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Educational Vouchers in Indiana? – Considering the Federal and State Constitutional Issues

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EDUCATIONAL VOUCHERS IN INDIANA? – CONSIDERING THE FEDERAL AND STATE CONSTITUTIONAL ISSUES

I. INTRODUCTION

Calls for educational reform continue to echo throughout the nation, sounding from social liberals and religious conservatives, presidents and parents, politicians and pundits, educators and think tanks. Because these calls come from such diverse voices, the reform proposals and programs vary widely.

Consider the call of the two most recent presidents. President Clinton addressed education reform in his 1999 State of the Union Address:

You know, our children are doing better . . . . But there's a problem. While our 4th graders outperform their peers in other countries in math and science, our 8th graders are around average, and our 12th graders rank near the bottom. We must do better. Now, each year the national government invests more than $15 billion in our public schools. I believe we must change the way we invest that money, to support what works and to stop supporting what does not work . . . .

[L]ater this year, I will send to Congress a plan that, for the first time, holds states and school districts


2 For a discussion of American Presidents’ calls for educational reform, see infra Section II.B.3.b. Minorities and lower-class parents yearn for a better educational system for their children. William J. Bennett et al., A Nation Still at Risk, 90 J. AM. CITIZENSHIP: POL’Y REV. 2, ¶22 (July-Aug. 1998) <http://www.policyreview.com/jul98/nation.html>. However, most of these parents lack the resources to provide their children with a quality private education. Id. For a discussion of Indianapolis’ Mayor Steven Goldsmith’s assessment of the educational system in Indianapolis, see infra Section II.A.4. For a discussion of numerous think tanks’, pundits’, and educators’ approaches to improving American schools, see infra Section II.B.3.a.

3 For a discussion on the available “school choice” reform programs, see infra Section II.A.
accountable for progress and rewards them for results. My Education Accountability Act will require every school district receiving federal help to take the following five steps.

First, all schools must end social promotion.

But we can’t just hold students back because the system fails them. So my balanced budget triples the funding for summer school and after-school programs, to keep a million children learning .

Second, all states and school districts must turn around their worst-performing schools—or shut them down .

Third, all states and school districts must be held responsible for the quality of their teachers .

Fourth, we must empower parents, with more information and more choices. In too many communities, it’s easier to get information on the quality of the local restaurants than on the quality of the local schools . And parents should be given more choices in selecting their public schools .

Fifth, to assure that our classrooms are truly places of learning, and to respond to what teachers have been asking us to do for years, we should say that all states and school districts must both adopt and implement sensible discipline policies .

If we do these things—end social promotion; turn around failing schools; build modern ones; support qualified teachers; promote innovation, competition and discipline – then we will begin to meet our generation’s historic responsibility to create 21st century schools.⁴

Former President George Bush also addressed educational reform during his term as President:

We must create an incentive to improve education by promoting school choice. For far too long, we've shielded our schools from competition, allowed the system a damaging monopoly power over students. Just as monopolies are bad for the economy, they're bad for our kids. Every parent should have the power to choose which school is best for his child, public, private or religious. 5

Both presidents lauded the possibilities of school choice as one of the solutions to some of the problems in the American educational system. 6 These proposals, while not new, are gaining supporters throughout the country.

Calls for educational reform resonate because of the alarm generated by continued poor performance by American students on standardized tests in comparison to students in other countries. 7 Since 1983, over ten

6 The term "school choice" refers to a parent choice of which school their children will attend. THE SCHOOL-CHOICE CONTROVERSY: WHAT IS CONSTITUTIONAL? 49 (James W. Skillen ed. 1993) [hereinafter CONTROVERSY]. The school may either be inside or outside of the families' residential district. Id. The parents also have the ability to decide whether to send their children to a public or private, sectarian or non-sectarian school. Id. Besides granting parents a choice, school choice also offers numerous alternative educational opportunities not available in the traditional public school experience. Paul E. Peterson, A Report Card on School Choice, COMMENTARY MAG., Oct. 1997, at ¶5. <http://www.commentarymagazine.com/9710/peterson.html>. School choice will not dismantle the 150-year-old public school system. Id. at ¶25. Rather, school choice will be a gradual process, focusing on the educational institutions most in need of improvements. Id.
7 Paul E. Peterson, School Choice: A Report Card, 6 VA. J. SOC. POL'Y & L. 47, 47-48 (1998). Numerous American voters are saying that their biggest concern is school choice. Thomas Toch, Outstanding High Schools, U.S. NEWS & WORLD REP., Jan. 18, 1999, at 46, 48. Although most statistics about the current state of the American educational system are grim, some schools are demonstrating academic excellence. Id. U.S. News and World Report and the National Opinion Research Center at the University of Chicago surveyed 1,053 high schools in metropolitan areas (Boston, Chicago, Dallas, Detroit, Fort Worth, Atlanta, and New York) searching for outstanding high schools. Id. The criteria consisted of high attendance rates, a core college preparatory curriculum, high academic standards, highly qualified and knowledgeable teachers, a strong mentoring program for new teachers, a strong partnership between the school and parents, and caring and encouraging
million American students have entered the twelfth grade without being able to read.\textsuperscript{8} Almost twenty million American high school seniors were unable to calculate elementary math problems, and twenty-five million twelfth grade students could not identify significant American historical events.\textsuperscript{9} In 1991, a study by the National Assessment of Educational Progress showed that approximately fourteen percent of public school eighth grade students could only perform seventh grade level mathematics, while only seventy-two percent of public school fourth grade students were capable of solving third grade math problems.\textsuperscript{10} The recent Third International Math and Science Study demonstrated that American students struggle with basic skills.\textsuperscript{11} The study found that, out of twenty-one developed nations, American twelfth grade students placed sixteenth in science, nineteenth in mathematics, and last in physics.\textsuperscript{12} Coupled with this minimal knowledge in basic math and science is the fact that the total number of high school drop-outs between administrators. \textit{Id.} at 49. Based on these criteria, only ninety-six schools gained outstanding institution status. \textit{Id.}

\textsuperscript{8} U.S. Taxpayers Not Getting Their Money's Worth out of Public Education, Says IPI, U.S. NEWSWIRE, Oct. 1, 1999. According to the National Assessment of Education Progress, between 1974 and 1991 high school students showed no improvements in math, and their progress dropped in reading and science. \textit{Id.} at \textsuperscript{\textsc{f1}}. During this same time period, elementary students showed minimal improvements in reading and mathematics. \textit{Id.}

\textsuperscript{9} Peterson, \textit{supra} note 6, at \textsuperscript{\textsc{f}3}. In 1986, one-third of high school students did not know that "the Declaration of Independence marked the American colonists' break from England." Richard S. Albright, Note, \textit{Educational Voucher Statutes: Does the Rosenberger Analysis Provide a Modern Constitutional Foundation for Legitimacy?}, 74 U. DET. MERCY L. REV. 525, 532 (1997). Despite the shocking statistics demonstrating students' lack of fundamental knowledge, the system does not punish them. Richard Rothstein, \textit{Where Is Lake Wobegon, Anyways?}, 80 PHI DELTA KAPPAN 195 (1998). Louis Gerstner, Chief Executive Officer of IBM, stated that "[t]oo often schools reward students merely for showing up, not for proficiency. Because educators do not define the goals students must achieve to advance from grade to grade, students who cannot read, write, or compute are promoted." Louis V. Gerstner, Jr., \textit{Don't Retreat on School Standards}, N.Y. TIMES, Dec. 30, 1995, at A02. In another setting, Sandra Feldman, president of the American Federation of Teachers, reached the same conclusion as Gerstner. Rothstein, \textit{supra} at 195. Feldman concluded that schools are sending students to the next grade level who have not developed solid skills in reading, writing, and arithmetic. \textit{Id.} In order for students to develop these skills, Feldman suggested more qualified teachers, intensive help to struggling children, and better preschool programs. \textit{Id.}

\textsuperscript{10} See Albright, \textit{supra} note 9, at 531.


\textsuperscript{12} \textit{Id.}
1983 and 1998 soared to over six million Americans. These alarming national statistics mirror those in the state of Indiana.

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13 See Bennett et al., supra note 2. A report released on November 23, 1998, by the Organization for Economic Cooperation and Development, indicated that currently only seventy-two percent of all American high school students graduate. Tamara Henry, USA Falling Back in School; Graduation Rates Lag Europe, Asia, USA TODAY, Nov. 24, 1998, at 1D. In comparison to the twenty-nine wealthiest countries surveyed, Mexico is the only country that ranks below the United States in graduation rates. Id.

14 Indiana high school juniors have consistently performed poorly on national assessment exams. James K. Baker, Given a Choice – Except in Educating Our Children, INDIANAPOLIS STAR, Nov. 8, 1993, at A13. In 1992 and 1996, Hoosier students ranked forty-seventh among students in the fifty states in their combined average math and verbal Scholastic Assessment Test scores. Id. See also Susan Miller, Technical Careers at the Top of the Class, TRIB. BUS. WEEKLY, Jan. 6, 1997, at 1. Indiana high school students’ SAT scores rose a few points in 1998, placing Indiana 42nd in national rankings. Editorial, Low SAT Scores, INDIANAPOLIS STAR, Sept. 2, 1999, at A18. However, the average SAT score for 1999 graduates dropped from the scores of the 1998 graduating class. Id. Currently, Indiana is 45th in national ranking for SAT scores. Michele McNeil Solida, Indiana Results on SAT Decline, INDIANAPOLIS STAR, Sept. 1, 1999, at A1. The five states with lower average SAT scores are South Carolina, Georgia, North Carolina, Pennsylvania, and Texas. Editorial, supra at A18. Bruce W. Galbraith, Headmaster at Park Tudor, Indianapolis, stated, “Whether we’re 45th or 46th as a state is irrelevant. Being in the 40s is relevant. Indiana needs to address that the product of our educational system is in the bottom quintile of our country.” John J. Shaughnessy, State’s Poor SAT Ranking Is a Matter of Perspective: Depending on Your Outlook, The Results Are Good, Bad or Irrelevant, INDIANAPOLIS STAR, Sept. 12, 1999, at A1. Indiana high school students also perform poorly on Indiana’s proficiency test, the Indiana Statewide Testing for Educational Progress Exam Plus (ISTEP+). John Krull & Gregory Weaver, More Money Sought to Aid Teens Who Failed Test; Teachers Union Calls on Legislature to Appropriate Funds to Help Correct Poor Showings on ISTEP Plus Exams, INDIANAPOLIS STAR, Jan. 9, 1998, at B1. Beginning with the graduating class of 2000, every third, sixth, eighth, and tenth grade student in Indiana must take the ISTEP+. Stacey Fuemmeler, Problems Are Apparent, but Solutions Have Proven to Be More Elusive, EVANSVILLE COURIER, May 10, 1998, at A1. After looking at the 1997 ISTEP+ results, experts said that poverty plays a large factor in poor student performance on these standardized tests. Id. Steve Gorman of the National Assessment of Education Program said that schools with over ninety percent lower-income students score an average of 60 points lower (on a 500 point scale) than schools with middle-class students do on the ISTEP+. Id. Indiana requires all public school sophomores to pass the ISTEP; the students must pass the ISTEP+ prior to graduation. Andrea Neal, A System Failing Students, INDIANAPOLIS STAR, Feb. 12, 1998, at A16; Barb Albert, District Delaying ISTEP Test for Some Struggling High School Students Aren’t Taking Graduation Exam Because of Officials’ Differing Policies, INDIANAPOLIS STAR, Jan. 23, 1999, at A1 [hereinafter Albert, Delaying ISTEP]. Indiana requires students who fail the test to take remedial classes. John M. Flora, ISTEP Passing Rates Decline, INDIANAPOLIS STAR, Jan. 27, 1999, at N1. The students then have five chances to pass the ISTEP+ prior to graduation. Michele McNeil, Some Face ISTEP-Plus a 3rd Time, INDIANAPOLIS STAR, Jan. 29, 1999, at S1. Although Indiana offers five chances to take the test, some students are more prone to drop out of high school because they feel like they are failures. Albert, Delaying ISTEP, supra at A1. Only fifty-four percent of Indiana sophomores in 1997 passed the ISTEP+ exam. Krull & Weaver, supra at B1. The Indiana
After hearing the alarming educational statistics, policymakers, educators, and pundits of all types began to advocate various remedies to this situation. Many, including President Clinton and President Bush, advocate school choice.\(^{15}\) Currently, a number of states are experimenting with nontraditional educational settings, some offering parents an array of schools from which to choose.\(^{16}\) In addition to traditional public schools and parochial schools, parents may choose to

Department of Education calculates that of the 67,000 Indiana students in the Class of 2000, seventeen percent still need to pass the language arts portion of the ISTEP+ and twenty-eight percent need to pass the math section. Barb Albert, *Many Students Fail ISTEP Retest, Educators Say They Won't Lower Standards, But Boosting Students' Morale Will Be Tough*, INDIANAPOLIS STAR, Feb. 19, 1999, at A1 [hereinafter Albert, *Many Students Fail*]. J. David Young, President of the Indiana State Teachers Association, responded to these test results by stating that, collectively, we have failed the children of Indiana. Krull & Weaver, *supra* at B1.

The City of Indianapolis exemplifies the problem-plagued Indiana educational system. Low graduation rates and low standardized test scores highlight the struggles of the Indianapolis Public School (IPS) system. Laura Winningham, *Better Return on Education Investment*, INDIANAPOLIS STAR, Oct. 15, 1998, at A19. In 1998, IPS students’ SAT scores were the lowest in Indiana. Ruth Holladay, *Voucher Case Only Provides Supporters with More Drive*, INDIANAPOLIS STAR, Sept. 2, 1999, at C1. Approximately one-third of all IPS students do not graduate from high school. Leonard N. Fleming, *Report Rips IPS for Low Skills, Graduation Rate*, INDIANAPOLIS NEWS, Oct. 21, 1997, at A1. In 1997, the Hudson Institute, an Indianapolis Think Tank, and the Community Leaders Allied for Superior Schools prepared a report analyzing the education in Indianapolis. *Id.* The study’s results show that schools were not demanding high expectations from their students. *Id.* Only a few students were enrolled in honors classes. *Id.* The report compared the Scholastic Assessment Test scores of IPS students with other schools in Indiana. *Id.* IPS consistently came in last place in each category and grade level. *Id.* The report predicts that for this generation of students approximately 15,000 will not earn their high school diploma by age eighteen. *Id.* One possible reason for these low graduation rates is the students’ performance on the ISTEP+. Barb Albert & Leonard Fleming, *Majority of Sophs at IPS Fall Short ISTEP Math, Language Arts Tests Trip up 79%,* INDIANAPOLIS NEWS, Jan. 8, 1998, at A1. In 1997, only twenty-one percent of IPS sophomores passed the language arts and mathematics portion of the ISTEP+. Neal, *supra* at A16. The results for the 1998 ISTEP+ are worse than the 1997 results. See Thomas P. Wyman, *Many Students Fail ISTEP Retest Lawmakers Drops Effort to Eliminate 10th-grade Exam as Graduation Requirement*, INDIANAPOLIS STAR, Feb. 19, 1999, at A1. On the students’ second attempt to take the required exam, more Indianapolis public school students failed than passed. Albert, *Many Students Fail, supra* at A1.


\(^{16}\) *Id.*
send their children to magnet, alternative, or charter schools.\textsuperscript{17} Allowing parents and students to choose their schools is one way that policymakers, educators, and others are attempting to help American students improve academically.\textsuperscript{18}

School voucher programs, a type of school choice program, represent one current attempt to address these concerns.\textsuperscript{19} Typically, in school voucher programs, state governments issue vouchers to parents of school children, who may then choose a school, either public or private, at which to redeem the voucher.\textsuperscript{20} This voucher pays a significant portion of a student's educational expenses for one school year.\textsuperscript{21}

Despite the alternative, school choice programs, in general, are subjected to serious criticism because of concerns regarding potential academic, social, and economic consequences. Some opponents of school choice argue that these programs will result in racial resegregation.\textsuperscript{22} Poor and minority students who do not have the means to attend magnet or other nontraditional schools will have to remain at inner-city public schools which may be underfunded, may employ less qualified teachers, may have fewer academic resources, and may provide limited opportunities for students.\textsuperscript{23} Other critics express concern that school choice alternatives will take the "brightest" students away from the public schools or that ultimately some public schools will have to

\textsuperscript{17} For a discussion on alternative schools, see infra Section II.A.1.a. For a discussion on magnet schools, see infra Section II.A.1.b. For a discussion on charter schools, see infra Section II.A.3.

\textsuperscript{18} For a discussion on school vouchers as one way to provide parents a choice, see infra Section II.B.

\textsuperscript{19} Scott A. Fenton, \textit{School Voucher Programs: An Idea Whose Time Has Arrived}, 26 \textit{CAP. U. L. REV.} 645, 645 (1997). Opponents of school vouchers argue that, at best, voucher programs will help a small group of students to gain a better education; at worst, the voucher programs will only be educating a small, select group of students while discarding the rest of the students in need of a better education. Al Ramirez, \textit{Vouchers and Voodoo Economics}, \textit{EDUC. LEADERSHIP}, Oct. 1998, at 1.

\textsuperscript{20} Fenton, supra note 19, at 1.

