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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,¹ sounding from social liberals and religious conservatives, presidents and parents, politicians and pundits, educators and think tanks.² Because these calls come from such diverse voices, the reform proposals and programs vary widely.³

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

¹ See Jonathon B. Cleveland, *School Choice: American Elementary and Secondary Education Enter the "Adapt or Die" Environment of a Competitive Marketplace*, 29 J. MARSHALL L. REV. 75 (1995); Peter J. Weishaar, *School Choice Vouchers and the Establishment Clause*, 58 ALB. L. REV. 543 (1994); Andrew A. Cheng, *The Inherent Hostility of Secular Public Education Toward Religion: Why Parental Choice Best Serves the Core Values of the Religion Clauses*, 19 U. HAW. L. REV. 697 (1997).

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

⁴ President William Jefferson Clinton, State of the Union Address (visited Dec. 22, 1999) <<http://www.whitehouse.gov/WH/New/html/19990119-2656.html>>.

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

⁵ President's Remarks to the Lehigh Valley 2000 Community, PUB. PAPERS 609, 610, 612 (Apr. 16, 1992).

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.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.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.¹⁰ The recent Third International Math and Science Study demonstrated that American students struggle with basic skills.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.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. *Id.* at 49. Based on these criteria, only ninety-six schools gained outstanding institution status. *Id.*

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. *Id.* at ¶1. During this same time period, elementary students showed minimal improvements in reading and mathematics. *Id.*

⁹ Peterson, *supra* note 6, at ¶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, *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, *Where Is Lake Wobegon, Anyway?*, 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., *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, *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. *Id.* In order for students to develop these skills, Feldman suggested more qualified teachers, intensive help to struggling children, and better preschool programs. *Id.*

¹⁰ See Albright, *supra* note 9, at 531.

¹¹ John Leo, *Hey, We're No. 1!*, U.S. NEWS & WORLD REP., Mar. 9, 1998, at 14.

¹² *Id.*

1983 and 1998 soared to over six million Americans.¹³ These alarming national statistics mirror those in the state of Indiana.¹⁴

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.

¹⁵ For an in depth discussion of school choice, see *infra* Section II.A. School choice especially attracts parents whose income forces them to send their children to the local public school. Nina H. Shokraii, *School Choice 1998: A Progress Report*, THE HERITAGE FOUNDATION, ¶4 (visited Jan. 15, 1999)

<<http://www.heritage.org/library/categories/education/fyi172.html>>.

¹⁶ *Id.*

send their children to magnet, alternative, or charter schools.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.¹⁸

School voucher programs, a type of school choice program, represent one current attempt to address these concerns.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.²⁰ This voucher pays a significant portion of a student's educational expenses for one school year.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.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.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

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.

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

¹⁹ Scott A. Fenton, *School Voucher Programs: An Idea Whose Time Has Arrived*, 26 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, *Vouchers and Voodoo Economics*, EDUC. LEADERSHIP, Oct. 1998, at 1.

²⁰ Fenton, *supra* note 19, at 1.

²¹ CONTROVERSY, *supra* note 6, at 32. Numerous types of voucher systems exist. Andrew S. Latham, *School Vouchers: Much Debate, Little Research*, 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. *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. *Id.*

²² Latham, *supra* note 21, at 82.

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, *Why Do Parents Choose Alternative Schools?*, EDUC. LEADERSHIP, Oct. 1, 1996, at 30, 32.

close.²⁴ Others argue that school choice simply will not improve overall student performance.²⁵

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.²⁶ 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.²⁷ Section III analyzes educational voucher programs under the U.S. Constitution.²⁸ Section IV analyzes the constitutionality of voucher programs under the Indiana Constitution.²⁹ Finally, Section V proposes a model voucher program that could be implemented in Indiana.³⁰

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.³¹ This Section also traces

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.

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, ¶2 (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.naspweb.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.³⁷ Some school districts offer alternative schools and magnet schools as additional forms of intradistrict school choice.³⁸

a. Alternative Schools

Alternative schools offer non-traditional learning opportunities to students.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.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.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.⁴² Magnet schools have three primary characteristics. First,

³⁷ Daniel, *supra* note 36, at 10.

³⁸ *Id.* These schools are included within intradistrict choice because only students residing within the school district may attend. *Id.*

³⁹ See generally *Alternative Schools—Some Answers and Questions*, 14 URB. REV. 65 (1982) [hereinafter *Alternative Schools*]. One example of an alternative school is the Home School Connections Center in Bellevue, Washington. Bellevue School District, *Home School Connections Center*, (visited Nov. 15, 1999)

<<http://belnet.bellevue.k12.wa.us/homeschool.html>>. Operating under state law, the school provides a supportive atmosphere for students. *Id.* The students' parents are the primary teachers, attending classes and workshops with their children. *Id.*

⁴⁰ *Alternative Schools*, *supra* note 39, at 65.

