

Symposium on Legal Education

Vouching for Federal Education Choice: If You Pay Them, They Will Come

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Recommended Citation

Jack A. Kramer, *Vouching for Federal Education Choice: If You Pay Them, They Will Come*, 29 Val. U. L. Rev. 1005 (1995).

Available at: <https://scholar.valpo.edu/vulr/vol29/iss2/9>

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Notes

VOUCHING FOR FEDERAL EDUCATIONAL CHOICE: IF YOU PAY THEM, THEY WILL COME

*Education, . . . beyond all other devices of human origin, is a great equalizer of conditions of men—the balance wheel of the social machinery.*¹

I. INTRODUCTION

The concept of the educational voucher is by no means novel.² The educational voucher was discussed in several early classic works.³ Thomas

1. Horace Mann, 1848, *quoted in* Walter Shapiro, *Tough Choice*, TIME, Sept. 16, 1991, at 54.

2. See *infra* section II.B., notes 65-84 and accompanying text. The terms "voucher" and "school choice" are not always interchangeable. The main difference between a voucher plan and a school choice plan is the inclusion of private and religious institutions as meaningful alternatives in the former. Carol L. Ziegler & Nancy M. Lederman, *School Vouchers: Are Urban Students Surrendering Rights for Choice?*, 19 FORDHAM URB. L.J. 813, 816 (1992). While these terms are not always interchangeable, this author utilizes the phrase "choice through vouchers" since a true choice cannot be made without having all of the available alternatives presented. The choice through voucher concept seeks to improve education's quality and efficiency by injecting competition into the market for educational services. The government does this by partially or completely subsidizing the parents and students' choice of which school to attend. Thus, schools will be forced to compete for students, and consequently will provide the type and quality of education that is desired.

3. The concept of educational vouchers predates the United States of America. Although not titled a voucher, it first appeared in Adam Smith's *Wealth of Nations* in 1776. DAVID W. KIRKPATRICK, *CHOICE IN SCHOOLING: A CASE FOR TUITION VOUCHERS* 1 (1990). The concept was dubbed a "voucher" by University of Chicago economist Milton Friedman. Milton Friedman, *The Role Of Government In Education*, in *ECONOMICS AND PUBLIC INTEREST* 123 (Robert A. Solo ed., 1955). The concept was also referred to in Thomas Paine's 1792 classic, *The Rights of Man*. KIRKPATRICK, *supra*. Furthermore, John Stuart Mill, in 1859, stated:

An education established and controlled by the State should only exist, if it exist at all, as one among many competing experiments, carried on for the purpose of example and stimulus to keep the others up to a certain standard of excellence . . . [I]f [a] country contains a sufficient number of persons qualified to provide education under government auspices, the same persons would be able . . . to give an equally good education on the voluntary principle, under the assurance of remuneration afforded by a law rendering education compulsory, combined with State aid to those unable to defray the expense.

John Stuart Mill, *On Liberty*, *reprinted in part in* GEORGE R. LA NOUE, *EDUCATIONAL VOUCHERS: CONCEPTS AND CONTROVERSIES* 4 (1972).

More recently, an Atlanta attorney discovered a 1961 Georgia law that requires the state to

Jefferson proposed a similar concept in his 1779 school bill.⁴ While the educational voucher concept received little attention in these early periods,⁵ it remains clear that the voucher concept is not new. Despite the voucher's low-profile history, education itself has always played an important role in society.

Education in our society is of primary importance.⁶ The Supreme Court of the United States has continually emphasized the importance of education in our society.⁷ However, the quality of public education has been questioned.⁸

provide tuition scholarships to parents whose children attend private schools. *Choice Reality*, WALL ST. J., Sept. 21, 1993, at A22. The Georgia law allots an educational grant to every child between the ages of six and 19 who resides in Georgia, has not graduated or finished high school, and is otherwise qualified to attend the elementary and secondary public schools. GA. CODE ANN. § 20-2-642 (1992). The grant is paid in lieu of attending the public school system and for the purpose of defraying the cost of attending a nonsectarian private school anywhere in the United States. *Id.*

4. KIRKPATRICK, *supra* note 3, at 25. Jefferson's educational proposals were not well received by the Virginia legislature, and consequently were not implemented. LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE COLONIAL EXPERIENCE* 443 (1970).

5. KIRKPATRICK, *supra* note 3, at 25. Perhaps the reason for this lack of attention to educational vouchers in its early period was because the early works on the topic were not regarded as educational works. *Id.* For example, Adam Smith's *Wealth of Nations* was dedicated to laissez-faire economics, while Thomas Paine's and John Stuart Mill's works focused on politics and philosophy. *Id.* However, more recent works, such as Friedman's *The Role of Government in Education*, have focused on education and how government can improve the educational system.

6. MILTON FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 150 (Harcourt Brace Jovanovich 1990) ("Education has always been a major component of the American Dream."). Also, an educated society will be better equipped to confront the challenges that are presented by modern technology, science, and thought. Lane Kirkland, *The Public School and the Common Good*, 33 J. TCHR. EDUC. 2, 3 (1982). The importance of education in American society was evident from its very beginning. For example, a plot of land was set aside in every possible township for the promotion of education under the Articles of Confederation, the Ordinance of 1787. 18 ENCYCLOPEDIA BRITANNICA 48 (15th ed. 1993).

7. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (noting that public schools were viewed "as the primary vehicle for transmitting 'the values on which our society rests'") (quoting *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)); *Ambach v. Norwick*, 441 U.S. 68, 75-76 (1979) (holding that state restrictions on teacher certification based on alienage is within the *Sugarman* exception and does not violate the Equal Protection Clause since teachers have the opportunity to affect attitudes towards government, the political process and social responsibilities); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1972) (noting that education is the very foundation of good citizenship and the primary method of instilling cultural values); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) ("Public schools . . . [are] a most vital civic institution for the preservation of a democratic system of government."); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) ("[Education] is the very foundation of good citizenship [The school] serves [as] a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.").

8. The poor quality of education was evidenced by a recent congressional finding that "many elementary and secondary schools [are] structured according to models that are outdated and ineffective." H.R. 2460, 102nd Cong., 1st Sess., Title I, § 101(1)(a) (1991). Furthermore, Congress concluded that many students are not provided with the skills and knowledge necessary to succeed in the workplace and the world economy. *Id.* §§ 101(1)(c), 101(2). *See also* David

Since the 1800s, when compulsory education laws were enacted,⁹ many experts¹⁰ have questioned the efficiency as well as the quality of public education.¹¹ These laws gave the public school system a virtual monopoly in

Boaz, *School Reform Was A Failure; Try Vouchers*, INSIGHT, July 5, 1993, at 18 ("American students ranked 13th on a 1992 international science test taken by students from 15 countries."); Robert Rector, *A Comprehensive Urban Policy: How To Fix Welfare And Revitalize America's Inner Cities*, 12 MEMO TO: PRESIDENT-ELECT CLINTON 11 (Jan. 18, 1993) (available from the Heritage Foundation, 214 Massachusetts Avenue, N.E., Washington D.C. 20002-4999) (citing that half of the Chicago public high schools rank in the bottom one percent of the nation in scholastic achievement); Ernest Van Den Haag, *Why Do American Kids Learn So Little*, NATIONAL REVIEW, Aug. 3, 1992, at 34 ("[American] children learn far less in school than European and Japanese children do, although America spends far more per pupil."); W. Terence Walsh, *A Safety Net For Dropouts*, A.B.A. J., Sept. 1993, at 128 (citing that in the United States a student drops out of school every 10 seconds of each school day).

9. Compulsory attendance laws are a general part of a state's educational system. 68 AM. JUR. 2D *Schools* § 228 (1993) [hereinafter *Schools*]. The idea for compulsory attendance in education was present as early as the 16th century. Martin Luther, in 1524, argued for the German state to establish compulsory public schools. R. J. LYTLE, *LIBERTY SCHOOLS* 54 (1975). Also during the 16th century, compulsory public education was advocated in Geneva by John Calvin. *Id.*

Modern attendance laws are premised on the idea that the primary purpose of the educational system is to train children to be good and loyal citizens. In *Re Shinn*, 195 Cal. App. 2d 683, 686 (1961); *Schools*, *supra*, § 228. Thus, parents owe a duty not only to the child, but also to the state to educate their child and may be coerced into performing such duty when the parents refuse to perform this obligation. See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (noting that the natural duty of parents is to provide their children with an education suitable for their station in life); *State v. Baily*, 61 N.E. 730, 732 (Ind. 1901) (holding that the welfare of the child and the best interest of society obligates the state to use its power to secure an educational opportunity for the child when the parent fails to fulfill this obligation); *Commonwealth v. Beiler*, 79 A.2d 134, 137 (Pa. Super. Ct. 1951) (commenting that parents have no constitutional right to deprive their children of an education or to prevent the state from assuring children an adequate preparation for life in a democratic society); *Schools*, *supra*, § 228. Furthermore, compulsory attendance laws have withstood constitutional challenges. See *State v. Garber*, 419 P.2d 896, 902 (Kan. 1966) (holding that a state's compulsory attendance law is a valid exercise of a state's police power), *cert. denied*, 389 U.S. 51 (1967); *Commonwealth v. Bey*, 70 A.2d 693, 695 (Pa. Super. Ct. 1950) (holding that a compulsory attendance law that allows a parent to choose the school that their child is to attend is within constitutional limits); *Rice v. Commonwealth*, 49 S.E.2d 342, 346 (Va. 1948) (holding that despite religious convictions that children must be taught by their parents, a statute requiring parents to send their children to a public, private, or parochial school, or to have them taught at home by qualified teachers, does not deprive parents of due process or equal protection of the laws).

10. See FRIEDMAN, *supra* note 6, at ch. 6 (arguing for an unregulated voucher to remove public schools' inefficiencies); KIRKPATRICK, *supra* note 3, at 10 (noting that former Labor Secretary William Brock stated that 700,000 high school graduates annually are functionally illiterate).

11. Stephen Arons, *Educational Choice: Unanswered Questions in the American Experience*, in *FAMILY CHOICE AND SCHOOLING: ISSUES AND DILEMMAS* 23-24 (Michael E. Manley-Casimir ed., 1982). See also KIRKPATRICK, *supra* note 3, at 10. A 1967 study of Indiana history teachers indicated that the average teacher surveyed read less than one book in his or her field annually. *Id.* However, all educators are not to blame for the failings of the public education system. During his term as the Pennsylvania State Education Association president, Colin Greer stated, "Educators must cease supporting a facade of quality where the substance is missing. Our schools have never

providing education.¹² However, along with the criticism have come many plans to improve the efficiency and quality of public education in America.¹³ Most recently, then-President George Bush proposed the America 2000 bill¹⁴ which sought to provide funding to states that would, among other things, implement a voucher scheme.¹⁵ These plans¹⁶ are a testament to the value that society places on education.

Proponents of educational choice¹⁷ cite several compelling arguments in favor of a voucher system. They argue that the voucher will empower parents and give them greater control over their childrens' education.¹⁸ In addition,

approached the effectiveness they should have, and they do not approach it now. We need not hide that fact, nor be apologetic for it, since we have not been responsible for it." *Id.* at 17.

12. A pure monopoly is defined as a single seller of a product or service that has no close substitutes. DAVID N. HYMAN, *MODERN MICROECONOMICS* 365 (2d ed. 1989). While public education is not the only seller of education, it retains virtual monopoly power because unlike private schools, no tuition is charged since all taxpayers bear the burden of financing public education. In effect, public schools retain their monopoly power because they are "giving" education for "free" while other nonpublic schools must charge tuition. *See infra* note 279.

13. *See* JOHN E. CHUBB & TERRY MOE, *POLITICS, MARKETS AND AMERICA'S SCHOOLS* (Brookings Inst., 1990) [hereinafter *POLITICS*] (proposing that each school district have sole authority to determine its structure subject to minimal certification for teachers so as to encourage and promote the entry of individuals outside the teaching profession to teach); JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978) [hereinafter *FAMILY CONTROL*] (proposing a "scholarship certificate" be given to each school-age child and that the certificate should not incorporate an "add-on" feature whereby parents could increase the certificate's value); FRIEDMAN, *supra* note 6, ch. 6 (proposing an unregulated voucher in which the market forces would ensure that the quality of education would rise).

14. *See infra* notes 85-94 and accompanying text for a discussion of the America 2000 bill.

15. *See infra* notes 87-92 and accompanying text for a discussion of the funding scheme proposed under the America 2000 bill.

16. *See infra* section II.C., notes 85-120 and accompanying text.

17. A few examples of such proponents are: Citizens for Educational Freedom, The Brookings Institute, Council For Educational Freedom in America, Freedom Council and The National Center for Privatization. KIRKPATRICK, *supra* note 3, at 171-74.