\textsuperscript{21} \textit{CONTROVERSY}, supra note 6, at 32. Numerous types of voucher systems exist. Andrew S. Latham, \textit{School Vouchers: Much Debate, Little Research}, \textit{EDUC. LEADERSHIP}, Oct. 1, 1998, at 82. For example, a voucher may be offered to all students or only those students from lower-income families. \textit{Id.} The vouchers may be redeemed at any school (public or private, sectarian or non-sectarian), or the voucher may only be redeemed at a public school within a specific school district. \textit{Id.}

\textsuperscript{22} Latham, supra note 21, at 82.

\textsuperscript{23} See Bennett et al., supra note 2. School choice may lead to increased separation of students by cultural background, race, and social class. Sally Bomotti, \textit{Why Do Parents Choose Alternative Schools?}, \textit{EDUC. LEADERSHIP}, Oct. 1, 1996, at 30, 32.
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close. Others argue that school choice simply will not improve overall student performance.

Voucher programs also raise a complex set of legal questions under the First Amendment to the U.S. Constitution and under the religion clauses of state constitutions. This Note focuses on the legal aspect of school voucher programs, and whether school voucher programs would be constitutional under the federal Establishment Clause and under Article I, sections 4 and 6 of the Indiana Constitution. While various school choice alternatives and the issues they raise merit individual consideration, this Note analyzes only the federal and state constitutional questions that would arise if the Indiana legislature chose to establish an educational voucher system in Indiana.

Section II provides historical background regarding education reform, school choice alternatives, and voucher programs. Section III analyzes educational voucher programs under the U.S. Constitution. Section IV analyzes the constitutionality of voucher programs under the Indiana Constitution. Finally, Section V proposes a model voucher program that could be implemented in Indiana.

II. SCHOOL CHOICE AND SCHOOL VOUCHERS

Before analyzing the legal issues presented by voucher programs, this Note begins by providing a background of the types of school choice alternatives and the history of school vouchers. This Section first discusses the types of school choice alternatives, including intradistrict and interdistrict school choice and charter school programs as well as the school choice alternatives available in Indiana. This Section also traces

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24 Peterson, supra note 6, at ¶6. The American Federation of Teachers has argued that, if private schools are given the option to select the best students, the weaker schools will incur greater hardship. Latham, supra note 21, at 82. This consequence would be a result of the "brightest" students being pulled from the weaker schools. Id.
25 Barbara Miner, Why I Don't Vouch for Vouchers, EDUC. LEADERSHIP, Oct. 1, 1998, at 5. Some opponents to school choice claim that these programs only save a handful of students, while the majority will have to remain in public schools. Id.
26 Peterson, supra note 6, at ¶6. Some opponents of state-funded voucher programs argue that public aid could end up in the coffers of the religious institutions that run the parochial schools (Jewish, Catholic, Baptist, Christian Reformed, etc.). Id.
27 See infra notes 31-172 and accompanying text.
28 See infra notes 173-313 and accompanying text.
29 See infra notes 314-95 and accompanying text.
30 See infra notes 396-413 and accompanying text.
31 See infra notes 33-74 and accompanying text.

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the history of school vouchers, discussing modern proposals and voucher programs that are currently in place.32

A. School Choice

"School choice" has various aspects and takes various forms. Parents and students may choose between a public or private school, based on factors such as where the family has decided to live and the family's economic circumstances.33 In addition to the parents' choices, students have choices pertaining to the courses of study offered at their schools.34 States already offer a variety of school choices, each providing a unique educational experience for students.35 The types of school choice include intradistrict schools (alternative and magnet schools), interdistrict schools, and charter schools.

1. Intradistrict school choice

Although school districts approach intradistrict school choice differently, most Americans are familiar with the general concept of intradistrict school choice which refers to choices already available to the parents within the school district in which they reside.36 Some school districts provide parents with the choice to send their children to any

32 See infra notes 75-172 and accompanying text.
33 In broad terms, school choice allows parents to pick the school that their children will attend. Toch, supra note 7, at 48. Thus, the government is giving parents control to choose where the public dollars designated for their child's education will be spent. Clint Bolick, School Choice, the Law, and the Constitution: A Primer for Parents and Reformers, THE HERITAGE FOUNDATION, ¶ 12 (last modified Sept. 19, 1997) <http://www.heritage.org/library/categories/education/bg1139.html>. School choice differs considerably from the traditional concept of assigning children to schools based on where they live. Camilla Lehr, School Choice: A Handout for Parents, ¶ 1 (visited Feb. 12, 1999) <http://www.naswebo.org/services/cq/sch_choice.html>. Although school choice provides many options for the students and parents, school choice does not guarantee that a student will attend the school he or she prefers. Id. Enrollment quotas and racial desegregation laws may dictate whether a student is able to attend his or her first school of choice. Id. See also Richard F. Elmore, Choice in Public Education, The POLITICS OF EXCELLENCE AND CHOICE IN EDUCATION, 79, 83-84 (William Lowe Boyd & Charles Taylor Kerchner eds., 1988). C. Lee Cusenbary, Jr., Educational Choice Legislation After Edgewood v. Kirby: A Proposal for Clearing the Sectarian Hurdle, 23 St. Mary's L.J. 269, 275 (1991).
34 Elmore, supra note 33, at 83-84.
35 See generally P.W. COOKSON, SCHOOL CHOICE: THE STRUGGLE FOR THE SOULS OF AMERICAN EDUCATION (1994). School choice alternatives are only limited by the imaginations of those committed to improving America's educational system. Bolick, supra note 33, at ¶ 2.
36 Philip T.K. Daniel, A Comprehensive Analysis of Educational Choice: Can the Polemis of Legal Problems Be Overcome?, 43 DEPAUL L. REV. 1, 10 (1993); see generally Lehr, supra note 33.
school within the district, while other districts have stringent guidelines requiring students to attend specific schools.\textsuperscript{37} Some school districts offer alternative schools and magnet schools as additional forms of intradistrict school choice.\textsuperscript{38}

a. Alternative Schools

Alternative schools offer non-traditional learning opportunities to students.\textsuperscript{39} These schools provide special instruction to minority students or to students with special needs who, for instance, have severe difficulty in mastering basic skills, are potential or actual dropouts, or have disciplinary problems.\textsuperscript{40} However, because many students are sent to alternative schools because of disciplinary problems, or because they are classified as emotionally disturbed or chronic truants, many teachers find these students detract from the educational process and avoid teaching in the alternative school context, if possible.\textsuperscript{41} Parents are leary of alternative schools for the same reasons.

b. Magnet Schools

Magnet schools, presently flourishing throughout the country, attract students with exceptional abilities in certain academic disciplines.\textsuperscript{42} Magnet schools have three primary characteristics. First,
the curriculum is specifically oriented to one particular academic discipline, such as mathematics, science, fine arts, or foreign languages.\textsuperscript{43} Second, a select group of qualified educators teach the students.\textsuperscript{44} Third, magnet school administrators select the enrolled students from a variety of school districts.\textsuperscript{45}

Originally developed in an effort to desegregate suburban schools,\textsuperscript{46} magnet schools sought to attract a racially diverse student population.\textsuperscript{47} In the 1960s, magnet schools placed limits on the number of minority students who could attend so that white students would continue to enroll.\textsuperscript{48} Currently, highly motivated students are still attracted to these magnet schools because of the alternatives the schools provide to traditional curricular offerings.\textsuperscript{49}

2. Interdistrict School Choice

Some states provide parents with the opportunity of interdistrict school choice.\textsuperscript{50} Interdistrict school choice allows parents to send their children to other schools within the resident state if certain qualifications are met.\textsuperscript{51} First, the student transfers cannot adversely affect state desegregation mandates.\textsuperscript{52} Second, the receiving districts must agree to accept transfer students.\textsuperscript{53} Third, the receiving districts must have ample space within their schools to allow for transfers.\textsuperscript{54}


\textsuperscript{44} Id. at 380.

\textsuperscript{45} Id. at 381.

\textsuperscript{46} See Daniel, supra note 36, at 11.


\textsuperscript{48} See Daniel, supra note 36, at 12.

\textsuperscript{49} See Grant Gives Six Magnet Schools a Boost; $2.37 Million Grant Will Go Toward Improving Curricula and Standards, \textit{Indianapolis Star}, July 18, 1998, at B3 [hereinafter Grant].

\textsuperscript{50} Toch, supra note 7, at 48. Approximately twenty-four states are allowing 7.4 million high school students to attend classes in other school systems without paying tuition. \textit{Id.}

\textsuperscript{51} See Daniel, supra note 36, at 13. The concept of unlimited interdistrict choice is the same as statewide open enrollment. Lehr, supra note 33, at ¶1.

\textsuperscript{52} Daniel, supra note 36, at 13.

\textsuperscript{53} Id.

\textsuperscript{54} Id. at 13-14.
3. Charter Schools

Since 1991, charter schools have been one of the fastest growing developments in school reform programs.55 Designed and operated by educators, community leaders, educational entrepreneurs, and parents, charter schools are independent public schools that offer many advantages over the traditional public schools, including improved curriculum, innovative teaching methods, and greater community involvement.56 Because charter schools are part of the public school system, each state provides public funds to these schools.57 These funds, while originally set aside for use at traditional public schools, are diverted to the charter school when a child transfers to that school.58 The state will release a charter school from the bureaucratic control that governs traditional public schools as long as one condition is satisfied: the charter school must improve student performance within a specified period of time, usually five years.59 If student performance does not improve during this time, the school loses its charter.60 Currently, thirty-

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57 Id.

58 Id.

two states have charter schools, and over one thousand charter schools are in operation nationwide.  

4. School Choice in Indiana

Indiana Governor Frank O' Bannon supports intradistrict public school choice and public charter schools; however, the majority of proposed school choice bills have not passed during O' Bannon's administration. Former Indianapolis Mayor Steve Goldsmith, acknowledging that the Indiana residents who most strongly advocate parental choice in education are minorities and the indigent, also advocated parental choice. Because middle- and upper-class families have the ability to leave inner city areas, the families from the lower-class are the strongest advocates for school choice. These families perceive that the state educational system has trapped them and their children in a "sub-par-education" system due to their socio-economic status.

Currently Indianapolis is leading the state in its experiments with various school choice alternatives, including magnet schools and private educational scholarships. Magnet schools in Indianapolis provide motivated students with unique educational experiences, including

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61 See Currents & Books, supra note 56, at B7. Student improvement is seen in charter schools that pursue educational excellence with the enthusiasm that many public schools lack. Bazaar, supra note 59, at 35.


63 Leonard N. Fleming, Mayor Backs Ideas on IPS After Listening to Public, Goldsmith Will Focus on Support of School Choice, INDIANAPOLIS STAR, Dec. 2, 1997, at D1; Winningham, supra note 14, at A19. See also Baker, supra note 14, at A13. Parent Power, an Indiana parent education involvement and awareness project, conducted a survey of 600 parents of Indiana school children. Id. When asked if parents wanted to choose their child's school, seventy-nine percent desired this option. Id. Sixty-one percent of parents polled also supported using public tax funds to assist in paying for private and parochial school tuition. Id.

64 Winningham, supra note 14, at A19.

programs in the performing arts, life sciences, environmental sciences, communications, arts, and health education. Typically these programs are not offered in other Indianapolis schools; therefore, students throughout the Indianapolis Public Schools (IPS) system are eager to participate in the magnet school alternative.

In addition to offering unique educational experiences for gifted students, Indianapolis also provides a limited number of lower-income students with the opportunity to attend private schools. J. Patrick Rooney created the Educational CHOICE Charitable Trust program to provide lower-income families with the same educational choices that middle and higher-income families enjoy. The CHOICE program provides private tuition scholarships to about one thousand Indianapolis students in kindergarten through eighth grade. Funding for the CHOICE scholarships comes from donations by area business leaders.

Some members of the Indiana General Assembly also favor school choice alternatives. In 1991 and again in 1992, Senate Bill 393 was introduced into the Education Committee of the Indiana General Assembly. This legislation sought to provide "scholarships for all children in the state to use at any school of their choice, reduce regulation of scholarship-redeeming schools and give teachers and schools more autonomy, provide for statewide testing, and add new measures to help preschool children." The bills, however, never made it out of the Education Committee.

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66 Grant, supra note 49, at B3.
67 Id.
68 Choice Programs, supra note 62. The Golden Rule Insurance Company began a private scholarship program in 1991. Id. The Educational CHOICE Charitable Trust program assists students from lower-income families by providing tuition scholarships for students. Id.
69 Bill Theobald, 8 Donate Money for Scholarships Funds Help Poor Children to Afford Private Education Through CHOICE Program, INDIANAPOLIS STAR, July 31, 1997, at B1. J. Patrick Ronney is the Chief Executive Officer of the Golden Rule Insurance Co. Id.
70 Id. To be eligible for the CHOICE scholarship, students must be on the free or reduced-price lunch program. Id. Eligible students receive half of their tuition costs, up to $800. Id.
71 Id. During the 1997-98 school year, the CHOICE program provided scholarships to 1,094 students, while 1,925 students remained on a waiting list. Choice Programs, supra note 62. By 1998, the figures were up to 1,703 scholarships and 4,168 on the waiting list. Id.
73 Id.
74 Id.
B. School Vouchers

The initial calls for school choice came from economists and philosophers and began in the United States in the late eighteenth century. While these early calls dissipated, the calls were renewed in the middle twentieth century when Milton Friedman resurrected the idea. Friedman’s call for educational reform through the use of school choice sparked exploration into different school choice options. One option available for educational reform that reformers proposed is a school voucher program.

1. Foundations of School Choice—A Vision for Vouchers

The modern notion of school choice builds upon the foundations laid by Adam Smith, Thomas Paine, and John Stuart Mill, who advocated competition and choice in the educational system. In The Wealth of Nations, Adam Smith suggested that schools could reach a higher quality of education by allowing students to choose their own teachers and schools. If afforded such a choice, students would flock to the educational facilities with the most renowned, and interesting, teachers. Smith argued that student choice would encourage teachers to be diligent and provide “tolerably good” lectures because students would not attend otherwise. With diminished student participation, ineffective teachers would be forced to improve their methods or risk

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75 For a detailed summary of school choice in America, see The CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, A SPECIAL REPORT: SCHOOL CHOICE (1992).
77 For a discussion on the educational reform ideas of Milton Freedman, see infra Section II.B.2.
78 For a discussion of theorists’, think tanks’, and Presidents’ programs to reform education, see infra Section II.B.3.
79 Id.
80 Nasstrom, supra note 76, at 1070.
81 Born in 1723 in Kirkcaldy, Scotland, Adam Smith is known as the father of scientific economics. D.D. RAPHAEL, ADAM SMITH 8 (1985); ADAM SMITH AND MODERN POLITICAL ECONOMY: BICENTENNIAL ESSAYS ON THE WEALTH OF NATIONS ix (Gerald P. O’Driscoll, Jr. ed., 1979). For a general biography on the life and works of Adam Smith, see THE ESSENTIAL ADAM SMITH (Robert L. Heilbroner & Laurence J. Malone eds., 1986).
83 Id. at 822-23.
84 Id. at 823. By establishing a dependent relationship between the teacher and student, the teacher would have to be an effective and well-respected educator. Id.
lecturing to an empty hall.\textsuperscript{85} Students dissatisfied with the mediocre quality of education that they were receiving from one institution would then choose to attend a different school.\textsuperscript{86} Smith thought that if a school's enrollment began to diminish drastically, the school would be forced to emulate the popular schools and offer high quality education.\textsuperscript{87} Therefore, to be financially stable, schools would compete to provide the best educational programs and employ the finest teachers in order to attract student attendance.\textsuperscript{88}

Thomas Paine\textsuperscript{89} advocated school choice for those students without the means to attend the finest educational institutions.\textsuperscript{90} Paine asserted that children of lower-class families should not be denied a quality education if their parents were unable to afford one.\textsuperscript{91} Although public schools were available at the time in some communities, Paine argued that the public schools did not adequately serve the interests of the poor.\textsuperscript{92} To provide all children with a quality education, Paine proposed granting parents funds derived from taxes to allow parents to select their children's schools.\textsuperscript{93} Moreover, Paine strongly advocated that parents use these funds to create their own community-based private schools.\textsuperscript{94}

John Stuart Mill\textsuperscript{95} built upon Paine's ideas arguing that parents should be able to choose between public and private education for their

\textsuperscript{85} SMITH, supra note 82, at 823.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 822-23. Smith also believed that a large portion of the teachers' income should come from student tuition. RAPHAEL, supra note 81, at 79.
\textsuperscript{89} Born in 1737, Thomas Paine devoted his life to political faith. THE SOCIAL AND POLITICAL IDEAS OF SOME REPRESENTATIVE THINKERS OF THE REVOLUTIONARY ERA 102-03 (F.J.C. Hearnshaw ed., 1931). Paine's writings encouraged the American colonists to fight for their independence. Id. at 103. For general biographies on the life and works of Thomas Paine, see HARRY HAYDEN CLARK, THOMAS PAINE (1944), and FRANK SMITH, THOMAS PAINE LIBERATOR (1938).
\textsuperscript{91} Id.
\textsuperscript{92} Id. at 60.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Born in 1806, John Stuart Mill spent his life searching for a systematic philosophy of action and knowledge. See generally JOHN STUART MILL, AUTOBIOGRAPHY OF JOHN STUART MILL (1924). Mill called his philosophy "the inductive school." ALAN RYAN, JOHN STUART MILL xi (1970). Although Mill created his own philosophy, he did not worry about the consequences it might have on society. Id. For general biographies on the life and works of John Stuart Mill, see WILLIAM THOMAS, MILL (1985); MICHAEL ST. JOHN PACKE, THE LIFE OF JOHN STUART MILL (1954).
children.\textsuperscript{96} Mill disagreed with Paine's assertion that only private schools provide students with quality educational experiences.\textsuperscript{97} For Mill, both public and private schools could effectively promote the primary purpose of education, which is to train students to think for themselves.\textsuperscript{98} These early philosophical discussions regarding school choice and voucher programs from the late eighteenth and early nineteenth centuries laid the conceptual foundation for the modern school choice movement.\textsuperscript{99}

2. Milton Friedman—"The Father of School Vouchers"\textsuperscript{100}

Milton Friedman has been one of the leading advocates for school vouchers in the twentieth century.\textsuperscript{101} Under Friedman's proposed plan, the state government would give parents a voucher "redeemable for a specified maximum sum per child per year if spent on 'approved' educational services."\textsuperscript{102} The parents would then be free to redeem this voucher at a public or private school.\textsuperscript{103} Under Friedman's system, parents who send their children to private schools would no longer pay twice for education—first, indirectly through general property taxes and second, directly through the private school fees.\textsuperscript{104} Parents desiring to supplement the voucher would have the option to do so.\textsuperscript{105} In Friedman's opinion, the voucher system would also foster competition among schools by encouraging improvements and efficiency within the educational market.\textsuperscript{106} Essentially, Friedman's educational voucher system seeks to improve family access to a high quality education.\textsuperscript{107}


\textsuperscript{97} Id.