⁴¹ Leona Hiraoka, *Face It*, NEA TODAY, April 1996, at 4. Nationwide, seventy-three percent of public school teachers think by removing troublemakers from class, academic achievement would greatly improve. *Id.*

⁴² One example of a magnet school is the Martin Luther King, Jr. Magnet High School located in Nashville, Tennessee. Martin Luther King, Jr. Magnet High School (visited Feb. 12, 1999) <<http://mlk.dhs.org/ie.html>>. This magnet school seeks to provide academically gifted and talented students with a high quality education. *Id.* The MLK Magnet school focuses on student career opportunities in the health sciences and engineering fields. *Id.* Detroit's Renaissance High School, Michigan's twenty-one year old public magnet high school, focuses on college admissions and has a reputation as a place where educational excellence is a preoccupation. Debra Viadero, *Higher Standards*, U.S. NEWS & WORLD REP., Jan. 18, 1999, at 52, 52-53. One magnet school, the Buckman

the curriculum is specifically oriented to one particular academic discipline, such as mathematics, science, fine arts, or foreign languages.⁴³ Second, a select group of qualified educators teach the students.⁴⁴ Third, magnet school administrators select the enrolled students from a variety of school districts.⁴⁵

Originally developed in an effort to desegregate suburban schools,⁴⁶ magnet schools sought to attract a racially diverse student population.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.⁴⁸ Currently, highly motivated students are still attracted to these magnet schools because of the alternatives the schools provide to traditional curricular offerings.⁴⁹

2. Interdistrict School Choice

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

Elementary School in Portland, Oregon, attracts students with exceptional talent in art. *Buckman Elementary School* (visited Feb. 12, 1999) <<http://buckman.pps.k12.or.us/>>.

⁴³ Augustus F. Hawkins, *Becoming Preeminent in Education: America's Greatest Challenge*, 14 HARV. J.L. & PUB. POL'Y 367, 380-81 (1991).

⁴⁴ *Id.* at 380.

⁴⁵ *Id.* at 381.

⁴⁶ See Daniel, *supra* note 36, at 11.

⁴⁷ Janet R. Price & Jane R. Stern, *Magnet Schools as a Strategy for Integration and School Reform*, 5 YALE L. & POL'Y REV. 291, 292 (1987).

⁴⁸ See Daniel, *supra* note 36, at 12.

⁴⁹ See *Grant Gives Six Magnet Schools a Boost; \$2.37 Million Grant Will Go Toward Improving Curricula and Standards*, INDIANAPOLIS STAR, July 18, 1998, at B3 [hereinafter *Grant*].

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. *Id.*

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.

⁵² Daniel, *supra* note 36, at 13.

⁵³ *Id.*

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-

⁵⁵ The first charter school began in Minnesota in 1991 under the "Outcome-Based School Act." See MINN. STAT. § 120.064(1)(1003) (1991). A wide variety of charter schools exist throughout the country; one example is the Discovery Elementary School in Fennville, Michigan. *U.S. Charter Schools, Discovery Elementary School* (visited Feb. 12, 1999) <http://www.uscharterschools.org/uscs_1/visit?x-a=v&x-id=3855>. The Discovery program strives to help children gain competency in using modern technology, develop good decision making skills, become critical thinkers, and develop respect for the world's various cultures. *Id.* Another successful charter school that prepares students for a college career, the Sport Sciences Academy in Hartford, Connecticut, concentrates on school-to-career model educational techniques. *U.S. Charter Schools, Sport Sciences Academy* (visited Feb. 12, 1999) <http://www.uscharterschools.org/uscs_1/visit?x-a=v&x-id=870>. This charter school's academic programming includes sports communication, sports merchandising, and sports law. *Id.* The Choice 2000 On-Line Charter School operating out of Perris, California, offers an innovative approach to education. *U.S. Charter Schools, Choice 2000 On-Line Charter School* (visited Feb. 12, 1999) <http://www.uscharterschools.org/uscs_1/visit?x-a=v&x-id=706>. Choice 2000's mission is to provide all students with an opportunity to excel at vocational skills and to master life all in preparation for the twenty-first century. *Id.* Students in New Jersey who display outstanding abilities in artistic expression may choose to attend the chARTer TECH High School for the Performing Arts in Ocean City, New Jersey. *U.S. Charter Schools, chARTer TECH High School for the Performing Arts* (visited Feb. 12, 1999) <http://www.uscharterschools.org/uscs_1/visit?x-a=v&x-id=5235>.

⁵⁶ *Currents & Books*, NEWSDAY, Jan. 10, 1999, at B7.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Mortimer Zuckerman, *Schools Our Kids Deserve*, U.S. NEWS & WORLD REP., Sept. 23, 1996, at 108. Local school boards have held a tight monopoly on how and where students can receive government assisted schooling. Thomas Toch, *The New Education Bazaar*, U.S. NEWS & WORLD REP., April 27, 1998, at 34, 35 [hereinafter *Bazaar*].

two states have charter schools, and over one thousand charter schools are in operation nationwide.⁶¹

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.⁶² 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.⁶³ 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.⁶⁴ 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.⁶⁵

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

⁶⁰ 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.

⁶¹ *Currents & Books*, *supra* note 56, at B7. Alaska, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, North Carolina, New Hampshire, New Jersey, New Mexico, New York, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Virginia, Wisconsin, and Wyoming are the thirty-six states that currently have signed charter school laws. U.S. Charter Schools, *Overview of Charter Schools* (visited Oct. 19, 1999)

<http://www.uscharterschools.org/gen_info/gi_main.htm>. For more information on charter schools, see JOE NATHAN, *CHARTER SCHOOLS: CREATING HOPE AND OPPORTUNITY FOR AMERICAN EDUCATION* (1996).

⁶² *School Choice Programs: Indiana* (visited Nov. 15, 1999)

<<http://www.heritage.org/schools/indiana.html>> [hereinafter Choice Programs].

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.