18. *See* FRIEDMAN, *supra* note 6, at 160. Friedman notes that "parents generally have both greater interest in their children's schooling and more intimate knowledge than anyone else." *Id.* Friedman further states that it is a "gratuitous insult" when educational and social reformers speculate that parents have little interest in their child's education and no competence to choose for them. *Id.* Also, history has demonstrated that when allowed to choose, parents have been willing to sacrifice and have done so wisely for their children's benefit. *Id.* Other scholars have argued that parents possess a special competence to make educational decisions concerning their children. *See* *FAMILY CONTROL*, *supra* note 13, at 53. The family's special ability to listen and know their child, as well as the deep personal care that the family has for the child, qualifies the parent as an excellent "senior partner for the decision-making team." *Id.* Moreover, the interest in directing a child's education is central to a parent's privacy rights protected under the Constitution. *See* *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990) (characterizing the invalidation of a compulsory attendance law, as applied to the Amish, in *Wisconsin v. Yoder* as being based on a parent's right to direct the education of their children as well as the Free Exercise Clause); Brantley

providing parents with the power to choose a nonpublic school for their child will compel the public school system to compete with the nonpublic schools for students,¹⁹ thus forcing public schools to increase the quality and efficiency of the school's services.²⁰ Moreover, despite voucher opponents' arguments to the contrary,²¹ a voucher scheme would also save the taxpayers money.²² Furthermore, fifty-one percent of public school parents surveyed would prefer a voucher system that would give them the ability to send their children to nonpublic schools.²³

v. Surles, 718 F.2d 1354, 1359 (5th Cir. 1983) (noting that a state's power to control the education of its citizens is secondary to the rights of parents to provide equivalent education for their children).

19. After citing a massive study of public and private high school education in the United States by University of Chicago Professor James Coleman, Gary Becker stated, "[o]n the whole, private schools do a better job of educating their pupils." Gary S. Becker, *What Our Schools Need is a Healthy Dose of Competition*, BUS. WK., Dec. 18, 1989, at 28. Coleman found that Catholic schools spend much less than larger inner-city schools and yet the private schools are more successful because they are subjected to less political interference and have parental involvement in the education process. *Id.* Academically, Coleman found evidence of higher basic cognitive skills in Catholic schools than in public schools. James S. Coleman, *Quality and Equality in American Education: Public and Catholic Schools*, PHI DELTA KAPPAN, Nov. 1981, at 159. Further, the intent to pursue higher education was greater for students at Catholic schools. *Id.*

20. See FRIEDMAN, *supra* note 6, at 158-71 (arguing that market forces will increase the quality of public education when parents and students may choose); Larry Armstrong, *California May Choose School Choice*, BUS. WK., Oct. 18, 1993, at 34 (quoting the orchestrator of the signature program for Proposition 174 as stating "Education is now just a monopoly Our objective is to bring the forces of the marketplace to bear to force public schools to improve").

21. See Jeanne Allen, *Nine Phoney Assertions About School Choice*, USA TODAY (magazine), July 1993, at 46 (citing nine arguments raised in opposition to choice programs); Susan Chira, *Research Questions the Effectiveness of Most School-Choice Programs*, N.Y. TIMES, Oct. 26, 1992, at A1 (citing a Carnegie Foundation report that choice programs do not necessarily improve student performance, require additional money and may cause segregation among students).

22. For example, in California education costs approximately \$5200 per pupil annually, which is about the average for the country. William T. Huston, *Free-Enterprise Education*, INDUSTRY WK., June 1, 1992, at 36; *The Price Of Choice*, ECONOMIST, Oct. 9, 1993, at 25. However, the voucher plan (Proposition 174) which was proposed on the California ballot in November of 1993 would supply a \$2600 voucher to California parents of school children. Marie Puente, *Calif. Vote May Spawn New School Voucher Plan*, USA TODAY, Nov. 2, 1993, at 3A. When parents exercise their power to send their child to a nonpublic school, the state will be relieved of the burden of educating that child. The cost to the state to give parents the power to choose would be approximately \$2600, the amount of the Proposition 174 voucher, a savings of \$2600 per pupil annually. *Id.* This result is a mutually beneficial outcome because the state has saved taxpayer dollars while the parents and children have greater control over the education of the child. *Cf.* Walsh, *supra* note 8 (noting that each school failure costs society a minimum of \$440,000 in lost earnings and foregone taxes along with the costs of crime and public assistance which are associated with school failures) (citing the Committee for Economic Development).

23. The Gallup Poll survey asked:

In some nations the government allots a certain amount of money for each child for his education. The parents can send the child to any public, parochial, or private school they choose. This is called a 'voucher system'. Would you like to see such an idea

However, not everyone is in favor of educational choice and vouchers.²⁴ Opponents argue that such a scheme would abandon the poor and difficult students while the better students would migrate to the best schools,²⁵ thus destroying the long tradition of American schools.²⁶ Further, they claim that there are large hidden costs associated with school choice programs, such as transportation costs.²⁷ Some argue that privatization of education will remove constitutional protections including legally defined procedural and participatory rights enjoyed by students and parents.²⁸ Still others claim that vouchers will

adopted in this country?

Alec M. Gallup, *The 18th Annual Gallup Poll of the Public's Attitudes Towards the Public Schools*, PHI DELTA KAPPAN, Sept. 1986, at 58.

24. Opposition to vouchers comes from predictable quarters: Civil Liberties Organizations with first amendment concerns like the American Jewish Committee, The American Federation of Teachers, and The National Education Association. Ziegler & Lederman, *supra* note 2, at 819.

25. Jeanne Allen, *Phoney Assertions About School Choice*, EDUCATION DIGEST, March 1992, at 52. Allen argues that this assertion assumes that the low-income families cannot tell the difference between the good and bad schools. *Id.* Allen further asserts that separation of the "haves" and "have nots" currently exists because the "haves" already possess a choice since they have the money to choose private schooling. *Id.* Thus, a choice program will allow the "have nots" to also engage in choice. *Id.* See also Nanette Asimov et al., *Education Initiative*, SAN FRANCISCO CHRON., Mar. 16, 1992, at A1 (arguing that because low-income families do not have the finances to "add-on" to any voucher, opponents envision a two-tiered educational system that would favor the wealthy since the value of the voucher would most likely not completely cover the cost of private tuition).

26. Allen, *supra* note 25. However, public schools do not now follow the common-school philosophy because they are exclusive and segregational. *Id.* A choice program will restore the common-school tradition by restoring the quality of education and holding schools accountable for results. *Id.* But see Asimov et al., *supra* note 25 (arguing that the voucher's cost would siphon money away from the public school system, resulting in further deterioration of the system).

27. Allen, *supra* note 25, at 55. Allen argues that a choice program would not necessarily increase costs. *Id.* Increased efficiency would lead to lower administrative costs. *Id.* Further, transportation costs would not necessarily increase because new and better schools, close to the students, would emerge through the operation of market forces. *Id.*

28. Public school students are entitled to due process protection from school suspensions and expulsions. Ziegler & Lederman, *supra* note 2, at 820. The Supreme Court, in *Goss v. Lopez*, held that a liberty interest under the Fourteenth Amendment is implicated when students are suspended or excluded from school. 419 U.S. 565 (1975). Private schools however are unlikely to be transformed into state actors merely because students are able to attend the school through the use of a voucher. See Ziegler & Lederman, *supra* note 2, at 824.

There are two basic theories under which a private party can be held to be a state actor. The first of these theories is the traditional public function approach. See *Smith v. Allwright*, 321 U.S. 649, 663 (1944) (holding that the delegation of the power to determine the qualifications of primary elections has traditionally been a public function); *Evans v. Newton*, 382 U.S. 296, 301 (1966) (holding that since services by a private park are municipal in nature and traditionally serve the community, state action was present). State action can also be found in private parties where a nexus exists between the state and private party. See *Shelley v. Kraemer*, 334 U.S. 1, 18-19 (1948) (holding that where a court enforces a racially restrictive covenant against a willing seller and buyer, state action is present); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725-26 (1961) (holding that a racially discriminatory restaurant, which leased space from a state owned parking facility, is

lead to racial segregation.²⁹ The opponents further charge that because many choice schemes permit governmental funds to flow to sectarian schools, such schemes would violate the Establishment Clause.³⁰ Without doubt, the opponents of a choice program will raise many, if not all of these arguments.

This Note examines the concept of educational choice through vouchers and proposes federal implementation of such a scheme for elementary and secondary education.³¹ Section II of this Note discusses the public educational system and its problems.³² This Section will also explore the concept of educational choice and vouchers,³³ as well as several choice schemes that are either in effect or have been proposed.³⁴ Section III of this Note will address the constitutional issues raised by such a scheme.³⁵ Specifically, this Section will address the establishment clause concerns³⁶ in light of the Supreme Court's recent decision in *Zobrest v. Catalina Foothills School District*.³⁷ This Section will also discuss the equal protection concerns of educational voucher schemes.³⁸ Finally, Section IV will conclude by proposing federal legislation, in the form

a state actor); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2083 (1991) (holding that a private civil litigant using racially based peremptory challenges is a state actor since the deprivation had its source in state authority and the private litigant acted with significant government assistance); *Rendall-Baker v. Kohn*, 457 U.S. 830, 838 n.6 (1982) (requiring not only a sufficiently close nexus between the state and private party but also between the state involvement and the resulting deprivation).

Zielger & Lederman argue that since private school operators are not state actors subject to the fourteenth amendment due process constraints, liberty interests are in danger of deprivation without the due process required at state schools. Zielger & Lederman, *supra* note 2, at 824. However, the legislation proposed by this note requires private schools not to discriminate. Thus, regardless of whether state action is presented, discrimination will be controlled under the proposed scheme.

29. FRIEDMAN, *supra* note 6, at 165. See also Chira, *supra* note 21, at A1 ("A report . . . by the Carnegie Foundation, . . . a leading educational research group, is the latest of several to argue that choice primarily benefits children of better-educated parents . . . and may actually widen the gap between rich and poor school districts."); Clint Bolick, *Choice in Education, Part II*, 809 BACKGROUND 3 (Feb. 18, 1991) (available from the Heritage Foundation, 214 Massachusetts Avenue, N.E., Washington D.C. 2002-4999) (noting that critics of educational choice often cite promotion of racial segregation in opposition to any such program).

30. The Constitution of the United States, in pertinent part, states: "Congress shall make no law respecting the establishment of religion . . ." U.S. CONST. amend. I.

31. See *infra* notes 65-84 and accompanying text and section IV.A.

32. See *infra* notes 41-64 and accompanying text.

33. See *infra* notes 65-84 and accompanying text.

34. See *infra* notes 85-120 and accompanying text.

35. See *infra* notes 121-266 and accompanying text.

36. See *infra* notes 127-229 and accompanying text.

37. 113 S. Ct. 2462 (1993). The Court, without applying the traditional *Lemon* analysis, held that a state providing a sign-language interpreter, pursuant to the Individuals with Disabilities Act, to a student attending a Roman Catholic high school, did not violate the Establishment Clause. *Id.*

38. See *infra* notes 230-66 and accompanying text.

of federal income tax deductions or positive tax credits,³⁹ to implement an educational choice through voucher program in the United States for elementary and secondary education.⁴⁰

II. THE CONCEPT OF EDUCATIONAL CHOICE AND VOUCHERS

A. *The American Educational System and Parental Control*

Education has always played a major role in American society.⁴¹ When schools were first established, little government involvement existed, leaving the educational decisions to local schools and parents.⁴² However, as the country developed, the government began to play an increasingly greater role in education.⁴³ Government involvement has increased to the point that the public school system has been likened to an "island of socialism in a free market sea."⁴⁴

39. A positive tax credit works to provide assistance in choosing a school to those who have no taxable income and thus are not benefited by a tax deduction. When an individual's income is below the taxable level, or when the taxable income is so small that the individual can not reap the full benefit of a tax deduction, a positive tax credit will be issued to that person. With respect to a voucher program, the positive tax credits are akin to the traditional "piece of paper voucher" and should be redeemable only for educational services.

40. See *infra* section IV.A.

41. See Kirkland, *supra* note 6, at 2-3 (noting that the American public education system has played a larger role than any other institution in sustaining the United States' democratic government and depriving Americans of an adequate education would "damage the very fiber of our nation and produce a population ill-equipped to defend democracy"). The importance of education was seen at the first convention of the American Federation of Labor in 1881 when the first issue addressed was to pass a resolution that supported the public educational system. *Id.* at 3. Kirkland also notes that success in the world marketplace depends on our commitment to education and a dedication to improving the quality of the public educational system. *Id.* See also cases cited *supra* note 7 (citing comments from the United States Supreme Court regarding the importance of education in society). See generally Burton White, *Education for Parenthood 1981*, 163 J. EDUC. 205 (1981) (discussing the importance of education in the early years of a child's development).

