

SCHOOL VOUCHERS

In attempting to fulfill the constitutional guarantee of a "high quality education,"¹ to every child in the state, Florida, under the leadership of Governor Jeb Bush, recently enacted the A+ Plan for Education,² instituting the first statewide educational voucher program in the nation.³ This legislation seeks to remedy the increasingly common problem of students, especially those from poor school districts, receiving an inadequate education at the hands of the state.⁴ As expected, the program has been challenged on both state⁵ and federal⁶ constitutional grounds. This Recent Legislation Essay focuses solely upon the federal Establishment Clause challenge. Regardless of how the state challenge is finally decided, the design of the Florida program retains national implications as it serves as a model for many other states considering voucher initiatives.⁷ Although the Supreme Court has yet to rule definitively on the constitutionality of school vouchers,⁸ Florida's A+ Plan for Education should endure an Establishment Clause attack because it has two important qualities that the Court has emphasized in upholding programs that confer some benefit to religious institutions: religion-neutrality and distribution of aid through private decision-making.⁹

¹ FLA. CONST. art. IX, § 1.

² See FLA. STAT. ANN. § 229.0537 (West Supp. 2000). The findings and intent of the statute recognize "that the voters of the State of Florida, in the November 1998 general election, amended s.1, Art. IX of the Florida Constitution so as to make education a paramount duty of the state." *Id.* § 229.0537(1).

³ See Jodi Wilgoren, *School Vouchers Are Ruled Unconstitutional in Florida*, N.Y. TIMES, Mar. 15, 2000, at A20.

⁴ School choice stirs emotions in players on both sides of the issue. Opponents fear school choice will lead to the denigration of the public school system. See, e.g., Jodi Wilgoren, *Florida Voucher Program a Spur to 2 Schools Left Behind*, N.Y. TIMES, Mar. 14, 2000, at A18. ("Opponents fear vouchers would drain resources from troubled schools, leaving them worse off for the students who stay."). Proponents argue school choice is necessary to resuscitate public school systems already drowning in failure. See, e.g., CLINT BOLOCK, TRANSFORMATION: THE PROMISE AND POLITICS OF EMPOWERMENT 53 (1998) ("[School Choice] can mean for the first time something approaching equal educational opportunities.").

⁵ See FLA. CONST. art. IX, § 1 (education provision); FLA. CONST. art. IX, § 6 (public school funding clause of the education provision); FLA. CONST. art. I, § 3 (the religious establishment and freedom provision).

⁶ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion. . . .").

⁷ See Wilgoren, *supra* note 3, at A20.

⁸ The Supreme Court denied review of school choice legislation that was upheld by the Wisconsin Supreme Court. See *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S.Ct. 466 (1998).

⁹ Florida's voucher program, however, may have difficulty overcoming state constitutional objections. On March 14, 2000, Circuit Court Judge L. Ralph Smith Jr. for the

This legislation applies a grading system for Florida public schools, assigning each school a letter grade between "A" and "F."¹⁰ The state will provide opportunity scholarships—i.e., vouchers—to students attending schools that receive an "F" for two consecutive years.¹¹ Using their vouchers, students can transfer to a public school that received a grade of "C" or better, a sectarian private school, or a non-sectarian private school.¹² The legislation gives parents of eligible students the choice of where to send their children. The parents *can* choose a religious private school, but nothing in the program compels them to make that decision. As a safeguard against religious discrimination, the legislation requires participating private schools to admit students on a random and religion neutral basis.¹³ And importantly, schools may not compel any voucher student to state a certain belief, to pray, or to worship.¹⁴

Economist Milton Friedman first developed the idea of improving schools with a system that requires local public school monopolies to compete in a market to produce the best education.¹⁵ The concept of "school choice" encompasses several possible variations of programs, ranging from plans restricting choice to public schools to plans where the government allows vouchers to be used to enroll in religious schools.¹⁶ Programs may also vary in funding, eligibility, safeguards, and admini-

Second Judicial Circuit of Leon County, Florida, ruled that a provision of the Florida Constitution forbids using public money for private school tuition. See *Holmes v. Bush*, Case No. CV 99-3370. See also Wilgoren, *supra* note 3, at A20. Judge Smith held that Article IX, § 1, of the Florida Constitution directs that the state provide an "adequate provision" for the education of Florida children, *only* through a system of public schools. See *id.* Since the legislation seeks to provide a "high-quality" education, in part, through private schools, Judge Smith found that the legislation violated the constitutional provision. The state plans to appeal. See *id.*

¹⁰ See FLA. STAT. ANN. § 229.57 (West 1998 & Supp. 2000).