⁶⁵ Editorial, *A Big Day for School Choice*, *INDIANAPOLIS STAR*, July 13, 1998, at A8.

programs in the performing arts, life sciences, environmental sciences, communications, arts, and health education.⁶⁶ 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.⁶⁷

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.⁶⁸ 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.⁶⁹ The CHOICE program provides private tuition scholarships to about one thousand Indianapolis students in kindergarten through eighth grade.⁷⁰ Funding for the CHOICE scholarships comes from donations by area business leaders.⁷¹

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.⁷² 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."⁷³ The bills, however, never made it out of the Education Committee.⁷⁴

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 Office 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.*

⁷² U.S. DEP'T OF EDUCATION, OFFICE OF INTERGOVERNMENTAL AND INTERAGENCY AFFAIRS, CENTER FOR CHOICE IN EDUCATION, REVIEW OF STATE CHOICE LEGISLATION (Sept. 1992).

⁷³ *Id.*

⁷⁴ *Id.*

B. School Vouchers

The initial calls for school choice⁷⁵ came from economists and philosophers and began in the United States in the late eighteenth century.⁷⁶ While these early calls dissipated, the calls were renewed in the middle twentieth century when Milton Friedman resurrected the idea.⁷⁷ Friedman's call for educational reform through the use of school choice sparked exploration into different school choice options.⁷⁸ One option available for educational reform that reformers proposed is a school voucher program.⁷⁹

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.⁸⁰ In *The Wealth of Nations*, Adam Smith⁸¹ suggested that schools could reach a higher quality of education by allowing students to choose their own teachers and schools.⁸² If afforded such a choice, students would flock to the educational facilities with the most renowned, and interesting, teachers.⁸³ Smith argued that student choice would encourage teachers to be diligent and provide "tolerably good" lectures because students would not attend otherwise.⁸⁴ With diminished student participation, ineffective teachers would be forced to improve their methods or risk

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).

⁷⁶ See Eric Nasstrom, *School Vouchers in Minnesota: Confronting the Walls Separating Church and State*, 22 WM. MITCHELL L. REV. 1065, 1070 (1996).

⁷⁷ For a discussion on the educational reform ideas of Milton Friedman, 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).

⁸² See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 819-46 (Edwin Cannan ed., Modern Library 1994) (1904).

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.⁸⁵ Students dissatisfied with the mediocre quality of education that they were receiving from one institution would then choose to attend a different school.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.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.⁸⁸

Thomas Paine⁸⁹ advocated school choice for those students without the means to attend the finest educational institutions.⁹⁰ Paine asserted that children of lower-class families should not be denied a quality education if their parents were unable to afford one.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.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.⁹³ Moreover, Paine strongly advocated that parents use these funds to create their own community-based private schools.⁹⁴

John Stuart Mill⁹⁵ built upon Paine's ideas arguing that parents should be able to choose between public and private education for their

⁸⁵ SMITH, *supra* note 82, at 823.

⁸⁶ *Id.*

⁸⁷ *Id.*

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.

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).

⁹⁰ THOMAS PAINE, THE LIFE AND WORKS OF THOMAS PAINE: RIGHTS OF MAN ESSAYS 59-60 (William M. Van der Weyde ed., 1925).

⁹¹ *Id.*

⁹² *Id.* at 60.

⁹³ *Id.*

⁹⁴ *Id.*

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.⁹⁶ Mill disagreed with Paine's assertion that only private schools provide students with quality educational experiences.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.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.⁹⁹

2. Milton Friedman—"The Father of School Vouchers"¹⁰⁰

Milton Friedman has been one of the leading advocates for school vouchers in the twentieth century.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."¹⁰² The parents would then be free to redeem this voucher at a public or private school.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.¹⁰⁴ Parents desiring to supplement the voucher would have the option to do so.¹⁰⁵ In Friedman's opinion, the voucher system would also foster competition among schools by encouraging improvements and efficiency within the educational market.¹⁰⁶ Essentially, Friedman's educational voucher system seeks to improve family access to a high quality education.¹⁰⁷

⁹⁶ Daniel, *supra* note 36, at 4 (citing E.G. West, *Tom Paine's Voucher Scheme for Public Education*, 33 S. ECON. J. 378, 379 (1967) (citing JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* (Ashley ed., 1915) (London n.d.)).

⁹⁷ *Id.*

⁹⁸ See THOMAS, *supra* note 95, at 46.

⁹⁹ See *infra* Section II.B.3.

¹⁰⁰ See Naastrom, *supra* note 76 (calling Friedman the father of school choice).

¹⁰¹ See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 89 (1962).

¹⁰² *Id.*

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.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

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.

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

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.

¹¹¹ See generally JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978); JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990).

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 "scholarship 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.¹¹⁶ By including parochial schools in this scholarship program, the educational system would include a larger number of schools with diverse educational offerings.¹¹⁷ A larger number would provide more choices and make it more likely that students could attend their school of first choice.¹¹⁸ Thus, the demand for exceptional educational institutions would create an incentive for schools to improve the quality of education.¹¹⁹

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*.¹²⁰ 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.¹²¹ The results showed that school organization, student ability, and family background significantly affect a student's academic achievement.¹²² Chubb and Moe explained that, even though these factors exist, the schools do not acknowledge them.¹²³ Schools strive less to please students and parents, than to comply with political agendas, democratic constituencies, and the administrators' agendas.¹²⁴ 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.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."¹²⁶ Like Coons and Sugarman's system, Chubb and Moe's plan also discourages parents from supplementing the scholarship amount.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.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."¹²⁹

b. Presidential Administrations and American Education

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

¹²⁵ *Id.*

¹²⁶ *Id.* at 215-26.