\textsuperscript{98} See THOMAS, supra note 95, at 46.

\textsuperscript{99} See infra Section II.B.3.

\textsuperscript{100} See Naastrom, supra note 76 (calling Friedman the father of school choice).

\textsuperscript{101} See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 89 (1962).

\textsuperscript{102} Id.

\textsuperscript{103} Id. Friedman continued to explain that the government would give parents choosing to send their children to private schools a sum equal to the estimated cost of a public school education. Id. at 93. The parents must redeem the voucher on their children's education in an approved school. Id.

\textsuperscript{104} Id.

\textsuperscript{105} Id.

\textsuperscript{106} FRIEDMAN, supra note 101, at 93. This notion of "free-market competition" among the schools would increase the educational quality of each school. Latham, supra note 21, at 82.

\textsuperscript{107} Latham, supra note 21, at 82.
Friedman’s proposals eventually drew the attention of academics, educators, and conservative think tanks.108

3. Modern Development of School Choice—Advocating Vouchers

a. Modern Theorists

In the late twentieth century, two groups of theorists separately studied the American educational system. John Coons and Stephen Sugarman built on the ideas of Milton Friedman to create an educational voucher system that would purportedly benefit all children.109 John Chubb and Terry Moe examined the reasons for the educational system’s failings and proposed a voucher program to improve the nation’s schools.110 Both groups advocated the use of school voucher programs to create better schools and to improve American academic achievement.111

i. John Coons and Stephen Sugarman

John Coons and Stephen Sugarman based their program on Milton Friedman’s educational voucher system.112 They believed school choice would best satisfy three widely embraced objectives that most Americans want for schools: to serve the best interest of the individual child; to foster consensus supporting the constitutional order; and to achieve racial integration.113 They proposed that the government provide “scholarship certificates”114 to students who could redeem the certificates at state-approved schools of their choice.115 Under the Coons

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108 See infra Section II.B.3.
109 For a discussion of Coons and Sugarman’s ideas, see infra Section II.B.3.a.i.
110 For a discussion of Chubb and Moe’s ideas, see infra Section II.B.3.a.ii.
112 COONS & SUGARMAN, supra note 111, at 17.
113 Id.
114 Id. at 31. Both Coons and Sugarman and Chubb and Moe used the term “school scholarships certificates” instead of “educational voucher.” Id. See also CHUBB & MOE, supra note 111. Both terms encompass the same basic concept of the government giving money to parents for redemption at a private or public school. Id. See also James B. Egle, The Constitutional Implications of School Choice, 1992 Wis. L. Rev. 459, 465 n.41.
115 COONS & SUGARMAN, supra note 111, at 32. The requirements for a school to gain state approval were limited to concerns over fraud, safety, and minimal education considerations. Id. The schools were also provided with the freedom to make their own curriculum. Id. If the number of applicants for a particular school exceeded the school’s seating capacity, a lottery would be conducted to determine which applicants would be able to attend. Id.
and Sugarman approach, parents would not have the option to increase the value of the scholarship certificate. By including parochial schools in this scholarship program, the educational system would include a larger number of schools with diverse educational offerings. A larger number would provide more choices and make it more likely that students could attend their school of first choice. Thus, the demand for exceptional educational institutions would create an incentive for schools to improve the quality of education.

ii. John Chubb and Terry Moe

The Brookings Institution, a conservative Washington think tank, advocates school choice plans, endorsing the idea in Politics, Markets & America’s Schools. John Chubb and Terry Moe analyzed and compiled data from numerous tests and surveys in an attempt to pinpoint the factors that cause schools to fail. The results showed that school organization, student ability, and family background significantly affect a student’s academic achievement. Chubb and Moe explained that, even though these factors exist, the schools do not acknowledge them. Schools strive less to please students and parents, than to comply with political agendas, democratic constituencies, and the administrators’ agendas. According to Chubb and Moe, the public school systems are

116 Id. Parents would not be able to supplement the voucher because of the effect it would create on the system. Id. One example of a voucher system that allowed parents to increase the amount of the voucher is in Chile. Latham, supra note 21, at 82. Since 1980, the country of Chile has been operating a voucher program. M. Carnoy, Is School Privatization the Answer: Data from the Experiences of Other Countries Suggest Not, EDUC. WEEK, July 12, 1995, at 40, 52. Chile’s voucher system has caused federal financial support of public education to fall drastically. Id. The rich Chileans met this decline by adding to the amount of the voucher in order to enroll their children in private schools. Latham, supra note 21, at 82. However, the lower-income families did not have the means to add to the vouchers and their children had to remain in the failing public schools. Id.

117 Egle, supra note 114, at 465.

118 COONS & SUGARMAN, supra note 111, at 153-54.

119 Id.

120 See generally CHUBB & MOE, supra note 111.

121 See id. at App. A.

122 CHUBB & MOE, supra note 111, at 140. In 1998, the Metropolitan Life Survey of the American Teacher showed that out of all students who earn A’s and B’s, eighty-seven percent of them cited their parents’ involvement as important to their success. Brendan I. Koerner, Parental Power, U.S. NEWS & WORLD REP., Jan. 18, 1999, at 72. Half of the students earning C’s or worse reported that their parents were not involved or interested in the student’s education. Id. at 73.

123 See generally CHUBB & MOE, supra note 111.

124 Id. at 38.
now the "proving grounds" where governors experiment with or attempt to implement their own values of public good and social reform.\textsuperscript{125}

Further, Chubb and Moe proposed a school reform plan that would be financed through tax-subsidized vouchers given to the parents as a "scholarship."\textsuperscript{126} Like Coons and Sugarman's system, Chubb and Moe's plan also discourages parents from supplementing the scholarship amount.\textsuperscript{127} Public, private, and parochial schools could all participate in Chubb and Moe's system, a system that was based on a competitive market model.\textsuperscript{128} These authors are convinced that school choice is capable of bringing about reform by itself, even stating that, "without being too literal about it, we think reformers would do well to entertain the notion that choice is a panacea."\textsuperscript{129}

b. Presidential Administrations and American Education

Education reform has been a high priority on the agendas of the last three presidential administrations.\textsuperscript{130} Through numerous proposals, Presidents Reagan, Bush, and Clinton have undertaken expansive reform agendas to improve America's educational system.\textsuperscript{131}

\textsuperscript{125} Id.
\textsuperscript{126} Id. at 215-26.
\textsuperscript{127} Id. at 220.
\textsuperscript{128} CHUBB & MOE, supra note 111, at 219. The private schools that participate would become public schools under this system. Id. Parochial (religious) schools would be admitted if the schools keep their religious customs clearly separated from their educational duties. Id.
\textsuperscript{129} Id. at 217. Chubb and Moe continued their argument by stating:
Choice is a self-contained reform with its own rationale and justification. It has the capacity \textit{all by itself} to bring about the kind of transformations that, for years, reformers have been seeking to engineer in myriad other ways. Indeed, if choice is to work to greatest advantage, it must be adopted \textit{without} these other reforms, since the latter are predicated on democratic control and are implemented by bureaucratic means.... [Choice] is a revolutionary reform that introduces a new system of public education.
i. The Reagan Administration

During President Ronald Reagan’s two terms in office, the U.S. House of Representatives and the Secretary of Education devised plans to improve America’s educational system. The House took the initiative to create educational systems that would include some elements of school choice. However, none of these bills passed.

William Bennett, Secretary of Education in the Reagan Administration, also considered solutions, such as parental school choice and competition between private and public schools for federal money, to address the problems facing the educational system. He explained that a voucher system would provide such choice and competition standards, by granting public money to parents who could choose the schools, whether public or private, sectarian or non-sectarian, that their children would attend. Despite all of the reform efforts during the Reagan years, no real improvements in the educational system were made.

ii. The Bush Administration

Drawing from the work of Chubb and Moe, President George Bush created an educational reform plan called the “G.I. Bill for Children.” For President Bush, the future of America depended on reinventing the current school system. His reform called for federal scholarships of $1000 to be given to children from lower to middle-income earning


133 Hearings Before the Senate Subcomm. on Taxation and Debt Management of the Committee on Finance on S. 550, 97th Cong. 10 (1981).

134 Id.


136 Id.

137 Stanley M. Elam & Alec M. Gallup, 20th Annual Gallup Survey on Public’s Attitudes Toward the Public Schools, 70 PHI DELTA KAPPAN 33, 36 (1988). During President Reagan’s administration, only twenty-three percent of Americans gave public schools an A or B rating. Id. The remaining poll results are C (48%), D (13%), F (3%). Id. American’s believed that the biggest problems facing the schools were drug use (32%), lack of discipline (19%), lack of proper financial support (12%), difficulty getting good teachers (11%), and poor schools/curriculum (11%). Id.


families which would be redeemable at private and public schools.\textsuperscript{140} Congress, however, did not approve Bush's proposal.\textsuperscript{141}

iii. The Clinton Administration

In 1994, under the Clinton Administration, the "Goals 2000: Educate America Act" became law.\textsuperscript{142} The Act encouraged states\textsuperscript{143} to improve their educational systems before the new millennium.\textsuperscript{144} Congress established eight educational goals for America to reach by the year 2000: (1) school readiness; (2) school completion; (3) student achievement; (4) teacher education and professional development; (5) students would lead the world in mathematics and science achievement; (6) adult literacy and lifelong learning; (7) safe, disciplined, and alcohol and drug free schools; and (8) parental participation.\textsuperscript{145} Objectives for achieving these goals before the year 2000 accompanied each goal.\textsuperscript{146}

c. Voucher Programs Presently in Place

Although President Bush's proposal for a federal voucher system was not enacted, some states have adopted voucher programs. In Wisconsin and Ohio, the legislatures have developed and implemented

\textsuperscript{141} H.R. 5664, 102d Cong. (1992); S. 3010, 102d Cong. (1992).
\textsuperscript{143} 141 \textit{CONG. REC.} S1877-01 (daily ed. Feb. 1, 1995). Some states have already begun to answer President Clinton's call by improving their educational systems. Columbus, Ohio, is working to improve its science and mathematics instruction. \textit{Id.} Illinois has developed a program for public school students to interact with scientists from Northwestern University. \textit{Id.} Minnesota parents are making statements to assist in improving their children's education. \textit{Id.}
\textsuperscript{144} 141 \textit{CONG. REC.} S1877-01 (daily ed. Feb. 1, 1995). Secretary of Education Dick Riley spoke of the Goals 2000: Educate America Act in his State of Education Address. \textit{Id.} Secretary Riley explained that Goals 2000 would help local schools without restrictions from the Department of Education. \textit{Id.} Ninety-eight percent of the funding in the $400 million program is directly given to schools which complete an application form. \textit{Id.} Although the program has set goals, Secretary Riley reminded the audience that we need to encourage ideas and remain flexible with these programs. \textit{Id.} Riley advocated public school choice and charter schools as ways to approach the various learning styles of children. \textit{Id.}
\textsuperscript{146} 20 U.S.C.A. § 5812 (1994) For example, the objectives for the school completion goal are to reduce the school dropout rate and to eliminate the gap between American minority and non-minority students' graduation rates. \textit{Id.} at § 5812(2)(b).
scholarship programs for students from lower-income families.\textsuperscript{147} In Arizona, the legislature has created a similar scholarship program funded by independent taxpayer contributions.\textsuperscript{148} All three of these programs seek to provide students with better educational opportunities through public funding granted to the students' parents.

i. Milwaukee, Wisconsin

Milwaukee, Wisconsin, was one of the first cities to implement a voucher program.\textsuperscript{149} In an attempt to improve its educational system, the Wisconsin legislature enacted the Milwaukee Parental Choice Program (MPCP) in 1989, providing eligible students\textsuperscript{150} with the opportunity to attend public or private, sectarian or non-sectarian schools\textsuperscript{151} outside of the problem-plagued Milwaukee Public School system.\textsuperscript{152} Under the MPCP, the government pays for an eligible

\textsuperscript{147} See infra Sections II.B.3.c.i., iii.

\textsuperscript{148} See infra Section II.B.3.c.ii.

\textsuperscript{149} Jo Ann Bodemer, School Choice Through Vouchers: Drawing Constitutional Lemon-Aid from the Lemon Test, 70 St. JOHN'S L. REV. 273, 276 (1996).

\textsuperscript{150} The eligibility requirements are that a student (1) has to be in kindergarten through twelfth grade; (2) has to be either enrolled in a Milwaukee public school, enrolled in a private school under the MPCP or not enrolled in school during the previous year; and (3) has to be a member of a family whose income did not exceed 1.75 times the federal poverty level. \textsc{Wis. Stat} § 119.23 (2)(a)(1)–(2) (1994).

\textsuperscript{151} The original MPCP only allowed non-sectarian schools to participate in the program. \textsc{Jackson v. Benson}, 578 N.W.2d 602, 608 (Wis. 1998), \textit{cert. denied}, 119 S. Ct. 466 (1998). The 1995 legislature amended that section to include all private schools. See \textsc{Wis. Stat. Ann.} § 119.23(2)(b) (West 1996). The amended MPCP includes an "opt-out provision." \textsc{Jackson}, 578 N.W.2d at 609. This provision allows a participating private school student to be exempt from attending religious activities with a written request from the child's parent. \textit{Id}.

\textsuperscript{152} \textsc{Jackson}, 578 N.W.2d at 612. In 1995, the Wisconsin legislature amended the Milwaukee Parental Choice Program (MPCP). \textit{Id.} at 608. The MPCP required private schools to comply with all safety and health codes applicable to Wisconsin public schools and the anti-discrimination provisions imposed under 42 U.S.C. § 2000d. \textit{Id.} Section 2000d states "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1997).
student’s education with a voucher;153 and the student’s parents may choose the school at which to redeem the voucher.154

After extensive litigation and debate regarding the issue of the separation of church and state, the Wisconsin Supreme Court upheld Milwaukee’s voucher system, making Wisconsin’s voucher program the first to permit the spending of public tax dollars on parochial education.155 The U.S. Supreme Court denied a petition for certiorari, perhaps indirectly encouraging other states to experiment with voucher programs.156

ii. Arizona

The Arizona legislature took a different approach to educational reform.157 Beginning in December 1997, the Arizona legislature allowed up to a five hundred dollar state tax credit when a taxpayer voluntarily contributed to a school tuition organization (STO).158 The statute does

153 Jackson, 578 N.W.2d at 608. The State is limited to pay to the private schools the lesser of two options: first, the educational programming operating cost per student, or second, the equivalent to the Milwaukee Public School per student state aid. Id. The State of Wisconsin decides which dollar amount the parents will be given. Id.
154 Id. The MPCP requires the State to pay the voucher to the parents directly. Id. To avoid administration problems, the State sends the voucher to the private school and then the parent endorses the check for the private school to use. Id.
156 On Nov. 9, 1998, the U.S. Supreme Court declined to review an appeal of the Wisconsin Supreme Court’s decision in Benson. Jackson v. Benson, 578 N.W.2d 602 (Wis.), cert. denied, 119 S. Ct. 466 (1998). In an 8-1 ruling, only Justice Stephen Breyer voted to hear the Wisconsin voucher dispute. Tony Mauro, Court Allows School Vouchers, USA TODAY, Nov. 10, 1998, at A1. Proponents of voucher programs declare that the Court’s decision gives a symbolic boost to voucher systems. Id. However, other voucher advocates are disappointed with the Court’s decision. Id. Chester Finn, Hudson Institution education expert said, “I hoped we would get a definitive high court ruling that would apply to the whole country.” Id. Aside from public opinion, the Court’s decision marks a significant spot in political history. Martin McLaughlin, U.S. Supreme Court Permits State Subsidy to Religious Schools (last modified Nov. 11, 1998) <http://www.wsws.org/news/1998/nov1998/vou-n11.shtml>. The Supreme Court has permitted a state to subsidize sectarian education for the first time in America’s history. Id.
158 Id. at 609. See ARIZ. REV. STAT. ANN. § 43-1089 (West 1998). “School tuition organizations” means an Arizona charitable organization that is exempt from federal taxation (see I.R.C. § 501(c)(3)(1999)). Id. The organization must also allocate, at a minimum, ninety percent of its annual revenue for tuition grants or educational scholarships to children to attend a qualified school, without limiting availability to only

https://scholar.valpo.edu/vulr/vol34/iss1/7
not allow taxpayers to designate their donation for their dependent’s direct benefit. The STO, however, would provide tuition grants or educational scholarships to children attending their parents’ choice of qualified school. In January 1999, the Arizona Supreme Court upheld the statute as valid under the federal Establishment Clause and Arizona’s religion clauses.

iii. Cleveland, Ohio

In 1996, the Ohio School Voucher Program (SVP) began offering financial assistance to children from lower-income families so that they could have the opportunity to attend sectarian or non-sectarian private schools. The program provides scholarships for students to attend alternative schools and tutorial assistance grants for an equal number of students attending public schools. Under the SVP, the state superintendent establishes an application process for students in kindergarten through third grade who desire to participate in the scholarship program. While preference is given to students from lower-income families, the superintendent has the discretion to award

one school. If a husband and wife file a joint tax return, the five hundred dollar tax limit still applies. However, if a husband and wife file separate tax returns, each may only claim one-half of the tax credit, two hundred and fifty dollars. Id.

