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Educational Choice Legislation after Edgewood v. Kirby: A Proposal for Clearing the Sectarian Hurdle.

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COMMENTS

Educational Choice Legislation After *Edgewood v. Kirby*: A Proposal for Clearing the Sectarian Hurdle

C. Lee Cusenbary, Jr.

I. Introduction

The Texas Constitution requires the Texas Legislature to establish an "ef-

ficient system of public free schools."[1] Although the legislature fulfilled its role by promulgating a regional system of educating Texas children,[2] the present district system has proven to be highly inefficient[3] and ineffective.[4] In 1989, the Texas Supreme Court addressed this inefficiency in *Edgewood v. Kirby*,[5] by holding that the present system of financing public education is unconstitutional due to the reliance on local property taxes.[6] The property values vary greatly among districts, creating inequitable revenues per

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1. TEX. CONST. art. VII, § 1.

2. DAVIS AND HAYES, EFFICIENCY AND INEFFICIENCY IN THE TEXAS PUBLIC SCHOOLS (1990) (copy on file with St. Mary's Law Journal). There are 1055 local school districts in Texas, with six additional special districts. *Id.* at 3 n.11.

3. *Id.* at 2. The Texas public schools employ more non-teachers than teachers, with expenditures for non-teaching activities reaching $5,000 per student in some Texas school districts. *Id.* at 8. Studies reveal that the most efficient economies of scale for the public school system require an average of 2,000 students per district to function economically. DAVIS AND HAYES, EFFICIENCY AND INEFFICIENCY IN THE TEXAS PUBLIC SCHOOLS 12 (1990) (copy on file with St. Mary's Law Journal). However, 73% of Texas school districts have less than 2,000 students. *Id.* From 1970 to 1988, spending per American public school student increased 59% in constant dollars. 1 U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 1989, Table 1:14-1 (1990). The Texas Education Agency estimates that total spending for Texas public schools was approximately $14.3 billion during the 1988-89 school year. DAVIS AND HAYES, EFFICIENCY AND INEFFICIENCY IN THE TEXAS PUBLIC SCHOOLS 2 n.6 (1990) (copy on file with St. Mary's Law Journal). Inefficiencies in public education are more acute in large urban settings. *See* MASSANET, BASIC ISSUES IN AMERICAN PUBLIC POLICY 246-71 (1970) (panel discussion of reasons for inefficient urban schools). *But see* THAYER, AN END TO HIERARCHY! AN END TO COMPETITION 81-115 (1973) (competition in in democracy leads to waste).

4. Education Daily, Oct. 1, 1987, at 5. In 1989, Texas ranked 46th among the states in Scholastic Aptitude Test scores. When compared to all the states in the U.S. in 1987, Texas ranked 41st in SAT scores. *See* College Board, Sept. 12, 1989, chart 1 (average SAT scores by state, 1979, 1984-1989). In addition, Texas ranks 47th in literacy of adults over the age of twenty. Fortnightly, Texas A&M University, Dec. 11, 1989, at 2. Texas is not alone in the decrease in the effectiveness of public education. The SAT scores of American college-bound high school seniors fell ninety points between 1963 and 1981. U.S. CONGRESSIONAL BUDGET OFFICE, Trends in Educational Achievement (1986). The National Assessment of Educational Progress exam revealed that less than ten percent of all American thirteen year-olds are "adept" at reading, and less than one percent can be categorized as "advanced." *Id.* at 43, 46. On a global standard, American eighth grade students ranked eleventh out of twelve on an international math examination given to children in twelve advanced industrial democracies. OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, U.S. DEP'T OF EDUC., YOUTH INDICATORS 1988: TRENDS IN THE WELL-BEING OF AMERICAN YOUTH, 64-65 (1988).

5. 777 S.W.2d 391 (Tex. 1989). *See* HAYES, EQUALITY AND INEQUALITY AMONG TEXAS SCHOOLS, NCPA POLICY REPORT NO. 147, NATIONAL CENTER FOR POLICY ANALYSIS (1990) (copy on file with St. Mary's Law Journal).

6. Edgewood v. Kirby, 777 S.W.2d 391, 392 (Tex. 1989). In 1985, the most wealthy school district in Texas had seven-hundred times more property wealth per student than the poorest. *Id.* at 392.

student.[7]

Following the *Edgewood* decision, the inefficiency and glaring ineffectiveness of many states' public school systems has become more apparent due to related suits in many states,[8] independent and government sponsored research,[9] and national media attention.[10] In November of 1990, twenty-seven

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7. *Id.* An example of how this inequity effects the education of Texas' youth is found in the *Edgewood* decision:

> The differences in the quality of educational programs offered are dramatic. For example, San Elizario I.S.D. offers no foreign language, no pre-kindergarten program, no chemistry, no physics, no calculus and no college preparatory or honors program. It also offers virtually no extracurricular activities such as band, debate or football.

Id. at 393. In addition, San Elizario is one of the least efficient school districts in Texas. With only 12% of the ninth grade students in the district passing the Texas Educational Assessment of Minimum Skills (TEAMS) tests, San Elizario has the lowest pass rate in Texas. DAVIS AND HAYES, EFFICIENCY AND INEFFICIENCY IN THE TEXAS PUBLIC SCHOOLS (1990) (copy on file with St. Mary's Law Journal).

The annual reports of the Texas Education Association reveal the disparity in state and local revenues which were the basis for the finding of inequity in the Texas education system in *Edgewood*:

San Antonio District	Total Tax per $100 Property Value	Annual State and Local Revenues Per Student
Edgewood	0.998	2985
Southside	1.305	3170
South San	0.88	2985
Harlandale	1.018	3126
Southwest	0.891	2773
San Antonio	1.173	3427
Northside	0.996	3084
Northeast	0.936	3287
Alamo Heights	0.874	4467
State High	1.75	3099
State Mean	0.998	4066
State Low	0.168	2458

TEXAS EDUCATION ASSOCIATION ANNUAL REPORT (1990) (copy on file with St. Mary's Law Journal). Additional federal funding of school districts is not considered in the court's determination of what is equal for all students. *Id.*

8. *See* N. Y. Times, Dec. 19, 1990, at B7, col. 1 (listing states currently challenging their public school system's efficiency). Suits which mirror the arguments and holding of *Edgewood* have been heard in Kentucky and New Jersey. *Id.*

9. *See e.g.*, U.S. DEPT. EDUCATION, CHOOSING A SCHOOL FOR YOUR CHILD (1989) (former Secretary of Education Lauro Cavazos endorses free choice of education); Lee, *U.S. Schools Need a Lesson in Competition*, CONTEMPORARY ISSUES 29 (Center for the Study of American Business-Wash. Univ. 1988) (advocating running schools like a business to cut administrative costs); 1 U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION, 1989: ELEMENTARY AND SECONDARY EDUCATION, 79 (1989); CHUBB AND MOE, EDUCATIONAL CHOICE (1990).

10. *See e.g.*, San Antonio Express News, Aug. 23, 1990, at 2A (Secretary of Education Cavazos reported on inefficiency of public school system and endorsed a voucher system); San Antonio Light, Aug. 19, 1990, at 1 (future legislation needed to reform ineffective public edu-

Chicago parents brought suit against the city of Chicago alleging the right to use their share of state educational funds at schools of their choice.[11] In addition, publications such as those sponsored by former United States Secretary of Education Lauro Cavazos,[12] encourage states all over the nation to utilize the first school system to be implemented in Texas after the adoption of the Texas Constitution in 1896[13]—educational free choice.[14]

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cation in Texas); Houston Chronicle, Aug. 12, 1990, at 3A (discussion of switching from government to free-market system of public education); San Antonio Express News, July 20, 1990, at 3 (increasing public awareness that state can't fix ailing school system without reform); Amarillo Daily News, June 26, 1990, at 4A (report on the Brookings Institute proposal for educational reform to cut education costs and improve quality of education).

11. Gannett News Service, Sept. 10, 1990, at 4.

12. *See* OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, U.S. DEP'T OF EDUC., CHOOSING A SCHOOL FOR YOUR CHILD (1989) (an explanation to parents why freedom of choice should be extended to schools). President George Bush has followed in President Ronald Reagan's footsteps by endorsing educational choice and drawing attention to other advocates of the concept. *See* Steves, *Oregon May Be First State to Allow Tuition Tax Credits*, Gannett News Service, Sept. 18, 1990 at 1. The present Secretary of Education, Lamar Alexander, has also placed great emphasis on "school choice." Wall Street Journal, May 2, 1991 at A19.

13. The Texas Legislature implemented a successful voucher system from 1856 to 1908. *See* EBY, EDUCATION IN TEXAS; SOURCE MATERIALS, 830-31 (1918) (Univ. of Texas Bulletin No. 1824). The system was abandoned due to inadequate funding due to a recessionary period. *See* Watts & Rockwell, *The Original Intent of the Education Article of the Texas Constitution*, 21 ST. MARY'S L.J. 771, 809-811 (1990). Some authorities believe that the use of the language "public-free schools" in the present Texas Constitution is misinterpreted by many to mean state owned schools for all to attend. *See* EBY, THE DEVELOPMENT OF EDUCATION IN TEXAS, 106-07 (1925). Historian Frederick Eby believes that the Texas Constitution literally referred to schools open to the public, free to operate independently much like our private schools today. *Id.* The basis for the stance of Eby is that the 1854 Texas Constitution adopted prior to the present Texas Constitution addressed only the right of the state to adopt general policy of assisting privately owned schools. *Id.* Eby writes: "[The 1845 Constitution] did not propose free tuition for all children or the principle of general taxation for popular education or a system of state-owned and supported schools. The advocates of private and church schools fully expected the State to assist in promoting their particular enterprises." *Id.*; *see also* 1 BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 505-06 (1977) (the Texas Constitution provides only for assisting indigent children and orphans to attend private schools at state expense); TEXAS STATE TEACHERS ASSOCIATION, ONE HUNDRED YEARS OF PROGRESS IN TEXAS EDUCATION: 1854-1954 at 7 (1954) (Texas legislation encouraged the attendance of private church schools promoting moral structure to aid in growth of Texas); EVANS, THE STORY OF TEXAS SCHOOLS 52 (1955) (present school system would have been tyranny in 1845). The district system that was adopted after the voucher system did not consider that the Texas property values would become drastically different and therefore created districts that were at a financial disadvantage. Watts & Rockwell, *The Original Intent of the Education Article of the Texas Constitution*, 21 ST. MARY'S L.J. 771, 816 (1990). Texas was not alone in its formation of privately or locally controlled school system in 1856. *See generally*, PFEFFER, CHURCH, STATE AND FREEDOM (1953) (in early America all schools were privately owned).

