of whether an institution is pervasively sectarian is a factor the Court has properly given considerably less relevance to in its recent decisions. See *id.* at 828-29 (plurality opinion).

116 See *id.* at 885 (Souter, J., dissenting).

117 See *id.* at 902 (Souter, J., dissenting).

118 See *id.* (Souter, J., dissenting). In support of the dissent's argument, it points out that "at least one" of those objecting to the program did so because she wanted to

fore, similar to the concurrence, the dissent would require an independent choice with respect to specific instances of aid.

In summary, and in light of the concurrence in *Mitchell*, under the First Amendment a school voucher program will probably be permissible if it satisfies the following conditions. First, the program must have a secular purpose. Second, a program may not have the effect of advancing or inhibiting religion. A program has an impermissible effect if it (1) results in governmental indoctrination, (2) defines its recipients by reference to religion, or (3) creates an excessive entanglement between the government and religious institutions.

At a minimum, the results under an effects analysis will depend on whether religious indoctrination may reasonably be attributed to government action. This attribution may not occur when aid is available to a broad range of groups or individuals. Also, attribution may not occur if aid reaches religious institutions through genuine and independent private choices of individuals. Based on the concurring opinion, other factors that may be relevant are whether the aid is divertible to religious uses, whether there is actual evidence of inculcation by publicly funded teachers, whether requirements that aid be supplemental exist, and whether public funds ever reach religious institutions.

Individuals make independent and private choices when government programs do not create incentives to undertake sectarian education, particularly financial incentives. Generally, such incentives do not exist when the same aid is available regardless of whether an individual chooses sectarian or non-sectarian education. The next Section discusses two recent cases that differ over what it means for government programs to create incentives to undertake religious education.

#### IV. THE MEANING OF "GENUINELY INDEPENDENT AND PRIVATE CHOICES" IN *JACKSON V. BENSON* AND *SIMMONS-HARRIS V. ZELMAN*

To explore what it means to have a true private choice within the meaning developed by *Mitchell* and the decisions leading up to it, this Section will discuss two relatively recent decisions, *Jackson v. Benson*<sup>119</sup> and *Simmons-Harris v. Zelman*,<sup>120</sup> because of the similarities between the programs involved and the courts' positions regarding the mean-

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have the opportunity to choose not to have her religious school receive aid under the program. See *id.* at 902 n.20 (Souter, J., dissenting).

119 578 N.W.2d 602 (Wis. 1998).

120 234 F.3d 945 (6th Cir. 2000).

ing of "independent and private choice." In *Jackson*, the Wisconsin Supreme Court considered the constitutionality of the Milwaukee Parental Choice Program (MPCP). Under the MPCP, eligible students could attend, at no cost to the students, any private school located in the City of Milwaukee.<sup>121</sup> To be eligible for the program, students had to be (1) students in kindergarten through twelfth grade, (2) from a family with an income not in excess of 1.75 times the federal poverty level, and (3) either enrolled in a public school in Milwaukee, attending a private school under the program, or not enrolled in school during the previous year.<sup>122</sup>

The schools participating in the program also had to meet a number of requirements. Participating schools had to comply with federal anti-discrimination provisions and all Wisconsin health and safety laws applicable to Wisconsin public schools.<sup>123</sup> Under amendments to the MPCP, however, participating schools did not need to be "nonsectarian."<sup>124</sup> Participating schools did, however, have to permit a student to "opt-out" of any religious activity if the student's parent or guardian submitted a written request for such an exemption.<sup>125</sup> Also, due to an amendment, there was no restriction on the number of participating students who could be enrolled in a particular private school.<sup>126</sup>

The State did not pay participating schools directly.<sup>127</sup> Rather, the State paid aid to each participating student's parent or guardian, sending a check in the name of the parent or guardian to be restrictively endorsed at the chosen school.<sup>128</sup> The amount the State would pay to a private school was also limited. The State would pay the lesser of the amount equal to the state aid per student to which Milwaukee Public Schools were entitled or the per pupil amount of "the private school's 'operating and debt service cost . . . that [was] related to educational programming.'"<sup>129</sup> The private schools were not subject to any restrictions on the uses to which they may put funding acquired through the MPCP.<sup>130</sup>

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

122 *Id.* at 608.