¹¹ See FLA. STAT. ANN. § 229.0537(2) (West Supp. 2000). As the legislation grandfathered ratings that the schools had received from the Florida Department of Education, students at two elementary schools in Pensacola, Florida are eligible for the program during the first year.

¹² See *id.*

¹³ See *id.* § 229.0537(4)(e).

¹⁴ See *id.* § 229.0537(4)(j).

¹⁵ See Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123 (Robert A. Solow ed., 1955), cited in Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243, 247 n.22 (1996). Assuming that participating schools want to attract students, creating a market that allows individual parents to make the choice where to send their children gives the competing schools an incentive to improve their own educational system.

¹⁶ See Suzanne H. Bauknight, *The Search for Constitutional School Choice*, 27 J.L. & EDUC. 525, 526 (1998) (outlining the different variations of school choice legislation).

stration.¹⁷ As a result, the constitutionality of a specific program could depend upon its individual components.¹⁸ For example, a program explicitly restricted to mostly religious private schools with no safeguards against religious discrimination would more likely raise Establishment Clause concerns than legislation that includes public schools, as well as secular and non-secular private schools, and also provides such safeguards.

In the 1971 decision of *Lemon v. Kurtzman*,¹⁹ the Supreme Court devised the framework still recognized by courts when adjudicating Establishment Clause challenges against government programs.²⁰ In *Lemon*, the Court struck down legislation, enacted in Rhode Island and Pennsylvania, that supplemented nonpublic teacher salaries.²¹ The Court established a three-prong test to analyze statutes under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive entanglement with religion."²² (citations omitted). Shortly after the *Lemon* three-prong test was developed, the Court used it on various occasions to strike down legislation that blurred the line between public funding and religion.²³

In the 1973 decision of *Committee for Public Education and Religious Liberty v. Nyquist*,²⁴ the Supreme Court struck down a

¹⁷ See *id.* at 542–50 (comparing the specifics of the Milwaukee and Cleveland school choice programs).

¹⁸ See *id.* at 548 (recognizing that because the Cleveland program is designed to be neutral, it is probably closer to a constitutionally valid plan than the Milwaukee program).

¹⁹ 403 U.S. 602 (1971).

²⁰ See, e.g., *Agostini v. Felton*, 521 U.S. 203, 222–23 (1997) (Noting that although the criteria used to assess whether aid to religion has an impermissible effect, the general principles have not changed); *Jackson v. Benson*, 218 N.W.2d 602, 612 n.5 (Wis. 1998) (recognizing that the continued authority of the test established by *Lemon* is uncertain, but applying it to the case anyway because the U.S. Supreme Court has not directly repudiated the test); Christopher D. Pixley, *The Next Frontier in Public School Finance Reform: A Policy and Constitutional Analysis of School Choice Legislation*, 24 J. Legis. 21, 50 (1998) ("Despite significant modification, this position continues to influence the Court's treatment of government aid to religious schools.").

²¹ See *Lemon*, 403 U.S. at 606–07.

²² *Id.* at 612–13. In *Agostini*, the court collapsed the second and third prongs into one category. See *infra* notes 74–75 and accompanying text.

²³ See, e.g., *Meek v. Pittenger*, 421 U.S. 349, 363 (1975) (holding that the direct loan of instructional material and equipment to private religious schools has the unconstitutional primary effect of advancing religion); *Sloan v. Lemon*, 413 U.S. 825, 832 (1973) (striking down a statute providing a tuition subsidy to parents because its intended consequence "is to preserve and support religious-oriented institutions"). See also Pixley, *supra* note 20, at 50–53 (examining *Lemon* and the cases following *Lemon*).

²⁴ 413 U.S. 756 (1973).

New York statute providing maintenance and repair grants, tuition reimbursements, and income tax deductions to parents of children attending New York private schools.²⁵ Although the Court accepted the New York legislature's stated secular purpose in passing the program,²⁶ it struck down the provisions on Establishment Clause grounds because their effect "is to subsidize and advance the religious mission of sectarian schools."²⁷

The *Nyquist* Court began its analysis by noting that "it is now firmly established that a law may be one 'respecting an establishment of religion' even though its consequence is not to promote a state religion."²⁸ On the other hand, the Court stated, "It is equally well established . . . that not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid."²⁹ Without a clear line, the courts must carefully examine the individual law to determine "whether it furthers any of the evils against which the [Establishment] Clause protects."³⁰ In other words, it is the individual components of the program that make the constitutional difference.