159 AZ. REV. STAT. ANN. § 43-1089 (West 1998).
160 Kotterman, 972 P.2d at 609 (citing ARIZ. REV. STAT. ANN. § 43-1089 (West 1998)). A “qualified school” is a nongovernmental primary or secondary school that satisfies Arizona’s requirements for private school status and does not discriminate on the basis of sex, race, color, creed, family status, or national origin. Id. at 610.
161 Id. at 625. See also Section III.B.2. for a discussion of the Kotterman court’s federal Establishment Clause analysis. See Section IV.A.2. for a discussion of the Kotterman court’s state constitutional analysis.
162 OHIO REV. CODE ANN. § 3313.975 (West 1999). Ohio’s Republican Governor, George Voinovich, signed the $5 million voucher program in 1995. School Choice Programs, 1999–Ohio (last modified Nov. 15, 1999) <http://www.heritage.org/schools/ohio.html>. Beginning in 1996, the program allowed approximately 1,855 elementary students to use vouchers. Id. Governor George Voinovich made Ohio the first state to enact a school choice program that included religious schools. Id. See generally, Andrew A. Adams, Note, Cleveland, School Choice, and “Laws Respecting an Establishment of Religion,” 2 TEX. REV. L. & POLITICS 165 (1997).
163 OHIO REV. CODE ANN. § 3313.975(A) (West 1999).
164 OHIO REV. CODE ANN. § 3313.975(C) (West 1999). The superintendent will initially only grant scholarships to students enrolled in kindergarten through third grades. Id. Once a student has received a scholarship, the student may continue to receive the scholarships until the completion of eighth grade. Id.
165 OHIO REV. CODE ANN. § 3313.975(B) (West 1999).
166 OHIO REV. CODE ANN. § 3313.975(C) (West 1999).
as many scholarships as necessary.\textsuperscript{167} If a student chooses to attend a public school, the superintendent distributes the funds directly to the school.\textsuperscript{168} If a student chooses a private school, however, the superintendent issues the voucher to the parents.\textsuperscript{169} This system was challenged. After an Ohio trial court upheld it,\textsuperscript{170} the Ohio Court of Appeals found the program’s inclusion of private, sectarian schools to be unconstitutional under both the U.S. Constitution and the Ohio Constitution.\textsuperscript{171} Recently, however, the Ohio Supreme Court held that the SVP did not violate the state or federal constitutions.\textsuperscript{172}

### III. FEDERAL CONSTITUTIONAL REQUIREMENTS

State voucher programs may be subjected to challenge under the U.S. Constitution because qualified students may choose to use their

\textsuperscript{167} Id. Each year, the Ohio General Assembly appropriates a sufficient amount of money to fund the Pilot Program. OHIO REV. CODE ANN. § 3313.975(C)(1) (West 1999). The superintendent awards the number of scholarships based on the General Assembly’s allocation. OHIO REV. CODE ANN. § 3313.975(B) (West 1999). However, the superintendent may not award more than fifty percent of the scholarships to nonpublic school students. Id.\textsuperscript{168} OHIO REV. CODE ANN. § 3313.979 (West 1999).

\textsuperscript{169} Id. Then the parents will redeem the voucher at the private school of their choice. Adams, \textit{supra} note 162, at 169. If the Pilot Program is discontinued, all students who are currently attending alternative schools will be granted continued admittance. OHIO REV. CODE ANN. § 3313.975(C)(2) (West 1999). The students will be subject to the same attendance guidelines as when they were participating in the Pilot Program. Id. Also, if the General Assembly fails to appropriate funds for the program, the tuition charged to parents of alternative school students will not be increased beyond the amount equal to the original scholarship. Id.


\textsuperscript{171} Simmons-Harris v. Goff, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583 (Ohio Ct. App. May 1, 1997). The court held that the program’s substantial and direct, non-neutral government assistance to religious schools has the “primary effect of advancing religion in violation of the Establishment Clause.” Id. at *9.

\textsuperscript{172} Simmons-Harris v. Goff, 711 N.E.2d 203, 211 (Ohio 1999). On August 24, 1999, one day before school started, U.S. District Judge Solomon Oliver, Jr. ordered the voucher program to stop while he determined its constitutionality, despite the Ohio Supreme Court’s ruling. \textit{Judge Blocks School Vouchers, NAT’L L.J.}, Sept. 6, 1999, at A6. On August 27, 1999, the U.S. District Court from the Northern District of Ohio granted a limited stay in the proceedings with a few modifications, including that the stay is only applicable to students who were enrolled in the Pilot Program under the 1995 Act, the stay is not applicable to new enrollees, and the stay is only extended for one semester or until the court renders a final decision. Simmons-Harris v. Zelman, Nos. 1:99 CV 1740, 1:99 CV 1818, 1999 WL 669222 (N.D. Ohio Aug. 27, 1999). The United States Supreme Court stayed the preliminary injunction issued by the U.S. District Court for the Northern District of Ohio pending the final disposition of the appeal by the 6th Circuit. Zelman v. Simmons-Harris, 1999 WL 1007170 (U.S. Nov. 5, 1999).
vouchers to attend religious schools. The question arises whether a sectarian school’s indirect receipt of state funding “establishes” religion in violation of the First Amendment to the U.S. Constitution.\footnote{Daniel, supra note 36, at 57. For cases involving parochial schools, the Supreme Court has a long established requirement of a strict separation between government and religious institutions. Joseph P. Viteritti, Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law, 21 HARV. J.L. & PUB. POL’Y 657, 665-81 (1998). Most opponents of school voucher programs argue that once any amount of public funds enters a religious school, this violates the First Amendment. Bolick, supra note 33, at 3. However, if these arguments were justified, federal daycare vouchers and Pell Grants would not be in existence. Id.} Applicable to the States through the Fourteenth Amendment,\footnote{U.S. CONST. amend XIV. The Supreme Court determined that the Establishment Clause of the First Amendment through the Fourteenth Amendment was applicable to the states in Everson v. Board of Educ., 330 U.S. 1, 15 (1947). For a discussion of the Fourteenth Amendment, see William J. Brennan, Jr., Color-Blind, Creed-Blind, Status-Blind, Sex-Blind: It’s All There, In the Fourteenth Amendment. But Why Are These Principles Under Relentless Attack Today?, HUM. RTS., Winter 1987, at 30.} the First Amendment to the U.S. Constitution guarantees that “Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.”\footnote{U.S. CONST. amend I. The simplistic language of the Establishment Clause has created complex and evolving interpretation by the Supreme Court. See generally, Kristin M. Engstrom, Comment, Establishment Clause Jurisprudence: The Souring of Lemon and the Search for a New Test, 27 PAC L.J. 121 (1995). “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” Larson v. Valente, 456 U.S. 228, 244 (1982).} The framers of the U.S. Constitution sought to protect religious freedom and to insure religious autonomy by prohibiting the establishment or imposition of a national church and by prohibiting favoritism of any particular denomination.\footnote{Walz v. Tax Comm., 397 U.S. 664, 668 (1970). The Framers intended the Establishment Clause to guard against three evils: financial support, sponsorship, and active involvement of the sovereign in religious activity. Id.} In interpreting this guarantee to bar laws that favor religion, the Supreme Court has declared that this amendment was intended to erect “a wall of separation between church and state.”\footnote{Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).} While the U.S. Supreme Court has not specifically determined whether school voucher programs are constitutional under the U.S. Constitution,\footnote{The U.S. Supreme Court has denied petitions for writ of certiorari in two cases seeking to determine the constitutionality of voucher programs. See Kotterman v. Killian, 972 P.2d 606 (Ariz.), cert. denied, 120 S. Ct. 283 (1999), and Rhodes v. Killian, 120 S. Ct. 42 (1999); Jackson v. Benson, 578 N.W.2d 602 (Wis.), cert. denied, 119 S. Ct. 466 (1998).} its case law is instructive regarding the tests that would likely apply.\footnote{See infra Section III.A.} State supreme courts have specifically considered whether voucher programs that include private
sectarian schools are constitutional under federal Establishment Clause jurisprudence.180

A. The U.S. Supreme Court's Establishment Clause Jurisprudence

During the last half of the twentieth century, the U.S. Supreme Court has articulated several different approaches to analyzing Establishment Clause cases.181 The Court began with a strict separationist approach,182 molding this principle of separation into the Lemon test in 1971.183 The Court used the Lemon test in analyzing school aid cases until 1985.184 More recently, however, the Court has adopted a less-stringent, multi-factor approach.185

180 See infra Section III.B.
182 Id. at 422. "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion." Everson v. Board of Educ., 330 U.S. 1, 15 (1947). Also, absolutely no tax could be levied to assist any religious institutions or activities. Id. at 16. The Court in Everson also declared that all state and federal laws would be struck down as unconstitutional if they did not conform to the separationist principles. Witte, supra note 181, at 422.
183 For a discussion of the Lemon test, see infra notes 195-203 and accompanying text.
185 See Agostini v. Felton, 521 U.S. 203 (1997); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986). These cases demonstrate the Court's growing appreciation for religious equality, pluralism, and voluntarism. Witte, supra note 181, at 426 (citing Bowen v. Kendrick, 487 U.S. 589, 607 (1988)). The Court's new approach towards Establishment Clause jurisprudence incorporates a multi-factor test within the second prong of Lemon. Id. at 425. The "neutrality" test looks to three factors to determine if the challenged program has the primary effect of either advancing or inhibiting religion. CONTROVERSY, supra note 6, at 56. The three factors are (1) facially neutral by demonstrating no preference for religion; (2) broad class of beneficiaries; (3) indirect aid/private choice. For a discussion about the "neutrality" approach towards Establishment Clause jurisprudence, see Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DEPAUL L. REV. 933 (1990).
1. Early Cases: Finding a Test

The 1947 Supreme Court decision in *Everson v. Board of Education*\(^{186}\) established the modern foundation for the Court's current Establishment Clause jurisprudence. The *Everson* Court considered a New Jersey statute allowing the state to reimburse parents for the bus fares they paid to transport their children to public and private schools.\(^{187}\) Speaking for the Court, Justice Black stated that "the First Amendment has erected a wall between church and state that must be kept high and impregnable."\(^{188}\) Even though the Court upheld the state reimbursement program when money was paid to parents whose children attended religious schools, the Court set a standard that would limit governmental assistance in the future.\(^{189}\) The Court announced that "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."\(^{190}\)

Although the *Everson* Court was united in deciding that the state could not directly aid religion, the Court was divided on whether indirect aid to religious institutions violated the Establishment Clause.\(^{191}\) The Court found significant the fact that the reimbursement payments went directly to the parents, not to the schools.\(^{192}\) The Court concluded that the state, by giving aid to the parents, would not be supporting the sectarian schools through monetary contributions.\(^{193}\) The program would merely help parents get their children to and from accredited schools safely and expeditiously, regardless of the children's religion.\(^{194}\)

Building on the *Everson* decision and subsequent case law, in 1971 the Supreme Court in *Lemon v. Kurtzman*\(^{195}\) held that programs in Rhode Island and Pennsylvania that reimbursed sectarian schools for the salaries paid to secular educators teaching secular subjects within those sectarian schools were unconstitutional.\(^{196}\) The Supreme Court in *Lemon*

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187 Id. at 16.
188 Id. at 18.
189 Id. at 16.
190 Id. at 16.
191 See *Everson*, 330 U.S. at 59-60 (Jackson, J. dissenting).
192 Id. at 18.
193 Id.
194 Id.
196 Id. at 612-13.
developed a three-pronged test (the "Lemon test") to evaluate the constitutionality of government action under the Establishment Clause.\textsuperscript{197} In \textit{Lemon}, the Court required that government programs providing assistance to sectarian schools satisfy all three prongs of the test to avoid violating the Establishment Clause.\textsuperscript{198} First, the law must have a secular legislative purpose.\textsuperscript{199} Second, the law must not have the primary effect of advancing or inhibiting religion.\textsuperscript{200} Finally, the law must avoid excessive government entanglement with religion.\textsuperscript{201} Although the Lemon test has been severely criticized and applied differently,\textsuperscript{202} the Court has never overruled the three-pronged Lemon analysis. Thus, for nearly thirty years, the Lemon test has provided the primary analytical model in Supreme Court Establishment Clause jurisprudence.\textsuperscript{203}

2. Transitional Cases: Debating Tests

In 1973, the Court used the three-pronged test to reach its holding in \textit{Committee for Public Education and Religious Liberty v. Nyquist}.\textsuperscript{204} In Nyquist, the Supreme Court considered the constitutionality of a New York program that granted direct tuition reimbursement payments to

\textsuperscript{197} Id.
\textsuperscript{198} Id.
\textsuperscript{199} Id. at 612-13 (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968)).
\textsuperscript{200} Lemon, 403 U.S. at 612-13 (citing Walz v. Tax Comm., 397 U.S. 664, 674 (1970)).
\textsuperscript{201} Id. at 613. "Incidental religious ‘effect’ or modest ‘entanglement’ of church and state was tolerable, but defiance of any of these criteria was constitutionally fatal." Witte, supra note 181, at 423.
\textsuperscript{202} In Lamb’s Chapel v. Center Moriches Union Free School District, Justice Scalia, concurring in the Court’s opinion, compared the three-pronged Lemon test to a resurrected ghost saying: [L]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorney.... The secret of the Lemon test’s survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will.
\textsuperscript{204} 413 U.S. 756 (1973).
parents of children attending private, sectarian schools.\textsuperscript{205} In considering the first prong of \textit{Lemon}, whether the program has a secular legislative purpose, New York argued that this program prevents financial crisis in public education that would occur if the number of private schools declined.\textsuperscript{206} By granting tuition reimbursements to lower-income families sending children to private schools, New York argued, non-public schools would continue to exist and flourish.\textsuperscript{207} The state also argued that the program provided lower-income families with additional educational choices.\textsuperscript{208} The \textit{Nyquist} Court agreed with New York, holding that the program had a secular legislative purpose of promoting diversity and pluralism in public and private schools.\textsuperscript{209}

Although the program survived the first prong of the \textit{Lemon} test, the program failed under the second prong.\textsuperscript{210} Under the second prong of \textit{Lemon}, the Court in \textit{Nyquist} concluded that the program had the primary effect of advancing religion because, in the New York program, only parents of private sectarian school students received tuition reimbursement payments.\textsuperscript{211} Thus, by creating incentives to attend sectarian schools, the program was not neutral toward religion.\textsuperscript{212} The non-neutrality aspect of the New York program created the appearance that the state was advancing religion through this program, and thus the Court found that the program violated the Establishment Clause.\textsuperscript{213} By not adequately ensuring that these public funds would be used only for neutral, nonideological, and secular purposes, the Court found this form of aid to be unconstitutional.\textsuperscript{214}

\textsuperscript{205} Id. at 759. The Governor of New York designed this “Elementary and Secondary Education Opportunity Program” to assist parents in low-income brackets whose children attended private schools. \textit{Id.} at 764. In the program, the government gave a parent who earned less than $5,000 in taxable income a direct, unrestricted grant of $50 to $100 per child. \textit{Id.} at 780. The governor limited this grant to no more than 50\% of the actual tuition paid to attend the private school. \textit{Id.}

\textsuperscript{206} Id. at 765.

\textsuperscript{207} Id. The State would provide the means for students from lower-income families to attend private schools. \textit{Id.} Before this program existed, most lower-income families were only able to send their children to free public schools. \textit{Id.} By offering the opportunity for larger enrollment in the private schools, the private schools could continue to operate. \textit{Id.}

\textsuperscript{208} Id.

\textsuperscript{209} \textit{Nyquist}, 413 U.S. at 773.

\textsuperscript{210} Id. at 780.

\textsuperscript{211} Id. at 764, 794.

\textsuperscript{212} Id. at 782.

\textsuperscript{213} Id.