Further, while Milton Friedman views education as an integral part of the "American dream," he perceives public education as less than par. FRIEDMAN, *supra* note 6, at 150-51. Friedman argues that education is like any other market: the less competition, the lower quality of service is provided at a higher cost. *Id.* at 152-58. As a partial solution to the educational problems in America, Friedman proposes a plan that injects competition into the educational market thus allowing parents to choose among many alternative sources of education for their children. *Id.* at 158-63.

42. FRIEDMAN, *supra* note 6, at 150 (noting that at first the neighborhood school and control by local school boards was the norm until a nationwide movement began, especially in the large cities, which was sparked by the belief that professional educators should play a large role in education).

43. For example, in 1852 the first compulsory attendance law was enacted in Massachusetts, and by 1918 attendance was mandatory in all states. *Id.* at 150. See also E.G. West, *The Political Economy of American Public School Legislation*, 10 J.L. & ECON. 101, 108 (1967) (outlining the growth of government involvement in education); sources cited *supra* note 9.

44. FRIEDMAN, *supra* note 6, at 154.

A movement developed in the 1840s to replace the private schools that educated the nation's children with "free" public schools, which would be financed through taxes.⁴⁵ This movement was primarily led by teachers and government officials, rather than by parents dissatisfied with the private school system.⁴⁶ The establishment of government schools with compulsory attendance laws⁴⁷ reduced parental control over their children's education by creating a public school monopoly over those parents who could not afford to send their children to a private institution as well as pay taxes to support the public school.⁴⁸ As a result, "the usual effects of monopoly occur: shoddy products at a high cost to involuntary purchasers, [the taxpayers]."⁴⁹ A system that would allow parents and children to choose among schools would create competition with nonpublic schools and force the waning public schools to increase the quality of their service.⁵⁰

Today, public education in the United States is provided through a

45. *Id.* at 153 ("The most famous crusader for free schools was Horace Mann . . . , the first secretary of the Massachusetts State Board of Education established in 1837 . . . , [who argued that] education was so important that government had a duty to provide education to every child . . .").

46. See West, *supra* note 43, at 108. West notes that the first step in the campaign for "free schools" came from the Onondaga County Teachers Institution in 1844. *Id.* The Institution cited three reasons why a free school system should be favored. First, every human being has a right to intellectual and moral education and government has a corresponding duty to provide such education. *Id.* Second, a free school system would prevent crime because of the free moral education. *Id.* Finally, a free school system would benefit the lower class by developing their talents thereby helping them to overcome the barrier of poverty. *Id.*

47. See *supra* note 43 (discussing mandatory attendance laws).

48. Van Den Haag, *supra* note 8, at 35. Van Deg Haag notes that the introduction of competition, by the utilization of vouchers, may eliminate the worst effects of the public school monopoly. *Id.*

49. *Id.* See also 3 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSE OF THE WEALTH OF NATIONS 160 (P.F. Collier & Son 1905). Upon noting the monopolistic features of public education, Smith commented, "The endowment of schools and colleges have . . . not only corrupted the diligence of public teachers, but have rendered it almost impossible to have any good private ones." *Id.*

50. See FRIEDMAN, *supra* note 6, at ch.6 (arguing that the ability to choose among schools will lead to an increase in educational quality); Van Den Haag, *supra* note 48, at 35 ("A voucher system, entitling parents to choose any . . . school . . . would introduce some competition and might eliminate the worst effects of the [public school] monopoly."); Alan Reynolds, *Al In Wonderland*, REASON, June 1992, at 49 (citing JOHN E. CHUBB & TERRY MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS):

It should be apparent . . . that schools have no immutable or transcendent purpose. What they are doing depends on who controls them and what those controllers want to do." Schools controlled by unions and bureaucracies want, above all, to expand their budgets and authority, while competitive schools would have no choice but to provide what parents and students want, and [to] do so in a cost-efficient way.

Id.

constitutional provision in each state's constitution.⁵¹ While the government has continually poured more money into education,⁵² governmental control of schools has led to increased overstaffing⁵³ and inefficiency⁵⁴ in the public school systems.⁵⁵ As Milton Friedman noted,⁵⁶ between 1968 and 1974 the bureaucratization of the school system led to a fourteen percent increase in teachers, fifteen percent increase in professional staff, and a forty-four percent increase in supervisors for every one percent increase in the number of students.⁵⁷ However, the increasing size of the public school systems is not the primary cause of the deteriorating quality of schools.⁵⁸ In fact, economies of

51. ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § V, ¶ 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2d, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, Pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. Pt. 2, C. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. Pt. 2, art. 83; N.J. CONST. art. VIII, § IV, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2(1); N.D. CONST. art. VIII, § 2; OHIO CONST. art. VI, § 2; OKLA. CONST. art. 1, § 5; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W.VA. CONST. art. XII, § 1; WIS. CONST. art. 10, § 3; WYO. CONST. art. VII, § 1.

52. Total U.S. spending on education rose from \$24.7 billion in 1960, to \$165.6 billion in 1980, and to \$425 billion in 1992. Boaz, *supra* note 8, at 18. After accounting for inflation, per pupil spending has increased approximately 35% over the past 10 years. *Id.*

53. See Rector, *supra* note 8, at 11 (citing that the New York City public school system employs nearly 7000 bureaucrats for its approximate 900,000 students, a ratio of one bureaucrat for every 155 students, while the New York City Catholic school system has fewer than 35 employees in its central office, a ratio of one for every 4000 students).

54. *Id.* (noting that in 1989, only 32% of the funds allocated for students by New York City actually reached the classroom; the remaining 68% fell into administrative and overhead costs of the public education system).

55. See FRIEDMAN, *supra* note 6, at 154 (citing E.G. West, *Education and the State* (London: The Institute of Economic Affairs, 1965)).

56. FRIEDMAN, *supra* note 6, at 156 (citing Market Data Retrieval).

57. *Id.* at 155. The Theory of Bureaucratic Displacement developed by Dr. Max Gammon which, in Dr. Gammon's words, states that "[in] a bureaucratic system . . . increase in expenditure will be matched by fall in production Such systems will act . . . like 'black holes' in the economic universe, simultaneously sucking in resources, and shrinking in terms of 'emitted' production." *Id.* at 155. This theory is equally applicable to the increasing bureaucratization and centralization of the public school system. *Id.*

58. This is evident by observing that there are many large corporations in the marketplace that are profitable and efficient. As noted by Friedman, "[t]he large size of General Motors has not prevented it from flourishing." *Id.* at 156.

scale⁵⁹ could exist for large school systems if the consumers of education, the students and parents,⁶⁰ were free to choose among competing schools.⁶¹

Many leading scholars have proposed various methods of bringing competition into the education market.⁶² The resounding theme of all these theories,⁶³ despite their distinct differences, is the concept of providing parents and students with the power to choose the school of their choice. The voucher concept, while enjoying considerable support, draws much controversy as a means of increasing the quality of education.⁶⁴ Nonetheless, the concept is at

59. Economies of scale occur when the average total cost of producing a good or service declines as output expands. HYMAN, *supra* note 12, at 237. Economies of scale are a result of specialization and better utilization of available resources as the producing entity increases its production and expands. *Id.* For schools, economies of scale would result when a school (or school system) makes better use of its available resources and thus provides a better service, namely better education at a lower cost.

60. Some argue that considering the student as the consumer of education is flawed reasoning because education of an individual benefits all of society and placing the student in the role of consumer obscures society's interest and stake in the transaction. Mary Anne Raywid, *Public Choice, Yes; Voucher, No!*, PHI DELTA KAPPAN, June 1987, at 764. It is further claimed that consuming education is unlike the consumption of an automobile where society has no real stake. *Id.* This line of analysis is misguided because of the extreme position that must be taken to support it. Just as society has an interest in one's education, society has an interest in one's purchase of an automobile. Without an automobile, many individuals could not work or consume goods and services. Clearly, working and the consumption of goods and services is in the public interest. However, no one would say that the true consumer of an automobile is too difficult to determine, the same is true for education. Whatever externalities exist, the primary consumer and beneficiary of education is the student.

61. See FRIEDMAN, *supra* note 6, at 156-57 ("If the consumer is free to choose, an enterprise can grow in size only if it [provides a service] that the consumer prefers because of either its quality or its price When the consumer is free to choose, size will survive only if it is efficient.").

62. See POLITICS, *supra* note 13 (citing a ten-year study of 500 schools which concludes that the only way to improve the quality of education is to remove the bureaucracy and make the public education system responsive to the demands of consumers); FAMILY CONTROL, *supra* note 13 (proposing a regulated voucher which would ensure against segregation); FRIEDMAN, *supra* note 6, at ch. 6 (proposing an unregulated, market driven voucher); LA NOUE, *supra* note 3, at v:

There is no single voucher proposal. Some advocate vouchers that would be highly regulated to avoid discrimination and inequality, whereas others urge unregulated vouchers that would encourage the maximum variety of educational alternatives. Similarly, compensatory vouchers that provide additional amounts for poor families are supported by some, whereas others insist all families should receive equal amounts.

Id. See also LYTLE, *supra* note 9, at 22-23 (proposing the "Liberty School Plan" where vouchers would be gradually phased into effect in order to help public schools prepare for competition among schools). Only when parents are given greater control and the freedom to choose from among many alternative schools will the quality of education improve. See POLITICS, *supra* note 13.

63. See *infra* notes 65-84 and accompanying text for a discussion of the voucher concept.

64. See Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37, 37 (1993) (noting that school choice is at the forefront of the modern educational debate); Kevin Banasik, Book Note, 31 HARV. J. ON LEGIS. 519, 519 (1994) (reviewing PETER W. COOKSTON, JR., *SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION*

the forefront of the many theories proposed to improve the educational system.

B. *The Voucher Concept*

The concept of a voucher system is straightforward: make schools more responsive to the demands of the consumer by returning greater control of the child's education to the parents.⁶⁵ The state simply provides parents with the ability to send their children to the school of their choice. Parents are provided with this ability in the form of assistance in paying for educational expenses incurred when sending their child to a nonpublic school.⁶⁶ Empowering parents and children with the ability to choose the school of their choice forces the public schools, which now have an almost perfect monopoly power over parents and children,⁶⁷ to compete with nonpublic schools.⁶⁸ As Friedman explains, "[t]he voucher plan embodies exactly the same principle as the GI bills that provide educational benefits to military veterans. The veteran gets a voucher only good for educational expenses⁶⁹ and is completely free to choose the school at which he uses it"⁷⁰ This type of system, implemented for elementary and secondary education, will force schools to respond to consumer demand and provide the type and quality of service that is desired.

As proposed by Milton Friedman,⁷¹ the state would provide the parents

(1994) (noting that educational choice is the favored policy for remedying the failing American educational system). See also *supra* notes 17-23 and accompanying text (supporting choice and vouchers). But see *supra* notes 24-30 and accompanying text (opposing vouchers).

65. See FRIEDMAN, *supra* note 6, at 160.

66. *Id.* at 161.

67. It should be noted that the public school does not have monopoly power over those parents and children who are fortunate enough to afford private school fees as well as taxes to support the public school system.

68. Competition will occur with a federal income tax deduction because public schools generally receive funding based on per pupil attendance at that school. L.S. Tellier, Annotation, *Determination of School Attendance, Enrollment, or Pupil Population for Purposes of Apportionment of Funds*, 80 A.L.R. 2d. 953, 955 (1961); see also cases cited in *infra* note 276. While a federal income tax deduction will not stop the state from continually funding even the most inefficient, low quality public schools, the flow of students out of the below par schools will result in less funding being allocated to that school. This will have virtually the same effect as if the state only funded public schools in proportion to the amount of vouchers that school can attract.

69. By allowing the use of a voucher only for approved educational expenses either in the form of an actual piece of paper or in the form of a tax deduction, the possibility of misuse of the vouchers for noneducational goods or services will greatly decrease. FRIEDMAN, *supra* note 6, at 165.

70. *Id.* at 161. The G.I. Bill was enacted after World War II under the title of the Servicemen's Readjustment Act of 1944. LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE METROPOLITAN EXPERIENCE* 250 (1988). While initially enacted for the purpose of easing the effects of the demobilization of the economy after the War, the Readjustment Act marked the turning point of the dramatic increase in popularity of higher education. *Id.* at 250-51.

71. See FRIEDMAN, *supra* note 6.

of school children with a piece of paper, redeemable for a certain amount if, and only if, it is used to pay for the cost of education.⁷² The amount of the voucher would be determined by the state and could reflect the approximate cost to the state of educating that child, or a lesser amount that would provide a savings to the state.⁷³ Parents could use the voucher at any school of their choice,⁷⁴ including schools outside their district, city, or state.⁷⁵ Furthermore, the public school system would rely solely on the voucher to finance its operations. Thus, if a school was unable to attract students, it would cease to exist because of the lack of financing. Only schools that provide what the consumer demands, quality and efficiency for example, would survive. The market would also allow for new market-participants, motivated by profit, to create new schools to meet the demands of the parents and students.