123 *Id.*

124 *Id.*

125 *Id.* at 609.

126 *Id.* At the time the Wisconsin district court had issued an injunction, 3400 students were participating in the program. *Id.* at 609 n.3.

127 *See id.*

128 *Id.*

129 *Id.* at 612. In the 1994-1995 term, the amount of aid to which a student would have been entitled under state aid distribution formulas was \$2500. *Id.* at 608.

130 *Id.*

The Wisconsin Supreme Court held that the program did not violate the Establishment Clause of the First Amendment.<sup>131</sup> The program satisfied the first prong of the *Lemon* test because the secular purpose of the MPCP was to "provide low-income parents with an opportunity to have their children educated outside of the embattled Milwaukee Public School system."<sup>132</sup>

Under the "effects" prong, the MPCP also passed muster. Although making its decision before *Mitchell*, the court reviewed the decisions leading up to it and concluded that a program satisfies this part of the *Lemon* inquiry when the program: (1) neutrally offers assistance based on "secular criteria that neither favor nor disfavor religion; and (2) does so only as a result of numerous private choices of the individual parents of school-age children."<sup>133</sup>

Applying these principles to the MPCP, the court first concluded that the eligibility requirements were neutral, secular criteria, made available to all beneficiaries on a nondiscriminatory basis.<sup>134</sup> Supporting this conclusion were the facts that neither were pupils selected on the basis of religion nor were participating private schools, which could be sectarian or non-sectarian.<sup>135</sup> Also supporting the neutrality of the program was that the amount of money available to students did not depend on the school that they attended.<sup>136</sup>

The program passed the "effects" test also because the aid flowed to religious schools only due to numerous private choices of the students' parents or guardians.<sup>137</sup> According to the court, parents had a number of options for their children: "a neighborhood public school, a different public school within the district, a specialized public school, a private nonsectarian school, or a private sectarian school."<sup>138</sup> Also supporting this conclusion was that the checks were made payable to the parents, were sent to the schools based on the parents' choices, and could only be cashed to cover the cost of tuition.<sup>139</sup> Most

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131 See *id.* at 620. But see Underkuffler, *supra* note 108, at 180-81 (arguing that the MPCP should have been held unconstitutional because it provided a significant amount of non-incidental direct aid).

132 *Id.* at 612.

133 *Id.* at 617.

134 *Id.* The court rejected an argument that *Nyquist* controlled its decision, concluding that the MPCP was different from the program in *Nyquist* because amendments to the MPCP "merely added religious schools to a range of pre-existing educational choices." *Id.* at 614 n.9.

135 See *id.* at 617.

136 See *id.*

137 See *id.* at 618.

138 *Id.* at 617-18.

139 See *id.* at 618.

important, it seems, was that the State would not send checks to a private school, sectarian or not, without a parent or guardian having decided to have their child attend the private school.<sup>140</sup>

Last, the MPCP did not involve an excessive entanglement between government and religion.<sup>141</sup> The State was not required to continuously monitor participating sectarian private schools.<sup>142</sup> Although these schools were subject to reporting requirements, and nondiscrimination, health, and safety obligations, enforcing these standards was part of the oversight the state superintendent already conducted as part of existing duties.<sup>143</sup> Therefore, excessive entanglement did not result.

Based on the above conclusions of the Wisconsin Supreme Court, the court probably would agree that a program offering only a failing public school and sectarian schools as options provides a basis for an independent and private decision under the First Amendment. First, the court concluded that it was a permissible legislative purpose to give parents the opportunity to take their children out of the “embattled” public schools.<sup>144</sup> Next, the court still considered public schools an option for parents, apparently even if they were failing public schools.<sup>145</sup> When the court listed the options available to parents, it did not qualify its list by stating that public schools are only an option when they are not deemed failing or some other similar qualification.<sup>146</sup> Therefore, the court probably would still consider the public schools an option and, thus, a genuine and independent private choice to exist, even if the only schools to which parents could send their children with vouchers were sectarian schools.