14. Historically, there have been voucher systems for other forms of government funded

Educational choice, or "free choice," when including choice of public and non-public schools, creates parental responsibility and involvement in allowing the selection of their child's primary or secondary school.[15] Some advocates of free choice believe that the selection of a school is not only an incentive for parental involvement with their child's education, but a free exercise right to educate their child in a religious surrounding.[16] Other theorists maintain that if free choice were adopted, the resulting competition among schools would promote efficiency in a system of state funded and

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services, including government housing, day care and medical services and by corporations to further educate employees. *See* Gregory, *Union Leadership and Workers' Voices: Meeting the Needs of Linguistically Heterogeneous Union Members*, 58 U. CIN. L. REV. 115, 153 (1989) (Ford Motor Company very successful with vouchers to further educate employees thereby increasing quality and productivity); *see also* Havighurst, *Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships*, 1984 DUKE L.J. 1071, 1161-62 (1984) (medical assistance programs operated by voucher system). This comment will refer to the voucher system as it pertains to providing a direct payment or tax exemption to state residents for public education reimbursement. *See generally* COONS & SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL (1978); MECKLENBURGER & HOSTROP, EDUCATION VOUCHERS: FROM THEORY TO ALUM ROCK (1972); BLUM, FREEDOM OF CHOICE IN EDUCATION (1958).

15. *See generally*, COONS & SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL (1978); BLUM, FREEDOM OF CHOICE IN EDUCATION (1958). For a voucher system to work effectively, the choice of schools must be uninhibited. *See* FRIEDMAN, FREE TO CHOOSE 150-88 (1980) (American education is island of socialism in great democracy). Parents are free to send their child to any school that they choose and cannot be compelled to send their child to public school. Pierce v. Society of Sisters, 268 U.S. 510 (1925). Parents have liberty interest under Fifth and Fourteenth amendments to the U.S. Constitution to decide where their child attends school. *Id.* Parents must see that their children receive some education but do not have the right to be reimbursed for choosing a private school over public school. *Id.*

16. *See* Arons, *Out of the Fire and Into the Frying Pan*, 1 FIRST THINGS 48 (1989) (free exercise liberty demands choice of non-public school funded by state); *see also*, WISHY, PREFACES TO LIBERTY 236 (1859) (asserting that public schools stifle plurality). John Stuart Mill stated:

> [State-sponsored education] . . . is a mere contrivance for molding people to be exactly like one another: and as the mold in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a despotism over the mind.

Id. It is difficult to define what is meant by "religion." In an often cited article, Dean Choper wrote, "the scope of religious pluralism in the United States alone has resulted in such a multiplicity and diversity of ideas about what is a 'religion' or a 'religious belief' that no simple formula seems able to accommodate them all." Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 579 (1982). *Cf.* Johnson, *Do You Sincerely Want to be Radical?*, 36 STAN. L. REV. 247, 288 n.106 (1984) (not all "religions" are based on concept of a one creator or god). *See generally*, Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984) (expressing difficulty in separating religion from philosophy or ideology).

privately chosen education.[17]

While free choice is presently debated as a viable solution to the need for educational reform,[18] one major obstacle that must be broached is the possibility that educational choice would lower the wall between church and state when sectarian schools participating in the "choice" program take the state's educational dollar.[19] This comment recognizes the urgent need for free choice of both public and non-public schools within a state and suggests a practical solution to the conflict raised by free choice between the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution.[20]

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17. *See* GILDER, WEALTH AND POVERTY 91, 146-49 (1981) (good intentions of socialism destroy motivation and efficiency of schools); FRIEDMAN, FREE TO CHOOSE 150 (1980) (competition would cure education system problems); FRIEDMAN, CAPITALISM AND FREEDOM 85-107 (1962) (free choice in education is fundamental to rights of Americans); *see also* CHUBB AND MOE, POLITICS, MARKETS, & AMERICA'S SCHOOLS (1990). *But see* Solet, *Educational Vouchers: An Inquiry and Analysis*, 1 J. OF L. & EDUC. 303 (1972); THAYER, AN END TO HIERARCHY! AN END TO COMPETITION, 81 (1973) (freemarket competition leads to waste); Wall Street Journal, May 2, 1991, at A19. *See generally*, CHUBB AND MOE, EDUCATIONAL CHOICE: ANSWERS TO THE MOST FREQUENTLY ASKED QUESTIONS ABOUT MEDIOCRITY IN AMERICAN EDUCATION AND WHAT CAN BE DONE ABOUT IT (1990) (copy on file with St. Mary's Law Journal).

18. *See e.g.*, Wall Street Journal, Sept. 4, 1990, at A1 (Wisconsin state legislator Polly Williams interviewed on pros and cons of vouchers); San Antonio Express News, July 3, 1990, at A3 (fear exists that public is incapable of choosing school for their children).

19. *See* Note, *The Increasing Judicial Rationale for Educational Choice*: Mueller, Witters *and Vouchers* 66 WASH. U.L.Q. 363, 372-84 (1988) (free exercise would allow sectarian schools to participate in voucher system); Runnels, *The Constitutionality of Louisiana Aid to Private Education*, 44 LA. L. REV. 865, 869 (1984) (discussion of free exercise clause pertaining to education). On a federal level, it has been suggested that an educational voucher system would not violate the U.S. Constitution's prohibition of direct aid by states to sectarian schools due to the interpretation of the free exercise clause. *Id.* The Texas Constitution clearly prohibits direct state funding to sectarian schools. The Texas Constitution Article VII § 5(a) states:

> The available school fund shall be applied annually to the support of the public free schools. Except as provided by this section, no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever; nor shall the same, or any part thereof ever be appropriated to or used for the support of any sectarian school; and the available school fund herein provided shall be distributed to the several counties according to their scholastic population and applied in such manner as may be provided by law.

TEX. CONST. art. VII, § 5(a). Further, the Bill of Rights of the Texas Constitution supports § 5(a): "No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes." TEX. CONST. art. I, § 7.

20. *See* U.S. CONST. amend. I (religion clauses). The First Amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II. EDUCATIONAL CHOICE

A. *Public v. Public and Private School Choice*

Currently, all the states afford parents at least one form of educational choice. Parents may reside or relocate in the school district of their choice and enroll their children in the public schools of that district. Unfortunately, the cost of housing in the desired district may inhibit free exercise of this alternative, thereby reserving the right for the affluent.[21] Choice among only the public schools within the state of residence, regardless of districts, is another form of educational choice. In the majority of proposed choice programs currently promulgated by states,[22] the selection of institutions is limited to exclusively public schools within the state, or public and secular non-public institutions.[23] The reasons behind limiting the scope of such legislation to only public schools result from the fear of state educators that parents will abandon the ineffective public school system if given the opportunity, the fears of school board administrators that their jobs will no longer be needed,[24] and the belief that lack of transportation in lower income

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Id. There are many unsettled areas of establishment clause jurisprudence, including the consitutionlity of utilizing free choice concepts in the state school system. *See*, Johnson, *The Religious Clauses Article: Concepts and Compromises in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 821 (1984) (listing proposed educational choice system including sectarian schools as one unsettled area of religion clause conflicts).

21. *See* Gallup, *Do Most Americans Prefer Private Schools?* 1986 PHI DELTA KAPPAN 3. Of 1,552 adults sampled from all the states in the U.S. in 1986, 49% of parents with children enrolled in public school would prefer to send their children to a private or sectarian school, but could not due to a lack of finances. *Id.* In 1986, 87% of primary and secondary school children attended public school. *Id.* In 1990, those who supported educational choice of private or public school increased to 72% of minorities and to 62% of the general public in the United States. Chicago Tribune, Jan. 21, 1991, at 8, col. C; Nat'l J., Nov. 3, 1990, at 2671.

22. Gannett News Service, Sept. 18, 1990, at 1. Educational choice is currently utilized in Minnesota, Wisconsin, Washington, New York, Arkansas, Iowa, Nebraska, and Ohio. *Id.* In Milwaukee, 400 students of low-income families are currently attending schools of their choice with $2,500 grants from the state. *Id.* In November of 1990, Oregon residents voted down Measure 11, which would have implemented a comprehensive educational choice plan. *Id.* For over a decade, families in Milwaukee, Wisconsin have been allowed to choose any public school under an open enrollment plan. *Id.*

23. *See* Gannett News Service, Sept. 14, 1990, at 6. One of the most publicized Choice programs was implemented in 1990 in Milwaukee, Wisconsin, where State Representative Polly Williams pushed through legislation engaging a voucher system for only very low-income families to redeem with non-sectarian non-public schools. Gannett News Service, Sept. 10, 1990, at 4. Up to 1,000 Milwaukee children can participate in the trial program, receiving $2,500 a year in state tax funds. *See id.* (first contemporary choice program including private sectarian schools); *see also* Gannett News Service, May 25, 1990, at 12 (Springfield, Illinois adopts public school choice program).

24. DAVIS & HAYES, EFFICIENCY AND INEFFICIENCY IN THE TEXAS PUBLIC SCHOOLS, (1990) (copy on file with St. Mary's Law Journal). Fifty-one percent of the individuals presently employed by the Texas public school system are not teachers. NAT'L CENTER FOR

areas will eliminate any true choice of schools.[25] Uninhibited by the concerns of those who oppose free choice, an Oregon organization[26] responded to that state's inefficient and ineffective public school system by proposing Measure Eleven.[27] This act attempted to create a free choice educational system for the state of Oregon.[28] The proposition failed in a November, 1990 election due to an underfinanced campaign and multi-million dollar opposition by Oregon school boards that did not want to see non-public schools receive any of the state's education funds.[29] Possibly the prototype for choice reform legislation, the ambitious Oregon proposal called for reimbursement of the educational expenditures made by the parents through tax deductions or a voucher system.[30] Although Measure Eleven only garnered

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POL'Y ANALYSIS, CHOICE IN EDUCATION: OPPORTUNITIES FOR TEXAS 4 (1990). Opposition by currently employed public school administrators is apparent in the over two million dollars spent by school boards in lobbying against a free choice bill promulgated by Oregonians for Educational Choice. Gannett News Service, Sept. 14, 1990 at 1.

25. *See* Rose-Ackerman, *Social Services and the Market*, 83 COLUM. L. REV. 1405, 1429 (1983) (voucher plans do not allow choice if participants are immobile).

26. Oregonians For Educational Choice, P.O. Box 40748, Portland, Oregon 97240, (503) 242-0080.

27. *See* Appendix A *infra*.

28. *See* School Board News, August 28, 1990, at 1 (reasons why Choice is opposed in Oregon).