The unregulated voucher envisions a program where parents would have the ability to "add-on" to the value of the voucher and send their children to a more expensive school.⁷⁶ Opponents have attacked this vision claiming it will lead to greater differences in educational opportunities because low-income families would be at a severe disadvantage to "add-on," while higher income families

72. FRIEDMAN, *supra* note 6, at 161.

73. For example, where the cost of educating a child in the public school system is approximately \$6000, the state could value the voucher at the entire \$6000. *Id.* However, the state could set the value at a lower figure, \$4000 for example, and save the state \$2000 in educational costs every time a parent opts to use the voucher in a nonpublic school. *Id.* The parents will also benefit because they would have the power, if they choose to use it, to send their child to a nonpublic school. In any event, both sides can gain from such a process. *Id.* This type of process will yield close to a Pareto optimal solution which is best for all parties involved. The Pareto condition is a situation in which it is impossible for all individuals to gain further from additional exchange. HYMAN, *supra* note 12, at 612; ROGER LEROY MILLER, *INTERMEDIATE MICROECONOMICS* 454 (McGraw-Hill 1978).

74. Certain minimal standards would still be imposed on schools. Schools would have to meet "certain minimal standards, such as the inclusion of a minimum common content in their programs, much [like] restaurants [must] maintain minimum sanitary standards." MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 89 (1962). This is illustrated by the fact that the educational programs for veterans after World War II were structured to allow veteran's to choose among any school that met certain minimal requirements. *Id.* at 89-90. See also *infra* note 281 (arguing that minimal requirements will increase the quality of education).

75. FAMILY CONTROL, *supra* note 13, at 161. Advantages would be created by allowing the choice of schools to extend beyond the immediate school district, especially for urban families. *Id.* Furthermore, the larger area provides for a better opportunity for children of similar interests to band together and form schools tailored to their similar needs and interests. *Id.*; FRIEDMAN, *supra* note 6, at 161 (noting that by not limiting the voucher to geographical or political boundaries it will give parents greater control and provide for greater competition).

76. See FRIEDMAN, *supra* note 6, at 167. For example, if a voucher would be worth \$1500, parents could "add-on" another \$500 to send their child to a school that charges a tuition of \$2000.

could substantially add to the value of the voucher.⁷⁷ This “add-on” feature causes some opponents to argue that vouchers will result in racial segregation and also leave some students behind in poorly funded schools.⁷⁸ Undoubtedly, differences in schools will continue to exist as the forces of the market take over. However, the quality of all education will rise so substantially that the worst schools would still be better in absolute terms, even though they may still lag behind in relative terms.⁷⁹

When parents and children have a choice of schools to patronize, economies of scale⁸⁰ can exist for large public school systems as they do for private enterprise.⁸¹ The size of the public school system will be dictated by consumer choice. Such choice would be based upon whether parents and children opt to take advantage of the services that the particular school is offering.⁸² In addition to the power to choose which school to attend, “the size of a public school would be determined by the number of consumers it attracted, not by politically defined geographical boundaries or by pupil assignment.”⁸³ When parents and children have the ability to choose the school that they will attend, schools will begin to cater to students’ needs. The market will dictate what type of schools will exist and how many of them will survive.⁸⁴ Some states, and

77. See FAMILY CONTROL, *supra* note 13, at 191.

Families unable to add extra dollars would patronize those schools that charged no tuition above the voucher, while the wealthier families would be free to distribute themselves among more expensive schools Both wealthier classmates and the schools [that low-income families] might prefer to associate with would be foreclosed, . . . all with the help of the state.

Id.

78. Allen, *supra* note 25, at 52. See also FAMILY CONTROL, *supra* note 13 (arguing that an “add-on” feature would cause greater separation of the classes because low-income families, unlike upper-income, will not be able to contribute additional money to the voucher).

79. FRIEDMAN, *supra* note 6, at 170. Friedman concedes that some schools will remain superior to others. *Id.* However, the structural change to the educational system will improve even the worst schools. *Id.* Thus, while inequalities are inevitable, the end result is an improvement for all schools.

80. See *supra* note 59 (explaining the concept of economies of scale).

81. See FRIEDMAN, *supra* note 6, at 156 (noting that General Motors’ large size has not impeded its growth & economic viability).

82. *Id.*

83. *Id.* at 163. The model legislation proposed by this note removes any state line barriers from the choice of alternative schools which one may choose. See *infra* section IV.A.

84. For example, some schools may specialize in a certain area of study such as mathematics, science, or the arts. In New York’s East Harlem District 4 there are twenty-four junior high schools. Joan C. Szabo, *Schools That Work*, NATION’S BUS., Oct. 1991, at 23. Many of these twenty-four schools are organized around a theme, such as the performing arts, computer science and health and biomedical studies, while others operate as traditional junior high schools. *Id.* These “specialty” schools are sometimes referred to as “magnet schools” because they naturally attract students who have the same interests. Magnet schools have been used as a tool to combat racial segregation in certain school districts. See *Jenkins v. Missouri*, 639 F. Supp. 19, 54 (W.D. Mo.

recently a White House proposal, have attempted to implement choice programs and allow economies of scale to occur in the education market. These programs and proposals will be discussed in the next Section.

C. Current and Proposed Choice and Voucher Programs

In May of 1991, the White House proposed a bill that would implement a voucher program.⁸⁵ Then-President Bush and Education Secretary Lamar Alexander introduced to Congress the America 2000 Excellence in Education Act ("America 2000").⁸⁶ America 2000 authorized \$700.5 million for fiscal year 1992 for several educational programs.⁸⁷ America 2000 would have also allotted the Secretary of Education more latitude in federal spending for local schools.⁸⁸ The "parental choice" feature of America 2000 would have permitted parents to select among public or private schools to send their

1985), *aff'd*, 855 F.2d 1295 (8th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989) (ordering that all senior high school, middle schools, and half of the elementary schools be converted into magnet schools in an effort to attract interested students from all over the district to the schools which would cause a voluntary desegregation).

85. The bill was introduced in the House of Representatives by the following Representatives: Rep. Robert H. Michel (R-IL), Rep. William F. Goodling (R-PA), Rep. Carl D. Pursell (R-MI), and many others. 2 Cong. Index (CCH) 28,298 (May 23, 1991). The bill was introduced in the Senate by the following Senators: Sen. Claiborne Pell (D-RI), Sen. Orrin Hatch (R-UT), Sen. Nancy Kassebaum (R-KS), Sen. Robert Dole (R-KS), Sen. Alan Simpson (R-WY), Sen. Jim Jeffords (R-VT), Sen. Strom Thurmond (R-SC), Sen. David Durenberger (R-MN), Sen. Thad Cochran (R-MS), Sen. Don Nickles (R-OK), Sen. Mark Hatfield (R-OR), Sen. Arlen Specter (R-PA), Sen. Robert Kastan (R-WA), Sen. Richard Lugar (R-IN), Sen. Slade Gorton (R-WA), Sen. John Danforth (R-MO) and Sen. Ted Stevens (R-AK). 1 Cong. Index (CCH) 14,213 (May 23, 1991).

86. H.R. 2460, 102d Cong., 1st Sess.; S. 1141, 102d Cong., 1st Sess. (1991). The America 2000 plan seems to be modeled after a British counterpart. Jill Smolowe, *Britain's Brand of Choice*, TIME, Sept. 16, 1991, at 60. The Education Reform Act, introduced in 1988 by Margaret Thatcher, allows the \$2550 per student annual allocation to follow the student to the school of their choice. *Id.* The Reform Act also allows local schools to "opt out" of the local system and receive funding directly from the national government. *Id.* Upon opting out, the school's governing body, which includes parents, becomes responsible for running the school. *Id.* Since the overhead of the local school system is no longer incurred after opting out, more funding can be allocated to books, facilities, and teachers. *Id.* Money which once went towards administrative costs is now used to hire additional teachers and update the school's labs. *Id.* The overall result of the Reform Act has been to breathe new life into many schools that were on the verge of failure, as well as improve the quality of education. *Id.*

87. Ziegler & Lederman, *supra* note 2, at 815. Specifically, the bill provided funding for: (1) \$180 million for the creation of a "New American School" in each congressional district; (2) \$100 million to make "Merit School" awards to public or private elementary or secondary schools whose students demonstrated competence in the new national core curriculum; (3) teacher training and teacher recognition awards along with alternative certification for teachers and school principals; (4) \$200 million for assistance for "parental choice" programs; and (5) a national core curriculum consisting of English, mathematics, science, history and geography, as well as national standardized tests to assess "educational progress." *Id.*

88. *Id.* See also S. 1411, 102d Cong., 1st Sess., Title V, Part A.

children.⁸⁹ Additionally, America 2000 would have provided financial support to many parents, which in turn would have allowed them to make such a choice.⁹⁰

The proposed bill also allowed for grants to Local Education Agencies that provided choice programs.⁹¹ America 2000 would have authorized the Secretary of Education to allot \$30 million in grants to state and local education authorities and to private educational institutions to operate "nationally significant models of educational choice."⁹² America 2000 was ultimately defeated in the Senate and replaced by a bill⁹³ that forbade the use of federal funds to help nonpublic educational institutions.⁹⁴

Several states have adopted choice systems of their own.⁹⁵ For example, in 1985, Minnesota developed a system of choice among public schools.⁹⁶ Minnesota's program allows students in grades kindergarten through twelve to choose their school regardless of district boundary lines, so long as racial balances are not disrupted.⁹⁷ State revenue follows the students to the school which they opt to attend.⁹⁸

While Minnesota's efforts are a step in the right direction,⁹⁹ much is left unattended. For example, choice in Minnesota is limited to choice among public

89. H.R. 2460, 102d Cong., 1st Sess., Title V, Part A; (1991).

90. *Id.*, Part B; S. 1411, 102d Cong., 1st Sess., Title V, Part B (1991); *See also* Ziegler & Lederman, *supra* note 2, at 816.

91. H.R. 2460, 102d Cong., 1st Sess., Title V, Part B; S. 1411, 102d Cong., 1st Sess., Title V, Part B (1991). *See also* Ziegler & Lederman, *supra* note 2, at 816.

92. H.R. 2460, 102d Cong., 1st Sess., Title V, Part D; S. 1411, 102d Cong., 1st Sess., Title V, Part D (1991). *See also* Ziegler & Lederman, *supra* note 2, at 816.

93. This bill was sponsored by Senator Edward Kennedy (D-Mass) and was adopted by the Senate Labor and Human Resources Committee. Ziegler & Lederman, *supra* note 2, at 816. The Kennedy bill eliminated the use of public funds for support of non-public education. *Id.* The Senate also rejected an amendment which would have given low-income parents public funds to purchase private education for their children. *Id.*

94. *Id.* at 816.

95. *See* Joe Nathan, *More Public School Choice Can Mean More Learning*, EDUC. LEADERSHIP, Oct. 1989, at 51 (explaining that 40 states have school choice programs of some sort).

96. *See* Nancy Paulu, U.S. Dept. of Education, *Improving Schools and Empowering Parents: Choice In American Education*, Oct. 1991, at 3 (outlining the several states' choice programs).

97. *Id.* at 3. The Minnesota program requires that the racial balance be maintained in St. Paul, Minneapolis and Duluth. Shapiro, *supra* note 1, at 59.

98. Paulu, *supra* note 96, at 4.

99. Minnesota has attempted to put some control back into the hands of the parents and students by allowing students to choose their school. While the state has not gone far enough in this author's opinion to inject competition back into the market for education, the state has taken a novel step towards improving its educational system. *See also* H.R. 2460, 102d Cong., 1st Sess., § 3(2) (1991) (finding that educational reform in the 1980s was too slow and too timid).

schools.¹⁰⁰ This leaves public schools to face competition only from other public schools. Also, while a public school cannot prohibit a student from leaving its district for another, the schools are not required to accept students from outside its district.¹⁰¹ Furthermore, limiting choice only to public schools lessens the impact of competition on public schools because the schools will only feel the pressure of competition from those districts that accept students from outside the district. The full beneficial effect of a choice program will only be felt when parents and children are truly free to choose among all alternative schools, not simply public alternatives.

Despite strong opposition,¹⁰² a second state, Wisconsin, enacted the Milwaukee Parental Choice Program in 1990.¹⁰³ While the program is only experimental,¹⁰⁴ the legislation allows up to 1000 low-income family students to receive tuition vouchers valued at \$2500.¹⁰⁵ In order to participate in the program, the family's income must be at least 175% below the federal poverty line.¹⁰⁶ Although the Parental Choice Program allows parents to choose

100. Paulu, *supra* note 96, at 3.

101. *Id.* at 4. Allowing school districts to reject students from other districts decreases the alternative choices that are available to parents. This decrease in choice results in less competition. Reduced competition leads to fewer and slower improvements in public school education because it reduces the force of the marketplace.