The voucher program in *Simmons-Harris* was similar in many ways to the program in *Jackson* and was set up as follows. The program was a legislative response to an order from the United States District Court placing the Cleveland School District under “direct management and supervision of the State Superintendent of Public Instruction.”<sup>147</sup> The court issued the order based on mismanagement by the local school board.<sup>148</sup>

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140 See *id.* at 618–19.

141 See *id.* at 619.

142 See *id.*

143 See *id.*

144 See *id.* at 612.

145 See *id.* at 617–18.

146 *Id.*

147 *Simmons-Harris v. Zelman*, 234 F.3d 945, 948 (6th Cir. 2000).

148 *Id.*

The program covered the Cleveland School District, providing scholarships to children residing in that district attending kindergarten through eighth grade.<sup>149</sup> Students from low-income families received preference for scholarships from the program.<sup>150</sup> Only after the State had considered all students from low-income families for scholarships could it provide scholarships to students who were not from low-income families.<sup>151</sup>

The amount of the scholarship the program paid depended on family income. Tuition at participating schools could not exceed \$2500 per year, and the program would pay ninety percent of tuition for low-income families and seventy-five percent of tuition for students from other families, up to a maximum of \$1875 per year.<sup>152</sup> The scholarships were payable to the students' parents, and the program mailed the scholarship checks to the schools chosen by the parents, to be endorsed by the parents at these schools.<sup>153</sup>

To be a program participant, a school had to register with the voucher program.<sup>154</sup> Participant schools had to meet the State's educational standards.<sup>155</sup> Both public and private schools in districts adjacent to the Cleveland district were permitted to register, but none of the public schools chose to register.<sup>156</sup> Participating schools could not discriminate on the basis of race, religion, or ethnic background, nor could the schools "advocate or foster unlawful behavior, or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion."<sup>157</sup> The schools, however, were not subject to any restrictions on the use of funds available to them through the program.<sup>158</sup>

The Sixth Circuit found that this program violated the First Amendment. According to the Sixth Circuit, *Agostini* had reaffirmed the importance of the *Lemon* test, and because it had not been explicitly overruled, *Nyquist* was the most persuasive decision to follow *Lemon*.<sup>159</sup> First, the court contended that other options available to

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149 *Id.*

150 *Id.* "Low-income" was defined as a family whose income was less than two hundred percent of the poverty line. *Id.* Children from families with incomes at or below the poverty line represented over sixty percent of the scholarship recipients. *Id.*

151 *Id.*

152 *Id.*

153 *See id.* at 948.

154 *Id.*

155 *See id.*

156 *Id.* at 949.

157 *Id.* at 948-49.

158 *Id.* at 949.

159 *See id.* at 953.



Cleveland parents like community schools were, at most, "irrelevant."<sup>160</sup> The court explained that the program was factually similar to *Nyquist* because parents directly received government funds and the great majority of schools that received the funds were sectarian.<sup>161</sup> Also similar to *Nyquist* was that the program created an excessive entanglement between the government and religion.<sup>162</sup> Last, the program was similar to the one in *Nyquist* because there were no restrictions on the use of the funds.<sup>163</sup>

In rejecting the program, the Sixth Circuit concluded that there was "no evidence that the tuition vouchers [were] a neutral form" of state aid.<sup>164</sup> The vouchers were not neutral aid because the program offered an "illusory choice."<sup>165</sup> According to the court, the program discouraged participation by schools that did not receive religious funds because the amount of the voucher resulted in a financial disincentive for both adjacent public schools outside the Cleveland School District and private non-sectarian schools within the district to register for the program.<sup>166</sup> Because of this design, a majority of the participating schools, over eighty percent, were sectarian, and the program, therefore, did not provide any "meaningful public school choice."<sup>167</sup> Therefore, the Sixth Circuit concluded that even though the legislature found it appropriate to provide parents with alternatives to a failing public school, the public school could not count as an option when evaluating whether an independent and private choice exists.<sup>168</sup> In so doing, it ignored the ability of students to continue to attend existing public schools.