29. *Id.* Alan Tresidder, a lobbyist for the school boards of Oregon stated, "The $67 Million loss estimate [to the public schools] is too conservative; schools will lose at least $100 million in the first year, if this is approved .... We are very much opposed to the proposed measure." *Id.* Measure Eleven would indeed have shifted money out of the public school system if parents chose not to place their children there. *See generally* OREGONIANS FOR EDUCATIONAL CHOICE, QUESTIONS AND ANSWERS ABOUT MEASURE ELEVEN (1990) (copy on file with St. Mary's Law Journal). Fear of Measure Eleven by the Oregonian school board appears to originate in the fact that the measure would be effective in creating efficient schools and relieve districts from the need for school administrators and school boards. *See id.*

30. For example, a state educational voucher system establishes a uniform property tax which is collected statewide based on local property. The tax revenue presently collected annually by most states is sufficient for the voucher system to operate successfully without the need for a property tax rate increase. The funds are then held by the State Comptroller. Each individual domiciled in the state receives a per capita allocation of the tax revenue held by the State Comptroller based child's category of need. Categories are general and specific, with the specific categories including physically and mentally handicapped children, children born with drug addictions, and gifted children. Allowing children to attend special schools that cater to specific needs encourages the formation of "boutique" schools. Parental choice would encourage smaller schools to form by specialist in a particular area of education, expanding and receding with the social needs of the Texas population. The concept of "boutique" schools for special student populations is a concept promoted by Allan E. Parker, Associate Professor of Law at St. Mary's Law School in his Equal Opportunity/Free Choice Education Plan. *See*, Appendix B *infra*. In order for the participating schools to receive a child's allocation of funds for education, they may have to meet certain requirements, such as: (1) making academic tests scores available to the public for comparison, (2) allowing admission of students by lottery if there are more applicants than positions for enrollment (the use of the lottery allows equal

thirty percent of the vote, the failure of the legislative proposal may have resulted from a lack of voter understanding and the fact that Measure Eleven did not include provisions for transportation to and from the schools chosen. Nevertheless, the stage has been set for states to recast Measure Eleven in a form that will accommodate their specific state's concerns and take full advantage of the free market[31] and free exercise[32] principles inherent in free choice.[33]

B. *Free Market Theory*

Free market theorist Milton Friedman once said that public education in America is like a socialist island in a sea of democracy.[34] To bring education into the democratic scheme, the free market theory for education reform envisions the removal of the centralized bureaucracy surrounding public education by facilitating parental choice of public and non-public schools.[35]

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opportunity for enrollment. After initial enrollment by a student in a school, the child has priority over new applicants for enrollment in order to promote continuity in the school's student population), and (3) agreeing not to charge any additional fee beyond the per capita allotment by the state for each student if the school accepts any state allocation of funds (states who propose this requirement of institutions fear the affluent will drive the costs of education out of the reach of many individuals by adding on cost to the state allocation). Schools which do not wish to participate in the voucher system would be free to charge any tuition rate and would not be limited by the proposed legislation.

31. *See* FRIEDMAN, FREE TO CHOOSE page 96-118 (1980) (free market economics demand choice for efficiency in education). *See generally*, CHUBB & MOE, POLITICS, MARKETS, & AMERICA'S SCHOOLS (1990) (proposal for reform of public school system in U.S. allowing free choice of all institutions to create free market economy).

32. *See* Arons, *Out of the Fire and Into the Frying Pan*, FIRST THINGS 48 (1991) (choice in education is necessary for free exercise right not economic utility). *See generally*, ARONS, COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING (1988).

33. *See*, Gallup, *The 22nd Annual Gallup Poll of Public's Attitudes Toward the Public Schools*, 22 PHI DELTA KAPPAN 65 (1990) (support for voucher system increased 10% in last year). Public opinion of Free Choice reform of state schools has made a substantial shift since the last campaign for reform in the early 1970's.

34. *See* FRIEDMAN, FREE TO CHOOSE 150-88 (1980) (public school system's poor performance curable by competition); FRIEDMAN, CAPITALISM AND FREEDOM 85-107 (1962) (socialism in education creates poor schools). *But see* THAYER, AN END TO HIERARCHY! AN END TO COMPETITION 81-115 (1973) (competition is road to waste and not efficiency); Ginzberg, *The Economics of the Voucher System*, 72 TCHRS. C. REC. 373 (1971) (opposing voucher system); Seldon, *Vouchers—Solution or Sop?*, 72 TCHRS. C. REC. 365 (1971) (vouchers would ruin public school system).

35. *See* GILDER, WEALTH AND POVERTY 91, 146-49 (1981) (liberalism destroys the educational system by excess bureaucracy); *see also* MCGARRY & WARD, EDUCATIONAL FREEDOM AND THE CASE FOR GOVERNMENT AID TO STUDENTS IN INDEPENDENT SCHOOLS 122-37 (1966) (free market naturally creates better schools at lower costs). Free market theorist John J. McDonough advocates free market for the benefit of competitive economy. *Id.* at 122-24. McDonough proposed a "taxpayers' savings plan" utilizing economy of government aid to independent education, in which he stated:

By allowing parents the freedom to select the school their child attends, public and non-public schools would have to compete for attendance, and thereby, compete for state education funds.[36] Poorly managed schools would be forced to cease operations due to lack of attendance,[37] allowing the superior schools to prosper.[38] The free market argument for education reform was made convincingly by those advocating reform in the early 1970's, but was not made in the atmosphere of urgency which currently surrounds state legislatures since the *Edgewood* decision.[39]

C. *Free Exercise Theory*

Unlike the free market theory which relies on economic motives, the free exercise theory emphasizes the freedom of belief and intellect guaranteed by the First Amendment as the rationale for adopting free choice, and thereby,

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> The "free market" naturally develops in our American way of life, with millions of Americans each day freely selecting their goods and services on the basis of each individual's personal preferences. This provides many choices, responding to the needs and desires of individuals, and gives us prompt recourse against inefficiency, unsatisfactory goods and services, or ones that do not fill our desires and needs. In the free market, multitudes of individual decisions are ceaselessly taking place on thousands of fronts .... The objective of our nation's founders was the formation of a central political establishment which would foster free choice and the free market in all aspects of life.

Id.

36. *See* FRIEDMAN, CAPTIALISM AND FREEDOM 85-107 (1962) (freedom to choose school would create efficiency in education); LAHAYE, BATTLE FOR THE PUBLIC SCHOOLS: HUMANISM'S THREAT TO OUR CHILDREN 69 (1973) (free market private education system would be superior to public schools system). *See generally*, Coons & Sugarman, *Vouchers for Public Schools*, 15 INEQUALITY IN EDUC. 60 (1973) (vouchers create equality among disadvantaged); Coons, Clune & Sugarman, *Recreating the Family's Role in Education*, in NEW MODELS FOR AMERICAN EDUCATION 216 (1971) (choice allows parental involvement); COONS & SUGARMAN, FAMILY CHOICE IN EDUCATION: A MODEL STATE SYSTEM FOR VOUCHERS (1971) (description of working state voucher system model for choice in education); COONS, CLUNE & SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970) (inequity of current state education systems).

37. *See* FRIEDMAN, CAPITALISM AND FREEDOM 85-107 (1962) (freedom to choose school would create efficiency in education).

38. *See* MECKLENBURGER & HOSTROP, EDUCATIONAL VOUCHERS: FROM THEORY TO ALUM ROCK 24-32 (1972) (analysis of four ways competition and vouchers could work).

39. *See* Edgewood v. Kirby, 777 S.W.2d 391 (Tex. 1989) (financing of education plan in Texas is unconstitutional). In addition to the *Edgewood* decision, the increasing cost of public education coupled with a nation-wide decline in Scholastic Aptitude Test scores and increased drop out rates has created a new atmosphere for the resurgence of interest in the free market theory for education reform. *See generally*, CHUBB & MOE, POLITICS, MARKETS, & AMERICA'S SCHOOLS (1990) (data from Brookings Institution on inefficiency and ineffectiveness of school system without choice). In addition, political groups historically opposed to choice in education agree that free market theory could benefit all economic classes and improve education in the public schools. The Nation, Mar. 4, 1991, at 1, col. 2 (not just conservatives could benefit from educational choice).

assures the free exercise of beliefs.[40] In 1859, John Stuart Mill forewarned of this stifling of liberty interests by expounding upon the imminent threat from state organized schools.[41] Mill stated that state run schools rob parents and their children of thoughts and beliefs due to the "molding effect" of centralized administration and curriculum.[42] Sometimes referred to as "secular humanism,"[43] public schools are often accused of violating constitutional rights[44] by endorsing a type of religion which is based on the exclusion or active neutrality toward all religions.[45] The constitutional right of parents to receive reimbursement for privately educating their children in religious institutions has been the subject of litigation in the lower courts, but has not as yet, been heard by the United States Supreme Court.[46] However, the Court

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40. *See generally*, Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U.L. REV. 603 (1987) (whether public schools are infringing on free exercise rights); LAHAYE, THE BATTLE FOR THE PUBLIC SCHOOLS: HUMANISM'S THREAT TO OUR CHILDREN (1983) (secularism as a religion in itself infringes on free exercise beliefs).

41. WISHY, PREFACES TO LIBERTY 236 (1859).

42. *Id.*

43. *See* Smith v. Bd. of School Comm'rs, 827 F.2d 684, 693 (11th Cir. 1987) (text-books found not to establish secular humanism); Grove v. Mead School Dist., 753 F.2d 1528, 1534 (9th Cir. 1985) (text-book found not to promote secular humanism); Wright v. Houston Indep. School Dist., 366 F. Supp. 1208, 1211 (S.D. Tex. 1972), *aff'd*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974) (public school's teaching of evolution did not establish secularism).

44. *See* Edwards v. Aguillard, 482 U.S. 578, 581 (1987); (*Torcaso* Court did refer to "secular humanism" as a religion); Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (unconstitutional for state to force individual to subscribe to any religion); *see also* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1689-91 (1969) (discussion of whether religion and secular education can be separated); CONFREY, SECULARISM IN AMERICAN EDUCATION 5, n.2 (1931) (Catholic University dissertation distinguishing secular from secularistic).

45. *See* Zorach v. Clauson, 343 U.S. 306, 314 (1952) (public schools do not have show hostility toward religion to create religion of secularism). Justice Goldberg remarked in his concurrence in *Abington School Dist. v. Schempp*;

> It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

46. *See* Rhode Island Fed'n of Teachers v. Norberg, 630 F.2d 850, 861 (1st Cir. 1980) (religious institutions do not have right to education funding from state); Jackson v. California, 460 F.2d 282, 283 (9th Cir. 1972) (free exercise clause does not entitle private school compensation from state). The function of the religion clauses has become more debated due to the application of the religion clauses to the state through the Due Process Clause of the Fourteenth Amendment, the increased government control over states, and the changes in the function of religion in American society. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW 812 (1978) (apparent conflicts of the religion clauses); Johnson, *Concepts and Compromise in First*

has implied that public schools fail to remain "value neutral," and limit beliefs and expressions that are protected by the free exercise clause.[47] In addition, the Court has held that because "the child is not a mere creature of the state," families have the right to choose an alternative to public school.[48] Unfortunately, this right has become largely unexercised due to the prohibitive burden of financing a child's non-public education without state assistance.[49] Therefore, the advocates of the free exercise theory support state funding of private education in order to promote a separation of school and state, allowing fundamental political, religious, and human rights to flourish.[50]

III. ESTABLISHMENT CLAUSE JURISPRUDENCE

A. *History of Establishment Clause Jurisprudence*

In the same breath, the First Amendment to the United States Constitution provides all citizens the right to be free from laws that establish religion and the right to freely exercise their religious beliefs.[51] While the framers' intent clearly seems to keep the federal government from interfering with the prosperity of all religions, the brevity of the Establishment and Free Exercise clauses leaves them vulnerable to varied interpretations, resulting in no steadfast boundary[52] between church and state.[53] Although it is relatively

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Amendment Religious Doctrine, 72 CALIF. L. REV. 817, 827-28 (1984) (discussion of increased complexity of the balance of religion clauses of U.S. Constitution).