102. The opposition came from the State Department of Public Instruction and state teachers unions. See James B. Egle, *The Constitutional Implications of School Choice*, 1992 WIS. L. REV. 459, 471. The opposition argued that despite the loss of students due to parental choice, the fixed costs remained the same. *Id.* The opposition also argued that the funds lost due to parental choice impaired the Milwaukee schools' ability to improve the quality of education, the ultimate goal of any choice program. *Id.* Finally, the opposition claimed that the program would cause the talented students to seek education elsewhere, leaving the Milwaukee public schools with many students with special education needs and with less funding to meet those needs. *Id.*

103. WIS. STAT. ANN. § 119.23 (West 1989-90). This legislation came after 20 years of consideration of various choice programs. See Egle *supra* note 102, at 469 n.68 (outlining the various bills that were proposed to the Wisconsin legislature but ultimately rejected).

104. See Egle, *supra* note 102, at 471 n.78 (citing that Governor Thompson stated that he has no immediate plans to expand the program because he wants to test the program) (citing *Thompson Wants to Test Choice Program*, MILW. J., Aug. 10, 1990, at A8).

105. WIS. STAT. ANN. § 119.23 (West 1989-90). See also Egle, *supra* note 102, at 470 n.71 (explaining that the program's enrollment is capped at 1000 because § 119.23(2)(b)(1) allows a maximum of 1% of the school district's 100,000 students to participate in the program).

106. WIS. STAT. ANN. § 119.23(2)(a)(1) (West 1989-90). See also Egle, *supra* note 102, at 470 n.72 (noting that a family of four would qualify if its monthly income was at or below \$1853) (citing WISCONSIN DEP'T OF PUB. INSTRUCTION, A BACKGROUND PAPER ON PRIVATE SCHOOL CHOICE (1990)). The poverty line is set at three times the cost of the "economy food plan" for a family of three or more. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, PUB. NO. P-60-185, CURRENT POPULATION REPORTS, POVERTY IN THE U.S.: 1992 at A-7. The "economy food plan" is the least costly of four nutritionally adequate food plans designed by the Department of Agriculture. *Id.* In 1994, the primary estimate of the poverty threshold for a family of four was \$15,141. BUREAU OF CENSUS, U.S. DEPARTMENT OF COMMERCE (1994).

private schools, it is strictly limited to nonsectarian schools.¹⁰⁷ Moreover, as with any valid program, the participating schools must also guarantee nondiscrimination on the basis of race, color, or national origin.¹⁰⁸

The Milwaukee Parental Choice Program is a hybrid of the mainstream choice programs rather than a mirror image of any one particular proposal.¹⁰⁹ While the size of the Milwaukee program will limit its effectiveness, the program is a step in the right direction. The Milwaukee Parental Choice Program has laid the groundwork for a more comprehensive, state-wide program. In fact, a state-wide voucher program was proposed in California.

The California plan was an attempt to give parents greater choice among alternative schools. On November 2, 1993, California citizens voted on the Parental Choice in Education Initiative ("Proposition 174").¹¹⁰ By state constitutional amendment, Proposition 174 would have allowed parents to choose

107. WIS. STAT. ANN. § 119.23(2)(b) (West 1989-90). The participating school administrator must guarantee that: "[t]he school is a nonsectarian school, that it does not include a pervasively religious curriculum and it is not sponsored, administered, or funded by any religious group or organization." WISCONSIN DEP'T OF PUB. INSTRUCTION, MILWAUKEE PARENTAL CHOICE PROGRAM NOTICE OF SCHOOL'S INTENT TO PARTICIPATE (1990), *cited in* Egle, *supra* note 102, at 470 n.70.

108. WIS. STAT. ANN. 119.23(2)(a)(4) (West 1989-90). The schools must also comply with other requirements such as: participation in a Pupil Assignment Counsel, *id.* § 119.23(8); notifying applicants of application decisions within 60 days and in writing, *id.* §§ 119.23(2)(b), 119.23(3); providing proof of pupil enrollment, *id.* § 119.23(6); enrollment counts on a biannual basis, *id.* § 119.23(5)(a); academic, attendance, discipline, and parental involvement records are required to be submitted to the State Department of Public Instruction, *id.* §§ 119.23(5)(a), 119.23(7)(b); and compliance guarantee of the private school provisions in Wisconsin law, *id.* §§ 119.23, 118.165(c), 118.165(d).

109. *See* Egle, *supra* note 102, at 471. The Milwaukee program adopts a random selection procedure in determining admissions to the program. *Id.* This methodology has been advanced by the choice proposal created by Coons & Sugarman. *Id.* Furthermore, as proposed by Moe & Chubb, the program leaves curricula decisions to the school. *Id.* However, as required by WIS. STAT. ANN. § 119.23(2)(b) (West 1989-90), the Milwaukee schools must ensure that the curricula are nonsectarian. *See supra* note 107 (discussing the standard that the participating school's administrator must comply with). The open market theory advocated by Friedman has not played a significant role in the Milwaukee program. Egle, *supra* note 102, at 471. Since the program limits choice to other public or private-nonsectarian schools and since only a small portion of students are able to participate, the market forces will have little effect. Furthermore, new schools have not emerged to take advantage of the program and thus increased competition among the schools exists, as many voucher advocates claimed would occur. *Id.* at 471 n.79. This should not be a surprising result in Milwaukee. Since the program is limited to only 1000 students, there may not be sufficient incentive to create a new school. Moreover, the program is only experimental which may explain why many are hesitant to enter the market.

110. Michael Barone, *School Choice: Its Time Has Come*, U.S. NEWS & WORLD REP., Oct. 18, 1993, at 57.

their child's school by providing them with a \$2600 voucher¹¹¹ redeemable at any qualified public, private, or sectarian school.¹¹² Proposition 174 was ultimately defeated, having received only thirty percent of the vote.¹¹³

Opponents of Proposition 174 claimed that funds paid to parents of children already in private institutions would destroy the state's education budget and violate the United States Constitution.¹¹⁴ The opposition also opined that such a program, which allows state funds to be channeled to sectarian schools, violates the Establishment Clause of the First Amendment.¹¹⁵ However, it is unlikely that a properly drafted program would offend the Establishment Clause.¹¹⁶

An effective voucher program must allow full parental choice among all viable alternatives, including the choice to attend a sectarian school. Importantly, studies have shown that sectarian institutions provide a higher quality of education than its public counterparts.¹¹⁷ This resource of quality education cannot be ignored. Competition and quality will be increased when parents and students have more options available to them. Beyond merely increasing the pool of available alternatives, including sectarian institutions within a voucher program will yield a faster and greater increase in the quality of all education. Also, the higher quality of education generally found in sectarian institutions will tend to improve the quality of the public schools forced to compete with them. To exclude sectarian institutions from an educational voucher program will only retard the improvement of the educational system by

111. California spends approximately \$5100 per pupil annually. *The Price of Choice*, *supra* note 22, at 25. Thus, every time a parent opts to use the voucher at a nonpublic school, the state will save approximately \$2500 while at the same time give parents greater power to control their children's education.

112. Mark P. Petracca, *Californians Weigh School-Choice System*, THE CHRISTIAN SCIENCE MONITOR, Oct. 4, 1993, at 19.

113. USA TODAY, Nov. 4, 1993, at 4A. The failure of Proposition 174 is puzzling because a poll by Stanford University and Berkeley found that 63% of Californians favored vouchers. *The Price of Choice*, *supra* note 22, at 25. The answer may lie in the fact that the California Teacher Association, which represents 90% of California's 250,000 public school teachers, had raised over \$10 million to fight such a program. *Id.*; *Choice Politics*, WALL ST. J., Oct. 15, 1993, at A10.

114. Armstrong, *supra* note 20, at 34. The rationale for the budgetary argument is that the state should not subsidize a cost that parents are willing to incur without state assistance.

115. *See id.* (arguing that state aid to a religious institution will violate the wall of separation between church and state). *But see* Allen, *supra* note 21, at 49 (arguing that such a choice program would not violate modern establishment clause jurisprudence).

116. *See infra* notes 181-85, 204-10 and accompanying text (discussing the requirements of a facially neutral program, which effects a broad class of beneficiaries that aids sectarian schools only as a result of private choice).

117. Peter M. Flanigan, *A School System That Works*, WALL ST. J., Feb. 12, 1991, at A14 (noting that over their high school career, Catholic students gain at least one year of academic performance over students in public high schools). *See also* Coleman, *supra* note 19.

shielding the lower quality schools from the schools that have achieved a high level of quality.

Undoubtedly, any program that includes within its framework assistance to support the choice to attend a sectarian school is certain to be challenged under the Establishment Clause.¹¹⁸ However, modern establishment clause jurisprudence indicates that the United States Supreme Court will sustain such a voucher system, provided the program is carefully drafted to meet certain criteria.¹¹⁹ A choice through voucher program may also face challenges under the Equal Protection Clause of the Fourteenth Amendment.¹²⁰ The following Section of this Note addresses the constitutional issues that are likely to confront a voucher program.

118. The potential for challenge is evidenced by the many challenges to government aid to religious schools. *See* *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993) (challenging the provision of a sign-language interpreter by the state to a student attending a Catholic high school); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (challenging the denial of financial vocational assistance by the state to a student who was pursuing a Bible studies degree at a Christian college); *Aguilar v. Felton*, 473 U.S. 402 (1985) (challenging New York's use of federal funds to finance programs which involved sending public school teachers into religious schools to provide remedial instruction); *Mueller v. Allen*, 463 U.S. 388 (1983) (challenging a Minnesota statute that allowed a tax deduction for parents for expenses incurred in sending their children to parochial schools); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (challenging a New York statute authorizing the use of public funds to reimburse church-sponsored and secular nonpublic schools for performing various testing and reporting services mandated by state law); *Wolman v. Walter*, 433 U.S. 229 (1977) (challenging an Ohio statute which authorized public funds to be used to purchase instructional materials and equipment for sectarian schools); *Meek v. Pittenger*, 421 U.S. 349 (1975) (challenging the loan of textbooks and instructional equipment to sectarian schools); *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (challenging tuition reimbursements to parents whose children attended nonpublic schools); *Sloan v. Lemon*, 413 U.S. 825 (1973) (challenging a Pennsylvania statute providing for reimbursement of tuition paid by parents who send their children to nonpublic schools); *Lemon v. Kurtzman*, 403 U.S. 602 (1973) (challenging attempts by Pennsylvania and Rhode Island to directly subsidize the salaries of teachers at nonpublic schools where 95% of the students attending nonpublic schools were enrolled in a sectarian school); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (challenging a New York statute requiring school districts to purchase and loan textbooks to students enrolled in a parochial school); *Flast v. Cohen*, 392 U.S. 83 (1968) (challenging the use of public funds to purchase textbooks and other instructional materials for use in parochial schools); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (challenging the practice of reimbursing parents for the transportation costs of sending their children to both public and parochial schools). *Cf.* *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994) (challenging New York's creation of a Hasidic Jewish village into a separate school district).

119. *See infra* notes 182-85, 204-10 and accompanying text for a discussion of these criteria.

120. The Equal Protection Clause of the Fourteenth Amendment states, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

III. CONSTITUTIONAL BARRIERS TO EDUCATIONAL VOUCHER PROGRAMS

Undoubtedly, a voucher program will face opposition on a constitutional level.¹²¹ This Section addresses the two areas of constitutional law under which a voucher program will likely be challenged: the Establishment Clause and the Equal Protection Clause. As this Section will illustrate,¹²² neither of these two areas of constitutional jurisprudence will be an effective barrier to properly drafted voucher legislation.¹²³ However, because this Note proposes federal legislation to improve the public educational system, the preliminary issue of state sovereignty must be briefly addressed.