After striking down the maintenance and repair provisions of the New York law that provided direct grants to sectarian schools,³¹ the Court then turned to New York's tuition reimbursement program, which provided tuition assistance grants to individual parents.³² Since the money went to the parents, the Court recognized that the grants do not directly support private sectarian schools, but declined to provide immunity to the program based upon that factor alone.³³ Next, the Court examined the subject matter of the program. The Court distinguished grants to religious schools from public services such as bus fares, police and fire protection, sewage disposal, highways, and sidewalks, because "such services provided in common to all citizens, are so separate and so indisputably marked off from the

²⁵ See *id.* at 798.

²⁶ See *id.* at 773.

²⁷ *Id.* at 779-80.

²⁸ *Id.* at 771.

²⁹ *Id.*

³⁰ *Id.* at 772.

³¹ See *id.* at 779-80.

³² See *id.* at 781.

³³ See *id.*

religious function that they may fairly be viewed as reflections of a neutral posture toward religious institutions.”³⁴

Importantly, the *Nyquist* Court specifically reserved the question as to “whether the significantly religious character of the statute’s beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.”³⁵ As will be discussed later, the Court’s decision to withhold judgment on such matters is important when analyzing Florida’s A+ Plan for Education, since the program specifically provides benefits without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited.

In several cases following *Nyquist*, from *Mueller v. Allen*,³⁶ in 1983, to *Agostini v. Felton*,³⁷ in 1997, the Supreme Court has, “piecemeal answered this question as it has arisen in varying fact situations.”³⁸ In *Mueller v. Allen*, a group of Minnesota taxpayers challenged a state law that provided an income tax deduction for certain educational expenses, including tuition, textbooks, and transportation.³⁹ Since the law allowed parents of children in sectarian schools to receive such tax benefits, the claimants contended that the law violated the Establishment Clause by providing financial assistance to religious institutions.⁴⁰ The Court, however, upheld the law. Writing for the majority, Justice Rehnquist first emphasized that “the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private

³⁴ *Id.* at 781–82. The Court distinguished *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (upholding a New Jersey provision reimbursing parents for the costs of sending their children to school), and *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (upholding a New York law authorizing the provision of secular textbooks to children attending both public and nonpublic schools). The Wisconsin Supreme Court characterized this distinction on the fact that “[t]he New York statute provided financial assistance rather than bus rides.” See *Jackson v. Benson*, 578 N.W.2d 602, 614 (1998).

³⁵ *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 781–82 (1973).

³⁶ 463 U.S. 388 (1983).

³⁷ 521 U.S. 203 (1997).

³⁸ *Jackson*, 578 N.W.2d at 614. See, e.g., *Agostini*, 521 U.S. 203; *Roseberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dep’t. of Serv. for the Blind*, 474 U.S. 481 (1986); *Mueller*, 463 U.S. 388.

³⁹ See *Mueller*, 463 U.S. at 391.

⁴⁰ See *id.* at 392.

schools."⁴¹ According to the Court, this all-inclusiveness reflects the program's neutrality.⁴² Furthermore, "by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objects to which its action is subject."⁴³ Similar to educational vouchers, the public funds in this case were "available only as a result of numerous, private choices of individual parents of school age children."⁴⁴ In other words, even though the state is providing a financial benefit, it does not exercise the control over whether a student will attend a religious school that direct funding might because the parents have sole discretion as to the distribution of state funds. This lack of state control over religion removes one of the most important evils against which the Establishment Clause protects.⁴⁵

Three years later, in *Witters v. Washington Department of Services for the Blind*,⁴⁶ the Supreme Court was confronted with the issue of whether the State of Washington was precluded by the Establishment Clause from extending aid, via a state vocational rehabilitation assistance program, to a blind person studying at a Christian college who sought to, "become a pastor, missionary, or youth director."⁴⁷ The Court upheld the state assistance and reaffirmed the importance of both private decision-making by individuals and neutrality to support the program's constitutionality.⁴⁸ Writing for a unanimous Court, Justice Marshall first pointed out that, as was the case in *Mueller*, "any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely

⁴¹ *Id.* at 397.

⁴² See *id.* at 398-99 (emphasizing that a program "that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.").

⁴³ *Id.* at 399.

⁴⁴ *Id.*

⁴⁵ Recall that Justice Powell, in *Nyquist*, framed the Supreme Court's Establishment Clause inquiry as "ascertaining whether it furthers any of the evils against which that Clause protects." *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973).

The *Mueller* Court declined to undertake a statistical analysis of which classes would benefit the most under the law. In making this decision, the Court argued, "Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principle standards by which such statistical evidence might be evaluated." *Mueller*, 463 U.S. at 401. This restraint may weaken cases against school vouchers by foreclosing any evidence that participating schools are mostly religious.

⁴⁶ 474 U.S. 481 (1986).

⁴⁷ *Id.* at 482.