¹²⁷ *Id.* at 220.

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.*

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 *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 *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.

Id.

¹³⁰ See generally LEON M. LESSINGER, ACCOUNTABILITY IN EDUCATION (1971); Michael Heise, *Goals 2000: Educate America Act: The Federalization and Legalization of Educational Policy*, 63 FORDHAM L. REV. 345 (1994); Daniel Johnson, *Putting the Cart Before the Horse: Parent Involvement in the Improving America's School Act*, 85 CAL. L. REV. 1757 (1997).

¹³¹ See *Goals 2000: Educate America Act*, 20 U.S.C. §§ 5811-12 (1994); Federal Grants for State and Local "GI Bills" for Children, H.R. 5664, 102d Cong. (1992); Federal Grants for

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.¹³² The House took the initiative to create educational systems that would include some elements of school choice.¹³³ However, none of these bills passed.¹³⁴

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.¹³⁵ 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.¹³⁶ Despite all of the reform efforts during the Reagan years, no real improvements in the educational system were made.¹³⁷

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."¹³⁸ For President Bush, the future of America depended on reinventing the current school system.¹³⁹ His reform called for federal scholarships of \$1000 to be given to children from lower to middle-income earning

State and Local "GI Bills" for Children Act, S. 3010, 102d Cong. (1992); America Excellence in Education Act 2000, H.R. 2460, 102d Cong. (1991).

¹³² President Reagan sought to meet the educational needs of children by declaring his last month in office, January 1989, "America Loves Its Kids Month." Proclamation No. 5933, 54 Fed. Reg. 1915 (1989).

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.*

¹³⁵ WILLIAM J. BENNETT, *THE DE-VALUING OF AMERICA* 65 (1992).

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.*

¹³⁸ H.R. 5664, 102d Cong. (1992); S. 3010, 102d Cong. (1992).

¹³⁹ H.R. 5664, 102d Cong. (1992); S. 3010, 102d Cong. (1992).

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

iii. The Clinton Administration

In 1994, under the Clinton Administration, the "Goals 2000: Educate America Act" became law.¹⁴² The Act encouraged states¹⁴³ to improve their educational systems before the new millennium.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.¹⁴⁵ Objectives for achieving these goals before the year 2000 accompanied each goal.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

¹⁴⁰ Henry M. Levin, *Market Approach to Education: Vouchers and School Choice*, 11 ECON. EDUC. REV. 279, 281 (1992).

¹⁴¹ H.R. 5664, 102d Cong. (1992); S. 3010, 102d Cong. (1992).

¹⁴² Goals 2000: Educate America Act, 20 U.S.C. §§ 5811-12 (1994).

¹⁴³ 141 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. *Id.* Illinois has developed a program for public school students to interact with scientists from Northwestern University. *Id.* Minnesota parents are making statements to assist in improving their children's education. *Id.*

¹⁴⁴ 141 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. *Id.* Secretary Riley explained that Goals 2000 would help local schools without restrictions from the Department of Education. *Id.* Ninety-eight percent of the funding in the \$400 million program is directly given to schools which complete an application form. *Id.* Although the program has set goals, Secretary Riley reminded the audience that we need to encourage ideas and remain flexible with these programs. *Id.* Riley advocated public school choice and charter schools as ways to approach the various learning styles of children. *Id.*

¹⁴⁵ 20 U.S.C.A. §§ 5801-6084 (West Supp. 1997). See also Lisa Kelly, *Yearning for Lake Wobegon: The Quest for the Best Test at the Expense of the Best Education*, 7 S. CAL. INTERDISC. L.J. 41, 51 (1998).

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. *Id.* at § 5812(2)(b).

scholarship programs for students from lower-income families.¹⁴⁷ In Arizona, the legislature has created a similar scholarship program funded by independent taxpayer contributions.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.¹⁴⁹ In an attempt to improve its educational system, the Wisconsin legislature enacted the Milwaukee Parental Choice Program (MPCP) in 1989, providing eligible students¹⁵⁰ with the opportunity to attend public or private, sectarian or non-sectarian schools¹⁵¹ outside of the problem-plagued Milwaukee Public School system.¹⁵² Under the MPCP, the government pays for an eligible

¹⁴⁷ See *infra* Sections II.B.3.c.i., iii.

¹⁴⁸ See *infra* Section II.B.3.c.ii.

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).

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. WIS. STAT § 119.23 (2)(a)(1)-(2) (1994).

¹⁵¹ The original MPCP only allowed non-sectarian schools to participate in the program. *Jackson v. Benson*, 578 N.W.2d 602, 608 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998). The 1995 legislature amended that section to include all private schools. See WIS. STAT. ANN. § 119.23(2)(b) (West 1996). The amended MPCP includes an "opt-out provision." *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. *Id.*

¹⁵² *Jackson*, 578 N.W.2d at 612. In 1995, the Wisconsin legislature amended the Milwaukee Parental Choice Program (MPCP). *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. *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).

298 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 34

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.*

¹⁵⁵ *Id.* at 620. See also Section III.B.1. for a discussion of the *Jackson* court's federal Establishment Clause analysis. See Section IV.A.1. for a discussion of the *Jackson* court's state constitutional analysis. See also Steve France, *A New Test for Lemon*, 84 A.B.A. J., Sept. 1998, at 30-31.

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.* See *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999).