Some opponents may view a federal voucher program as a violation of the Tenth Amendment,¹²⁴ rendering Congress without power to enact any such legislation. The Tenth Amendment has undergone dramatic changes and has been subjected to a wide range of interpretations.¹²⁵ While education may be

121. See *supra* notes 30, 118 and accompanying text.

122. See *infra* sections III.A. & B.

123. See *infra* section IV.A. for proposed legislation that would effectively overcome any constitutional challenge.

124. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

125. Until 1985, the prevailing view of the Tenth Amendment's effect on Congress' power was that Congress could not interfere in the areas of *traditional governmental functions* of the states. *National League of Cities v. Usery*, 426 U.S. 833 (1976) (emphasis added). Thus, the role of the judiciary in determining if state sovereignty had been encroached was to determine whether a particular activity was a traditional governmental function of the state. Under the *National League of Cities* approach, it is likely that a federal voucher plan would be viewed as a violation of state sovereignty because education would be viewed as a traditional governmental function of the state since every state individually provides and has traditionally provided for its own public education. See *supra* note 51. The Court's view of the Tenth Amendment in *National League of Cities* was changed in 1985. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

In *Garcia*, a case dealing with the applicability of the Fair Labor Standards Act to a state owned and operated transit authority, the Court expressly overruled *National League of Cities*. 469 U.S. at 557 (1985). In effect, *Garcia* removed any tenth amendment barriers that may have existed to Congress' power. After reasoning that an analysis of the Tenth Amendment that turns on whether an activity is "traditional" or "integral" is unworkable, the Court explained that the only limit that the Tenth Amendment places on Congress' power is the inherent limits of the political system. *Id.* at 547. The Court reasoned that the federal government is structured in such a way so as to protect state sovereignty. *Id.* at 552. In reaching this conclusion, the Court noted several features of the federal system of government: each state is guaranteed two senators, states have control over electoral qualifications for federal elections, and states play an important role in presidential elections through the Electoral College. *Id.* at 551. *Garcia* stands for the proposition that the inherent limits on federal power over the states through a properly working political system is the only limit the Tenth Amendment places on Congress. Thus, *Garcia* reduced the role of the judiciary, in determining whether the Tenth Amendment has been violated, to merely deciding if the political

viewed as a traditional state activity, since Congress, acting under its Commerce Clause power as well as its spending power, will not commandeer state governments for the implementation of voucher legislation, a federal choice through voucher program will not implicate the Tenth Amendment.¹²⁶ However, voucher legislation, once enacted, will face other constitutional challenges.

A. The Establishment Clause: The Wall Is Not Too High

The Establishment Clause of the First Amendment to the United States Constitution states, "Congress shall make no law respecting the establishment

process is working correctly, a virtually meaningless inquiry.

Six years after *Garcia*, the Court, in *Gregory v. Ashcroft*, once again spoke to the issue of state sovereignty in deciding that the Age Discrimination in Employment Act did not apply to a Missouri constitutional provision mandating the retirement of state judges at age 70. 501 U.S. 452 (1991). In *Gregory*, the Court delineated its Plain Statement Rule. *Id.* The Court held that Congress must clearly state when it intends to upset the normal balance of power between the federal government and the states. *Id.* This rule was an attempt to ensure that the states, as represented in Congress, know what they are enacting, thereby preventing the breakdown of the political process. *Id.* at 463. The *Ashcroft* decision compliments *Garcia's* approach on the limits that the Tenth Amendment imposes on Congress by creating a doctrine which will ensure a proper political process and necessarily less judicial involvement.

After *Garcia*, the Tenth Amendment seemed to impose no actual barrier to Congress at all. However, the Court breathed new life into the Tenth Amendment only one year after *Ashcroft*. See *New York v. United States*, 112 S. Ct. 2408 (1992). In *New York*, Congress passed legislation, the Low-Level Radioactive Waste Policy Amendments Act of 1985, that required states to either provide for disposal of radioactive waste generated within their borders or take title to that waste. *Id.* at 2415-16. The Court found that the "take title" provision of the Act was constitutionally deficient. *Id.* at 2427-28. The Court held that when there is an interest which is sufficiently compelling to cause Congress to legislate, it must do so directly, and may not commandeer the state government. *Id.* at 2428. In effect, the Court held, that while Congress may preempt the states in a particular subject matter, Congress does not have the power to require states to legislate.

Thus, it appears that *Ashcroft*, by requiring a clear statement of intent from Congress when upsetting the normal balance of federalism, and *New York*, by holding that Congress can not require states to legislate, puts new life into the Tenth Amendment and places a limit on the *Garcia* approach to the Tenth Amendment. However, *Garcia* can be distinguished from *New York* on the basis that *Garcia* dealt with a generally applicable piece of legislation, the Fair Labor Standards Act, while *New York* dealt with federal legislation aimed solely at the state, the Low-Level Radioactive Waste Policy Amendments Act of 1985. In sum, the Tenth Amendment has undergone considerable change and currently does not present an effective barrier to congressional power.

126. A federal voucher program, as proposed by this note, will not violate the principles of the Tenth Amendment. The model legislation neither requires state governments to legislate, as agents of Congress, nor is the legislation unclear as to its intent. Assuming a properly working political process, the Court will not intervene to invalidate this legislation as a violation of state sovereignty. Thus, under the principles set forth in *Garcia*, *Ashcroft*, and *New York*, the proposed voucher legislation will not fall victim to the Tenth Amendment.

of religion"¹²⁷ While the First Amendment applies directly to the federal government, it is applied to the states through the selective incorporation doctrine of the Due Process Clause of the Fourteenth Amendment.¹²⁸ But for a voucher program's inclusion of sectarian schools, the Establishment Clause would not be an issue.¹²⁹ Many of the proposed voucher schemes, including that proposed by this Note, include sectarian schools within their framework,¹³⁰ thus bringing the Establishment Clause into consideration. Determining when the federal or state government has violated the Establishment

127. U.S. CONST. amend. I. Not until after 1947 did the Supreme Court seriously address the Establishment Clause. WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW* 1091 (7th ed. 1991). Only two cases prior to that time produced any significant establishment clause analysis. See *Quick Bear v. Luepp*, 210 U.S. 50 (1908) (upholding the disbursement of federal funds to Catholic schools for tuition costs for the Sioux Indians); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (allowing federal appropriations for construction costs and care for indigent patients at a Catholic hospital).

128. See *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 389 (1985) (invalidating a school district's shared time program under the Establishment Clause); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (concluding that a New York law providing income tax benefits to parents of children attending nonpublic schools violates the Establishment Clause); *Walz v. Tax Comm.*, 397 U.S. 664, 666-67 (1970) (challenging the constitutionality, under the Establishment Clause, of a New York City property tax exemption for religious organizations for property used solely for religious purposes); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (noting explicitly that the First Amendment was made applicable to the states through the Fourteenth Amendment); *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947) (challenging the state transportation of pupils to both public and parochial schools).

Originally, the Bill of Rights was not applicable to the activities of the state and local governments. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 382 (4th ed. 1991). However, the selective incorporation doctrine incorporates specific provisions of the Bill of Rights into the Fourteenth Amendment and provides "protections against the states exactly congruent with those [protections] against the federal government." 16A AM. JUR. 2D *Constitutional Law* § 453 (1979). Modern jurisprudence demonstrates that virtually all of the provisions of the Bill of Rights have been selectively incorporated into the Fourteenth Amendment's Due Process Clause and made applicable to the states. TRIBE, *supra*, at 385. When determining whether a provision should be incorporated into the Due Process Clause, the Court asks whether the guarantee is fundamental to the American scheme of justice. *Id.* Thus, the Court seems to be willing to enforce rights which it views as having a special importance in the development of individual liberty in American society. *Id.*

129. The Establishment Clause of the First Amendment protects religious liberty and prohibits the government from making laws "respecting an establishment of religion." U.S. CONST. amend. I. If the government implements a voucher program that in no way involves a religious entity, no threat of the government establishing a religion would exist and therefore no Establishment Clause issue would be presented. Furthermore, excluding sectarian schools from a voucher plan would not offend the Free Exercise Clause because the initial step of demonstrating governmental action which substantially interferes with religion could not be established. See *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Hobbie v. Unemployment Appeals Comm'n.*, 480 U.S. 136 (1987). Since people could not claim that their religious beliefs require receipt of educational vouchers, the Free Exercise Clause is not implicated.

130. See *supra* section II.B. & C., notes 65-120 and accompanying text.

Clause can be a difficult task.¹³¹ Establishment clause jurisprudence can be as perplexing as the M.C. Esher print,¹³² *The Waterfall*.¹³³ However, several factors have emerged that help to determine when the line separating church and state has been impermissibly crossed.¹³⁴

This Section begins by exploring the *Lemon* test as applied by the Court in cases dealing with government funding of sectarian schools.¹³⁵ Next, this Section analyzes establishment clause jurisprudence in light of the recent decision in *Zobrest v. Catalina Foothills School District*¹³⁶ and its effect on the validity of educational vouchers.¹³⁷ Finally, this Section briefly explores other tests employed by the Court in addressing the Establishment Clause,¹³⁸ including Justice O'Connor's endorsement test and the "neutrality" test recently employed by the Court. However, any examination of the Establishment Clause must begin with the *Lemon* test.

In *Lemon v. Kurtzman*,¹³⁹ the Court created a three-part test for determining when an Establishment Clause violation has occurred. Despite the Court's heavy reliance on *Lemon*, this test has been characterized as only a

131. See *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 485 (1986) ("The Establishment Clause of the First Amendment has consistently presented this Court with difficult questions of interpretation and application We can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."); *Mueller v. Allen*, 463 U.S. 388, 393 (1983) ("It is not at all easy, however, to apply this Court's various decisions construing the [Establishment] Clause"); *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part and dissenting in part) ("Our decisions in this troubling area draw lines that often must seem arbitrary."); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 761 N.5 (1973) ("[T]he Court has recognized its inability to perceive with invariable clarity the 'lines of demarcation in this extraordinarily sensitive area of constitutional law.'").

132. Maurits Cornelis Esher was a graphic artist born June 17, 1898 in Leeuwarden. BENEDIKT TASCHEN, *M.C. ESHER THE GRAPHIC WORK* 16 (1992).

133. The print depicts water continually falling over a millwheel and then impossibly flowing back "up" to the water's point of descent over the millwheel. *Id.* at 76. The two towers, which make up the waterfall, are the same height and yet the tower from which the water falls onto the millwheel is impossibly a story higher than the tower from which the water flows. *Id.* at 16, 76. As described by M.C. Esher, the watertower "is composed of square beams which rest upon each other at right angles. If we follow the various parts of this construction . . . we are unable to discover any mistake in it. Yet it is an impossible whole because changes suddenly occur in the interpretation of distance between our eye and the object." *Id.* at 16.

134. See *infra* text accompanying notes 181-85, 204-10.

135. See *infra* notes 139-91 and accompanying text.

136. 113 S. Ct. 2462 (1993).

137. See *infra* notes 192-214 and accompanying text.

138. See *infra* notes 215-28 and accompanying text.

139. 403 U.S. 602 (1971) (invalidating attempts by Pennsylvania and Rhode Island to directly subsidize the salaries of teachers at nonpublic schools where 95 % of the students attending nonpublic schools were enrolled in a sectarian school).

“helpful signpost” in dealing with establishment clause challenges,¹⁴⁰ and in the Court’s most recent decisions it has been greatly ignored.¹⁴¹ Nonetheless, *Lemon* has not been overturned or replaced by an alternative test, and thus it continues to govern establishment clause challenges.

The three-part test initially requires that the government action have some secular legislative purpose.¹⁴² Generally, this prong is of little importance because of the considerable deference given to federal and state legislatures.¹⁴³ The legislative purpose must be “motivated wholly by an impermissible purpose” to fail the secular purpose prong of *Lemon*.¹⁴⁴ The second prong of the test requires that the principle or primary effect of the government action be one that neither advances nor inhibits religion.¹⁴⁵ The Court has delineated several factors that it will look to when deciding this prong of the *Lemon* analysis.¹⁴⁶ Finally, the government action must not foster an excessive government entanglement with religion.¹⁴⁷

Not satisfied with the traditional *Lemon* test, the Supreme Court in recent

140. *Mueller v. Allen*, 463 U.S. 388, 394 (1983).

141. See cases cited *infra* note 148.

142. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

143. Carl H. Esbeck, *The Lemon Test: Should It Be Retained, Reformulated or Rejected?*, 4 NOTRE DAME J.L. ETHICS & PUB. POL’Y 513, 518 (1990) (“This highly deferential approach can be seen in the Supreme Court’s parochial aid cases.”); Amy Christine Hevly, Note, *Nothing Simple or Certain: Establishment Clause Barriers to Choice Systems in American Education*, 35 ARIZ. L. REV. 467, 479 (1993) (“The first prong of the test . . . is generally applied with considerable deference to state legislatures.”); Joel T. Ireland, Note, *The Transfiguration of the Lemon Test: Church and State Reign Supreme in Bowen v. Kendrick*, 32 ARIZ. L. REV. 365, 385 (1990) (“The Court has shown great deference to legislatures in their statement of secular purpose.”).

144. *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) (citing *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *Stone v. Graham*, 449 U.S. 39 (1980), the Court stated, “Under the *Lemon* standard . . . a court may invalidate a statute only if it is motivated wholly by an impermissible purpose . . .”).