47. *See* Board of Education v. Pico, 457 U.S. 853, 864 (1982) (public schools do not remain value-neutral and promote varied social, moral and political values).

48. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (invalidating Oregon law which required all students attend public schools). The Court's holding in *Pierce* was reinforced by *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

49. *See* Arons, *Out of the Fire and Into the Frying Pan*, 1990 FIRST THINGS 50 (1990) (contrast of free exercise and free market approach to choice reform).

50. *Id.* The right of individuals to worship in their various institutions has been supported by the U.S. Supreme Court. Justice Douglas stated: "We are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952) (opinion of Douglas, J.); *Cf.* Lynch v. Donnelly, 465 U.S. 668, 694-712 (1984) (dissent of Justice Brennan recognizing the religious nature of our society as a given).

51. The first amendment to the U.S. Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

52. In *Everson v. Board of Education*, the Court stated that a "wall of separation" must exist between church and state. *Everson*, 330 U.S. 1 (1947). The phrase was coined by Roger Williams who intended the phrase to mean the government should not intrude on individuals' rights to their own religious beliefs. The Court in *Everson* used the phrase as an analogy to a tool of the government, and not a shield of the people. HOWE, THE GARDEN AND THE WILDERNESS 5-10 (1965).

settled that the Establishment Clause encompasses the doctrine of political noninvolvement[54] and the import of individual liberty to worship without constraint,[55] the United States Supreme Court has at times been supportive of unusual religious practices and at other times taken all requisite precautions to avoid government assistance to a particular religion.[56] As a result of the dim demarcation between church and state, state legislation promulgat-

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53. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (Court acknowledges that there are many blurred areas between church and state); *see also* Comm. for Pub. Educ. v. Regan, 444 U.S. 646, 662 (1980) (establishment clause issues difficult to determine); Tilton v. Richardson, 403 U.S. 672, 677-78 (1971) (establishment clause jurisprudence is not clear). *See generally*, West, *Constitutional Judgment on Non-Public School Aid: Fresh Guidelines or New Roadblocks?*, 35 EMORY L.J. 795 (1986) (analyzing the Supreme Court's decisions regarding establishment clause after 1980).

54. *See* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 516-22 (1968) (political noninvolvement and voluntarism are values protected by the establishment clause); *see also* Zorach v. Clauson, 343 U.S. 306, 313 (1952) (worship is part of American culture).

55. *See Zorach*, 343 U.S. at 313 (examples of religion in American traditions). In *Zorach*, the Court stated:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. . . . We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.

Id. See also Note, *Government Neutrality and Separating Church and State*, 92 HARV. L. REV. 696, 697 (1979) (political noninvolvement is fundamental to voluntarism in religion).

56. *Compare* Sherbert v. Verner, 374 U.S. 398, 411 (1963) (employment compensation benefits not withheld from employee whose religion would not allow labor on Saturdays) *with* Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 798 (1973) (invalidating statute which in effect assisted sectarian education in non-public schools) *and* McCollum v. Board of Educ., 333 U.S. 203, 231-32 (1948) (invalidating statute which allowed sectarian instruction in public schools). The severely muddled guidelines are expounded upon by Chief Justice Rehnquist:

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

ing a free choice system which includes sectarian schools is not certain to survive constitutional scrutiny, if challenged.[57]

Some boundaries of establishment clause jurisprudence were fashioned, however, by *Everson v. Board of Education*,[58] in which the Court applied the Establishment Clause to the states through the doctrine of selective incorporation under the Fourteenth Amendment.[59] In *Everson*, the Court upheld a New Jersey statute[60] which reimbursed all parents for expenses incurred in the transportation of their children to sectarian and secular schools.[61] Fol-

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Wallace v. Jaffee, 472 U.S. 38, 115 (1985) (Rehnquist, J., dissenting) (citations and footnotes omitted).

57. Johnson, *The Religious Clauses Article: Concepts and Compromise in the First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 819 (1984). The U.S. Supreme Court decisions regarding establishment clause jurisprudence reflect the "internal tension" between the establishment clause and the free exercise clause. Tilton v. Richardson, 403 U.S. 672, 677 (1971).

58. 330 U.S. 1 (1947).

59. *Id.* at 18.

60. N.J. STAT. ANN. § 18 A:39-1 (West 1989). The New Jersey statute states:

> Whenever in any district there are pupils residing remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such pupils to and from school, including the transportation of school pupils to and from school other than a public school, except such school as is operated for profit in whole or in part. When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil.

Id.

61. *Everson*, 330 U.S. at 18. Prior to *Everson* in 1947, establishment clause case law was much less definitive. The Court had upheld an agreement between a Roman Catholic hospital and the federal government in *Bradfield v. Roberts*, 175 U.S. 291, 300 (1899). The government was to assist with the financial obligation of building a wing on the Catholic hospital for hospital care for indigents. *Id.* at 293-94. In 1908, the Court found that congressional expenditures from a trust fund to support mission schools on Indian reservations did not violate the establishment clause. *See* Quick Bear v. Leupp, 210 U.S. 50, 81-82 (1908). After *Everson* was decided, two schools of analysis were born out of the conflict between what was and was not aid to religion. *See* Monaghan & Ariens, Mueller v. Allen: *A Fairer Approach to the Establishment Clause*, 29 ST. LOUIS U.L.J. 115, 142-43 (1984) (*Mueller* correctly decided although did not address free exercise clause). The methodology of strict neutrality advances the concept that if government legislation is religiously neutral, and incidentally aids a religious sect, the statute does not violate the Establishment Clause. *Id.* From this perspective, state tax exemptions to foster more efficient and effective education may include sectarian schools if the aid is given to all participants. *See* KURLAND, RELIGION AND THE LAW 80-85 (1962), P. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 70-72 (1961). However, the dichotomy of strict neutrality is strict no-aid, advocated by individuals who would not allow any financial benefit to sectarian schools under legislation, even if the statute gave state benefits equally to all regardless of religious affiliation. PFEFFER, CHURCH, STATE AND FREEDOM, 533-36 (1967); Pfeffer, Book Review, 15 STAN. L. REV. 389, 400-1 (1963). The first case

lowing *Everson*, the Court also found that laws requiring closing on Sundays had a secular purpose and were therefore constitutional, and that a daily nondenominational prayer in public school was unconstitutional.[62] The limitations on state advancement of religion in education were further defined by the Court's holding in *Board of Education of Central School District Number 1 v. Allen*,[63] in which a New York statute[64] allowing a state to loan textbooks to all children was upheld against an establishment clause chal-

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concerning the establishment clause of religion after *Everson* was *McCullum v. Board of Education*, 333 U.S. 203, 212 (1948) (unconstitutional to release public school children from school to receive religious instruction). *McCullum* followed the strict no-aid concept of *Everson*. *Id.* In 1952, the Court in *Zorach v. Clauson* held that public school children could leave school to receive religious instruction during the school day since the school was not providing the instruction and incurred no expenditure in the releasing of the children. Zorach v. Clauson, 343 U.S. 306, 308-15 (1952). *Zorach* has been interpreted as diluting the strict no-aid concept of *McCullum* and criticized for broadening the meaning of strict neutrality. P. KAUPER, RELIGION AND THE CONSTITUTION 67-79 (1964); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 530-31 (1968).

62. *See* Engel v. Vitale, 370 U.S. 421, 424 (1962) (invalidating state statute formulating prayer for public schools). The Court also interpreted the establishment clause to forbid Bible readings and recitations of the Lord's Prayer in public school. *See* Abington School District v. Schempp, 374 U.S. 203, 223 (1963) (invalidating statute requiring recitation of prayer in public school).

63. 392 U.S. 236 (1968).

64. 1950 N.Y. Laws ch. 239, §§ 1, 3. Section 703 of the New York Education Law allowed qualified school district voters to authorize a tax that would make available free textbooks. § 701 states:

> 1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate text-books to be used in the schools under their charge.
>
> 2. A text-book, for the purpose of this section shall mean a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.
>
> 3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed be the board of regents and such boards of education, trustees or other school authorities.

N.Y. EDUC. LAW § 701 (Supp. 1967). Subdivision two was added in 1966 by amendment. 1966 N.Y. Laws 795. The *Allen* trial court decision was rendered prior to the 1966 amendment. *Allen*, 392 U.S. at 241-44.

lenge.[65] In *Allen*, the statute stated that its purpose was purely secular in scope[66] and was to expand the educational opportunities of all children in the state.[67]

B. *The* Lemon v. Kurtzman *Test*

Relying on the guidelines set forth in their previous decisions, the Court developed the three prong test of *Lemon v. Kurtzman*[68] which is presently applied by the Court to analyze establishment clause challenges.[69] The three part *Lemon*[70] test requires (1) that the statute in question have a secular purpose,[71] (2) that the principle or primary effect of the statute does not advance nor inhibit religion,[72] and (3) that the statute does not foster an

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65. *Allen*, 392 U.S. at 249.

66. *Id.* at 243. Because the books remained the property of the state, the religious schools did not benefit from the program of loaning textbooks. *Id.*

67. *Id.* at 243.

68. 403 U.S. 602 (1971). In *Lemon*, a statute allowing reimbursement to sectarian schools for the cost of secular text-books and instructional materials did not survive establishment clause challenges. *Id.* The *Lemon* analysis has been utilized by the Court repeatedly in establishment clause challenges to legislation concerning grants, tax credits, or text-book loans. *See, e.g.*, County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 575 (1989) (religious holiday display maintained by city violates establishment clause); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 6 (1989) (statute allowing religious periodicals exemption from sales and use tax invalidated); Mueller v. Allen, 463 U.S. 388, 393 (1983) (statute providing tax deduction for education expenses upheld as having secular purpose); Widmar v. Vincent, 454 U.S. 263, 271 (1981) (state colleges cannot bar students use of class space for religious worship); Wolman v. Walter, 433 U.S. 229, 235 (1977) (statute which made state responsible for standardized tests at non-public schools upheld); Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 740 (1976) (grants to schools including religious institutions upheld); Meek v. Pittenger, 421 U.S. 349, 358 (1975) (statute authorizing text-book loan to non-public school not allowed); Grit v. Wolman, 413 U.S. 1021, 1021 (1973) (tuition tax credit upheld with no analysis by the Court); Levitt v. Committee For Pub. Educ. & Religious Liberty, 413 U.S. 472, 481 (1973) (sectarian schools reimbursed for services such as student health costs); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 789-90 (1973) (tuition grants and deductions to parents of children in private school invalidated).