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160 *Id.* at 958. Similar to the problem discussed above with regards to *Nyquist*, it is difficult to understand how available choices are irrelevant, when it seems that the Establishment Clause protects individuals' right to choose how to relate themselves to religion in all contexts, including education. See *supra* note 49 and accompanying text. Whether the program creates impermissible incentives to choose program schools over non-program schools thus seems to be a relevant inquiry for a court to make and it seems to require consideration of other options.

161 See *Simmons-Harris*, 234 F.3d at 958.

162 See *id.* at 958-59.

163 See *id.* at 959.

164 *Id.*

165 See *id.*

166 See *id.*

167 See *id.* at 959-60.

168 See *id.* at 960-61.

V. SHOULD A "FAILING" PUBLIC SCHOOL BE CONSIDERED AN OPTION  
WHEN EVALUATING WHETHER AN INDEPENDENT AND  
PRIVATE CHOICE EXISTS?

The different positions adopted by the Wisconsin Supreme Court and the Sixth Circuit give rise to the questions posed in the heading: Should a "failing" public school be considered an option when evaluating whether an independent and private choice exists? To work towards an answer to this question, it will initially be useful to discuss what it means for a school to be "failing." In the context of education, we may use this term to describe related, but different situations. In one sense, a school may "fail" for an individual student, and yet, still be performing at a level which adequately serves the vast majority of students, such that no one would say, "that school is failing." In other words, we probably mean that we do not think there are general problems with the school with which we should be concerned. Rather, for whatever reason, the school does not meet the needs of an individual student. In some instances, this may be because the student has some type of recognized disability with which a school is not equipped to deal. In other instances, parents or children have decided that a given school is not meeting their needs for other reasons that are too specific to the individual children to lead to a general conclusion that there are problems with the way in which a school is functioning.

When we say, instead, that "*a school is failing*" (or "embattled") we probably mean that it is no longer performing at an adequate level, such that more than a typical number of students are not receiving the kind of education we would expect them to receive. For example, its average test scores are well below the national average. When this happens, it too describes different situations. In some situations, it may be that the school is performing so poorly that we would expect the government to shut the school down. In other instances, however, the government keeps the school open, like in both Milwaukee and Cleveland. Presumably, this is because the school is performing at a level where it still functions for enough of its students such that we could not conclude that the state is depriving the students who attend the school of an education.

These distinctions regarding different instances when schools are "failing" may offer insight into our conclusions regarding the question, somewhat modified, posed in the Introduction: Does a "failing" school, which the government has decided to leave open, present an option such that a decision to attend another school may appropri-

ately be described as a "true independent and private choice"? I propose that it does, based on the following discussion and examples.

Children or parents may decide that a particular school does not meet a child's needs for reasons independent of some recognized disability. For instance, they might think another public school is better than the one in their district. If the government refused to permit the child to attend the other public school, and the only other options in the child's school district were sectarian schools, we probably would not conclude that a decision to attend a sectarian school was not independent and private. This is because it is probably generally accepted that children do not have the right to attend any public school they wish, even if they conclude that other schools would perform better for them than the one that they are currently attending.<sup>169</sup> This would also be true even if they were able to point to some kind of statistical data that shows, in some objective sense, that another public school might be better than the one they are currently attending. In this situation, the government cannot fairly be said to be coercing someone into adopting a particular position with respect to religion just because they do not permit them to attend the public school of their choice, and the only other private options are sectarian. We probably would conclude that this is not the kind of improper incentive with which the Court has been, or should be, concerned.

I propose that when a government leaves a so-called failing school open, it is incorrect to conclude that it makes a situation so different from the situation described in the above paragraph that it results in incentives to undertake sectarian education. In this situation, the government has recognized that there is a problem with the way a school is functioning and determines that it meets the criteria for "failing." Presumably, however, that it left the school open means it decided that the school can still educate a number of students, just not the number it typically expects from its schools. One possible result of such a determination is the concern that this government recognition causes parents to have for their children's education, and, based on this concern, will choose to take their children out of the "failing" school. This possibility, however, exists regardless of whether there is a government voucher program through which funds may reach religious institutions.