⁴⁸ See *id.* at 487-88.

independent and private choices of aid recipients.”⁴⁹ Therefore, the Court found that any decision to support religious education is made by the individual rather than the state.⁵⁰ Second, the inquiry is not controlled by *Nyquist*, because Washington’s program is “made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.”⁵¹ Furthermore, Marshall claimed that the funding program was sufficiently religion-neutral since: (1) it does not create a financial incentive for students to undertake religious education, (2) it does not provide greater benefits to those recipients who apply their aid to religious education, (3) it does not limit the benefits to students at religious schools, and (4) a significant portion of the aid would not end up flowing to religious education.⁵²

In *Zobrest v. Catalina Foothills School District*,⁵³ the Supreme Court continued on the path set by *Mueller* and *Witters* by holding that the Establishment Clause does not prevent a school district from providing a sign-language interpreter to a deaf student at a private religious school.⁵⁴ Drawing directly upon *Mueller* and *Witters*, Chief Justice Rehnquist, writing for the majority, reiterated that the Court has consistently upheld state programs that neutrally provide benefits to a broad class of citizens that are not defined in terms of religion, even though sectarian institutions may benefit.⁵⁵ Since the Individuals with Disabilities in Education Act (IDEA) provides benefits to qualifying children without reference to the sectarian-nonsectarian, or public-nonpublic nature of the school the child attends, the program in *Zobrest* did not create a financial incentive for parents to choose a religious school.⁵⁶ Therefore, this is a permissibly religion-neutral program. In addition, the Court emphasized that “any attenuated financial benefit that parochial schools do ultimately receive from the IDEA is attributable to the ‘private choices of

⁴⁹ *Id.* at 488.

⁵⁰ *See id.*

⁵¹ *Id.* (quoting *Nyquist*, 413 U.S. at 782–83, n.38). The Court, in *Nyquist*, reserved the question of whether a program fitting these characteristics would survive Establishment Clause scrutiny. *See id.*

⁵² *See Witters*, 474 U.S. at 488. This last factor could be troubling to some voucher programs. The first three factors, however, should assure the neutrality of Florida’s program.

⁵³ 509 U.S. 1 (1993).

⁵⁴ *See id.* at 3; 20 U.S.C. § 1401 (1994).

⁵⁵ *See id.* at 8.

⁵⁶ *See id.* at 10.

individual parents.”⁵⁷ Once again, the Court highlights facial neutrality and private choices of individuals as crucial components of a valid program.

One after another, each of the cases following *Lemon* and *Nyquist* blazed the trail for the Supreme Court’s momentous holding in *Agostini v. Felton*,⁵⁸ which was delivered in 1997. In this case, the Court, directly reversing a decision from twelve years earlier,⁵⁹ held that a federally funded program providing supplemental, remedial instruction to disadvantaged children at sectarian schools does not violate the Establishment Clause.⁶⁰ The controversy involved Title I of the Elementary and Secondary Education Act of 1965,⁶¹ enacted by Congress to “provide full educational opportunity to every child regardless of economic background.”⁶² Under the statute,⁶³ public funds were channeled to the states via “local educational agencies” (LEA’s) and are available to all eligible children, regardless of whether they attend public schools.⁶⁴ A number of federal taxpayers challenged the City of New York Board of Education’s provision of these services to private sectarian schools, declaring the program constituted an unconstitutional entanglement of church and state.⁶⁵ The issue in *Agostini* was whether “later Establishment Clause cases have so undermined *Aguilar*, that it is no longer good law.”⁶⁶

⁵⁷ *Id.* at 12 (citation omitted). In a footnote, the Court states that the “respondent readily admits, as it must, that there would be no problem under the Establishment Clause if the IDEA funds instead went directly to James’ parents, who in turn, hired the interpreter themselves.” *Id.* at 13, n.11. This suggests that a program providing funds to parents, who then apply the funds to the school does not create an Establishment Clause problem. See Pixley, *supra* note 20, at 54 (outlining this argument).

⁵⁸ 521 U.S. 203 (1997). In fact, Justice O’Connor, writing for the majority, disputed the dissent’s contention that this case even created “fresh law.” See *id.* at 225; see also *id.* at 240–41 (Souter, J., dissenting).

⁵⁹ See *Aguilar v. Felton*, 473 U.S. 402 (1985) (holding that the Establishment Clause barred New York from sending public school teachers into parochial schools to provide remedial education through a federal government program to disadvantaged children). The companion case to this challenge was *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

⁶⁰ See *Agostini*, 521 U.S. at 208–09.

⁶¹ 20 U.S.C. § 6301 et seq. (1994).

⁶² *Agostini*, 521 U.S. at 209 quoting 1965 U.S.C.C.A.N. (79 Stat.) 1446, 1450.