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

146. See *infra* text accompanying notes 181-85, 204-10.

147. *Lemon*, 403 U.S. 602, 612-13 (1971). The concept of the excessive entanglement-political divisiveness test was first introduced in *Board of Educ. v. Allen* by Justice Harlan. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1192 (4th ed. 1991). A clear example of an excessive government entanglement with religion was seen in *Larkin v. Grendel’s Den, Inc.* 459 U.S. 116 (1982). In *Larkin*, a zoning law which granted all churches or schools the power to veto the issuance of a liquor license for property within 500 feet of the church or school was held to be unconstitutional. *Id.* See also *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2487 (1994) (relying on *Larkin* to invalidate an attempt by New York to delegate to an Hasidic Jewish village the powers of a school district).

decisions¹⁴⁸ has completely side-stepped its analysis.¹⁴⁹ Some members of the Supreme Court have advocated other tests for establishment clause challenges. Justice O'Connor has proposed that the Court inquire whether the objective observer¹⁵⁰ would perceive the government action as an endorsement of religion,¹⁵¹ while Justice Kennedy would focus attention on whether the government has coerced anyone to support or participate in religion.¹⁵² Educational voucher programs would have little difficulty passing Justice Kennedy's coercion analysis because none of the proposed programs coerces an individual, even subtly, to participate in or support religion.¹⁵³ While new

148. See *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2498, & 2500 (1994) (O'Connor, J., concurring) (noting that the focus of the Court was not on the *Lemon* test and commenting that the Court has begun to move away from the three-part test); *Id.* at 2515 (Scalia, J., dissenting) (commenting that although the three lower courts relied on *Lemon*, as well as eighty pages of briefing by the parties, the Court refused to rely on the test, giving it only two "see also" references); *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993) (concluding, without applying the three-prong *Lemon* analysis, that the Establishment Clause does not prevent a school district from providing a deaf student attending a religious school with a sign-language interpreter).

149. As noted by William Bently Ball, who represented Jimmy Zobrest before the Supreme Court, "The Court, it is true, did not overrule *Lemon*. It simply *bypassed Lemon*." William Bently Ball, *One Student's Struggle*, CHRISTIAN LEGAL SOC'Y. Q., Fall 1993, at 15 (emphasis in original).

150. It is not entirely clear who the objective observer is or what characteristics this mythical person possesses. See William P. Marshall, "We Know It When We See It," *The Supreme Court And Establishment*, 59 SO. CAL. L. REV. 495, 537 (1986) ("Is the objective observer . . . a religious person, an agnostic, a separationist, a person sharing the predominate religious sensibility of the community, or one holding a minority view? Is there any 'correct' perception?"). But see Note, *Religion and the State*, 100 HARV. L. REV. 1606, 1648 (1987) ("If the Establishment Clause is to prohibit government from sending a message to religious minorities or nonadherents that the state favors certain beliefs and that as nonadherents they are not fully members of the political community, its application must turn on the message received by the minority or nonadherent.") (emphasis in original).

151. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). There seems to be a fairly significant overlap between Justice O'Connor's Endorsement Test and the *Lemon* Test's primary effects prong. NOWAK & ROTUNDA, *supra* note 147, at 1162 n.1. (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 590-93 (1989); *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 247-253 (1990)).

152. *County of Allegheny v. ACLU*, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice Kennedy commented:

Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.' These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion.

Id.

153. Choice and voucher programs, like that proposed by this note, provide for no incentive or penalty respecting the parent's and child's choice to attend a public, private-secular, or private-sectarian school. Therefore, a coercion analysis will not be the constitutional downfall of this choice through voucher proposal because there is no form of coercion present.

tests have emerged, the *Lemon* test has yet to be permanently laid to rest by the Court¹⁵⁴ and remains a crucial inquiry for an establishment clause challenge.

Because educational voucher plans that include sectarian institutions raise potential establishment clause problems,¹⁵⁵ such programs should be tested under *Lemon's* three-part analysis.¹⁵⁶ Furthermore, to address Justice O'Connor's concerns, such a program must not send a message that government is endorsing religion.¹⁵⁷ Various decisions suggest that the Court would most likely approve of such a voucher scheme.¹⁵⁸ However, the Court has not always implied its approval of a voucher plan that includes sectarian schools.

In *Committee for Public Education & Religious Liberty v. Nyquist*,¹⁵⁹ the Court held invalid a New York law that sought to provide, among other things, tuition reimbursements to parents.¹⁶⁰ The Court, in applying the *Lemon* test, found no violation of the secular purpose prong,¹⁶¹ but concluded that the law had the primary effect of advancing religion.¹⁶² The Court reasoned that because the state paid the tuition reimbursement directly to the parents, rather than to the school, the tuition reimbursement law violated the primary effects prong of *Lemon*.¹⁶³ The Court has since changed its view towards the direct

154. See *Lamb's Chapel v. Center Moriches Union Free School Dist.* 113 S. Ct. 2141, 2149 (1993) (Scalia J., concurring) ("As to the Court's invocation of the *Lemon* test: Like 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 the Establishment Clause jurisprudence . . . frightening the little children and . . . attorneys . . .").

155. See cases cited *supra* note 118.

156. See *supra* text accompanying notes 139-47.

157. See *infra* notes 216-28 and accompanying text.

158. See *infra* notes 166-228 and accompanying text.

159. 413 U.S. 756 (1973).

160. Approximately 20% of all students attended over 2000 nonpublic schools, approximately 85% of which are church affiliated. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 768 (1973). Parents whose annual taxable income was less than \$5000 were entitled to a tuition reimbursement of \$50 for each grade school child and \$100 for each high school child. *Id.* at 764. For those parents who failed to qualify for tuition reimbursements, a state tax deduction was allowed for as much as \$1000 per dependant for a taxpayer with an adjusted gross income of less than \$9000, to zero deductions allowed for taxpayers with an adjusted gross income of \$25,000 or more. *Id.* at 765-66.

161. *Nyquist*, 413 U.S. at 773 (noting that the law's legislative purposes of promoting diversity among the schools and protecting the public school system from becoming overburdened by an influx of children which have been serviced by private schools adequately supports legitimate, nonsectarian state interests).

162. *Id.* at 779-80.

163. *Id.* at 783. The Court reasoned that while other secular purposes existed for the tuition grants, the pervading purpose was to ensure that parents have the option to send their children to sectarian schools. *Id.*

payment of educational reimbursements to parents.¹⁶⁴ After *Nyquist*, the chance of any voucher program that included sectarian schools seemed to have little hope of surviving an establishment clause challenge.¹⁶⁵

Ten years after *Nyquist*, the Court in *Mueller v. Allen*¹⁶⁶ upheld¹⁶⁷ a Minnesota statute¹⁶⁸ that allowed Minnesota taxpayers to deduct certain expenses incurred in providing education for their children.¹⁶⁹ Unlike the *Nyquist* decision, the Court found importance in the fact that the aid was provided to parents and not directly to the sectarian institution. The *Mueller* decision removed a brick from the wall separating church and state, and "cleared the way for an accommodation between church and state that more equitably recognizes the principles and values of the religion clause"¹⁷⁰ of the First Amendment.¹⁷¹

164. *Mueller v. Allen*, 463 U.S. 388, 399 (1983) (noting that the direct payment to parents was an important factor in concluding that the Minnesota tax benefit did not violate the Establishment Clause). See also *infra* note 175 and accompanying text.

165. The probability of a voucher scheme, which includes sectarian schools, being held unconstitutional after *Nyquist* was quite high. *Nyquist* invalidated a law that sought to partially and directly reimburse parents for the cost of tuition, including tuition paid to sectarian schools. A voucher program, which entails both of these features, would thus be struck down after *Nyquist*.

166. 463 U.S. 388 (1983).

167. The Court was split five-to-four: Justices Burger, White, Powell, and O'Connor joined in the majority opinion delivered by Justice Rehnquist while Justices Brennan, Blackmun, Marshall, and Stevens dissented in an opinion written by Justice Marshall.
Id. at 389.

168. MINN. STAT. § 290.09(22) (1982).

169. The statute provides:

Tuition and transportation expense. The amount he has paid to others, not to exceed \$500 for each dependant in grades K to 6 and \$700 for each dependant in grades 7 to 12, for tuition, textbooks and transportation of each dependant in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and chapter 363. As used in this subdivision, 'textbooks' shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in teaching religious tenets, doctrines or worship, the purpose of which is to inculcate such tenants, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

MINN. STAT. § 290.09(22) (1982)

170. The Religion Clause of the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. CONST. amend. I.

171. Thomas Patrick Monaghan & Michael S. Ariens, II, *Mueller v. Allen: A Fairer Approach To The Establishment Clause*, 29 ST. LOUIS U. L.J. 115, 115 (1984).

As opposed to the statute in *Nyquist*, the Minnesota law challenged in *Mueller*¹⁷² did not restrict the use of the deduction to taxpayers whose dependents attended nonsectarian schools.¹⁷³ The only restriction in the statute with respect to sectarian institutions is that neither instructional materials used in teaching religious tenets, nor materials or transportation to extracurricular activities of sectarian institutions, are included as deductible expenses.¹⁷⁴ Thus, the state, through a facially neutral law and the private choice of the parent and student in deciding to attend a sectarian school,¹⁷⁵ assisted the parent and child in the costs associated with such attendance.

In sustaining the law,¹⁷⁶ the Court applied the three-part test established in *Lemon*.¹⁷⁷ The Court spent little time deciding that the statute had a secular legislative purpose.¹⁷⁸ The Court noted that governmental assistance programs aimed at improving educational opportunities for students have consistently been held to have a secular purpose.¹⁷⁹ More specifically, the Court recognized that "a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves [a] secular purpose."¹⁸⁰

The *Mueller* decision focused on the primary effects prong of the *Lemon* test. In deciding that the Minnesota statute neither advanced nor inhibited religion, the Court cited several factors that were determinative in this result.¹⁸¹ Most importantly, the deduction allowed by the law was available to a broad class of beneficiaries.¹⁸² The Court reasoned that "the deduction is available for educational expenses incurred by all parents, including those

172. 463 U.S. 388 (1983).

173. See *supra* note 169 (quoting the Minnesota statute).

174. See *supra* note 169.

175. The Court found the private choice of the parent and child to attend a sectarian school, rather than the state directly issuing payment of funds to the sectarian school to be an important factor in upholding the statute. *Mueller*, 463 U.S. at 399. This private choice is likewise found in the model legislation proposed by this note.

176. See *supra* note 169.

177. See *supra* notes 137-47 and accompanying text (discussing *Lemon's* three-part test).

178. *Mueller v. Allen*, 463 U.S. 388, 394 (1983). The Court noted that it is reluctant, especially when a plausible secular purpose may be discerned, to assign unconstitutional motives to the states. *Id.* at 394-95.

179. *Id.* at 394 (citing *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

180. *Mueller*, 463 U.S. at 395. The Court noted that the consistency by which governmental assistance programs pass the secular purpose prong reflects, at least in part, the Court's reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose may be gleaned from the text of the statute. *Id.* at 394-95.

181. See *infra* text accompanying notes 182-85.

182. *Mueller v. Allen*, 463 U.S. 388, 397-98 (1983) (noting that the assistance program in *Mueller* is different from that in *Nyquist* because the Minnesota assistance program is available to all parents, not only those whose children attend non-public schools, like that in *Nyquist*).

whose children attend public schools [as well as] those whose children attend nonsectarian private schools or sectarian private schools."¹⁸³ The Court also noted that the deduction allowed by the Minnesota tax laws was only one among many deductions,¹⁸⁴ and public funds only became available to sectarian schools after the private choice of individual parents of school-age children.¹⁸⁵

Thus, a voucher program that includes sectarian schools can survive the primary effects prong of *Lemon*, provided that certain criteria are built into the program. First, the voucher program must provide funds only on the basis of a parental decision to enroll their children in a nonpublic school.¹⁸⁶ Also, the program must include a broad class of beneficiaries by making nonsectarian private schools equally eligible for the vouchers.¹⁸⁷ Further, the program must in no way create a financial incentive to attend sectarian institutions.¹⁸⁸

Turning to the third prong of the *Lemon* inquiry, the *Mueller* Court had no difficulty deciding that the Minnesota law did not excessively entangle the state with religion.¹⁸⁹ The Court reasoned that the only plausible source of entanglement would come from state officials determining whether particular textbooks would qualify for a deduction,¹⁹⁰ but the Court in *Board of Education v. Allen*¹⁹¹ previously held that this posed no constitutional obstacle. Thus, a voucher program in which the state plays a minimal role, only ensuring that certain minimal standards are met, will not excessively entangle the state with religion.

Evidence that the Court will sustain a properly drafted voucher program

183. *Id.* at 397.

184. *Id.* at 396. For example, Minnesota tax law also allows for deductions for charitable contributions. MINN. STAT. ANN. § 290.21(3) (West 1993).

185. *Mueller*, 463 U.S. at 399. The Court rejected the Petitioner's argument that the statute, despite its facial neutrality, primarily benefitted sectarian schools.