For instance, a government recognizes a school in a district as "failing" and because of this, decides to devote more funds than it provides the rest of the similarly situated schools in the state in order

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169 Absent some disability or other generally recognized compelling interest of the child.

to have the school achieve at more acceptable levels. If the only available alternatives in such a district were sectarian schools, we probably would not conclude that the government had created an incentive to undertake sectarian education based only on it having labeled the school as "failing." The decisions parents made to take their children out of the school would still be independent and private.

Likewise, if in the very same district the government labeled the school as "failing," devoted more funds to the school, *and* established a voucher program, the government has not in any meaningful way created an *incentive* to undertake sectarian education. Rather, the government has provided another option without making the situation any more coercive. A decision to leave the school in this situation is no less independent and private; it is just that aid is now directed to a religious institution. Parents still have to evaluate the school for their child's needs the same as they would if there were no voucher program; it is just that parents now have more *choices*, not more government *incentives* to leave. It is fundamentally inconsistent to argue that giving parents an option where they had none before is somehow not a free or real choice.

In addition, it is important to distinguish whether a choice was independent and private from other concerns related to the use of government-provided aid in, or in furtherance of, religion or religious institutions. As discussed above, the concurring justices in *Mitchell* were concerned with the "visibility" of the choice.<sup>170</sup> This concern, no matter how relevant it may be to a constitutional analysis, should not be relevant to determining whether a choice was independent or private. Whether *other people* perceive the use of aid once held by the government to be an "endorsement" of religion, once we have concluded an independent and private choice by a *particular individual* has been made is different from being concerned with whether an independent and private choice existed.

Another concern that is different from the concern with the independence or privacy of a choice is the concern with *the effect of the choice*. If the proper way to interpret the First Amendment is that it is meant to prevent "direct" aid or more than "incidental" aid, it may be that even some choices which are independent and private are not the proper type of choice for purposes of making some forms of aid permissible under the First Amendment. In this instance again, however, it is not the independence or privacy of the choice with which we are concerned. Rather, it is that some kind of impermissible government advancement exists. It is worth pointing out, however, that it is diffi-

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170 See *supra* text accompanying notes 110–12, 117–18.

cult to conceive of how, once we have concluded that an independent and private choice exists, we could still conclude that it is still somehow *government* advancement of religion, solely based on the fact that the government once possessed the aid. Such a conclusion would likely make impermissible other forms of aid now considered permissible.

We should not conclude—and nor should a court conclude as the Sixth Circuit did—that a public school is not a “real” option for purposes of the First Amendment because it has been labeled “failing,” “embattled,” or “troubled.” To do so is to challenge, and essentially overrule, a legislative determination that such a school is a viable option to which it should continue to provide money and resources. Without a challenge to the legislature’s decision, or other clear evidence of legislative error, a court should not independently eliminate one of the choices under a government aid program because it appears undesirable to the court.<sup>171</sup> Ultimately, the proper analysis in this situation, and others involving voucher programs should be—given that there is a public school available to students, was the decision to attend a sectarian school independent and private? Absent other inequities in the program’s design, the conclusion should be yes.

### CONCLUSION

In the next few years, more states are likely to establish school choice voucher programs to respond both to problems with their public school systems and to demands from citizens of their states. If this happens, what it means to have an “independent and private choice” will likely remain a very significant and important issue for legislatures and courts to consider. It will be increasingly important to the proper consideration of how to structure government aid programs that public schools—whatever label they are given, but particularly if they are described as “failing”—are not ignored as options for parents under these programs. Consistent with the idea that no one has the right to choose which public school one will attend, a properly designed school choice program cannot and should not be seen as coercion by the state to either require students to attend the public school in their district or utilize other options under government programs. In fact, more options do not make for a less independent and private choice.

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171 See Garnett & Garnett, *supra* note 12, at 333 (“The relative attractiveness of parents’ non-religious options should not distort the constitutional analysis.”).