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

not allow taxpayers to designate their donation for their dependent's direct benefit.¹⁵⁹ The STO, however, would provide tuition grants or educational scholarships to children attending their parents' choice of qualified school.¹⁶⁰ In January 1999, the Arizona Supreme Court upheld the statute as valid under the federal Establishment Clause and Arizona's religion clauses.¹⁶¹

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.¹⁶² The program provides scholarships for students to attend alternative schools and tutorial assistance grants for an equal number of students attending public schools.¹⁶³ Under the SVP, the state superintendent establishes an application process for students in kindergarten through third grade¹⁶⁴ who desire to participate in the scholarship program.¹⁶⁵ While preference is given to students from lower-income families,¹⁶⁶ the superintendent has the discretion to award

one school. *Id.* If a husband and wife file a joint tax return, the five hundred dollar tax limit still applies. *Id.* 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 ARIZ. 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.¹⁶⁷ If a student chooses to attend a public school, the superintendent distributes the funds directly to the school.¹⁶⁸ If a student chooses a private school, however, the superintendent issues the voucher to the parents.¹⁶⁹ This system was challenged. After an Ohio trial court upheld it,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.¹⁷¹ Recently, however, the Ohio Supreme Court held that the SVP did not violate the state or federal constitutions.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

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.*

¹⁶⁸ OHIO REV. CODE ANN. § 3313.979 (West 1999).

¹⁶⁹ *Id.* Then the parents will redeem the voucher at the private school of their choice. Adams, *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.*

¹⁷⁰ See *Gatton v. Goff*, Nos. 96CVH-01-193, 96CVH-01-721, 1996 WL 466499 (Ohio. Com. Pl. July 31, 1996). Judge Sadler found the Program to be constitutional. *Id.*

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.

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. *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.¹⁷³ Applicable to the States through the Fourteenth Amendment,¹⁷⁴ 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."¹⁷⁵ 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.¹⁷⁶ 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."¹⁷⁷ While the U.S. Supreme Court has not specifically determined whether school voucher programs are constitutional under the U.S. Constitution,¹⁷⁸ its case law is instructive regarding the tests that would likely apply.¹⁷⁹ State supreme courts have specifically considered whether voucher programs that include private

¹⁷³ 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.*

¹⁷⁴ 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.

¹⁷⁵ 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).

¹⁷⁶ *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.*

¹⁷⁷ *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947).

¹⁷⁸ 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).

¹⁷⁹ See *infra* Section III.A.

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.

¹⁸¹ John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 421 (1996).

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.

¹⁸⁴ *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973). Using the three-pronged Establishment Clause test, the Court invalidated tax schemes allowing reimbursement payments for parochial school tuition. *Id.* See also *infra* notes 204-217 and accompanying text. The Court prohibited public employees from teaching in religious schools. *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985). See *infra* notes 231-40 and accompanying text. The Court also prohibited the State from loaning textbooks to religious schools. *Meek v. Pittenger*, 421 U.S. 349 (1975).

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*

¹⁸⁶ 330 U.S. 1 (1947).

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.*

¹⁹⁵ 403 U.S. 602 (1971).

¹⁹⁶ *Id.* at 612-13.

developed a three-pronged test (the “*Lemon* test”) to evaluate the constitutionality of government action under the Establishment Clause.¹⁹⁷ In *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.¹⁹⁸ First, the law must have a secular legislative purpose.¹⁹⁹ Second, the law must not have the primary effect of advancing or inhibiting religion.²⁰⁰ Finally, the law must avoid excessive government entanglement with religion.²⁰¹ Although the *Lemon* test has been severely criticized and applied differently,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.²⁰³

2. Transitional Cases: Debating Tests

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

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 612-13 (citing *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

²⁰⁰ *Lemon*, 403 U.S. at 612-13 (citing *Walz v. Tax Comm.*, 397 U.S. 664, 674 (1970)).

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.

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 stating:

[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.

Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392 (1993). But see *Agostini v. Felton*, 521 U.S. 203 (1997), in which the Court made the third prong part of the effects inquiry for state aid cases. See also Kenneth W. Starr, *The Establishment Clause*, 41 OKLA. L. REV. 477, 483 (1988) (discussing how the rigid *Lemon* test fails to consider the values the Establishment Clause intended to impose).

²⁰³ Michael J. Stick, *Educational Vouchers: A Constitutional Analysis*, 28 COLUM. J.L. & SOC. PROBS. 423, 433 (1995).

²⁰⁴ 413 U.S. 756 (1973).

parents of children attending private, sectarian schools.²⁰⁵ In considering the first prong of *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.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.²⁰⁷ The state also argued that the program provided lower-income families with additional educational choices.²⁰⁸ The *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.²⁰⁹

Although the program survived the first prong of the *Lemon* test, the program failed under the second prong.²¹⁰ Under the second prong of *Lemon*, the Court in *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.²¹¹ Thus, by creating incentives to attend sectarian schools, the program was not neutral toward religion.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.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.²¹⁴

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. *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. *Id.* at 780. The governor limited this grant to no more than 50% of the actual tuition paid to attend the private school. *Id.*

²⁰⁶ *Id.* at 765.

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

²⁰⁸ *Id.*

²⁰⁹ *Nyquist*, 413 U.S. at 773.

²¹⁰ *Id.* at 780.

²¹¹ *Id.* at 764, 794.

²¹² *Id.* at 782.

²¹³ *Id.*

²¹⁴ *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. Allen*²¹⁸ 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,

²¹⁵ *Id.* at 794.

²¹⁶ *Id.*

²¹⁷ *Id.* at 775. The following statement by Justice Powell provides a foundation for a valid school voucher program:

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 nonsecular 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.