69. The most recent application of the *Lemon* test by the court was County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter 492 U.S. 573, 575 (1989) (religious holiday display maintained by city violates establishment clause).

70. Justice Rehnquist added the caveat that the *Lemon* test was used only as a helpful signpost in dealing with establishment clause challenges. *Mueller*, 463 U.S. at 394.

71. The secular purpose prong of *Lemon* was originally promulgated by Professor Philip Kurland. *See* Kurland, *Of Church And State And The Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961) (legislation must state secular purpose); *see also* KURLAND, RELIGION AND THE LAW 80-85 (1962) (factors used to determine whether statute is secular in purpose); Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175, 1179 (1974) (three ways the court has determined if statute had secular purpose).

72. The Court in Abington School District v. Schempp added the "primary effect" analysis to what was to become the *Lemon* test. *See Schempp*, 374 U.S. 203, 222 (1963) (Court

"excessive government entanglement with religion."[73] With the newly formulated test at their disposal, the Court proceeded to determine whether non-public colleges could receive federal funding for new buildings,[74] whether non-public schools could be reimbursed for mandatory state testing and record keeping,[75] whether counseling, special therapies, and special education could be state funded,[76] and whether religious publications could be deemed tax exempt by a state when no other publications received the tax exemption.[77]

Because of the large number of sectarian schools in the United States and the resulting shift of state educational funds to those religious institutions under the free choice plan, constitutional challenges to the legislation will probably arise.[78] Unless replaced before the Court grants certiorari to hear a

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inquired as to purpose and "primary effect" of the statute). However, the primary effect element contributed by *Schempp* was limited considerably by the Court's holding in *Mueller* when Justice Rehnquist stated that the secular purpose of legislation should be determined by looking at the statute's face, not inquiring into its resulting effect. *Mueller*, 463 U.S. at 401-02.

73. *Lemon*, 403 U.S. at 612.

74. *See* Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 740 (1976) (upholding statute of non-public college grants); Hunt v. McNair, 413 U.S. 734, 938 (1973) (statute granting funds for construction of religious non-public school upheld); Tilton v. Richardson, 403 U.S. 672, 809 (1971) (federal grants allowed to non-public sectarian college).

75. *See* Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 474-76 (1973) (state cannot reimburse sectarian non-public schools for mandatory state testing). *But see* Committee For Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 948, 948-49 (1979) (upholding statute paying non-public schools for correcting state performance tests).

76. *See* Meek v. Pittinger, 421 U.S. 349, 358 (1975) (invalidating statute that funded special education services to non-public schools).

77. *See generally* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 6 (1989) (invalidating statute giving tax exemption to religious publications).

78. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 768 (1973) (most non-public schools in New York are sectarian). In 1973, 85% of all non-public school students in New York attended sectarian schools. *Id.* In 1971, 96% of non-public school students in Rhode Island and Pennsylvania attended Roman Catholic or other sectarian schools. *Lemon*, 403 U.S. at 610. The most recent application of the *Lemon* analysis is also the broadest. It was the alleged establishment clause infraction examined in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). In *Allegheny*, a courthouse in downtown Pittsburgh which had placed a Christian nativity scene at top of the main public stairway of the courthouse, and an eighteen foot Jewish Chanukah menorah in front of the courthouse. *Id.* at 588. The District Court refused to grant an injunction to remove the displays, relying on *Lynch v. Donnelly*, 465 U.S. 668 (1984). The *Lynch* Court held that a creche as used in a city Christmas display was did not support or promote any religious affiliation, but instead accommodated what had become a cultural phenomenon of Christmas. *Id.* at 672-687. The Court urged that such displays as the creche in *Lynch* are part of American culture and play a role in the history of society in the U.S. *Id.* at 674-78. In *Allegheny*, the district court decision was reversed by the court of appeals, which distinguished *Allegheny* from *Lynch* by applying the *Lemon* test. *Allegheny*, 492 U.S. at 588. Granting certiorari, the Court affirmed in part and reversed in part, holding that because the creche in *Allegheny* contained a signboard suggesting that onlookers "praise God for the birth of Jesus," the display could be distinguished from the neutral display

challenge to free choice legislation, the *Lemon* test will most assuredly be applied by the Court.[79] In addition to the *Lemon* analysis, the Court will also view the state statute providing free choice in the light of *Mueller v. Allen*,[80] which set the parameters of establishment clause jurisprudence in the area of tuition tax credits.[81]

C. Mueller v. Allen

When *Mueller* was decided in 1983, some legal scholars predicted that the foundation had been laid for future state legislatures to attempt a much needed reform of the public school system with free choice.[82] Prior United States Supreme Court cases holding that state tuition tax credits were unconstitutional failed to provide an analysis for the decision[83] or were based on distinguishable facts,[84] thereby reserving the issue for the Court in *Mueller*.[85] The statute at issue in *Mueller* was a Minnesota law[86] which permitted

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of a creche among other holiday symbols in *Lynch*. *See Allegheny*, 492 U.S. at 588 (distinguishing *Lynch* from the facts of the case). By so holding, the Court expanded the second *Lemon* prong forbidding a governmental practice that has a principal or primary effect of advancing or inhibiting religion. *See Allegheny*, 492 U.S. at 656 (Kennedy, J., concurring in part, dissenting in part) (noting that Court expanded primary effects test to include any government support for a religion). Under *Allegheny* interpretation of the *Lemon* test, a government practice which shows public recognition of an established religion, indorses, shows preference, or promotes a specific religion will be in direct violation of the establishment clause. *See id.* (Kennedy, J., concurring in part, dissenting in part) (primary effects test now too broad). Justice Kennedy claims the court is callously indifferent to religion in the U.S. and is discarding part of our social and political history. *Id.*

79. *See* Comment, *Is* Lemon *a Lemon? Crosscurrents in Contemporary Establishment Clause Jurisprudence*, 22 ST. MARY'S L.J. 129, 133-34 (1990) (potential for new standard to replace *Lemon*).

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

81. *See id.* at 404 (tuition tax credit statute upheld because afforded to all).

82. *See* Monaghan & Ariens, Mueller v. Allen: *A Fairer Approach to the Establishment Clause*, 29 ST. LOUIS U.L.J. 115, 116 (1984) (educational choice funds now available to sectarian schools under *Mueller*). States including New York, Rhode Island, and Hawaii had all attempted to pass tuition tax credits prior to *Mueller*, but had failed or the statutes had been struck down. *Id.*

83. *See* Grit v. Wolman, 413 U.S. 901, 901 (1973) (affirming district court opinion without reason); Essex v. Wolman, 419 U.S. 820, 820 (1972) (memorandum decision affirming district court decision).

84. The plaintiffs in *Mueller* relied on *Nyquist* to allege that the establishment clause was violated by the statute at issue. *See Mueller*, 463 U.S. at 393. However, the statute in *Nyquist* granted tuition tax credits only to parents of children enrolled in private schools. *See Nyquist*, 413 U.S. at 797-98 (statute violated establishment clause due to limitation of availability of funds to public school participants).

85. *Mueller*, 463 U.S. at 391. Justice Rehnquist, writing for the majority, began the *Mueller* opinion by stating that the *Nyquist* Court had intentionally reserved the issue of educational tax credits for both public and non-public school expenses. *Id.* at 390-91.

86. MINN. STAT. § 290.09 (1982).

taxpayers to claim a gross income deduction in computing their state tax liability to abate the cost of their childrens' primary and secondary school education.[87] The educational expenditures for which tax deductions were allowed included textbooks, transportation, tuition, and teaching materials.[88] While *Mueller* was being decided by the Court in 1983, ninety-five percent of the students attending non-public schools in Minnesota were attending sectarian schools.[89] Petitioners were Minnesota taxpayers, alleging the statute violated the establishment clause by providing financial aid to sectarian schools.[90] The state's motion for summary judgment was granted by the district court, which held "that the statute was neutral on its face and in its application and does not have a primary effect of either advancing or inhibiting religion."[91] The court of appeals affirmed the lower court's decision and found that the Minnesota statute was facially neutral and assisted a "broad class of Minnesota citizens."[92]

The United States Supreme Court granted certiorari to decide what would become a landmark in establishment clause jurisprudence. After Chief Justice Rehnquist recognized what an onerous task it is to "perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," he employed the *Lemon* test in his analysis of the Minnesota statute.[93] In applying the first prong of the *Lemon* analysis,[94] the Court found that the Minnesota statute had a secular purpose and was similar to prior governmental assistance programs that have survived constitutional muster.[95] The Court disposed of the third prong of *Lemon* in a similarly abbreviated manner by comparing *Mueller* to *Board of Education v. Allen*, in which the Court found that a state statute which required officials to determine if text-books were of a secular nature did not "excessively entangle" the state with religion.[96] Ap-

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87. *See Mueller*, 463 U.S. at 396 (describing Minnesota statute).

88. MINN. STAT. § 290.09(22) (1982).

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

90. *Id.* at 392.

91. *Id.* at 392 (citing *Mueller v. Allen*, 514 F. Supp. 998, 1003 (D. Minn. 1981)).

92. *Id.* at 292 (citing *Mueller v. Allen*, 676 F.2d 1195, 1205 (8th Cir. 1982)).

93. *Mueller*, 463 U.S. at 393; *Nyquist*, 413 U.S. at 761 (quoting *Lemon* concerning difficulty of establishment clause issues); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (difficult to distinguish line between church and state).

94. The *Lemon* test employed by the *Mueller* Court in 1983 was narrower than the one used previously in the *Allegheny* decision in 1989, which raised the wall separating church and state slightly higher. *Compare* Mueller v. Allen, 463 U.S. 388, 401-402 (1983) (indirect financial assistance to sectarian schools not endorsing religion) *with* County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 599 (1989) (display of religious symbols by county courthouse is alone enough to promote religion and violate establishment clause).

95. *Mueller*, 463 U.S. at 394.