\textsuperscript{214} \textit{Nyquist}, 413 U.S. at 780.
After holding that the New York program failed the "effects" prong of the Lemon test, the Court determined that it did not need to analyze the program under the excessive entanglement prong of Lemon.215 The Court, however, observed that the type of assistance necessary to ensure that the program would operate effectively presented a "grave potential for entanglement."216 Although Nyquist seemed to indicate that direct state assistance to sectarian schools was impermissible, Justice Powell's majority opinion stated that incidental and indirect aid to religious institutions could be sustained.217

In 1983, the Supreme Court in Mueller v. Allen218 reached the opposite result when reviewing a similar legislative program. In Mueller, the Supreme Court held that a statute granting a deduction to Minnesota taxpayers for educational expenses did not violate the Establishment Clause.219 After acknowledging that the statute clearly had the secular legislative purpose of reducing the educational costs incurred by parents, considering the primary effect of the statute, the Court concluded that it did not further sectarian purposes of private schools, basing its holding on certain features of the Minnesota program.220 First,

\[\text{\footnotesize 215 Id. at 794.}\]
\[\text{\footnotesize 216 Id.}\]
\[\text{\footnotesize 217 Id. at 775. The following statement by Justice Powell provides a foundation for a valid school voucher program:}\]
\[\text{\footnotesize These cases simply recognize that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian. But the channel is a narrow one. . . . Of course, it is true in each case that the provision of such neutral, nonideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsectarian areas. But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law.}\]
\[\text{\footnotesize Id.}\]
\[\text{\footnotesize 218 463 U.S. 388 (1983).}\]
\[\text{\footnotesize 219 Id. at 402-03. Minnesota's statute provided for a deduction from a state taxpayer's gross income for certain educational expenses. Id. at 391. The expenses included transportation, textbooks, and tuition, as well as special equipment required for classes (e.g. ice skates, tennis shoes, art supplies, and notebooks). Id. at 391-92, n.2. The deductions were capped at $500 per student in kindergarten through sixth grade and $700 per student in seventh grade through twelfth. Id. at 391.}\]
\[\text{\footnotesize 220 Id. at 396. In discussing the first prong of Lemon, the Court reasoned that it was reluctant to find the State's motives unconstitutional. Id. at 394. Looking to the prior}\]
Minnesota's statute was facially neutral and made no preference toward religion. The Court reasoned that it has traditionally allowed state legislatures broad latitude in creating classifications and distinctions in tax statutes because legislatures are uniquely situated to "achieve an equitable distribution of the tax burden." Second, Minnesota's statute had a broad class of beneficiaries. In sharp contrast to *Nyquist*, the Minnesota statutory benefit was available to parents whose children attended public schools, non-sectarian private schools, or sectarian private schools. The Court determined that a program that rewards a broad class of beneficiaries does not create the primary effect of advancing religion. Third, the Court found that Minnesota gave public aid only indirectly to religious institutions. Specifically, Minnesota's system disbursed public funds to parents who could choose where to send their children to school. The Court reasoned that because it is the parents who direct the funds to a private, sectarian school, it is only the parent's private choice that indirectly advances religion. Considering these three factors of neutrality, the Court determined that the effect of Minnesota's statute was neither to advance nor inhibit religion.  

Establishment Clause decisions, the Court stated that it could usually find a secular purpose within a statute. *Id.*  

221 *Id.* The Minnesota statute offered state benefits to all parents with school age children. *Id.* The statute offered benefits to public and private, sectarian and non-sectarian students. *Id.*  

222 *Id.* at 396.  

223 *Mueller*, 463 U.S. at 396.  

224 *Id.* at 397.  

225 *Id.* The statute struck down in *Nyquist* only provided benefits to the parents of nonpublic sectarian schoolchildren. *Id.* at 398.  

226 *Id.* at 398.  

227 *Id.* at 399.  

228 *Mueller*, 463 U.S. at 396.  

229 *Id.* Under this indirect aid system, the parents are furthering religion. *Id.* The State is not furthering religion because it is not directly giving public funds to private sectarian schools. *Id.*  

230 *Id.* at 402. The Court also held that the Minnesota statute did not excessively entangle the state in religion. *Id.* at 403. The Court discussed the possibility of entanglement in regards to one scenario, when state officials determine whether specific textbooks qualify for a deduction. *Id.* According to the statute, deductions are not allowed for materials used to teach religious doctrines, worship or tenets. *Id.* Therefore, the Minnesota statute passed all three prongs of the *Lemon* test successfully. *Id.*
In 1985, when it decided *Aguilar v. Felton*,231 the Supreme Court reverted back to a strict application of the *Lemon* test. Under Title I of the Civil Rights Act of 1964 ("Title I”),232 the U.S. government channels federal funds to local educational agencies, which use the funds to provide eligible school children233 with greater educational opportunities.234 The Board of Education of the City of New York ("Board") sought to use federal funds to provide these services to school children in private, sectarian schools.235 In an attempt to avoid potential constitutional violations regarding the separation of church and state, New York restricted Title I instructional programs at private, sectarian schools, reminding the teachers that Title I shall only advance secular purposes.236

Despite the Board’s efforts to avoid Establishment Clause issues, the *Aguilar* Court invalidated New York’s use of Title I funds,237 holding that New York’s use of Title I federal funds to compensate secular teachers who taught parochial school children violated the Establishment

233 The eligibility requirements for proposed programs to receive Title I funds are (1) the student must live within the attendance boundaries of a public school located in a lower-income area; (2) the student must either be failing, or at risk of failing, the State’s performance standards; and (3) the proposed program must supplement programs that would not exist but for the Title I funding. *Aguilar*, 473 U.S. at 405-06.
234 Id. at 406. The New York Title I program used regular employees of the public schools to provide special services for eligible children in both public and parochial schools. Id. The teachers were assigned to parochial schools on a voluntary basis, often spending less than five consecutive weekdays at the same school. Id.
235 Id. Beginning in 1966, the Board provided Title I instructional services to parochial school students on parochial school campuses. Id. From 1981-82, only 13.2% of all eligible Title I recipients were attending parochial schools. Id.
236 Id. at 407. New York City instituted a number of safeguards to prevent teachers from using their publicly funded positions to inculcate religion. Id. Teachers were monitored by a field supervisor and others who would occasionally make unannounced visits. Id. The professionals involved in the program were instructed to avoid involvement in religious activities and to bar religious subjects in the classroom. Id. The Government provided all the materials used in the program, and these materials could only be used in the Title I program. Id. Title I personnel were solely responsible for selecting participants, and were to keep contact with private school personnel to a minimum. Id. Finally, the classrooms used for Title I classes had to be cleared of all religious symbols. Id.
237 Id. at 414.
Clause. The Court ruled that the Board’s program failed the third prong of the Lemon test regarding excessive entanglement between church and state because the state would need to extensively monitor “pervasively sectarian” schools to ensure that the aid was used appropriately, thus infringing upon fundamental Establishment Clause values.

Since its decision in Aguilar, the Court has returned to a “neutrality” based analysis as established in Mueller when deciding school-aid cases. In 1986, in Witters v. Washington Department of Services for the Blind, the Court considered a school-aid program, holding unanimously that the

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238 *Aguilar*, 743 U.S. at 414. The same day the Supreme Court decided *Aguilar*, the Court also decided a similar school-aid case, *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985). In line with the Court’s holding in *Aguilar*, the Court in *Ball* held that the Shared Time and Community Education programs offered in the Grand Rapids, Michigan, nonpublic schools violated the Establishment Clause. *Id.* at 397. The Shared Time program employed public school teachers to offer supplementary classes at nonpublic schools. *Id.* at 375-76. The teachers taught the classes during the school day in nonpublic schools and the subjects ranged from remedial mathematics and reading to enrichment music and physical education. *Id.* at 375. The Community Education program that was taught by part-time public school teachers was opened to children and adults. *Id.* at 377. The Community Education program offered a wide-range of programs including Spanish, chess, model building, and drama. *Id.* at 376-77. Both programs were taught in nonpublic classrooms in which all religious paraphernalia was removed. *Id.* at 378. The *Ball* Court held that both programs have the primary effect of advancing religion, therefore violating the Establishment Clause. *Id.* at 396. The Court reasoned that both programs may provide the symbolic unification of church and state, especially in the minds of schoolchildren. *Id.* at 389-92. Second, the teachers may intentionally inject their religious beliefs into the programs. *Id.* at 385-89. Finally, by teaching a majority of the secular subjects in nonpublic schools, the program’s teachers are subsidizing the schools’ religious functions. *Id.* at 393-97.

239 *Aguilar*, 473 U.S. at 413-14. The *Aguilar* Court did not focus on the first two prongs of the Lemon test, but instead, focused its attention on the problem of entanglement, proscribed by the Lemon Court. *Id.* at 412. The entanglement elements are: (1) the government must not provide aid in a pervasively sectarian atmosphere; and (2) the government is required to constantly inspect the program to ensure that teachers are not injecting religious messages. *Id.* The *Aguilar* Court held that both entanglement elements were present in the Title I program. *Id.* at 412-13.

240 *Id.* at 414. The Court explained its interpretation of “pervasively sectarian” by comparing the program in *Aguilar* to the program in *Roemer v. Maryland Public Works Board*, 426 U.S. 736 (1976). *Aguilar*, 473 U.S. at 411. In *Roemer*, the Court held that state aid to religiously affiliated educational institutions did not violate the Establishment Clause. *Roemer*, 426 U.S. at 758-59. The *Roemer* Court reasoned that the school was not pervasively sectarian because the State was able to identify separate secular functions within the school. *Id.* at 765. This is distinct from *Aguilar*, where the school that received Title I funds reported back to their respective religious association and the schools required attendance at religious activities. *Aguilar*, 473 U.S. at 412.

State of Washington could provide a vocational tuition grant to a blind student studying to become a pastor at a Christian college. In analyzing whether the program was neutral, the Court focused on two core factors that demonstrated that the Washington vocational tuition assistance program was neutral to religion. First, under the Washington program, the aid was paid directly to the student who would then transfer the money to the educational institutions of the student’s choice. Second, the program’s benefits were available to students without regard to the nature of the educational institution, and the program in no way preferred religious institutions.

Another school-aid case that is similar to Witters is Zobrest v. Catalina Foothills School District. In Zobrest, the Court held that a California school district’s action of providing an interpreter, pursuant to the Individuals with Disabilities Education Act (IDEA), for a sectarian high school student did not violate the Establishment Clause. The Court reasoned that the beneficiaries were the disabled children, not the schools. Second, the aid flowed indirectly to the schools after the parents and students choose the educational facility. Finally, the program offered benefits to students who attended public or private schools. Therefore, the IDEA has created a neutral program that does not advance religion nor violate the Establishment Clause.

3. The Most Recent Establishment Clause Case: Settling on a Test

The Court’s multi-factor neutrality approach articulated in Mueller, its unanimous decision in Witters, and its decision in Zobrest established the legal standards that would govern its consideration of school-aid cases. In 1997, the Supreme Court decided Agostini v. Felton.
reversing its prior holding in *Aguilar*, after finding that the Court’s Establishment Clause jurisprudence had changed significantly.\(^{254}\) In overruling *Aguilar*, the Court reconsidered what it had said in *Meek v. Pittenger*,\(^{255}\) *School District of Grand Rapids v. Ball*,\(^{256}\) and *Aguilar* regarding the allegedly symbolic union between states and religious schools.\(^{257}\)

In *Agostini*, the Court reconsidered the validity of New York’s Title I program which it had declared unconstitutional in *Aguilar*.\(^{258}\) The *Agostini* Court concluded that the Court in *Meek* and *Ball*, in determining

\(^{253}\) 521 U.S. 203 (1997). The *Agostini* case was a five-four decision written by Justice O’Connor. *Id.* In 1995, the Board and a group of parents, hereinafter “petitioners,” sought to have the Supreme Court relieve the party from the *Aguilar* holding. *Id.* The petitioners filed a Rule 60(b)(5) motion under the Federal Rules of Civil Procedure. *Id.* Rule 60(b)(5) states that the court may relieve a party from a final judgment when the judgment would no longer have the same application. *Fed. R. Civ. P.* 60(b)(5). The *Agostini* Court reexamined its rulings in *Aguilar*, *Ball*, and *Meek* to determine if petitioners’ were entitled to a Rule 60(b)(5) motion. *Agostini*, 521 U.S. at 217-18.

\(^{254}\) *Agostini*, 521 U.S. at 222.

\(^{255}\) 421 U.S. 349 (1975). In 1975, the Supreme Court in *Meek* held that a Pennsylvania Act that provided nonpublic sectarian schoolchildren with instructional materials and teachers violated the Establishment Clause. *Id.* at 372. However, providing textbooks to sectarian students was not a violation of the Establishment Clause. *Id.* at 361. The Pennsylvania General Assembly created Acts 194 and 195 in 1971. *Id.* at 352. Act 194 allowed public employees to provide nonpublic sectarian school children with auxiliary services similar to those readily available to public schoolchildren. *Id.* at 353. These services included speech therapy, psychological therapy, instruction for exceptional and remedial students and other secular, nonideological services. *Id.* Act 195 instructed the State Secretary of Education to lend textbooks without a charge to nonpublic schoolchildren as well as providing useful instructional materials and equipment to nonpublic schools. *Id.* at 353-54. The *Meek* Court held that Act 194 violated the Establishment Clause because of the potential for political entanglement. *Id.* at 372. The Court reasoned that the Pennsylvania government would have to make continual efforts to guarantee that the public employees were not advancing the religious missions of the nonpublic sectarian schools while providing Act 194 services. *Id.* at 370. This surveillance to maintain the public employee’s neutrality would cause great administrative entanglement. *Id.* at 372. Therefore, the Court reversed the District Court, reasoning that Act 194 created an establishment of religion and caused excessive entanglement. *Id.* at 373. The Court analyzed the textbook and instructional materials provisions of Act 195 separately. *Id.* at 361. The Court held that Act 195’s program of lending textbooks to nonpublic schoolchildren was constitutional. *Id.* The Court reasoned that granting this financial benefit to children and parents, instead of directly to the religious schools, did not cause any Establishment Clause violations. *Id.* However, the Court struck down Act 195’s provision allowing the lending of instructional materials and equipment to nonpublic schools. *Id.* at 363. The Court reasoned that this action was neither indirect nor incidental and would inescapably result in advancing religion. *Id.* at 365-66.

\(^{256}\) 473 U.S. 373 (1985). For a discussion of the *Ball* case, see *supra* note 238.


that the programs had the "impermissible effect of advancing religion," had based its decisions on three questionable assumptions: (1) public employees who work on religious school grounds inculcate religion in their work; (2) the presence of public employees on religious school premises creates a symbolic union between church and state; and (3) all public money that aids the educational function of religious schools impermissibly finances religious indoctrination, even when the money reaches religious schools as a consequence of private decision-making. The Court determined that the *Aguilar* decision rested on a fourth assumption: the program necessitated an excessive government entanglement with religion because extensive monitoring would be required to ensure that teachers paid with public funds would not inculcate religion.

The *Agostini* Court concluded that its more recent jurisprudence, particularly its decisions in *Zobrest* and *Witters*, had undermined the four assumptions in *Meek, Ball*, and *Aguilar*. The *Agostini* Court recognized that the first two assumptions of *Meek* and *Ball* were abandoned by the Court in *Zobrest*. The *Zobrest* Court had rejected the notion that the placement of public employees in sectarian educational settings "inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."

The *Agostini* Court recognized that the Court in its *Witters* decision had discredited the third assumption. The *Agostini* Court noted that, in repudiating the third assumption that all government assistance that directly aids religious school education is entirely invalid, the *Witters* Court and the *Zobrest* Court distinguished governmental assistance given to students who attend private sectarian schools from assistance given directly to sectarian schools. The *Agostini* Court identified the *Witters* Court as holding that the government's action is not unconstitutional when the government gives public money to parents of sectarian school students because the parents, not the government, make...

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259 Id. at 222.
260 Id.
261 Id. at 222-27.
262 Id. at 222.
263 *Agostini*, 521 U.S. at 223 (citing *Zobrest* v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993)).
264 Id. at 224-26 (citing *Witters* v. Washington Dep't of Services for the Blind, 474 U.S. 481, 488 (1986)).
265 Id. at 224-27 (discussing *Witters*, 474 U.S. at 487-88, and *Zobrest*, 509 U.S. at 10-12).
independent and private choices regarding where the public money will be spent.\textsuperscript{266} The Court recognized that its jurisprudence indicated that this form of indirect aid is no different from a public employee giving a portion of the employee's paycheck to a religious organization.\textsuperscript{267} In both instances, the government only indirectly aids religious institutions through private choices of individuals, and therefore, the aid is not invalid.\textsuperscript{268}

In the school-aid programs approved under recent Supreme Court Establishment Clause jurisprudence, the Court has found significant the fact that the aid was given to a broad class of beneficiaries and the recipients eligible to receive the aid could attend a school of their choosing whether public or private, sectarian or non-sectarian.\textsuperscript{269} Thus, the Agostini Court expressly held that, "contrary to our conclusion in Aguilar, placing full-time employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination."\textsuperscript{270}

The Agostini Court also considered whether the criteria by which an aid program identifies its beneficiaries had the effect of advancing religion by creating a financial incentive to undertake religious indoctrination.\textsuperscript{271} The Court stated that "[t]his incentive is not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."\textsuperscript{272} The Court held that New York City's Title I program did not allocate services on the basis of criteria that favor or disfavor religion and, thus, the program did not give beneficiaries any incentive to modify their religious beliefs or practices in order to obtain the services.\textsuperscript{273}

The Agostini Court then analyzed whether the program resulted in an excessive entanglement between church and state, noting that "[n]ot all entanglements . . . have the effect of advancing or inhibiting

\textsuperscript{266} Id. at 225-26 (citing Witters, 474 U.S. at 487).
\textsuperscript{267} Id. at 226 (citing Witters, 474 U.S. at 487). It is permissible for the State to give public employees paychecks even if the government is aware that the money will end up in the coffers of a religious institution. Witters, 474 U.S. at 487-88.
\textsuperscript{268} Agostini, 521 U.S. at 226; Witters, 474 U.S. at 488-89.
\textsuperscript{269} Agostini, 521 U.S. at 228-32.
\textsuperscript{270} Id.
\textsuperscript{271} Id. at 230-31.
\textsuperscript{272} Id. at 231.
\textsuperscript{273} Id.
religion." The Court discounted the excessive entanglement analysis used by the Aguilar Court. The Court held that, because the unannounced monthly visits by public supervisors were not demonstrated to be insufficient to prevent or to detect the inculcation of religion by public employees and because the monitoring system was not overly burdensome on the religious institutions, the program did not cause an excessive entanglement.