Id.

²¹⁸ 463 U.S. 388 (1983).

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.

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.²²¹ In addition to providing educational deductions for parents of public or private school children, medical expenses and charitable contribution deductions were also included.²²² 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."²²³ Second, Minnesota's statute had a broad class of beneficiaries.²²⁴ 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.²²⁵ The Court determined that a program that rewards a broad class of beneficiaries does not create the primary effect of advancing religion.²²⁶ Third, the Court found that Minnesota gave public aid only indirectly to religious institutions.²²⁷ Specifically, Minnesota's system disbursed public funds to parents who could choose where to send their children to school.²²⁸ 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.²²⁹ Considering these three factors of neutrality, the Court determined that the effect of Minnesota's statute was neither to advance nor inhibit religion.²³⁰

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

²³¹ 473 U.S. 402 (1985).

²³² 20 U.S.C. § 6301-03 (1999). Originally enacted by Congress as Title I of the Elementary and Secondary Education Act of 1965, the United States provided financial aid to local educational agencies that focus on improving educational opportunities for children from lower-income families. 20 U.S.C. § 2701 (1982). As of October 1982, Title I was superseded by the Education Consolidation and Improvement Act of 1981. 20 U.S.C. § 3801 (1982). More recently, Title I has been reenacted in the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified at 20 U.S.C. § 6301-03).

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.²³⁸ The Court ruled that the Board's program failed the third prong of the *Lemon* test regarding excessive entanglement between church and state²³⁹ 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.²⁴⁰

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*,²⁴¹ the Court considered a school-aid program, holding unanimously that the

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.

²⁴¹ 474 U.S. 481 (1986).

State of Washington could provide a vocational tuition grant to a blind student studying to become a pastor at a Christian college.²⁴² 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.²⁴³ 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.²⁴⁴ 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.²⁴⁵

Another school-aid case that is similar to *Witters* is *Zobrest v. Catalina Foothills School District*.²⁴⁶ 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.²⁴⁷ The Court reasoned that the beneficiaries were the disabled children, not the schools.²⁴⁸ Second, the aid flowed indirectly to the schools after the parents and students choose the educational facility.²⁴⁹ Finally, the program offered benefits to students who attended public or private schools.²⁵⁰ Therefore, the IDEA has created a neutral program that does not advance religion nor violate the Establishment Clause.²⁵¹

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.²⁵² In 1997, the Supreme Court decided *Agostini v. Felton*,²⁵³

²⁴² *Id.* at 482.

²⁴³ *Id.* at 488.

²⁴⁴ *Id.*

²⁴⁵ *Id.* The assistance program does not provide greater benefits for students enrolled in sectarian institutions. *Id.* The choice to attend a sectarian or non-sectarian institution is made by the student, not the government. *Id.*

²⁴⁶ 509 U.S. 1 (1993).

²⁴⁷ *Id.* at 3.

²⁴⁸ *Id.* at 12.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 10.

²⁵¹ *Zobrest*, 509 U.S. at 13-14.

²⁵² See Doug Roberson, *The Supreme Court's Shifting Tolerance for Public Aid to Parochial Schools and the Implications for Educational Choice: Agostini v. Felton*, 117 S. Ct. 1997 (1997), 21 HARV. J.L. & PUB. POL'Y 861 (1998).

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.

²⁵⁷ *Agostini*, 521 U.S. 203 (1997). See also *Roberson*, *supra* note 252, at 861.

²⁵⁸ *Agostini*, 521 U.S. 203 (1997).

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.²⁵⁹ 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.²⁶⁰

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*.²⁶¹ The *Agostini* Court recognized that the first two assumptions of *Meek* and *Ball* were abandoned by the Court in *Zobrest*.²⁶² 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."²⁶³

The *Agostini* Court recognized that the Court in its *Witters* decision had discredited the third assumption.²⁶⁴ 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.²⁶⁵ 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

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.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.²⁶⁷ In both instances, the government only indirectly aids religious institutions through private choices of individuals, and therefore, the aid is not invalid.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.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."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.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."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.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

²⁶⁶ *Id.* at 225-26 (citing *Witters*, 474 U.S. at 487).

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.

²⁶⁸ *Agostini*, 521 U.S. at 226; *Witters*, 474 U.S. at 488-89.

²⁶⁹ *Agostini*, 521 U.S. at 228-32.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 230-31.

²⁷² *Id.* at 231.

²⁷³ *Id.*

religion."²⁷⁴ The Court discounted the excessive entanglement analysis used by the *Aguilar* Court.²⁷⁵ 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.²⁷⁶

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."²⁷⁷ 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]."²⁷⁸ 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.²⁷⁹

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-

²⁷⁴ *Agostini*, 521 U.S. at 233.

²⁷⁵ *Id.* In discussing the *Aguilar* Court's excessive entanglement analysis, the Court stated: [T]he Court's finding of "excessive" entanglement in *Aguilar* rested on three grounds: (1) the program would require "pervasive monitoring by public authorities" to ensure that Title I employees did not inculcate religion; (2) the program required "administrative cooperation" between the Board and parochial schools; and (3) the program might increase the dangers of "political divisiveness."

Id. at 233 (citing *Aguilar v. Felton*, 473 U.S. 402, 413-14 (1985)).

The Court noted that the first of these considerations had been undermined and that the last two of these considerations were insufficient by themselves to constitute an excessive entanglement. *Id.* at 233-34.

²⁷⁶ *Id.* at 234.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 234-35.