96. *Mueller*, 463 U.S. at 403. The Court noted that in earlier Supreme Court decisions, state involvement with a text-book loan program to determine if books were of a secular nature was not in violation of the establishment clause. *Id. See* Board of Educ. v. Allen, 392 U.S.

plication of the second prong of the *Lemon* test in *Mueller* produced an unprecedented result. Chief Justice Rehnquist brought to the forefront the specific facet of the Minnesota statute that safeguarded it from invalidation: the statute provided that the deduction for education expenses was available for educational expenses incurred by *all* parents.[97] In addition, Chief Justice Rehnquist stated, "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect."[98]

To further solidify the newly drawn boundary between church and state, the Court distinguished the Minnesota statute from state legislation analyzed under the *Lemon* analysis in prior cases, including *Committee for Public Education v. Nyquist*.[99] In *Nyquist*, financial assistance (that resulted in what were actually tuition grants) was provided to parents of non-public school students exclusively, in an attempt to promote pluralism and diversity among the state's public and non-public schools.[100] While the purpose of the statute in *Nyquist* was a secular one, the primary effect of the legislation was to assist only parents of children enrolled in non-public schools.[101] The Court in *Mueller* repeatedly underscored the importance of state legislation permitting all parents to benefit from the provisions regarding tax deductions.[102] Reiterating the holdings of both the district and circuit courts, the Court maintained that the neutrality of the statute on its face and in its effect on a broad spectrum of people guards it from an Establishment Clause challenge.[103]

Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, wrote the dissent in *Mueller* which emphasized the effect of the Minnesota statute rather than its facial neutrality.[104] The dissent noted that the majority of non-public schools in Minnesota were sectarian, therefore making the statute's primary effect to facilitate religious institutions.[105] Justice Marshall argued that *Nyquist* controlled in determining the constitutionality of the statute at issue: "[t]he Establishment Clause of the First Amendment prohibits a State from subsidizing religious education, whether it does so di-

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236, 249 (1968) (text book loan program not in violation of establishment clause); *see also* Meek v. Pittinger, 421 U.S. 349, 361-62 (1975) (text book loan program constitutional).

97. *See Mueller*, 463 U.S. at 401-02 (primary effect of statute does not promote religion because all parents may deduct expenses from taxable income).

98. *Id.* at 397.

99. 413 U.S. 756 (1973).

100. *Id.* at 780-89.

101. *Nyquist*, 413 U.S. at 797-98.

102. *See Mueller*, 463 U.S. at 397 (tax deduction not limited to religious non-public school and therefore constitutional).

103. *Mueller*, 463 U.S. at 392-404.

104. *Id.* at 405-06 (Marshall, J., dissenting).

105. *Id.* at 405 (Marshall, J., dissenting).

rectly or indirectly."[106] Finally, the dissent argued that the statutes at issue in *Nyquist* and *Mueller* were indistinguishable in their effect although the *Nyquist* statute provided aid to parents of non-public school students exclusively, and the *Mueller* statute provides aid to all who requested it.[107]

D. *United States Supreme Court Cases Following* Mueller

1. *Witters v. Washington Department of Services for the Blind*

Following the five to four decision of *Mueller*, the Court aligned with Chief Justice Rehnquist's rationale concerning who could receive state funds for education without violating the Establishment Clause. In *Witters v. Washington Department of Services for the Blind*,[108] the Court held that financial assistance to a student of a Christian college under a Washington vocational rehabilitation statute would not advance religion in a manner inconsistent with the Establishment Clause.[109] In so holding, the Court emphasized that neutrally available state aid used at the receiver's discretion to pay for religious education does not confer state endorsement of religion.[110]

2. *Board of Education of the Westside Community Schools v. Mergens*

In *Mergens*,[111] the Court upheld the Equal Access Act[112] which forbids

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106. *Id.* at 404 (Marshall, J. dissenting).

107. *Mueller*, 463 U.S. at 408-11 (Marshall, J., dissenting). In his dissent, Justice Marshall repeatedly relies upon the fact that although the Minnesota statute is facially neutral and effects a broad scope of people, the fact remains that almost all of the non-public schools in the state were at that time sectarian schools. *Id.* at 407-09 (Marshall, J., dissenting).

108. 474 U.S. 481 (1986).

109. *Id.* at 489.

110. *Id.* at 487-89. Before *Witters* was decided, some legal scholars promoted the concept that state assistance given directly to individuals who placed the assistance directly into the hands of a religious institution is not in violation of the Establishment Clause, but rather an employment of free exercise liberty. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 675-80 (1980) (allowing free exercise liberty interest of school choice does not violate Establishment Clause). Justice Brennan's dissent in *Marsh v. Chambers* implemented the same rationale as the majority in *Witters*. *See* Marsh v. Chambers, 463 U.S. 783, 810 (1983) (Brennan, J., dissenting) (exceptions to separation of church and state). In Justice Brennan's dissent in *Marsh*, he made evident that the Justices who take a strict separation of church and state stance when deciding establishment clause issues make exceptions to their position for specific situations such as chaplains for the military, providing sewer and fire protection to religiously affiliated property, public transportation to individuals attending church, and allowing tax exemptions to churches by categorizing them with other charitable and educational institutions. *Id.*

111. Board of Educ. of the Westside Community Schools v. Mergens, ___ U.S. ___, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990).

112. 20 U.S.C. § 4071(a), (b) (1982). The Act provides:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity

public secondary schools that receive federal funding and that maintain a "limited open forum" from denying "equal access" to students who request to meet at the school on the basis of "religious, political, philosophical, or other content" of speech at such meetings.[113] The Court relied on *Widmar v. Vincent*[114] in which the Court upheld a similar policy of "equal access" as it applied to state universities. Further, the Court interpreted the act as preserving the free exercise clause, rather than offending principals behind the establishment clause.[115]

IV. *LEMON* ANALYSIS OF FREE CHOICE LEGISLATION

There are many obstacles to be negotiated in order for state legislation providing free choice in education to survive under the establishment clause.[116] The voucher or tax deduction relied upon in free choice provisions is subject to review under *Lemon* to determine if the incidental state financial aid to sectarian schools is unconstitutional.[117] In addition, those states defending the statute will necessarily rely on *Mueller*, *Witters*, and *Mergens* to persuade the Court that the state statute has a secular purpose, does not have the primary effect of advancing religion, and does not unneces-

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to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

Id. § 4071(a).

113. *Mergens*, __ U.S. at __, 110 S. Ct. at 2361, 110 L. Ed. 2d at 196.

114. 454 U.S. 263 (1981). The Court in *Widmar* applied the three-part analysis of *Lemon* to determine that the Establishment Clause was not violated by an "equal access" policy at the state university level. *Id.* at 275. Religious students are therefore allowed to meet in vacant classrooms at state universities without infringing upon establishment clause rights. *Id.* at 278.

115. *Mergens*, __ U.S. at __, 110 S. Ct. at 2361, 110 L. Ed. 2d at 196. *See generally* McCarthy, *Students Religious Expression: Mixed Messages From the Supreme Court*, 64 W. EDUC. L. REP. 1 (1991) (historical perspective of the *Mergens* litigation).

116. *See* GAFFNEY, PRIVATE SCHOOLS AND THE PUBLIC GOOD; POLICY ALTERNATIVES FOR THE EIGHTIES 165-71 (1981) (constitutional issues involved with education reform); COONS & SUGARMAN, EDUCATION BY CHOICE 91-108 (1978) (problems with choice in education leading to poor education); REISCHAUER & HARTMAN, REFORMING SCHOOL FINANCE 95-131 (1973) (pros and cons of public aid to non-public schools); MECKLENBURGER & HOSTROP, EDUCATION VOUCHERS: FROM THEORY TO ALUM ROCK 24-32 (1972) (problems with free market approach to education reform); MCGARRY & WARD, EDUCATIONAL FREEDOM AND THE CASE FOR GOVERNMENT AID TO STUDENTS IN INDEPENDENT SCHOOLS 40-55 (1966) (discussion of rights and roles of parents, church and state in education); BLUM, FREEDOM OF CHOICE IN EDUCATION 121-42 (1958) (state can allow educational choice and not violate establishment clause).

117. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (three-prong test to determine if government action violates the establishment clause); *see also* Comment, *Is* Lemon *a Lemon? Crosscurrents in Contemporary Establishment Clause Jurisprudence*, 22 ST. MARY'S L.J. 129, 133 (1990) (inherent problems with *Lemon* analysis).

sarily entangle church and state.[118]

A. *Secular Purpose Test*

The first prong of the *Lemon* test is whether a state's free choice plan has a secular purpose.[119] Considering that the statutory scheme in *Nyquist* passed this prong of the test, it is apparent that a plan giving all participants an opportunity to select their child's educational facility would also pass the secular purpose test.[120] Further, it appears from *Nyquist* that the only plan that would not pass constitutional muster is a scheme that specifies that the state expenditures were to be received by only sectarian schools.[121] Therefore, general statutory grants for the advancement of all education will probably be interpreted by the Court as having a secular purpose.[122]

While the New York statute in *Nyquist* was held to have a secular purpose, free choice statutes must be distinguishable to prevail under the remaining two prongs of the *Lemon* test.[123] This necessity originates from the entanglement of church and state which resulted from the statute at issue in *Nyquist*.[124] The New York statute attempted to lessen the financial burden on parents paying for non-public education, thereby creating a primary effect of assisting a select group of parents, most of whom utilized sectarian non-public schools for their childrens' education.[125] In addition, the structure of the statute at issue in *Nyquist* caused unnecessary entanglement of the state government with religion.[126] Accordingly, free choice legislation must express the requisite secular purpose of creating economy in education for all state participants including those who attend public schools.[127] The general nature of the statute will make the state involvement with religious

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118. *See* Mueller v. Allen, 463 U.S. 388, 395 (1983) (statute allowing assistance to public and non-public schools found to pass *Lemon* test).

119. *See Lemon*, 403 U.S. at 612 (statute must have secular legislative purpose).

120. *See Nyquist*, 413 U.S. at 779 (statute providing assistance to parents of non-public school children passes first prong of *Lemon*); *see also* Meek v. Pittenger, 421 U.S. 349, 358 (1975) (invalidated statute passed first prong of *Lemon*).

121. *See Nyquist*, 413 U.S. at 790.

122. *See* Note, *Tax Deductions as Permissible State Aid to Parochial Schools*, 60 CHI. KENT L. REV. 657, 662-63 (1984) (analysis of secular purpose discussion in *Lemon* decision).

123. *Nyquist*, 413 U.S. at 773-75. The New York statute at issue in *Nyquist* failed the primary effect and entanglement prongs of *Lemon*. *Id.*

124. *Id.*

125. *See Nyquist*, 413 U.S. at 782-83.

126. *Id.*

127. If the free choice legislation is reviewed under establishment clause challenge, much will turn on the interpretation by the Court of what the actual proclaimed purposes were by the state legislature. *See e.g.*, Palmer v. Thompson, 403 U.S. 217, 224-26 (1971) (Court applies "motive" analysis).

institutions only incidental.[128]

B. *Primary Effect Test*

The second prong of the *Lemon* test is whether the statute at issue has the primary effect of advancing or inhibiting religion.[129] The Court in *Nyquist* found that the tuition reimbursement provisions failed this prong of the test due to the disproportionate benefit of parents who placed their children in sectarian schools.[130] The majority in *Nyquist* based its decision on a tabulation of the number of sectarian schools benefitted.[131] Justice Burger dissented in *Nyquist*, expressing his disapproval of the "tallying up" application of the primary effect test by the majority because this use of the test left no clear indicators for states to follow.[132]

In *Mueller*, Chief Justice Rehnquist positioned an easily defined boundary in establishment clause jurisprudence by upholding a statute which gives all individuals financial assistance for educational expenses.[133] By avoiding the far-reaching method employed by the *Nyquist* majority, Chief Justice Rehnquist made clear that it is immaterial what percentage of those benefitted under state educational funding are sectarian schools, as long as the statute provides general educational grants and tax deductions that are facially neutral and benefit a broad scope of individuals.[134] Further, the number of sectarian schools incidentally assisted in *Mueller* were not at issue because there was no delineation between public and non-public schools in the Minnesota statute.[135] Therefore, it is critical to the constitutionality of free choice legislation that it be broad in application and scope, without reservation as to who may utilize the vouchers or tax deduction. In forming the plan to effect all participants equally, the "tallying up" of beneficiaries is avoided.