⁶³ See 20 U.S.C. § 6312(c)(1)(F) (1994).

⁶⁴ See *Agostini*, 521 U.S. at 209. The statute, however, places a number of constraints on services provided to children enrolled in private schools. See *id.* at 210.

⁶⁵ See *Aguilar*, 473 U.S. at 414. This was in spite of a number of safeguards taken by the City of New York to avoid entangling church and state. For a description of these efforts, see *Agostini*, 521 U.S. at 210–12.

⁶⁶ *Agostini*, 521 U.S. at 217–18.

Writing for the majority in *Agostini*, Justice O'Connor began her analysis by recognizing that, although the general principles that the Court uses to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided,⁶⁷ the Court's understanding of the criteria used to assess a law's effect on religion has changed.⁶⁸ One significant difference is the departure from the rule that all government aid that directly benefits the educational function of religious schools is invalid.⁶⁹ To make this point, the Court invoked *Witters* and its criteria for neutrality. The program in *Witters*, which disbursed grants directly to students who used the money to pay for tuition at the educational institution of their choice, "was no different from a State's issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution."⁷⁰ The Court went on to caution, however, that past cases have found that certain criteria might have the effect of advancing religion because of the financial incentive created to undertake religious indoctrination.⁷¹ This is not the case in *Agostini* because neither religious beliefs nor the attendance in a certain type of school play any role in allocating services.⁷² The rules regarding the aid's distribution made the difference: "Where the 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

⁶⁷ Justice O'Connor elaborated: "[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged . . . Likewise, we continue to explore whether the aid has the 'effect' of advancing or inhibiting religion." *Id.* at 222-23 (citations omitted).

⁶⁸ *See id.*

⁶⁹ *See id.* at 225. Justice O'Connor also found significant that through *Zobrest* the Court has "abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Id.* at 223. This finding was important to *Agostini* because part of the services provided through the program required teachers to travel to the premises of religious schools. *See id.* at 211. The Court also rejected the Establishment Clause challenge to this aspect of the program. *See id.*

⁷⁰ *Id.* at 226.

⁷¹ *See id.* at 230-31. An obvious example might be a voucher program that gives a larger grant, or additional benefits, to parents and students who choose religious schools over public schools or secular private schools. According to the Court, *Witters* and *Zobrest* are two examples of programs that do not create a financial incentive to undertake religious indoctrination. *See id.* at 231.

⁷² *See id.* at 232. Therefore, the program does not "give aid recipients any incentive to modify their religious beliefs or practices to obtain those services." *Id.*

nondiscriminatory basis . . . the aid is less likely to have the effect of advancing religion."⁷³

Finally, Justice O'Connor shifted focus to the *Lemon*'s entanglement prong, and acknowledged that the factors used to identify entanglement are similar to the factors used under the "effects" prong.⁷⁴ Therefore, she argued that it would be simplest to treat entanglement as an aspect of the inquiry into the statute's effect on religion.⁷⁵ After dismissing the argument that the program in *Agostini* created an excessive entanglement between government and religion,⁷⁶ Justice O'Connor summarized the three primary criteria now used to evaluate whether government aid has the effect of advancing religion: "it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."⁷⁷ Since the *Agostini* program passed all three criteria, the Court held that it was valid under the Establishment Clause.⁷⁸

With regard to Florida's A+ Plan for Education, the United States Supreme Court has yet to directly review the constitutionality of a school voucher program.⁷⁹ As a result, one must analyze the individual components of Florida's program in light of the criteria established by the Court's previous decisions to ascertain its constitutionality, and also analyze how it, as a whole, fits into the broader principles that underlie the modern Court's Establishment Clause jurisprudence.

First, under the *Lemon* test, any statute, in order to survive an Establishment Clause challenge, must have a secular legislative

⁷³ *Id.* at 231.

⁷⁴ *See id.* at 232.

⁷⁵ *See id.* at 233.

⁷⁶ *See id.* at 234. The Court began this inquiry by recognizing that "[i]nteraction between church and state is inevitable," and the Court has "always tolerated some level of involvement between the two." *Id.* at 233.

⁷⁷ *Agostini*, 521 U.S. at 234.

⁷⁸ *See id.* at 234-35. In making this determination, the Court, therefore, overruled *Ball* and *Aguilar*. Nevertheless, Justice O'Connor admonished lower courts not to conclude that the more recent cases have, by implication, overruled an earlier precedent. *See id.* at 237. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). The United States District Court in the Northern District of Ohio made use of this language in a challenge to a school voucher plan when it held that it did not have the power to accept the argument that *Nyquist* has been overruled. *See Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 850 (1999) (holding that the voucher portion of the Ohio Pilot Scholarship Program violates the Establishment Clause). As of April 2000, this case is awaiting appeal in the Sixth Circuit.