²⁷⁹ *Agostini*, 521 U.S. at 235.

established school voucher programs that include sectarian schools,²⁸⁰ the U.S. Supreme Court has not determined whether school voucher programs are constitutional.²⁸¹ 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.²⁸²

1. Wisconsin

In *Jackson v. Benson*,²⁸³ the Wisconsin Supreme Court held that the MPCP²⁸⁴ did not violate the Establishment Clause. Applying the *Lemon* test,²⁸⁵ the court determined that the MPCP had the secular purpose of providing greater educational opportunities for children from lower-income families.²⁸⁶ 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.²⁸⁷ Further, the court concluded that the state superintendent's minimal supervision of the participating religious schools did not create excessive government entanglement.²⁸⁸ Having satisfied all three prongs

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.

²⁸¹ The U.S. Supreme Court has denied petitions for writ of certiorari in two cases seeking to determine the constitutionality of voucher programs. *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).

²⁸² See *infra* Section III.B.

²⁸³ 578 N.W.2d 602, 611 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998).

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 program²⁹¹ 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

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*,²⁹⁸ the Ohio Supreme Court held that the School Voucher Program²⁹⁹ did not violate the First Amendment's Establishment Clause. The *Goff* court utilized the *Lemon* test,³⁰⁰ along with subsequent U.S. Supreme Court Establishment Clause jurisprudence, in reaching its holding.³⁰¹ The court found that the SVP clearly served the secular legislative purpose of educating children within the Cleveland City School District.³⁰² 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.³⁰³ 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.³⁰⁴ The Ohio Supreme Court held, therefore, that the SVP did not violate the Establishment Clause of the First Amendment.³⁰⁵

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.³⁰⁶ First, the voucher program must demonstrate a

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.³⁰⁷ Generally, if a voucher program promotes the educational opportunities of students, it has a secular purpose.³⁰⁸ Second, the voucher program must not have the primary or principal effect of either advancing or inhibiting religion.³⁰⁹ Several factors are key to making this determination: the voucher program must be facially neutral, not creating a preference for or against religion;³¹⁰ it must be directed toward a broad class of beneficiaries;³¹¹ 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.³¹² Third, the voucher system must not cause excessive government entanglement with the religious institutions.³¹³ 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.³¹⁴ 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

v. Felton, 521 U.S. 203 (1997). For a discussion of the *Lemon* test, see *supra* notes 195-203 and accompanying text.

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.³¹⁵ First, federal law is supreme; therefore, all conflicts between federal and state law are resolved in favor of federal law.³¹⁶ Second, state courts must interpret federal law in accordance with U.S. Supreme Court precedent.³¹⁷ Third, the U.S. Supreme Court will only review state law that is inconsistent with federal law.³¹⁸ These principles allow state courts to interpret their constitutions independently from the federal constitution.³¹⁹

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.³²⁰ Because the religion clauses in the Indiana Constitution are similar to the religion clauses in the Wisconsin, Arizona, and Ohio Constitutions,³²¹ the analysis used by these state supreme courts under their state constitutions is instructive regarding the interpretation of the Indiana Constitution.³²² All four constitutions establish that no public money shall be directed toward a religious institution or seminary;³²³ thus, in order for a voucher program to include private, sectarian schools, the religious institutions can only receive public funds indirectly.³²⁴

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 religions 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.³²⁵ 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,³²⁶ the Wisconsin Supreme Court analyzed the MPCP to determine whether it had the primary or principal effect of advancing religion.³²⁷ 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.³²⁸ 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.³²⁹ 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.³³⁰

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.

³²⁶ See *State ex rel. Warren v. Nusbaum*, 219 N.W.2d 577, 583 (Wis. 1974). The Wisconsin Supreme Court interprets Article I, § 18 of the Wisconsin Constitution in light of the U.S. Supreme Court cases that analyze the First Amendment's Establishment Clause. *King v. Village of Waunakee*, 517 N.W.2d 671, 683 (Wis. 1994).

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.

³³² See ARIZ. REV. STAT. § 43-1089 (1998).

³³³ *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999)

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.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.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.³⁴¹ The court held that the tax credit and scholarship programs do not violate the Arizona Constitution's religion clauses.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.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,³⁴⁴ has been interpreted to be the approximate equivalent of the Establishment Clause of the First Amendment to the U.S.

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.

Id.

³³⁹ *Kotterman*, 972 P.2d at 612.

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.*

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.*

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)).

³⁴³ *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999).

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." OHIO CONST. art. I, § 7.

Constitution.³⁴⁵ The court adopted the three-part *Lemon* test to determine whether the SVP establishes religion,³⁴⁶ 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.³⁴⁷ The court reiterated its federal constitutional analysis of the SVP under the *Lemon* test³⁴⁸ 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.³⁴⁹ The court therefore held that the SVP did not violate the Ohio Constitution.³⁵⁰

B. An Invalid Program Under the Vermont State Constitution

In *Chittenden Town School District v. Vermont Department of Education*,³⁵¹ 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.³⁵² Instead of sending the tuition

³⁴⁵ *Goff*, 711 N.E.2d at 211 (citing *State ex rel. Heller v. Miller*, 399 N.E.2d 66, 67 (Ohio 1980) and *Southern Ridge Baptist Church v. Industrial Comm.*, 676 F. Supp. 799, 808 (S.D. Ohio, 1987)).