The Court held that the New York program did not run afoul of any of the three primary criteria the Court now uses to determine whether government aid has the primary effect of advancing religion: "it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." The Court also held that "a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present [in this case]."

The Court further concluded that the carefully constrained program could not reasonably be viewed as an endorsement of religion, thus satisfying a separate consideration sometimes used in Establishment Clause jurisprudence.

B. Federal Establishment Clause Jurisprudence in State Courts

Although the Court's recent trend of applying a less rigorous standard in school-aid cases may suggest a willingness to uphold state-
established school voucher programs that include sectarian schools, the U.S. Supreme Court has not determined whether school voucher programs are constitutional. The Supreme Courts in Wisconsin, Arizona, and Ohio have, however, recently ruled that each state's respective voucher-type program does not violate the Establishment Clause of the First Amendment.

1. Wisconsin

In *Jackson v. Benson*, the Wisconsin Supreme Court held that the MPCP did not violate the Establishment Clause. Applying the Lemon test, the court determined that the MPCP had the secular purpose of providing greater educational opportunities for children from lower-income families. The court held that, by granting parents choices among public and private, sectarian and non-sectarian schools, the MPCP did not have the primary effect of advancing or inhibiting religion. Further, the court concluded that the state superintendent's minimal supervision of the participating religious schools did not create excessive government entanglement. Having satisfied all three prongs

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280 Roberson, *supra* note 252, at 862, 872. The Agostini decision is favorable to religious students who desire to receive the same government benefits that are awarded to public school students. *Id.* According to Nyquist, Mueller, and Witters, the proper analysis for determining the validity of a school aid case appears to be neutrality. Fenton, *supra* note 19, at 663.


282 See *infra* Section III.B.


284 For a discussion of the Milwaukee Parental Choice Program, see *supra* Section II.B.3.c.i.

285 For a discussion of the Lemon test, see *supra* notes 195-203 and accompanying text.

286 Jackson, 578 N.W.2d at 612. The legislature created the MPCP to offer educational opportunities outside of the Milwaukee Public School system for students. *Id.* The court also discussed the need for an educated population to have a stable community. *Id.* (citing Mueller v. Allen, 463 U.S. 388, 395 (1983)).

287 *Id.* at 612-19. The Jackson court analyzed numerous U.S. Supreme Court cases to decide the second prong of Lemon. *Id.* The Jackson court decided to analyze the MPCP under the recently adopted “neutrality” approach. *Id.* at 617. See also Agostini v. Felton, 521 U.S. 203, 222-23 (1997). First, eligibility for the MPCP is based on neutral secular criteria. Jackson, 578 N.W.2d at 617. Second, the court reasoned that the religious schools only receive assistance because of the parents' private decisions. Jackson, 578 N.W.2d at 618.

288 Jackson, 578 N.W.2d at 619. Before the legislature enacted the MPCP, the state superintendent monitored the quality of religious and non-sectarian education. *Id.* The MPCP did not increase the superintendent's monitoring responsibilities. *Id.*
of the *Lemon* test, the Wisconsin Supreme Court declared the MPCP constitutional under the federal Establishment Clause.\(^{289}\)

2. Arizona

In *Kotterman v. Killian*,\(^{290}\) the Arizona Supreme Court held that the Arizona tax deduction program\(^{291}\) did not violate the Establishment Clause.\(^{292}\) In reaching its holding, the *Kotterman* court relied primarily on the U.S. Supreme Court's decisions in *Mueller* and *Lemon*.\(^{293}\) First, the court held that the Arizona tax deduction had the secular purpose of providing Arizona students with a quality education at schools of their choice.\(^{294}\) Second, the court found that, by allowing parents to receive tax credits for sending their children to sectarian or non-sectarian schools, the primary effect of the Arizona statute was neither to advance nor to inhibit religion.\(^{295}\) Third, the court determined that Arizona's passive role in administering the credit program did not create excessive government entanglement with religion.\(^{296}\) The court concluded, therefore, that the Arizona program was constitutionally valid under the federal Establishment Clause.\(^{297}\)

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\(^{289}\) *Id.* at 620.

\(^{290}\) 972 P.2d 606, 616 (Ariz. 1999).

\(^{291}\) For a discussion of this Arizona statute, see *supra* Section II.B.3.c.ii.

\(^{292}\) *Kotterman*, 972 P.2d at 616.

\(^{293}\) *Id.* at 611-16. For a discussion of *Lemon v. Kurtzman*, see *supra* notes 195-203 and accompanying text. For a discussion of *Mueller v. Allen*, see *supra* notes 218-30 and accompanying text.

\(^{294}\) *Kotterman*, 972 P.2d at 611-12. Since 1994, the Arizona legislature has expanded the educational opportunities for Arizona students by establishing charter schools and non-tuition public schools. *Id.*

\(^{295}\) *Id.* at 616. The *Kotterman* court analyzed the second prong of *Lemon* by using the three step approach developed in *Mueller*. *Id.* at 612. First, the tax deduction must be one of many offered by the state. *Id.* at 613. Besides the school tax credit, Arizona also provides a credit for contributions made to assist the poor, a $200 credit for public school extracurricular activities fees, and the ability to take the full amount of allowable deductions under the Internal Revenue Code. *Id.* at 616. Second, the tax deduction must be available to a broad class of beneficiaries. *Id.* at 613. Arizona's tax credit is available for all taxpayers, not just parents of school-age children. *Id.* Third, the credit must be directed to the school as a result of private choices. *Id.* at 613. The Arizona taxpayers' decide whether to make cash contributions to an STO. *Id.* at 614. Then the parents determine which STO they will apply to for a student scholarship. *Id.* Therefore, religious schools receive taxpayer contributions indirectly. *Id.*

\(^{296}\) *Id.* at 611-12 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)).

\(^{297}\) *Id.*
3. Ohio

In Simmons-Harris v. Goff, the Ohio Supreme Court held that the School Voucher Program did not violate the First Amendment’s Establishment Clause. The Goff court utilized the Lemon test, along with subsequent U.S. Supreme Court Establishment Clause jurisprudence, in reaching its holding. The court found that the SVP clearly served the secular legislative purpose of educating children within the Cleveland City School District. The court further determined that the SVP neither advanced nor inhibited religion because students benefited whether they attended the qualifying public or private, sectarian or non-sectarian schools. Finally, the court concluded that the SVP did not cause an excessive entanglement of government with religion because the state provided the assistance to the parents, not the religious schools. The Ohio Supreme Court held, therefore, that the SVP did not violate the Establishment Clause of the First Amendment.

C. Requirements for a Valid Voucher Program Under the Federal Constitution

For a voucher program to be valid under the Establishment Clause of the U.S. Constitution, it will have to withstand constitutional scrutiny under the Lemon test. First, the voucher program must demonstrate a

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298 711 N.E.2d 203, 211 (Ohio 1999).
299 For a review of the School Voucher Program, see supra Section II.B.3.c.iii.
300 For a discussion of the Lemon test, see supra notes 195-203 and accompanying text.
301 See Goff, 711 N.E.2d at 207-11.
302 Id. at 208.
303 Id. at 210. In its analysis of section two of the Lemon test, the court examined the criteria that registered private schools must follow in order to grant priority to students. Id. at 210. The priorities were granted as follows: (1) previously enrolled students; (2) siblings of previously enrolled students; (3) students living in the school district where the private school is located; (4) “students whose parents are affiliated with any organization that provides financial support to the school”; and (5) all other applicants. Id. (citing OHIO REV. CODE ANN. § 3313.977(A) (West 1999)). The court determined that priorities (1), (2), (3), and (5) were both secular and neutral. Id. However, priority (4) favored religion by providing parents with the incentive to modify their religious practices in order to receive a school voucher. Id. Therefore, priority (4) was unconstitutional and had to be severed from the rest of the statutory scheme. Id.
304 Id. at 211.
305 Id.
306 See Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999); Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999); Jackson v. Benson, 578 N.W.2d 601 (Wis. 1998). See also Lemon v. Kurtzman, 403 U.S. 602 (1971). In spite of its lack of favor with a majority of the current Supreme Court justices, the Court has not overruled the use of the Lemon test. See Agostini
secular purpose. Generally, if a voucher program promotes the educational opportunities of students, it has a secular purpose. Second, the voucher program must not have the primary or principal effect of either advancing or inhibiting religion. Several factors are key to making this determination: the voucher program must be facially neutral, not creating a preference for or against religion; it must be directed toward a broad class of beneficiaries; and, rather than granting the aid to the schools, the state or local government should grant the aid to parents who then may independently choose where to direct the money. Third, the voucher system must not cause excessive government entanglement with the religious institutions. A voucher program that satisfies these requirements should withstand scrutiny under Supreme Court Establishment Clause jurisprudence.

IV. STATE CONSTITUTIONAL REQUIREMENTS

A state voucher program may also be subjected to challenge under the state constitution. Because the U.S. Constitution and state constitutions contain language relating to the establishment of religion and the free exercise of religion, it is important to understand how the federal and state provisions interrelate. Three principles govern the interpretive relationship between the religion clauses in the federal and


307 Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968). See also Mueller v. Allen, 463 U.S. 388 (1983). The Supreme Court has been reluctant to invalidate a state statute using the first prong of Lemon. Id. at 394. The Court will usually be able to find a secular purpose in the state’s legislation. Id. at 395. For instance, the secular purpose in Zobrest was to provide a better educational experience for a deaf student by assigning him an interpreter. See Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3, 10 (1993).

308 Mueller, 463 U.S. at 395.

309 For a discussion of secular purpose, see supra notes 204-09 and accompanying text.

310 Witters v. Washington Dep’t of Services for the Blind, 474 U.S. 481, 488 (1986). The voucher program must not provide greater benefits for students enrolled in sectarian institutions. Id.

311 Zobrest, 509 U.S. at 10.

312 CONTROVERSY, supra note 6, at 61. As soon as the state gives a voucher to parents to redeem for their child’s educational expenses, then that money no longer belongs to the state. Id. The parents are then free to choose whether to send their child to a public or private school. Id. If a parochial school receives the parent’s voucher, it is because the parent wants the child to be educated at that particular school. Id.; see also Agostini v. Felton, 521 U.S. 203, 226 (1997).

313 Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973); but see Agostini, 521 U.S. at 233-34 (including excessive entanglement in the second prong as one of three undesirable effects to be avoided).

314 G. Alan Tarr, Church and State in the States, 64 WASH. L. REV. 73, 78-79 (1989).
state constitutions. First, federal law is supreme; therefore, all conflicts between federal and state law are resolved in favor of federal law. Second, state courts must interpret federal law in accordance with U.S. Supreme Court precedent. Third, the U.S. Supreme Court will only review state law that is inconsistent with federal law. These principles allow state courts to interpret their constitutions independently from the federal constitution.

A. Programs Upheld Under State Constitutions

The Wisconsin, Arizona, and Ohio Supreme Courts have held that the voucher programs in their respective states are valid under their state constitutions. Because the religion clauses in the Indiana Constitution are similar to the religion clauses in the Wisconsin, Arizona, and Ohio Constitutions, the analysis used by these state supreme courts under their state constitutions is instructive regarding the interpretation of the Indiana Constitution. All four constitutions establish that no public money shall be directed toward a religious institution or seminary; thus, in order for a voucher program to include private, sectarian schools, the religious institutions can only receive public funds indirectly.

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315 Id.
316 Id.
317 Id. Besides interpreting federal law in accordance with U.S. Supreme Court precedent, the state courts must also prefer federal law to state law. Id.
318 See Michigan v. Long, 463 U.S. 1032 (1983). See also Tarr, supra note 314, at 78-79. If a state court’s ruling is based on an adequate and independent state ground, that particular holding is exempt from U.S. Supreme Court review. Id. at 79 (citing Kramer, State Court Constitutional Decisionmaking: Supreme Court Review of Nonexplicit State Court Judgments, 1983 ANN. SURV. AM. LAW 277 and Welsh, Reconsidering the Constitutional Relationship Between State and Federal Courts; a Critique of Michigan v. Long, 59 NOTRE DAME L. REV. 1118 (1984)).
319 Tarr, supra note 314, at 79. The state court may decide to interpret the state’s constitution as requiring more, equal, or less separation of church and state than the federal Constitution. Id.
320 For a discussion of the state supreme court decisions regarding the Wisconsin, Arizona, and Ohio voucher programs, see infra Sections IV.A.1-3.
321 To compare the religion clauses of the four constitutions, see infra notes 325, 336-38, 344, 363, 367 and accompanying text.
322 For a discussion of the Indiana Constitution’s religion clauses pertaining to the implementation of a voucher program, see infra Section IV.C.
323 See infra Section IV.C.
324 Id.
1. Milwaukee Parental Choice Program

In *Jackson*, the Wisconsin Supreme Court determined whether the MPCP violated Article I, Section 18 of the Wisconsin Constitution, which provides that no public money shall benefit religious seminaries. As the court had previously interpreted the religion provision of the Wisconsin Constitution to require the same showing as the second prong of the *Lemon* test, the Wisconsin Supreme Court analyzed the MPCP to determine whether it had the primary or principal effect of advancing religion. The court reasoned that the MPCP is facially neutral because eligibility for program benefits is based on neutral, secular criteria that neither favors nor disfavors religion. The court also reasoned that program benefits were available to a broad class of beneficiaries because schools, whether public or private, whether sectarian or non-sectarian, could participate in the MPCP. Further, the court reasoned that state assistance is indirect because the local government sends aid directly to the parents of participating students, not to the religious institutions.

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325 *Jackson* v. *Benson*, 578 N.W.2d 602, 619 (Wis. 1998). Article I, Section 18 of the Wisconsin Constitution states:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect, or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

WIS. CONST. art. I, § 18.


327 *Jackson*, 578 N.W.2d at 621. The Wisconsin Supreme Court states that the crucial question is not whether religious institutions receive any benefit from a legislative program, but whether its principal or primary effect advances religion. *Id.* (citations omitted).

328 *Id.* at 617, 621. The Wisconsin Supreme Court looks to federal Establishment Clause jurisprudence when interpreting the Art. I, § 18 of the Wisconsin Constitution. See *King v. Village of Waunakee*, 517 N.W.2d 671, 672 (Wis. 1994); *State ex rel. Wisconsin Health Facilities Auth. v. Lindner*, 280 N.W.2d 773, 776 (Wis. 1979); *State ex rel. Warren v. Nusbaum*, 198 N.W.2d 650, 653 (Wis. 1972); *State ex rel. Warren v. Reuter*, 170 N.W.2d 790, 802 (Wis. 1969).

329 *Jackson*, 578 N.W.2d at 617, 621.

330 *Id.* at 618-19, 621. With a variety of participating schools, the MPCP does not require students to attend a religious school. *Id.* at 623. The student may only be required to attend a religious school because of their parent's choice. *Id.* The “opt-out” provision also
The Wisconsin Supreme Court concluded therefore that the MPCP is constitutionally valid because it does not have the primary effect of advancing religion.331

2. Arizona Statute Section 43-1089

The Arizona Supreme Court in Kotterman considered whether the legislatively-enacted program in Arizona, allowing taxpayers to voluntarily contribute to the STO and providing a tax credit for that contribution,332 violated the Arizona Constitution.333 Specifically, the court determined whether scholarships provided through the STOs to qualified private school children constitute public aid to religious instruction.334 The Arizona Supreme Court considered two provisions of the Arizona Constitution which prohibited taxes from being laid and public money335 from being appropriated to aid private or sectarian schools, to fund religious instruction, or to support any religious establishment.336 The court noted that the framers of the Arizona Constitution supported tax exemptions for non-profit religious institutions.337 In fact, the court recognized that Arizona’s constitutional exemption for churches in its taxing scheme has laid the foundation for modern tax exemptions.338 The Kotterman court used the primary effects prohibits religious schools from requiring student attendance at religious activities. Id. For a discussion regarding MPCP criteria, see Section II.B.3.c.i.