⁷⁹ *See supra* note 8.

purpose.⁸⁰ As recognized in *Mueller*, however, this analysis is usually perfunctory: "This reflects, at least in part, our reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute."⁸¹ The mission of the program seeks to improve Florida's educational system by moving children from failing schools to better schools through the provision of financial assistance to parents. Under a *Mueller* analysis, this would be a sufficiently secular purpose: "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."⁸²

A constitutional analysis of Florida's school voucher program is more difficult under the effects prong of *Lemon*.⁸³ In *Nyquist*, New York's educational program was held unconstitutional under the effects prong;⁸⁴ however, it is uncertain whether *Nyquist* would be applicable. The *Nyquist* Court did strike down a tuition grant program that, like most school voucher programs, provided financial assistance to parents whose children attended private schools.⁸⁵ Nevertheless, in *Nyquist*, the Court was not reviewing a religion-neutral program.⁸⁶ The tuition grants in *Nyquist* were limited to children attending nonpublic schools.⁸⁷ In fact, the court expressly reserved the question of the constitutionality of religion-neutral programs, such as the G.I. Bill, which provide public assistance or scholarships to individuals "without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."⁸⁸ Florida's program explicitly fits this

⁸⁰ See *Lemon*, 403 U.S. at 612–13.

⁸¹ *Mueller v. Allen*, 463 U.S. 388, 394–95 (1983). See also *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 485–86 (1986) (acknowledging that the analysis relating to the first prong of the test is simple); *Jackson v. Benson*, 578 N.W.2d 602, 612 (1998) (noting that the secular purpose of the program is virtually conceded).

⁸² *Id.* at 395.

⁸³ See, e.g., *Witters*, 474 U.S. at 486; *Mueller*, 463 U.S. at 396; *Jackson*, 578 N.W.2d at 612.

⁸⁴ See *Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 751, 779–80, 783 (1973). See also text following note 24.

⁸⁵ See *id.* at 783.

⁸⁶ See *id.* at 780 (recognizing that the aid is provided to children of exclusively nonpublic schools). See also *Mueller*, 463 U.S. at 398 (distinguishing *Nyquist* because the public assistance in *Nyquist* was provided only to parents of children in nonpublic schools).

⁸⁷ See *Nyquist*, 413 U.S. at 780.

⁸⁸ See *id.* at 782 n.38. The Court also distinguished past cases where the "class of beneficiaries included all schoolchildren those in public as well as those in private

category since students can use their vouchers at public, secular private schools, or non-secular private schools.⁸⁹

With regard to determining whether Florida's program would have an unconstitutional effect on religion, Justice O'Connor, in *Agostini*, set out the criteria for such an analysis.⁹⁰ First, does the program result in government indoctrination of religion? In *Agostini*, such concerns were especially pertinent because the program in question placed full-time public employees on parochial school campuses.⁹¹ The same concern does not exist with Florida's school voucher program because it does not require public school employees to work at private religious schools.⁹² On the other hand, at least one court—a federal district court in Ohio—has found that a voucher program would result in religious indoctrination.⁹³

schools." *Id.*

The Supreme Court has affirmed the *Nyquist* Court's reservation on this question by subsequently approving public aid programs fitting into this neutral category in spite of *Nyquist*'s decision on that particular New York program. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 234-235 (1997); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 845 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13-14 (1993); *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481, 489 (1986); *Mueller v. Allen*, 463 U.S. 388, 400 (1983). See also *Jackson v. Benson*, 578 N.W.2d 602, 614 n.9 (rejecting the argument that the case is controlled by *Nyquist* because the voucher program at issue in Wisconsin provided a neutral benefit to qualifying parents of school-age children in the Milwaukee Public Schools).

⁸⁹ See FLA. STAT. ANN. § 229.0537(1) (West Supp. 2000).

⁹⁰ See *Agostini*, 521 U.S. at 234.

⁹¹ *Id.* at 223-25. This issue also was present in *Zobrest*. See *Zobrest*, 509 U.S. at 13. In fact, the *Agostini* court credited *Zobrest* with abandoning the presumption "that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Agostini*, 521 U.S. at 223.

⁹² See Michael W. McConnell, *Governments, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847, 855 (1999).