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.³⁵³ 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.³⁵⁴ In 1996, fifteen students from Chittenden attended this school.³⁵⁵

The Department of Education challenged Chittenden's program under the Compelled Support Clause of the Vermont Constitution.³⁵⁶ 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.³⁵⁷ 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.³⁵⁸

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:

[A]ll [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

³⁵⁹ Honorable Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U. L. REV. 449, 456 (1999). The first constitution took only eighteen working days to draft. *Id.*

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 infeasible 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 infeasible 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."³⁶⁴ Article I, Section 6 provides that "no money shall be drawn from the treasury, for the benefit of any religious or theological institution."³⁶⁵ 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.*

³⁶⁴ IND. CONST. art. I, § 4.

³⁶⁵ IND. CONST. art. I, § 6. See also *State ex rel. Johnson v. Boyd*, 28 N.E.2d 256, 263 (Ind. 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 schools shall be appropriated to 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."); WIS. CONST. art. I, § 18 ("[N]or shall any money be drawn from the treasury for the benefit of religious or theological seminaries.").

³⁶⁶ See *State ex rel. Johnson v. Boyd*, 28 N.E.2d 256 (Ind. 1940); *Center Township v. Coe*, 572 N.E.2d 1350 (Ind. Ct. App. 1991).

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.³⁶⁹ 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.³⁷⁰ 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.³⁷¹ 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.³⁷² The Superintendent of the Vincennes Public Schools hired teachers recommended by Roman Catholic colleges.³⁷³ 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.³⁷⁴ 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.³⁷⁵

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.³⁷⁶ 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.³⁷⁷ Therefore, the decision of the Board did not violate the Indiana Constitution by making any contributions to the church directly.³⁷⁸

In 1991, the Indiana Court of Appeals in *Center Township v. Coe*³⁷⁹ held that a homeless shelter's requirement of church attendance violated the Indiana Constitution.³⁸⁰ The Court of Appeals reasoned that conditioning a statutory benefit on attending religious programs violates a person's constitutional rights.³⁸¹ Specifically, a requirement to attend or support worship against a person's will clearly violates Article I, Section 4 of Indiana's Constitution.³⁸² The court also held that, according to *Boyd*, direct payments to the religious mission violated Article I, Section 6 of the Indiana Constitution.³⁸³ The Court reasoned that the Trustee of Center Township made no effort to separate the statutory benefits from the missions' sectarian purpose.³⁸⁴ 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.³⁸⁵

³⁷⁷ *Boyd*, 28 N.E.2d at 261.

³⁷⁸ *Id.*

³⁷⁹ 572 N.E.2d 1350 (Ind. Ct. App. 1991).

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.*

³⁸¹ *Coe*, 572 N.E.2d at 1360. The government cannot force a person to choose between participating in a public program and exercising their constitutional rights. *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981).

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 encourage³⁹⁴ nor benefit religion.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.³⁹⁶ Thus, they delegated the responsibility of improving the educational system to the General Assembly.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.³⁹⁸ Local public school boards may only exercise those powers expressly granted under the statute.³⁹⁹ Because the power over the

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, *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. *Id.*

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, *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. *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.

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

³⁹⁷ *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." *Id.*

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). See also *State 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." *Id.* at 948. See also *Stone v. Fritts*, 82 N.E. 792 (Ind. 1907). The legislature will establish and regulate the public schools. *Id.* at 794.

³⁹⁹ *Haworth*, 23 N.E. at 948. See also *Gruber v. State 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. *Id.* at 485.

public schools is legislative, the General Assembly is not precluded from attempting new programs with the intent of improving education.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.⁴⁰¹ According to the Indiana Constitution, the General Assembly shall only pass general laws, rather than special or local laws,⁴⁰² that can operate throughout the state.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.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.

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.*

⁴⁰¹ IND. CONST. art. IV, § 23. See generally *Wayne Township v. Brown*, 186 N.E. 841 (Ind. 1933).

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).

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.

⁴⁰⁴ See *State ex rel. Todd v. Hatcher*, 301 N.E.2d 766 (Ind. Ct. App. 1973); *Pennsylvania Co. v. State*, 41 N.E. 937 (Ind. 1895).

B. The Proposed Voucher Program⁴⁰⁵

- (1) *The Indiana Board of Education⁴⁰⁶ 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.*

⁴⁰⁵ This model voucher program is derived from the Milwaukee Parental Choice Program, WIS. STAT. ANN. § 119.23 (West 1998), the Cleveland Pilot Project Scholarship Program, OHIO REV. CODE ANN. § 3313.975 (West 1996), and the Arizona Credit for Contributions to School Tuition Organizations Program, ARIZ. REV. STAT. ANN. § 43-1089 (West 1998).

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).

334 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 34

(iii) *The private school must meet all health⁴⁰⁷ and safety⁴⁰⁸ codes that apply to the local public school system, as well as 42 U.S.C. § 2000d.⁴⁰⁹*

(iv) *The private school must also satisfy all of the requirements prescribed by law for Indiana private schools.⁴¹⁰*

(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

⁴⁰⁷ IND. CODE § 20-8.1-7-1 to § 20-8.1-7-21 (West 1995).

⁴⁰⁸ IND. CODE § 20-8.1-8-1 to § 20-8.1-8-2 (West 1995).

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.*

⁴¹⁰ IND. CODE § 20-1-19-1 to § 20-1-19-24 (West 1999).

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 Superintendent⁴¹¹ 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' parents⁴¹² 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*

⁴¹¹ 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).

⁴¹² 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.

IND. CODE § 20-8.1-1-3 (West 1995).

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.”⁴¹³ 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.

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⁴¹³ IND. CONST. art. I, § 4.

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