331 Jackson, 578 N.W.2d at 623.
334 Id.
335 “Public money” means revenue received from local, state, and federal governments from fees, fines and taxes. BLACK’S LAW DICTIONARY 1005 (6th ed. 1990).
336 Kotterman, 972 P.2d at 617. Article 2, Section 12 of the Arizona Constitution states: “No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment.” ARIZ. CONST. art. II, § 12. Article 9, Section 10 of the Arizona Constitution states: “No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.” ARIZ. CONST. art. IX, § 10.
337 Kotterman, 972 P.2d at 620. See ARIZ. CONST. art. IX, § 2 (allowing tax-exempt status for churches). The Kotterman court reasoned that these exemptions suggest either: (1) that the Framers did not believe the exemptions were direct grants of public money; or (2) that the Framers did not intend the prohibition against public aid to religious institutions to be all-encompassing. Kotterman, 972 P.2d at 620.
338 Kotterman, 972 P.2d at 621-23. “[T]he doctrine of separation of church and state does not include the doctrine of total nonrecognition of the church by the state and of the state by the church.” Community Council v. Jordan, 432 P.2d 460, 463 (Ariz. 1967). The Community Council Court stated:

The prohibitions against the use of public assets for religious purposes were included in the Arizona Constitution to provide for the historical
prong of the Lemon test in analyzing the validity of the Arizona statute.\textsuperscript{339} The court reasoned that the program did not violate Article II, Section 12, prohibiting the appropriation of public money or property for religious instruction or support of any religious establishment, because the public aid only indirectly flowed to religious schools.\textsuperscript{340} The court also reasoned that the program did not violate Article IX, Section 10, prohibiting taxation or appropriation of public money made in aid of private or sectarian schools, because the tax credit is not an appropriation of public funds.\textsuperscript{341} The court held that the tax credit and scholarship programs do not violate the Arizona Constitution's religion clauses.\textsuperscript{342}

3. Ohio School Voucher Program

In Goff, the Ohio Supreme Court considered whether the SVP, which provides scholarship funds to students who may use the money to attend public or private schools, violated the Ohio Constitution.\textsuperscript{343} The court noted that Article I, Section 7 of the Ohio Constitution, providing that no person shall be compelled to support a place of worship against his consent,\textsuperscript{344} has been interpreted to be the approximate equivalent of the Establishment Clause of the First Amendment to the U.S. Constitution.

\hspace{1cm} \textit{Id.} doctrine of separation of church and state, the thrust of which was to insure that there would be no state supported religious institutions thus precluding governmental preference and favoritism of one or more churches.

\textsuperscript{339} Kotterman, 972 P.2d at 612.

\textsuperscript{340} Id. The taxpayers choose whether to make cash contributions to the participating STO's. Id. at 614. The families receiving assistance decide which school to send their children to. Id. Then the public aid flows to the religious school as a result of independent, not government, choices. Id.

\textsuperscript{341} Id. at 620. The Arizona statute does not impose any taxes. Id. at 621. Instead, the statute reduces a taxpayers tax liability if he or she chooses to contribute to the STO. Id. If a taxpayer chooses not to contribute to the STO, the statute does not provide for a penalty for this choice. Id.

\textsuperscript{342} Id. The Kotterman court also looked to the framer's intent to analyze this case. Id. at 621-23. The court reasoned that the framers valued the educational system and created the Arizona Constitution to change with economic conditions. Id. at 623. The economic conditions of today's society show a nation-wide call for school reform. Id. (citing Jo Ann Bodemer, Note, School Choice Through Vouchers: Drawing Constitutional Lemon-Aid from the Lemon Test, 70 ST. JOHN'S L. REV. 273, 275-77 (1996)).

\textsuperscript{343} Simmons-Harris v. Goff, 711 N.E.2d 203, 211 (Ohio 1999).

\textsuperscript{344} Id. Article I, Section 7 of the Ohio Constitution states, "No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted." \textit{Ohio Const. art. I, § 7}.

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Constitution. The court adopted the three-part Lemon test to determine whether the SVP establishes religion, clarifying that it adopted the Lemon test not because it was the federal constitutional standard, but instead because the Lemon test provided a reasonable and logical method of resolving this state constitutional question. The court reiterated its federal constitutional analysis of the SVP under the Lemon test and reached the same conclusion, reasoning that the legislature did not have the impermissible purpose of advancing or inhibiting religion when it enacted the SVP and that the SVP does not cause the excessive entanglement of the government and religion. The court therefore held that the SVP did not violate the Ohio Constitution.

B. An Invalid Program Under the Vermont State Constitution

In Chittenden Town School District v. Vermont Department of Education, the Vermont Supreme Court considered a state constitutional challenge brought by the Department of Education against a local school district's provision of education to local high school students. Because Chittenden, Vermont, did not maintain a public high school to educate its ninety-five students who were in grades nine through twelve, the Chittenden Town School District devised a program that would pay the tuition costs of these students so that these students could attend nearby public high schools or approved independent schools, including sectarian schools. Instead of sending the tuition

346 Id.
347 Id. The Ohio Supreme Court also reserved the right to adopt a different constitutional standard that is pursuant to the Ohio Constitution in deciding future religious issues. Id. at 212. The court reserved this right so that it would not be "irreversibly tie[d]" to the Lemon-Agostini analysis. Id.
348 For a discussion of the court's federal analysis, see supra Sec. III.B.3.
349 Goff, 711 N.E.2d at 212.
350 Id. The Ohio Supreme Court also discussed whether the School Voucher Program violated Article 6, Section 2 of the Ohio Constitution. Id. Article 6, Section 2 states "[N]o religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state." Ohio Const. art. VI, § 2. The court explained that the School Voucher Program does not allow any public money to flow directly from the state to a sectarian school. Goff, 711 N.E.2d at 212. Further, the only way that a sectarian school receives money originating in the School Voucher Program is by the independent decisions of families to direct their scholarships to sectarian schools. Id. Therefore, the School Voucher Program does not violate Article 6, Section 2 of the Ohio Constitution. Id.
351 738 A.2d 539 (Vt. 1999).
352 Id. at 542. See also VT. STAT. ANN. tit. 16, § 822 (1989).
money to the parents, however, the school district sent the money directly to the school that the parents had selected for their children. One of the approved schools was a sectarian school operated under the authority of the Roman Catholic Diocese; a school that incorporated prayer and religious studies into its educational curriculum. In 1996, fifteen students from Chittenden attended this school.

The Department of Education challenged Chittenden's program under the Compelled Support Clause of the Vermont Constitution. In analyzing the constitutionality of the Chittenden program, the Vermont Supreme Court considered prior case law, the text of the constitutional provision, the historical context surrounding the adoption of the Compelled Support Clause, and decisions of other state courts. The court concluded that the Chittenden program violated the Compelled Support Clause because the program lacked restrictions to prevent the use of public money to fund sectarian education.

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353 Chittenden, 738 A.2d at 542. See also VT. STAT. ANN. tit. 16, §§ 822(a)(1), 824(b).
354 Chittenden, 738 A.2d at 542.
355 Id. at 543.
356 Id. The Compelled Support Clause of the Vermont Constitution provides:

[All [persons] have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding, as in their opinion shall be regulated by the word of God; and that no [person] ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of... conscience, nor can any [person] who professes the Protestant religion be justly deprived or abridged of any civil right, as a citizen, on account of religious sentiment, or peculiar mode of religious worship, and that no authority can, or ought to be vested in, or assumed by, any power whatsoever, that shall, in any case, interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship: nevertheless, every sect or denomination of people ought to observe the Sabbath, or the Lord's day, and keep up and support some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.

VT. CONST. ch. I, art. 3.
357 See Chittenden, 738 A.2d at 539.
358 Id. at 562. The court declined to provide a solution for a tuition-payment scheme that would pass muster under the Vermont Constitution. Id.
C. Indiana

In 1816, delegates from the Indiana territory convened in Corydon, Indiana, to draft Indiana's original constitution and to seek statehood.359 The delegates gathered copies of existing constitutions and hurriedly adapted them to create Indiana's first constitution.360 The original constitution, however, was sharply criticized throughout the state; so, delegates assembled a second time to draft another constitution.361 In 1850, one hundred and fifty-four delegates convened the Constitutional Convention of 1850-51 and drafted a second constitution for Indiana, which is presently the Constitution of the State of Indiana.362

Two religion clauses under the Indiana Constitution are particularly relevant to the legal questions presented by school vouchers, Article I, Section 4 and Article I, Section 6.363 Article I, Section 4 of the Indiana

360 John D. Barnhart, Sources of Indiana’s First Constitution, 39 INDIANA MAG. HIST. 55 (1943). Indiana’s first constitution closely resembles the Kentucky, Ohio, Pennsylvania, and Tennessee Constitutions. Id.
361 Rucker, supra note 359, at 457.
362 Brent E. Dickson et al., Lawyers and Judges as Framers of Indiana’s 1851 Constitution, 30 IND. L. REV. 397 (1997). The legal profession greatly influenced the framing of the Indiana Constitution. Id. at 398. Among the delegates, fifty-six out of one hundred and fifty-four men had either studied law, become attorneys, or were, or in the future would be, judges. Id. The original constitution has been modified by several amendments. Id. However, these changes have not significantly affected the basic framework of the document establishing the structure of Indiana’s legal and government system. Id.
363 The delegates only placed one religion clause within the first constitution. Article I, §3 (1816). The original religion clause stated:

That all men have a natural and indefeasible right to worship Almighty God, according to the dictates of their own consciences; That no man shall be compelled to attend, erect, or support any place of worship or to maintain any ministry against his consent; That no human authority can, in any case, whatever, control or interfere with the rights of conscience; and that no preference shall ever be given to any religious Societies, or modes of worship; and no religious test shall be required as a qualification to any office of trust or profit.

IND. CONST. of 1816, art. I, § 3.

The delegates adapted this religion clause from the Kentucky and Ohio constitutions. The Kentucky religion clause read:

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man of right can be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority can in any case whatever control or interfere with the
Constitution states that “no preference shall be given, by law, to any
creed, religious society, or mode of worship; and no man shall be
compelled to attend, erect, or support, any place of worship, or to
maintain any ministry, against his consent.” Article I, Section 6
provides that “no money shall be drawn from the treasury, for
the benefit of any religious or theological institution.” Although Indiana

rights of conscience; and that no preference shall be given by law to
any religious societies or modes of worship.

KY. CONST. of 1792, art. XII, § 3.
The Indiana constitutional framers also borrowed a portion of the original religion clause
from the Ohio Constitution. Rucker, supra note 359, at 456. The relevant portion of the
Ohio Constitution reads “and no religious test shall be required, as a qualification to any
office of trust or profit.” OHIO CONST. of 1802, art. VIII, § 3. The second constitution
originally contained one religion clause. CHARLES KETTLEBOROUGH, CONSTITUTION
MAKING IN INDIANA 296 (photo. reprint 1971) (1916). The Committee on Revision divided
the original religion clause into five sections, currently known as Sections 2, 3, 4, 5, and 6 of
Article I. Id. These sections of the Indiana Constitution are equivalent to the federal
Establishment Clause and Free Exercise Clause of the U.S. Constitution. Id.


1940). If any public official knowingly violates these provisions by paying money from the
public treasury to a religious institution, then that official is required to reimburse the
Treasury for all amounts paid. Id. Most state constitutions prohibit direct aid to religious
schools. See ALA. CONST. art. XIV, § 263 (“No money raised for the support of the public
school shall be appropriated or used for the support of any sectarian or denominational
school.”); ALASKA CONST. art. VII, § 1 (“No money shall be paid from public funds for the
direct benefit of any religious or other private educational institution.”); ARIZ. CONST. art.
II, § 12 (“No public money or property shall be appropriated for or applied to any religious
worship, exercise, or instruction, or to the support of any religious establishment.”); ARK.
CONST. art. XIV, § 2 (“No money or property belonging to the public school funds, or to
this State for the benefit of schools or universities, shall ever be used for any other than for
the respective purposes to which it belongs.”); CAL. CONST. art. IX, § 8 (“No public money
shall ever be appropriated for the support of any sectarian or denominational school.”);
COLO. CONST. art. IX, § 7 (“Neither the general assembly, nor any county, city, town,
township, school district or other public corporation, shall ever make any appropriation, or
pay from any public fund or moneys whatever, anything in aid of any church or sectarian
society, or for any sectarian purpose . . . .”); DEL. CONST. art. X, § 3 (“No portion of any
fund now existing or which may hereafter be appropriated, or raised by tax, for
educational purposes, shall be appropriated to, or used by, or in aid of any sectarian,
church or denominational school.”); IDAHO CONST. art. IX, § 5 (“Neither the legislature nor
any city . . . shall ever make any appropriation, or pay from any public fund or moneys . . .
to help support or sustain any school, academy . . . controlled by any church, sectarian, or
religious denomination.”); ILL. CONST. art. I, § 3 (“Neither the General Assembly nor any
county, city . . . shall ever make any appropriation or pay from any public fund . . . to help
support or sustain any school, academy, seminary, college, university . . . controlled by any
church or sectarian denomination.”); KY. CONST. § 189 (“No portion of any fund or tax now
existing, or that may hereafter be raised or levied for educational purposes, shall be
appropriated to, or used by, or in aid of, any church, sectarian or denominational school.”);
LA. CONST. art. XII, § 13 (“No appropriation of public funds shall be made to any private or
case law is not fully developed regarding the requirements of these two religion clauses, decisions by two Indiana appellate courts have interpreted both of these provisions and are instructive regarding tuition vouchers in Indiana.366

In 1940, the Indiana Supreme Court, in *State ex rel. Johnson v. Boyd*,367 held that the school board’s decision to grant public aid to Roman Catholic parochial schools when it paid teachers their salaries directly violated neither Article I, Section 4 nor Article I, Section 6 of the Indiana Constitution.368 The facts that prompted the school board’s decision

sectarian schools.”); *Mich. Const.* art. VIII, § 2 (“No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school.”); *Minn. Const.* art. XIII, § 2 (“In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.”); *Miss. Const.* art. 8, § 208 (“[N]or shall any funds be appropriated toward the support of any sectarian school.”); *Mo. Const.* art. IX, § 8 (“Neither the general assembly, nor any county, city, town... shall ever make an appropriation or pay from any public fund whatever, anything... to help to support or sustain any private or public school academy, seminary, college, university, or other institution of learning controlled by any religious creed, church, or sectarian denomination.”); *Mont. Const.* art. X, § 6 (“The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.”); *Neb. Const.* art. VII, § 11 (“The state shall not accept money or property to be used for sectarian purposes.”); *N.H. Const.* Pt. 2, art. 83 (“[N]o money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination.”); *N.Y. Const.* art. XI, § 3 (“Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination...”); *Pa. Const.* art. III, § 15 (“No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.”); *S.C. Const.* art. XI, § 4 (“No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution.”); *Utah Const.* art. X, § 13 (“Neither the Legislature nor any county, city... shall make any appropriation to aid in the support of any school, seminary, academy, college, university or other institution, controlled in whole, or in part, by any church sect or denomination whatever.”); *Wisc. Const.* art. I, § 18 (“[N]or shall any money be drawn from the treasury for the benefit of religious or theological seminaries.”).


367 28 N.E.2d 256 (Ind. 1940).

368 Id. at 264.
were relevant to the court's holding. The effects of economic depression in the 1930's caused parochial schools in the City of Vincennes to lack operating funds, and school officials feared that the schools would have to be closed. The Board of School Trustees, a city administrative body, voted to assume both the administrative and the instructional obligations for parochial school children within the city limits, based on an understanding that the city would not assume any existing, outstanding, or future financial obligations for the maintenance, operation, or capital outlay costs incurred by the Catholic Parochial Schools. The resolution, which applied to students enrolled in kindergarten through the sixth grade in certain parochial schools, declared these parochial schools part of the public school system and therefore subject to all regulations of the public school system. Vincennes continued to use the former parochial school building at no rental cost to the city, and none of the religious symbols were removed from the classrooms. The Superintendent of the Vincennes Public Schools hired teachers recommended by Roman Catholic colleges. The Board required these teachers, all of whom were certified to teach within the State of Indiana, to teach only secular material during school hours. The issue presented on appeal by the taxpayers of Vincennes was whether the salary payments made by the Board of School Trustees to the parochial school teachers violated the Indiana Constitution.

The Court found that the teachers were employees of the School City of Vincennes and, therefore, the Board was obligated to pay the teachers for their services. The court reasoned that, based on the employment contracts between the teachers and the Board, the salaries did not constitute assistance to the parochial schools or to the Roman Catholic

369 Id. at 260. On July 28, 1933, a group of priests from the Roman Catholic Parishes informed the Board of School Trustees for the School City of Vincennes that the church operated schools would not be run during the school year of 1935-36. Id. The Parish Committee requested that the trustees provide educational facilities for the eight hundred students that would be affected by the school closing. Id.

370 Id. at 260.

371 Id. The parochial schools that the resolution applied to were St. Francis Xavier School, Sacred Heart School, and the St. John School. Id.

372 Boyd, 28 N.E.2d at 261.

373 Id.

374 Id.

375 Id. at 263-64. The appellants, taxpayers, argued that the schools continued to be parochial schools under the Roman Catholic church's control and payments made to the teachers was a pretext for making donations to the church. Id.

376 Id. at 261.
Church. Therefore, the decision of the Board did not violate the Indiana Constitution by making any contributions to the church directly.

In 1991, the Indiana Court of Appeals in Center Township v. Coe held that a homeless shelter's requirement of church attendance violated the Indiana Constitution. The Court of Appeals reasoned that conditioning a statutory benefit on attending religious programs violates a person's constitutional rights. Specifically, a requirement to attend or support worship against a person's will clearly violates Article I, Section 4 of Indiana's Constitution. The court also held that, according to Boyd, direct payments to the religious mission violated Article I, Section 6 of the Indiana Constitution. The Court reasoned that the Trustee of Center Township made no effort to separate the statutory benefits from the missions' sectarian purpose. Although the Court of Appeals held that the Trustee violated Article I, Sections 4 and 6, the Court noted that a religious mission can receive government funding if the mission does not require the shelter inhabitants to attend religious services.