⁹³ See *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 849 (1999) ("It can fairly be said that because the Program does not make aid available generally without regard to the nature of the institution benefited, the Voucher program results in government-sponsored religious indoctrination."). The district court in *Simmons-Harris* followed *Nyquist* even though both public and private schools are eligible for assistance under the program. It did so, in spite of *Nyquist*'s reservation of the question involving cases providing neutral assistance, because only private schools have chosen to participate in the program, and most of them are parochial, and because the program provides unrestricted tuition grants. See *id.* Both of these arguments are flawed. First, the district court departed from *Mueller*'s warning that "[w]e would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller*, 463 U.S. at 401. Following the reasoning of the Ohio District Court, a court could come to a different conclusion about the constitutionality of the program each year depending upon which schools participate, and how parents make their choices. Similarly, two identical programs in different locations could receive different judgments by the same court. This approach "would scarcely provide the certainty that this field stands in need of." *Id.* In addition, it is logical that a new program might take a

In spite of what one court may have held, Florida's program does not constitute government indoctrination of religion. First, opportunity scholarships are provided to students at eligible public schools—those schools receiving an "F" for any two years in a four-year period.⁹⁴ The parents and students make the decision where to use the scholarships.⁹⁵ They can choose a sectarian private school, but they can also choose a non-sectarian private school, or a public school. The program merely grants poorer students an opportunity that richer students already possess: a quality education.⁹⁶ Second, the program explicitly safeguards against religious indoctrination by requiring all participating schools to agree to admit students on a random and religion-neutral basis, and to agree not to compel any voucher student to profess a specific belief, to pray, or to worship.⁹⁷

The second criteria for determining whether a law has an unconstitutional effect on religion under *Agostini* is whether the program defines its beneficiaries with regard to religion.⁹⁸ The

couple years to become established before garnering more widespread participation. Second, while the *Nyquist* court did criticize the unrestricted tuition grants, it refused to decide the question about tuition grants in the context of a neutral program. See *Nyquist*, 413 U.S. at 782 n.38. Both the *Nyquist* court's example of the G.I. Bill and the program upheld in *Witters* involve variations of unrestricted tuition funding. See *Witters*, 474 U.S. at 488.

⁹⁴ See FLA. STAT. ANN. § 229.0537(3) (West Supp. 2000). Pixley notes that "because tuition vouchers are redeemable at any school—public, private, religious, or for-profit—their primary effect is to expand educational alternatives for all parents." Pixley, *supra* note 20, at 52.

⁹⁵ Vouchers opponents argue that even though parents make the decision where to apply the aid, the state is still providing a benefit to religious schools. See, e.g., *Simmons-Harris*, 72 F. Supp. 2d at 849 ("Even though parents must endorse their checks to the schools, the aid is given directly to participating schools."). The religious schools, however, must compete in a market for the funds, and the parents, not the government, decide whether to make the purchase.

⁹⁶ If voucher programs are unconstitutional on this basis, welfare programs that fail to limit the recipient's spending to non-religious avenues should be similarly condemned. In *Witters*, the Court analogized that "a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary." *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481, 486–87 (1986).

⁹⁷ See FLA. STAT. ANN. § 229.0537(4) (West Supp. 2000). Nevertheless, this safeguard, while important, does not transform religious schools in the program into secular schools. Depending upon the school, religious indoctrination may still permeate both the lesson plans and the atmosphere. In addition, although students may not be directly compelled to take part in religious activities, it is possible that peer pressure could indirectly influence a student to participate. These safeguards only support the constitutionality of the program as a supplement to the necessary choice component. Religious indoctrination may still exist, but the significant constitutional fact is that the choice to undertake the indoctrination remains with the parent and the child.

⁹⁸ See *Agostini v. Felton*, 521 U.S. 203, 234 (1997).

Court recognized that the criteria used for identifying beneficiaries "might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination."⁹⁹ Even though the government is not providing religious instruction, a program may still fail constitutional scrutiny if it is set up in such a way as to give the individual parents the incentive to choose private religious schools over secular schools, public or private. On its face, Florida's voucher program does not encourage parents to select religious schools since all participating schools are treated equally. In fact, the schools themselves must admit students on a religion-neutral basis.¹⁰⁰ With this requirement, the program removes religion from the decision as to where scholarship funding may end up, except to the extent that individual parents exercise their right to take religion into account when deciding where to send their children.

Justice O'Connor's last criterion requires assurance that the state program at issue does not create excessive entanglement between government and religion.¹⁰¹ *Lemon* originally included this factor as one its three prongs to determine constitutionality, but *Agostini* collapsed it into the effects analysis.¹⁰² An entanglement inquiry would conclude that excessive entanglement exists if "a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions against the inculcation of religious tenets are obeyed and the First Amendment otherwise respected."¹⁰³ The Florida A+ Plan for Education does require administrative cooperation between private schools and the government, but such cooperation most likely is not enough to constitute excessive entanglement. For instance, in *Agostini*, the Court held that the fact that a program requires administrative cooperation between government and parochial schools is not sufficient by itself to create an excessive entanglement.¹⁰⁴

⁹⁹ *Id.* at 231.