Alternatively, if the *Nyquist* approach of tallying beneficiaries of the statute were taken by the Court in reviewing free choice legislation, the statute could further be distinguished by employing *Mueller*. Under the guidelines of *Mueller*, a free choice statute must provide equal assistance to all who

128. *See Mueller*, 463 U.S. at 393 (governmental assistance programs which do not violate establishment clause).

129. *See Lemon*, 403 U.S. at 612 (statute must have principal or primary effect which neither advances nor inhibits religion).

130. *Nyquist*, 413 U.S. at 774-80.

131. *See id.*

132. *Nyquist*, 413 U.S. at 813 (Burger, J., dissenting).

133. *See Mueller*, 463 U.S. at 401 (incidental assistance to sectarian schools by facially neutral statute does not violate establishment clause).

134. *Id.*

135. *Id.*

request it to avoid invalidation under the primary effects test.[136] Hence, the state vouchers or tax deductions must be available for attendance in public as well as non-public schools. Unlike *Nyquist*, where only parents of students enrolled in non-public schools were assisted, the proposed free choice statute assists non-public schools as well as public school students, making the assistance to sectarian schools incidental.

A paradoxical triangle exists between the primary effects test of *Lemon*,[137] a proposed free choice statute made feasible by *Mueller*,[138] and the free exercise clause. The primary effects test sets parameters to invalidate government actions which have the primary effect of advancing or inhibiting religion.[139] However, a free choice statute, fashioned to meet the boundaries of *Mueller*, may indirectly advance religion while advancing all educational facilities. The resulting conflict is further complicated by the free exercise liberty interest protected by the Court in *Pierce v. Society of Sisters*,[140] which found that parents have the right to educate their children at the school of their choice.[141] To accommodate all three interests, it is necessary to adhere to the approach promulgated by Chief Justice Rehnquist in *Mueller*.[142] The Chief Justice refused to muddle establishment clause jurisprudence with the yearly burden of monitoring attendance records of non-public versus public schools to determine the primary effect of those benefitting from the facially neutral Minnesota statute.[143] Instead, Chief Justice Rehnquist made it evident that the primary effect of a statute would not turn on how many non-public schools were indeed sectarian, if the benefits were open to secular schools as well.[144] While *Mueller*'s bright line approach makes a free choice plan feasible under establishment clause boundaries, it also accommodates the free exercise liberty shielded by *Pierce*, placing the control of school choice back in the hands of parents. In addition, the Court in *Mueller* effectively avoids the placement of establishment clause precedent on roaming variables such as enrollment rates of non-public sectarian schools, which will change dramatically when the financial barrier to non-public schools is lifted

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136. *See Mueller*, 463 U.S. at 396-412 (Minnesota statute does not restrict its tax deduction benefits to parents of non-public school children).

137. *See Lemon*, 403 U.S. at 612-13 (three prong test to determine Establishment Clause violation).

138. *Mueller* makes possible free choice in that it allows incidental assistance to non-public sectarian school by a facially neutral statute. *Mueller*, 463 U.S. at 396-402.

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

140. 268 U.S. 510 (1925).

141. *Id.* at 535.

142. *See Mueller*, 463 U.S. at 396-402.

143. *Id.*

144. *Id. See* Smart, *Tax Deductions as Permissible State Aid to Parochial Schools*, 60 CHI. KENT L. REV. 657, 681 (1984) (after *Mueller* states are free to aid religious schools).

and a free market is allowed to operate.[145]

Opponents to free choice challenge the plan under the primary effects test of *Lemon* because financial assistance can potentially flow to religious institutions.[146] The Court has addressed the effect of state aid to individuals who ultimately apply the funds to gain religious instruction.[147] In *Witters*, the Court determined that if vocational rehabilitation financing is granted to all who qualify for assistance and is granted directly to them, the fact that the funds find their way to religious institutions does not have the primary effect of promoting or inhibiting religion.[148] The *Witters* decision was delivered for the majority by Justice Marshall, who wrote the strong dissent in the five to four decision of *Mueller*.[149] The *Witters* opinion suggests a change in position as to what constitutes "direct" financial assistance to religious institutions for Justice Marshall and the other Supreme Court Justices joining in Justice Marshall's dissent in *Mueller*.[150] In this apparent change of position on his stance on establishment clause jurisprudence, Justice Marshall did not discuss *Mueller* in the primary effects analysis of the statute at issue in *Witters*.[151] Although Justice Marshall avoided discussing *Mueller* in his opinion, *Witters* nonetheless solidified the precedent that state programs which are neutral in offering educational assistance to classes defined without men-

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145. *See* Gannett News Service, Sept. 14, 1990 at 1 (school boards fear demise of public school system if choice is adopted). Opposition by currently employed public school administrators is apparent in the over two million dollars spent by school boards in lobbying against a free choice bill promulgated by Oregonians for Educational Choice. *Id.*

146. *See id.*; *see also Mueller*, 463 U.S. at 404-05 (Marshall, J., dissenting) (money will flow directly to sectarian schools if state education funds were used for choice).

147. *See* Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481, 488 (1986) (statute providing aid to vocational rehabilitation program for blind man's training at Christian college upheld).

148. *Id.* at 488-89. While the Court has been careful to distinguish their decisions upholding statutes affecting state universities and those that apply to primary and secondary public schools, the division was lessened by *Mergens*. *Compare* Edwards v. Aguillard, 482 U.S. 578, 583-85 (1987) (statutory funds to sectarian primary and secondary school's invalidated) *with* Board of Educ. of the Westside Community Schools v. Mergens, __ U.S. __, __ 110 S. Ct. 2356, 2366, 110 L. Ed. 2d 191, 199 (equal access by religious group to secondary public school and state university programs do not violate establishment clause). California courts have already held that the payment of tuition directly to a student who then pays for tuition at a nonsectarian school does not violate the state constitution which prohibits direct or indirect state aid to parochial schools. *See*, Board of Trustees v. Cory, 145 Cal. Rptr. 136, 138 (1978).

149. *See Mueller*, 463 U.S. at 404 (Marshall, J., dissenting).

150. *Id.* (Marshall, J., dissenting). Justices Brennan, Blackmun, and Stevens joined in Justice Marshall's dissent. *Id.*

151. *Compare Mueller*, 463 U.S. at 404-05 (Marshall, J., dissenting) (primary effect of statute is to foster religion) *with Witters*, 474 U.S. at 481-90 (opinion by Justice Marshall apparently altering stand on what constitutes establishment clause violation).

tion of religion do not violate the primary effects test of *Lemon*.[152]

C. *Excessive Entanglement Test*

Because free choice legislation may allow for state standards of accreditation in order to provide information upon which parents can base their selection of schools, there may be some administrative role for the state in the free choice educational plan. However, this does not provide grounds for the excessive entanglement proscribed by the third prong of the *Lemon* test.[153] The Court has made clear that no entanglement of church and state exists when consistent supervision or control of the religious institution by the state is absent.[154] In addition, the free choice plan's objective is to advance the efficiency and cost-effectiveness of education—not to lessen the financial burden of parents utilizing non-public schools, as was the case in *Nyquist*, where excessive entanglement was found to exist. Much like the statute at issue in *Mueller*, the free choice plan does not limit its assistance to a predominately sectarian group and therefore passes the excessive entanglement test of *Lemon*.

V. CONCLUSION

While state school boards continue to resist the adoption of educational free choice legislation after the *Edgewood v. Kirby* decision, two schools of thought promote free choice as the only means of achieving effective and efficient schools. Free market economists suggest that the lack of competition in the monopolistic public school system should be replaced with a voucher or tax deduction system of financing education, thereby alleviating the need for the costly bureaucracy inherent in the present district system. Alternatively, free choice is also promulgated by those who maintain that their free exercise liberty interests are encroached by the refusal of the public school system to finance the education of children who attend sectarian schools to further religious convictions. Both the economic and free exercise contentions demanding education reform legislation must be cast as dictated by the equality standard established by *Edgewood* and not violate the parameters of establishment clause jurisprudence as prescribed by the three-prong test of *Lemon v. Kurtzman*.

Proposed free choice legislation will pass the secular purpose prong of the *Lemon* inquiry by stating that choice of educational institutions including

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152. *See Witters*, 474 U.S. at 491 (Powell, J., concurring) (*Mueller* should have been applied by Justice Marshall in *Witters*).

153. *See Lemon*, 403 U.S. at 613 ("statute must not foster an excessive government entanglement with religion").

154. *See* Walz v. Tax Comm'n, 397 U.S. 644, 705 (1970) (tax exemptions allowed to churches in same category with hospitals, libraries and scientific groups).

sectarian schools promotes plurality and individualism and therefore furthers the public interest protected by the free exercise clause. In order to pass the second prong of the *Lemon* test, the primary effect of the reform statute will necessarily be to provide financial assistance to both public and private school children. By benefitting a broad scope of individuals, as did the statute at issue in *Mueller*, free choice legislation will circumvent the demise suffered by the *Nyquist* statute under primary effect analysis, which suggested that the statute was too limited in its application to pass constitutional muster. Finally, the free choice statute must not include administrative state systems to perform regular monitoring or evaluation of non-public schools. Without these administrative duties by the state, excessive entanglement forbidden by the last prong of the *Lemon* test will successfully be avoided. By adhering closely to the guidelines intimated by the Court in the past interpretations of the *Lemon* establishment clause test, states will optimize the probability of their free choice legislation withstanding an establishment clause challenge.

VI. APPENDIX A

MEASURE ELEVEN

PARAGRAPH 1. The Constitution of the State of Oregon is amended by creating a new Article to be known as Article VIII-A and to read:

Article VIII-A

SECTION 1. The state shall improve basic education through competition and diversity by providing for choice between different schools and different kinds of schooling.

SECTION 2. The state shall institute an open enrollment plan for government schools by the 1991-1992 school year. The plan shall allow families to choose their children's schools, even if the schools are in other school districts. The Legislative Assembly shall enact by law the standards used to accept or reject applications under the plan. The Legislative Assembly shall enact by law the rules for financing open enrollment.

SECTION 3. The state shall provide a personal income tax credit for basic education expenses incurred after July 31, 1991. Any person who pays a student's education expenses during a school year is eligible for the credit, subject to these requirements:

(1) The student does not attend a government school during the school year.