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377 Coe, 28 N.E.2d at 261.
378 Id.
380 Id. at 1359. The court cited to provisions in the Indiana Code indicating that the Trustee of Center Township was obligated to provide emergency shelter assistance. IND. CODE §§ 12-2-1-10(b), 12-2-1-20(a) (1988) (repealed 1992). To meet the statutory obligation, the Trustee offered two types of shelter: permanent housing through a lease agreement and shelter in a religious mission. Coe, 572 N.E.2d at 1359. Any person in need of emergency shelter was referred directly to the religious mission, no other alternatives were available. Id. One requirement to receive shelter at the mission was to attend religious services. Id. The Trustee, aware of this requirement, nevertheless, continued to reimburse the religious mission for its shelter services. Id.
382 Coe, 572 N.E.2d at 1360. Similar to requiring a person to attend a religious service, a professor's requirement of having students listen to Bible readings at the beginning of class violates the students' constitutional rights. Lynch v. Indiana State Univ. Bd. of Trustees, 378 N.E.2d 900 (Ind. Ct. App. 1978).
383 Coe, 572 N.E.2d at 1360. The Coe court contrasted the payment of public funds to the religious mission with the situation in Boyd. Id. In Boyd, the Indiana Supreme Court held that the schools were public and therefore no public money would benefit the religious institution. Id. However, in Coe, the money went directly to the religious mission and furthering its sectarian purposes; therefore, it was in violation of Article I, Section 6. Id.
384 Id. at 1360.
385 Id.
D. Application of the Indiana Constitution to Voucher Programs

Given the "no aid" language found within most state constitutions,\(^{386}\) indirect aid to parochial schools appears to be constitutionally suspect.\(^{387}\) Despite the constitutional language, however, some state courts have upheld indirect aid to private sectarian schools.\(^{388}\) These challenged programs have withstood state constitutional scrutiny because the purpose of the indirect aid was to benefit the child, not the parochial school.\(^{389}\)

Despite the "no-aid" language within the Indiana Constitution, a voucher program within the State of Indiana may be constitutionally valid.\(^{390}\) Boyd and Coe establish two essential requirements for a valid voucher system.\(^{391}\) First, the proposed voucher system would have to grant assistance directly to the students.\(^{392}\) Second, after the students direct the money to their choice parochial school, the parochial school cannot require the students to attend that school's religious activities.\(^{393}\) A voucher system bearing these characteristics, along with the

\(^{386}\) For a list of state constitutions that contain this "no aid" language, see supra note 365.

\(^{387}\) Tarr, supra note 314, at 96.

\(^{388}\) See Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998); Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999). Cf. Visser v. Nooksack Valley Sch. Dist., 207 P.2d 198 (Wash. 1949) (holding that bus transportation to and from a sectarian school violated the provision of the Washington Constitution that stated, "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment."); Dickman v. School Dist. No. 62C, 366 P.2d 533, 535 (Or. 1961) (holding that free textbooks to parochial schools violates the provision of the Oregon Constitution that stated, "No money shall be drawn from the Treasury for the benefit of any [religious], or theological institution, nor shall any money be appropriated for the payment of any [religious] services in either house of the Legislative Assembly.").

\(^{389}\) Tarr, supra note 314, at 97-98. In Cochran, the U.S. Supreme Court first introduced this "child-benefit" theory. Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930). The Court reasoned that the state may assist lower-income parochial school students when general aid to the parochial school would otherwise be unconstitutional. Id.

\(^{390}\) See State ex rel. Johnson v. Boyd, 28 N.E.2d 256, 264 (Ind. 1940); Center Township v. Coe, 572 N.E.2d 1350, 1360 (Ind. Ct. App. 1991). See also Voglesong v. State, 9 Ind. 112 (1857). In Voglesong, the Indiana Supreme Court upheld Indiana's Sunday closing law, even though the legislature established the law to protect the Sabbath. Id. at 113-14. Thus, the court acknowledged religion could be recognized by the state. Id.

\(^{391}\) See Boyd, 28 N.E.2d at 264; Coe, 572 N.E.2d at 1360.

\(^{392}\) See Boyd, 28 N.E.2d at 264. In Boyd, the city of Vincennes provided assistance to the parochial school teachers. Id. The Court found this type of aid constitutional because it did not directly nor indirectly benefit the religious institution. Id.

\(^{393}\) See Coe, 572 N.E.2d at 1360.
requirements under the federal constitution, would neither encourage\textsuperscript{394} nor benefit religion.\textsuperscript{395}

V. PROPOSED STATUTORY VOUCHER PROGRAM

A. The Indiana Constitution

The framers of the Indiana Constitution considered learning and knowledge to be essential to the governance, freedom, and well-being of the people of Indiana.\textsuperscript{396} Thus, they delegated the responsibility of improving the educational system to the General Assembly.\textsuperscript{397} Under its plenary power over the public school system, the General Assembly has enacted a statute from which all public school boards derive their authority.\textsuperscript{398} Local public school boards may only exercise those powers expressly granted under the statute.\textsuperscript{399} Because the power over the

\textsuperscript{394} Article I, Section 4 of the Indiana Constitution prohibits legislation that encourages people to support one religious belief while discouraging support of another. Robert Twomley, \textit{Indiana Bill of Rights}, 20 IND. L.J. 211, 222 (1945). However, Section 4 does not prohibit legislation that provides for the social well-being of citizens. \textit{Id.}

\textsuperscript{395} Article I, Section 6 of the Indiana Constitution reads, "No money shall be drawn from the treasury, for the benefit of any religious or theological institution." IND. CONST. art. I, § 6. The question of aid to parochial schools through a voucher program can be analogized to the following situation. If the Indiana Division of Public Health provided medicine to private or denominational institutions to treat inmates, this action would violate section 6. Twomley, \textit{supra} note 394, at 223. However, if the Indiana Division of Public Health provided the drugs directly to the inmates, no constitutional violation would occur. \textit{Id.} Similarly, if the state provided monetary assistance directly to the parochial schools, the State would violate the Indiana Constitution. However, if the State gave the vouchers to parents, the voucher program would pass constitutional muster.

\textsuperscript{396} IND. CONST. art. VIII, § 1. "Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government . . . ." \textit{Id.}

\textsuperscript{397} \textit{Id.} "[I]t shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." \textit{Id.}

\textsuperscript{398} The General Assembly has devoted Indiana Code Title 20 to education and Title 21 to education finance. IND. CODE tits. 20 & 21 (West 1995). It established the Indiana State Board of Education and the requirements for membership. IND. CODE § 20-1-1-1 (West 1995). \textit{See also} State \textit{ex rel.} Clark v. Haworth, 23 N.E. 946, 947-48 (Ind. 1890). As Judge Cooley stated, "to what degree the legislature shall provide for the education of the people at the cost of the state, or of its municipalities, is a question which, except as regulated by the constitution, addresses itself to the legislative judgment exclusively." \textit{Id.} at 948. \textit{See also} Stone \textit{v.} Fritts, 82 N.E. 792 (Ind. 1907). The legislature will establish and regulate the public schools. \textit{Id.} at 794.

\textsuperscript{399} Haworth, 23 N.E. at 948. \textit{See also} Gruber \textit{v.} State \textit{ex rel.} Welliver, 148 N.E. 481 (Ind. 1925). The courts and the local authorities must respect the General Assembly's decisions in providing for children's education, unless the legislature's decision contradicts the Indiana Constitution. \textit{Id.} at 485.
public schools is legislative, the General Assembly is not precluded from attempting new programs with the intent of improving education.\textsuperscript{400} A school voucher program may provide the General Assembly with a legislative option to improve the quality of education provided to Indiana students and to improve their performance. In creating a voucher program, the General Assembly must develop a general law that applies in the same manner to all parts of Indiana where similar operating conditions exist.\textsuperscript{401} According to the Indiana Constitution, the General Assembly shall only pass general laws, rather than special or local laws,\textsuperscript{402} that can operate throughout the state.\textsuperscript{403} Although the general law does not need to be uniform, it must operate throughout the state in a similar manner where the same conditions and circumstances exist.\textsuperscript{404} Therefore, the voucher program must be available to each school district. The Superintendent of each local school district would then choose whether to participate in the program.

Any program enacted by the General Assembly must be able to withstand scrutiny under both the U.S. Constitution and the Indiana Constitution. The following proposed voucher program provides Indiana’s most disadvantaged students the opportunity to attend quality schools that they could not afford, thus benefiting the students. This proposed voucher program would be defensible under both the U.S. Constitution and the Indiana Constitution.

\textsuperscript{400} Gruber, 148 N.E. at 485. "To deny the power to change, is to affirm that progress is impossible, and that we must move forever ‘in the dim footsteps of antiquity.’" Id.
\textsuperscript{401} IND. CONST. art. IV, § 23. See generally Wayne Township v. Brown, 186 N.E. 841 (Ind. 1933).
\textsuperscript{402} A “special law” is one made for an individual case, or “for less than a class requiring laws appropriate to its particular condition or one relating to particular persons or things of a class.” Perry Civil Township v. Indianapolis Power & Light Co., 51 N.E.2d 371, 374 (Ind. 1943).
\textsuperscript{403} Article IV, Section 22 of the Indiana Constitution provides a list of circumstances in which the General Assembly shall not pass special or local laws. IND. CONST. art. IV, § 22. Although a proposed voucher program would not fall under the requirements of Section 22, Article IV, Section 23 applies. Article IV, Section 23 states: In all cases enumerated in the preceding section [Art. IV, § 22], and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state.” IND. CONST. art. IV, § 23.
B. The Proposed Voucher Program

(1) The Indiana Board of Education shall authorize the development and implementation of the voucher system.

(2) The Superintendent of the local public school system shall establish a voucher program for that school district. The program shall provide vouchers for the educational expenses of qualified students at a participating schools.

(a) For the purposes of this section, a “qualified student” is one who meets all of the following criteria:

(i) The student’s family has a total income that does not exceed an amount that is equal to 1.75 times the federal poverty level. The federal office of management and budget determines the criteria for the poverty level annually.

(ii) In the previous school year, the student has not yet entered kindergarten, was enrolled in kindergarten through fifth grade at either an Indiana public school or a local private school, or was a past recipient of a voucher.

(b) For the purposes of this section, a “participating school” must meet all of the following criteria:

(i) The private school must notify the local public school Superintendent of its intent to participate in the program. The school must give notice before June 1st of the previous school year.

(ii) The private school is a non-governmental primary or secondary school in Indiana.


406 According to Indiana law, “board” refers to “the state board of education” established by the Indiana Code. See Ind. Code § 20-1-1.1-1 (West 1995).
(iii) The private school must meet all health and safety codes that apply to the local public school system, as well as 42 U.S.C. § 2000d.

(iv) The private school must also satisfy all of the requirements prescribed by law for Indiana private schools.

(c) No more than twenty percent of the school district's membership may attend private sectarian schools under this voucher program.

Commentary

This proposed voucher program represents one possible step to improve the educational system in Indiana. The Superintendent of the local public school system would establish the voucher program based on the authority granted by the General Assembly. The Superintendent would then provide vouchers to qualified students to cover their educational expenses. The qualification requirements under this proposed voucher program are fairly stringent. The student must be able to meet all of the criteria established in section (1)(a) in order to qualify for the voucher. The program only offers vouchers to students from lower-income families because these students would ordinarily not have the means to attend a school of their choice. Thus, the voucher program provides students from lower-income families more educational choices, including private sectarian and non-sectarian schools. Also, in the previous school year, the student must have been enrolled in kindergarten through the fifth grade at either an Indiana public school or a local private school or must not have yet entered kindergarten upon applying. The purpose of this qualification is to ease the administrative process in implementing the program. By only issuing vouchers to elementary-aged school students, the administration will be able to expand the number of students gradually and to run the program more efficiently. Because students may renew the vouchers

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409 42 U.S.C. § 2000d (1997). "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Id.
annually, from an early age, students will have the opportunity to choose and attend the school of their choice throughout their education.

The participating schools must comply with all of the criteria established in section (2)(b). This criterion is also applicable to the public schools within the State of Indiana. By complying with these laws, the participating schools will demonstrate to the Superintendent that the school provides a safe, healthy, and nurturing environment for Indiana students.

(3) The Superintendent\(^4\) shall be responsible for the overall development, implementation, and monitoring of the school voucher system.

(a) The Superintendent shall establish an application process and deadline for accepting applications. Qualified students or the students’ parents\(^5\) must complete an application, indicating the school that the student prefers to attend.

(b) The qualified student or the student’s parent will send the application to the requested participating school. The Superintendent will ensure that the schools do not discriminate against students. Participating schools may require students to complete the schools’ application procedures and may select students consistent with the schools’ standard admissions policy. If more students qualify for admission in a participating school than the school can accept, the Superintendent shall use a lottery system to select from among the qualified applicants. If an applicant’s siblings are currently attending that

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\(^4\) According to Indiana law, “superintendent” means “the chief administrative officer of a school corporation generally referred to as the superintendent of schools, except that, in the case of a township school, the term refers to the county superintendent of schools.” IND. CODE § 20-8.1-1-4 (West 1995).

\(^5\) According to Indiana law, “parent” is defined as:

[T]he natural, or in the case of adoption, the adopting father or mother of a child; or where custody of child has been awarded in a court proceeding to someone other than the mother or father, the court appointed guardian or custodian of the child; or where the parents of a child are divorced, the term ‘parent’ means the parent to whom the divorce decree or modification awards custody or control with respect to a right or obligation under this article.

school, the private school may give preference to that applicant.

(c) Within two months of receiving the application, the participating school will notify the student in writing of his or her acceptance. However, if the student is not chosen to participate due to lack of space at the requested school, the student may resubmit the application to another participating school.

(d) In each year of the program, only qualified students, who have not entered kindergarten or were enrolled in kindergarten through fifth grade in the previous year, may apply for an initial voucher. Once a student has received a voucher, the student may renew the voucher at the end of each school year until the student completes the twelfth grade.

Commentary

The application process seeks to minimize the state’s administrative role within the voucher program. The students or their parents apply to the participating school. Within two months, the participating school must notify the parents of the student’s acceptance. The Superintendent only ensures that the selection process operates effectively and will not discriminate against students. Because the Superintendent’s role in administering the voucher program is minimal, no excessive entanglement between the church and the state should occur.

(4) Once the student or the student’s parents are informed of the student’s acceptance, the student must be enrolled in the participating school. The parent must then send proof of enrollment to the Superintendent.

(5) After the Superintendent receives the student’s proof of enrollment, the Superintendent will send a voucher to the qualified student’s parent. The voucher will be equal to the private school’s per pupil operating cost for educational expenses or the amount that the State provides to educate each public school pupil in that district, whichever is lower. The parent will endorse the check and forward it to the participating school.
Commentary

The Establishment Clause and the Indiana Constitution prohibit the State from directly granting public money to private sectarian schools. In order to create a constitutionally valid voucher program, public assistance would only flow to a private school indirectly. This model voucher program demonstrates how the process of gaining indirect aid occurs. Under the program, the Superintendent would send a voucher directly to the student’s parents upon receipt of a student’s proof of enrollment. The parents would then forward the voucher to the participating school. Thus, the parents would decide to grant public money to the private schools, and the private school would only receive the public money indirectly.

(6) The Superintendent shall monitor the performance of the qualified students attending each participating school. If the Superintendent determines that the participating school is not meeting a standard set forth in (2)(b) of this section, the school will be ineligible to participate in the program during the following school year.

Commentary

To ensure that the voucher program benefits students, the Superintendent shall monitor the students’ progress. While this form of governmental supervision may appear to create excessive entanglement between the church and state, the U.S. Supreme Court has allowed this type of evaluation process. Under Indiana law, the Superintendent already has the power to enter the private schools for administrative matters. The voucher program’s monitoring system reinforces the Superintendent’s purpose of ensuring quality education and performance within the school district.

(7) If a qualified student wishes not to participate in the school’s religious activities or programming, the student’s parent(s) shall submit a letter to the student’s teacher or participating school principal requesting that the student be exempt from attending such activities. The participating school shall not require these students to attend religious activities.

Commentary

The Indiana Constitution prohibits the government from compelling any person “to attend, erect, or support, any place of worship, or to
maintain any ministry, against his consent." By placing an "opt-out" provision within the voucher program, the General Assembly would not be compelling students to worship. The students attending private sectarian schools would have the opportunity to either support or be excused from religious activities. This provision would allow students to receive a private school education without being compelled to worship.

VI. CONCLUSION

The poor academic performance by Indiana students has received considerable attention by the media and has been the focus of much debate and discussion. One potential solution to some of the problems is for the General Assembly to enact legislation providing for school voucher programs in Indiana. While school voucher programs may provide a viable solution, a voucher system raises many concerns and presents numerous federal and state constitutional issues that will shape the nature and function of any proposed voucher system. This Note has proposed a model statute that would create a voucher system, would address some of the problems in education, the needs of children, and the desires of parents, and would satisfy the requirements of the federal and state constitutions.

Jennifer Lynn Smith

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413 IND. CONST. art. I, § 4.

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