¹⁰⁰ See FLA. STAT. ANN. § 229.0537(4) (West Supp. 2000).

¹⁰¹ See *Agostini*, 521 U.S. at 234. *Agostini* explicitly requires that the entanglement "must be excessive before it runs afoul of the Establishment Clause." *Id.* at 233. *Agostini* also recognizes that the Court has always tolerated some level of involvement between government and religion. See *id.*

¹⁰² See *supra* notes 74-75 and accompanying text.

¹⁰³ See *Jackson v. Benson*, 578 N.W.2d 602, 619 (1998) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971)).

¹⁰⁴ See *Agostini*, 521 U.S. at 233-34; *Hernandez v. Commissioner*, 490 U.S. 680, 696-97 ("[R]outine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no 'detailed monitoring and

In light of *Agostini* and its predecessors, Florida's A+ Plan for Education would likely survive an Establishment Clause challenge. Since changes in the Court may affect how it would specifically apply the criteria of its previous holdings,¹⁰⁵ however, it is critical to understand the fundamental principles underlying the Court's Establishment Clause jurisprudence to foresee whether Florida's voucher program, or whether any other voucher program involving parochial schools, would be upheld. From its recent opinions, the Court has emphasized the importance of neutrality and the transfer of control from the state to the private choices of individuals,¹⁰⁶ accepting a certain degree of state-religion interaction so long as the state does not gain control over religion, or visa versa. By requiring neutral selection criteria in programs that distribute public aid,¹⁰⁷ the Court prevents the government from gaining leverage over religion, which the government could achieve by using selection criteria to acquire concessions from religious institutions. Additionally, by including public schools and secular private schools, Florida's A+ Plan for Education assures that the state does not favor any religious institutions. Furthermore, the program's safeguards prevent religious schools from gaining leverage against the state. For example, without such safeguards a top performing religious school could exact concessions from the state in exchange for opening up its school to a broader range of students. Such bargaining could create a situation in which the school and the state negotiate over selection criteria and financial assistance, thereby leading to favorable treatment for one religion over another, or religious schools over secular schools. In addition, the use of individual parents as the decision-makers reduces the likelihood of collusion between the state and religious institutions.¹⁰⁸

close administrative contact' between secular and religious bodies, does not of itself violate the entanglement command.").

¹⁰⁵ See *Bauknight*, *supra* note 16, at 541 (recognizing that changes in the Court might change the analysis, but predicting that the Court will likely maintain the neutrality analysis of *Mueller*, *Witters*, *Zobrest*, *Rosenberger*, and *Agostini*).

¹⁰⁶ See *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983). See also *Pixley*, *supra* note 20, at 58 (noting the Court's "move away from the separationist standards of the *Lemon* test toward an analysis that accommodates the private choices of aid recipients").

¹⁰⁷ See *Agostini*, 521 U.S. at 231.

¹⁰⁸ Admittedly, like any situation where two entities mutually benefit from a relationship, the state and private schools, including religious schools, could develop a dependence upon each other. The state might count on many private schools to educate its

By focusing more on neutrality and transferring decision-making down to the individual, the Court is accepting, to a certain degree, some church-state relationships. There is no bright-line separation between church and state. Although some might disagree with even the slightest amount of collaboration, for better or for worse, the government has been playing an increasingly active role in our lives and religion has not disappeared. To demand a complete separation between state and religion would be unrealistic. Therefore, the question when analyzing the constitutionality of a state program that confers benefits to religious institutions should not be whether there is separation or not, but whether the relationship fits within the parameters established by the Court, which has shifted toward neutrality and decision-making by individuals.¹⁰⁹ The Court's approach allows religion to function in our society on an equal footing with other entities, but at the same time prevents either the state or religious institutions from gaining control over the other. Under this working concept, determining which programs are constitutionally permissive and which ones are not may be difficult. One therefore must analyze the specific facts of each program and, in light of the criteria established by the Court's recent decisions, determine "whether it furthers any of the evils against which that [the Establishment] Clause protects."¹¹⁰ Until the Court directly reviews the constitutionality of a voucher program, however, one cannot be precisely sure where it will draw the line separating the "evil" from the constitutional.

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children each year, while the private schools depend upon a constant flow of income. This relationship, however, should stay within Establishment Clause bounds so long as the choice whether, and where, to provide funds stays in the hands of parents.

¹⁰⁹ See *Bauknight*, *supra* note 16, at 541.

¹¹⁰ *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973).