(2) The student lives in Oregon when the expenses are incurred.

(3) The student is at least five years of age and under nineteen years of age when the expenses are incurred. The Legislative Assembly may authorize waivers of the age requirements.

(4) The student's resident school district is notified that the student will not be attending a government school. Notice must be given by May 1 before the school year or within 30 days after moving into the district. A district may waive this requirement.

(5) The maximum tax credit per student shall be $1,200 for tax year 1991. The maximum tax credit per student shall be $2,500 for tax year 1992 if the student is eligible in both school years overlapping the tax year, or $1,250 if the student is eligible in an overlapping school year. The maximum tax credits shall then be adjusted annually in proportion to changes in the cost of living. The Legislative Assembly by law may set higher maximums for students with special needs.

(6) Eligible expenses include tuition and any kind of educational good or service that a majority of Oregon's government schools subsidize or provide without charge.

(7) One hundred percent of eligible expenses may be subtracted from Oregon income tax owed, up to the maximum credit allowed. Documentation for claimed expenses must be submitted with each tax return that claims the credit.

(8) One person can claim credits for multiple students. Multiple persons

can claim credits for one student, but the sum of those claims cannot exceed the allowed maximum.
(9) The credit is refundable. A property claimed credit shall be paid even if it exceeds the tax otherwise owed.
(10) Secular and religious education are equally eligible for the credit. Institutional schooling and home schooling are equally eligible for the credit.
SECTION 4. Choice in basic education shall be financed as follows:
(1) The state shall establish an Educational Choice Fund. The state shall pay into the Educational Choice Fund a proportion of other state funds for basic education equal to the proportion of students using the basic education tax credit.
(2) For each student using the basic education tax credit for a school year, the student's resident school district shall pay into the Educational Choice Fund a base amount minus the amount of state and federal funds that the district would have received for the student. The base amount for the 1991-1992 school year shall be $3,000. The base amount shall then be adjusted annually in proportion to changes in the cost of living. The Legislative Assembly may set higher base amounts for students with special needs, in proportion to any higher tax credits allowed for such students.
(3) Monies in the Educational Choice Fund may be used to reimburse the state for its tax credit costs, to provide impact aid to school districts, or for tax relief.
SECTION 5. Genuine choice requires that educational alternatives be protected from excessive regulation. Accordingly, neither the state nor local governments shall create any new laws or rules regulating nongovernment basic education nor make existing laws or rules more restrictive or burdensome, unless such a measure is referred to the voters at a general election. This section shall not prevent the state or local governments from revising laws or rules to make them less restrictive.
SECTION 6. The Legislative Assembly shall enact legislation to carry out the provisions hereof. This article shall supersede all conflicting constitutional provisions.

VII. APPENDIX B

EQUAL OPPORTUNITY FREE CHOICE SYSTEM OF PUBLIC FREE SCHOOLS AN ACT RELATING TO PUBLIC AND PRIVATE EDUCATION; FUNDING; LOCAL AUTONOMY; PRIVATIZATION OF PUBLIC EDUCATION:

BE IT ENACTED BY THE LEGISLATURE

Section 1.01. The short title of this Act shall be the EQUAL OPPORTUNITY FREE CHOICE EDUCATION PROGRAM.

Section 1.02. *Definitions.* The following definitions apply to this Act:

a. Public School. Any school operated which is solely administered, operated, and staffed by state or local governments and their employees.

b. Free School. A non-governmental educational establishment for the general education of elementary and secondary students between the general scholastic ages, which accepts student scholarships funded by the State under this program in lieu of tuition.

c. Home School. The provision of education directly to the child by the parent, custodian or guardian, in a home setting.

d. Private School. A non-governmental educational establishment which does not accept state scholarships funded by the State under this program in lieu of tuition.

Section 1.03. *Public Policy and Purpose.* The purpose of this legislation is to respond to inefficiencies in the current public school system, which have seriously hindered the general diffusion of knowledge measured by student performance, especially that of minorities. It is the policy of the State that a suitable and efficient system of publicly funded schools be established and maintained. Providing public funded education is a constitutionally mandated duty, but public education can be provided through government operated schools as well as privately operated entities, as long as public funds are available to all schoolchildren to pay for an education at public expense. Because a monopoly is not an efficient way to provide education, this State no longer desires to have a monopoly on the provision of public education, but shall encourage innovation, freedom of choice, parental involvement, and autonomous decision making for each school as the solution to the severe deficiencies in education produced by its previous government monopoly. This legislation will create an alternative public educational system of free schools to be operated concurrently with the present public education system. The combination of public and free schools constitutes a public free school system. Public schools will be publicly operated, free schools will be privately operated. Free schools will be free of any regulations not essential for the preservation of the liberties and rights of the people and available to all on a free tuition basis through public education scholarships funded by the state.

Section 2.01. *Parental Choice.* Notwithstanding any other law, every school age child shall be entitled to attend the public school, private school, or home school chosen for them by their parent, guardian or custodian, subject to availability, regardless of residence. A student may exercise his own choice after reaching the age of majority. Each child's choice will be registered with the central office of the public school district of his residence in order to obtain public financing. A private school which does not accept any state scholarships from any student is not subject to the provisions of this Act, however, acceptance of any state scholarship from any student shall subject a private school to the provisions of this Act and such schools shall be known as free schools. All public schools are also subject to the provisions of this Act.

Section 3.01. *Financing.* Notwithstanding any law or Education Code provision to the contrary, each public school district currently existing or hereafter created under the Education Code, shall obtain its public financing based on the Education Code, however, average daily attendance will include all school age children residing in said district and registering their choice with the district, even if they do not choose to attend school at a public school in their district of residence. The total funding received by each district from state and local sources will be divided on a category of student basis according to formulas to be adopted by the State Board of Education which may include different amounts for different categories of students. The total per student funding amount, less a reduction for capital outlays, and a reasonable reserve for each public school district, shall constitute the child's public education scholarship. This scholarship will be divided into monthly installments and be paid by the 10th school day of each month. The child's public education scholarship is the entitlement of the child, under the supervision of the child's parent, guardian or custodian, not that any school of any kind, and shall be paid to the school solely as a means of administrative convenience. No public school shall have any direct right or entitlement to receipt of the public education scholarship based solely on residence.

Section 3.02. *Conditions for Receipt of Funds by Free Schools.*

a. The per child allocation established in Section 3.01 constituting the child's education scholarship shall be the entitlement of each child regardless of which school he attends, public or private. Such public education scholarship is solely the entitlement of the child and no funds shall be paid directly to any free school, unless it be at the direction of the student, their parent, guardian or custodian.

b. The United States Constitution and the Texas Constitution both guarantee the right to the free exercise of religion of the parents and child, through their parent, guardian or custodian, and such right shall not be abridged by the state or any government official, whether executive, legisla-

tive or judicial. The purpose of this legislation is not to aid or inhibit religious education, nor is it to prohibit the free exercise of religion, but to neutrally provide equal educational benefits to all citizens, regardless of religious affiliation or lack thereof.

c. Any free school which complies with the following provisions and in which the child is enrolled on the first day of the month shall receive from the child's resident public school district the child's monthly public education scholarship allocation. In order to receive the child's monthly public education scholarship allotment, the school selected by the child must certify to the child's resident district that it has complied with the following conditions:

a. If the school has more applicants than positions, it must fill the positions by lottery. All positions in public and free schools must be filled by lottery the first year of this program, or the first year a school is in operation or the first year a private school accepts funds under this plan, and becomes a free school, whichever is later, but after said first year for each school, that school may give preference to current students for the sake of continuity, and preference may be given to students residing in the same household for the sake of custodial convenience. Schools may conduct their lotteries on May 1 for the fall school year or monthly thereafter for as long as necessary to fill all positions.

b. If the free school accepts any state public education scholarship money, it must charge no individual student more than the amount of the child's scholarship.

c. No free school accepting state public education scholarship funds may refuse to admit students on the basis of residence, religion, race, national origin or ethnic background.

d. Students attending free schools shall be tested in accordance with Sec. 6.01.

Section 3.03. *Who May Operate Schools.* Any non-profit or profit corporation, partnership, or association, may operate a free school and accept student scholarship funds, including without limitation, schools founded by parents, teachers, or others. A parent, custodian or guardian may also operate a home school for their own children. Public schools shall be created and governed in accordance with the Education Code, except to the extent in conflict with this Act.

Section 3.04. *Home Schools.* A child who is enrolled in a home school may receive his public education scholarship paid directly to the parent, guardian or custodian, from the resident public school district. Home schools need not comply with Section 3.02, but must submit to the requirements of Section 6.01 as a condition to continued receipt of funds.

Section 4.01. *Non-State Action and Free School Autonomy.* Nothing in

this legislation shall turn a free school, or home school which accepts a child's public education scholarships into an agent or arm of the government, and the conduct of such institutions shall be governed by the law governing private conduct, not state action. The purpose of this legislation is to allow freedom to the private sector to respond to educational needs without excessive government control and shall be liberally construed to that end. Free schools are not subject to any educational regulations or statutes except those expressly set forth in this Program, or as set forth in Sec. 6.01.

Section 5.01. *Public School Autonomy.* In order to allow free competition between public and private entities in education, public schools may file a request for an exemption from all or part of the State Education Code provisions. A public school board may apply for exemption for the entire district, or each individual school may file for an exemption if 75% of the teachers at that school so indicate by written anonymous ballot, with voting conducted by the superintendent or a delegated employee other than the principal. The exemption will automatically take effect 30 days after the request for exemption is filed with the Commissioner of Education. An exemption may be revoked after one year of poor student performance determined by the Commissioner of Education upon 30 days notice to the district or individual school.

Section 6.01. *Accountability.* In order to allow innovation and local autonomy while insuring accountability for the results, the State Board of Education (SBOE) will conduct and administer at public expense at least two standardized norm referenced tests on those subjects it finds to be essential to the preservation of liberty and the rights of the people for each grade level, one near the beginning and one near the end of the school year. The results for public and free schools will be published by the State Board of Education, and copies of the statewide scores must be made available for parental inspection at each public or free school. The State can achieve sufficient curricular control through testing, publication of results, and parental control, without further excessive governmental regulation. No regulation of free schools other than in this statute shall be allowed, except for those schools whose student scores register in the bottom thirty percent of student achievement gains between the beginning and ending tests. The Commissioner of Education may investigate the reasons for such poor free school performance. After reasonable notice of deficiencies and opportunity for correction, and failure to do so, if such achievement gains are below those of all public schools in the area, then the Commissioner may prohibit the receipt of future scholarships by that free school.

Section 7.01. *Criminal Penalties.* Appropriate theft or embezzlement penalties for false reporting.

Section 8.01. *Regulatory Authority.* The State Board of Education may promulgate only those regulations which are necessary and essential to the

effective implementation of this Act, consistent with its express provisions and legislative purpose. Such regulations, if any, will be subject to strict scrutiny by the Courts.