Petitioners cite[d] a "Revenue Analysis" prepared in 1976 by the Minnesota Department of Revenue, which state[d] that "[o]nly those taxpayers having dependents in nonpublic elementary or secondary schools are effected by the law since tuition, transportation and textbook expenses for public school students are paid for by the school district."

Id. at 400 n.9. The majority stated, "[W]e would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Id.* at 401. It was further stated that the attenuated financial benefit to sectarian schools, as a result of private choice from a neutrally available tax deduction, is not within the historic purposes of the Establishment Clause. *Id.* at 400.

186. See Bolick, *supra* note 29, at 2 (providing a checklist for a successful educational choice program that includes religiously affiliated schools); see also *supra* note 184 and accompanying text.

187. See Bolick, *supra* note 29 at 2. See also *supra* note 182 and accompanying text.

188. See Bolick *supra* note 29, at 2. See also *supra* note 182 and accompanying text.

189. *Mueller v. Allen*, 463 U.S. 388, 403 (1983).

190. *Id.* at 403 (citing *Board of Educ. v. Allen*, 392 U.S. 236 (1968)).

191. 392 U.S. 236 (1968).

may also be found in *Zobrest v. Catalina Foothills School District*.¹⁹² In *Zobrest*, James Zobrest requested¹⁹³ the Catalina Foothills School District to provide a sign-language interpreter to accompany him to class at a Roman Catholic high school.¹⁹⁴ After the school district refused to provide the interpreter, James Zobrest instituted an action in United States District Court.¹⁹⁵ The district court held that a state-provided interpreter, under the Individuals with Disabilities Education Act (IDEA),¹⁹⁶ would violate the Establishment Clause because the interpreter would "act as a conduit for . . . religious inculcation" and therefore was an impermissible entanglement of church and state.¹⁹⁷ By a divided vote, the Court of Appeals for the Ninth Circuit affirmed the district court opinion after applying the *Lemon* test.¹⁹⁸ The Court of Appeals ruled that the IDEA, as applied, would have the primary effect of advancing religion and thus violated the Establishment Clause.¹⁹⁹

On October 5, 1992, the United States Supreme Court granted certiorari in *Zobrest*.²⁰⁰ The Court,²⁰¹ on June 18, 1993, reversed the lower court's

192. 113 S. Ct. 2462 (1993).

193. The request was made pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* (1988), and the Arizona counterpart, ARIZ. REV. STAT. ANN. § 15-761 *et seq.* (1991 and Supp. 1992). *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2464 (1993). See also *infra* note 195.

194. *Zobrest*, 113 S. Ct. at 2464.

195. *Id.* The action was premised on the theory that the Individuals with Disabilities Education Act and the Free Exercise Clause of the First Amendment required the school district to provide a sign-language interpreter. *Id.* at 2464.

196. 20 U.S.C. § 1400 *et seq.* (West 1988). This Act provides federal money to assist state and local agencies in educating handicapped children. The Act conditions such funding upon a state's compliance with extensive goals and procedures. See 20 U.S.C. §§ 1412(1)-(7) (West 1988). Among the many qualifications for federal assistance under the Act, a state must demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C.A. § 1412(1) (West 1988).

197. *Zobrest*, 113 S. Ct. at 2464.

198. *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190 (9th Cir. 1992).

199. *Id.* at 1196.

200. 113 S. Ct. 52 (1992).

201. Justices White, Scalia, Kennedy, and Thomas joined Chief Justice Rehnquist's opinion. Justice Blackmun filed a dissenting opinion in which Justices Souter and Stevens joined and Justice O'Connor joined in part. Justice O'Connor filed a separate dissent in which Justice Kennedy joined.

Some members of the Court concluded that the constitutional question should not be addressed because of prudential concerns. *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2469 (1993) (O'Connor, J., dissenting) ("It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them That 'fundamental rule' suffices to dispose [this] case"). Justice Stevens joined Justice O'Connor's dissent. *Id.* at 2475. Justices Souter, Stevens, and O'Connor joined Justice Blackmun's dissenting opinion, which first concluded that the Court should not have reached the constitutional question. *Id.* at 2469. Justice Blackmun argued that the case could easily be disposed of by remanding it for consideration of whether the IDEA provides an entitlement to services for students placed in private

ruling and held that the Establishment Clause does not prevent a school district from furnishing a disabled child, enrolled in a sectarian school, with a sign-language interpreter.²⁰²

The Court did not mention *Lemon* in its establishment clause analysis.²⁰³ Side-stepping this traditional test, the Court instead focused on several features of the assistance program that were similar to those in *Mueller* to support its decision. First, the Court noted that the service was "part of a general government program that distributes its benefits neutrally . . . without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends."²⁰⁴ The Court concluded that handicapped children were the primary beneficiaries under IDEA and that the sectarian schools were only incidental beneficiaries to the extent that they benefitted at all.²⁰⁵ Next, the Court reasoned that IDEA created no incentive to attend a sectarian institution.²⁰⁶ The governmental aid only reached a sectarian institution as a result of a private choice by parents.²⁰⁷ Further, the Court, in distinguishing *Meek v. Pittenger*²⁰⁸ and *School District of Grand Rapids v. Ball*,²⁰⁹ reasoned that providing a sign-language interpreter did not relieve the sectarian institution of costs it otherwise would have borne in educating its students.²¹⁰

As the *Mueller* and *Zobrest* decisions illustrate, a governmental educational assistance program that includes sectarian institutions will survive an

schools at their parents' option. *Id.* at 2470. However, Justice Blackmun continued on to disagree with the majority on the merits of the case, in which only Justice Souter joined. *Id.* at 2471-75.

202. *Zobrest*, 113 S. Ct. 2462 (1993).

203. *Id.* at 2466-69 (concluding, without applying the traditional three-prong *Lemon* analysis, that a state provided sign-language interpreter for a student attending a religious school did not violate the Establishment Clause).

204. *Id.* at 2467. As in *Zobrest*, the *Mueller* Court found the neutrality of the program of particular importance. See *supra* note 182 and accompanying text. The neutrality aspect appears to be a pivotal factor in the Court's establishment clause jurisprudence. See also *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2494 (1994) (holding that New York's attempt to create a new school district from an existing Hasidic Jewish village unconstitutional because in doing so the state violated the principle of neutrality towards religion).

205. *Zobrest v. Catalina Foothills Sch. Dist.* 113 S. Ct. 2462, 2469 (1993).

206. *Id.* at 2467.

207. *Id.*

208. 421 U.S. 349 (1975) (striking down a statute that provided aid, in the form of a direct loan of teaching equipment and material, to private schools, more than 75% of which were sectarian).

209. 473 U.S. 373 (1985) (declaring unconstitutional a scheme whereby public school teachers were sent into sectarian schools to offer courses that were solely attended by students at those sectarian schools).

210. *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2469 (1993) (explaining that supplemental state aid to a religious school is permissible, although attempts to supplant costs that the religious school would have otherwise incurred is impermissible funding because the effect would be to directly subsidize the religious school).

establishment clause challenge, provided that it includes certain features. Specifically, the program must be facially neutral and apply to a broad class of beneficiaries without regard to the sectarian-secular nature of the beneficiaries.²¹¹ Further, the program should not relieve the sectarian institution of costs that it otherwise would incur in educating its students.²¹² A voucher program will clearly not relieve the sectarian school of any cost; rather, the voucher will relieve the parents who opt to send their children to the sectarian school of the burden of the school's fees.²¹³ Although this may mean more dollars flowing into sectarian institutions, this occurs solely as a result of private choices.²¹⁴ Therefore, a voucher that is given to parents and redeemable at any qualified school will meet the required criteria necessary to survive a first amendment challenge.

As noted earlier and as demonstrated by *Zobrest*, *Grumet*, and other decisions, some members of the Court have become disenchanted with the *Lemon* analysis²¹⁵ and have proposed new tests for establishment clause challenges. These tests, if anything, propose a more accommodating approach to church and state relations and thus make it more likely that voucher programs will pass constitutional scrutiny. Justice O'Connor, in her concurring opinion in *Lynch v. Donnelly*,²¹⁶ articulated her endorsement test, which can be viewed as a refinement of the primary effects prong of *Lemon*.²¹⁷ First, Justice O'Connor stated that the Establishment Clause can be violated when the government excessively entangles itself with religion.²¹⁸ Educational vouchers are unlikely to fail under this analysis when the government involvement is kept

211. See *supra* text accompanying note 182.

212. See *supra* text accompanying note 210.

213. See *supra* text accompanying notes 185, 210.

214. See *supra* text accompanying note 185.

215. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2150 (1993) (Scalia, J., concurring) (citing numerous opinions, Justice Scalia commented that "[o]ver the years . . . no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart, [referring to the *Lemon* test,] . . . and a sixth has joined an opinion doing so"). See also *supra* notes 148, 154 and accompanying text.

216. 465 U.S. 668 (1984) (holding that a nativity scene displayed in a public park did not violate the Establishment Clause as a constitutionally impermissible governmental display of a religious symbol).

217. *Egle*, *supra* note 102, at 480 (noting that Justice O'Connor reasoned in *Lynch* that "[t]he strength of [the analysis'] application . . . is that it avoids invalidation of some laws that the Court has upheld even though they may advance or inhibit religion . . .").

218. *Lynch*, 465 U.S. at 688. According to Justice O'Connor, excessive entanglement may interfere with the religious institution's independence, convey to the religious institutions governmental powers which are not shared by nonadherents, as well as create religiously defined political constituencies. *Id.*

to a minimum.²¹⁹ Second, direct infringement occurs when the government endorses or disapproves of religion.²²⁰ Thus, any voucher program that includes sectarian institutions must not convey a message of governmental endorsement of religion.

To prevent the conveyance of such a message, several precautions can be taken when drafting voucher legislation. Justice O'Connor, in a concurring opinion in *Witters v. Washington Department of Services for the Blind*,²²¹ noted that when the aid to religion is a result of private choice, the objective observer would not view the aid as an endorsement of religion.²²² Further, provided the voucher program does not favor sectarian schools, the government cannot be accused of sending a message of endorsement.²²³ Likewise, any voucher program must be carefully drafted to avoid creating an incentive to select sectarian over non-sectarian schools by providing assistance regardless of the institution chosen. Moreover, after *Mueller*,²²⁴ whether the challenged law is neutral on its face is critical.²²⁵ The Supreme Court recently invalidated a New York law which sought to create a school district within the exact confines of a Hasidic Jewish village.²²⁶ The law violated the Establishment Clause because the state singled out a religious sect and sought to delegate its power in

219. See *supra* notes 166-91 and accompanying text. The *Mueller* case exemplified government involvement kept to a minimum. Justice O'Connor joined the majority opinion in *Mueller* and upheld the Minnesota law against an establishment clause challenge.

220. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984). Justice O'Connor commented that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.*

221. 474 U.S. 481 (1986). The Court upheld against an Establishment Clause challenge the state of Washington's extension of vocational assistance to a blind person studying to become a pastor, missionary or youth director at a private Christian college. *Id.* at 489. The Court noted that any state aid which flowed to the sectarian institution was a result of private choice and that the Washington assistance program applied generally to a broad class of beneficiaries. *Id.* at 487.

222. *Id.* at 493 (O'Connor, J., concurring) ("The aid to religion at issue . . . is the result of . . . private choice. No reasonable observer is likely to draw . . . an inference that the State itself is endorsing a religious practice or belief.").

223. Eric J. Segall, *Parochial School Aid Revisited: The Lemon Test, The Endorsement Test and Religious Liberty*, 28 SAN DIEGO L. REV. 263, 292 (1991) (observing that such a practice would send a message that the government approves of the religious affiliation which it assists, while at the same time send a message that it disapproves of the religious affiliations which it does not assist).

224. See *supra* notes 166-91 and accompanying text for an analysis of the *Mueller* decision.

225. *Mueller v. Allen*, 463 U.S. 388, 400 (1983) ("The historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from [a] neutrally available tax benefit . . ."). See also Hevly, *supra* note 143, at 486 (noting that after *Mueller*, if a statute is facially neutral it will not be deemed to endorse religion, even if it has the effect of bestowing a benefit on religion).

226. *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994).

a manner which did not remain neutral towards religion.²²⁷ Thus, a voucher program must remain facially neutral, like the tax deduction challenged in *Mueller*,²²⁸ so as to not prefer one religion over another or send a message of governmental endorsement of religion.

The preceding analysis indicates that a properly drafted voucher program that includes sectarian institutions will survive an establishment clause challenge. In this respect, the process of drafting the voucher legislation is crucial. However, even if an establishment clause challenge is successfully defended, other constitutional challenges may await a choice through voucher program.²²⁹ The following Section explores the merits of an equal protection challenge to such a program.

B. Equal Protection Concerns

Enacted shortly after the Civil War,²³⁰ the Fourteenth Amendment to the Constitution was established primarily to secure freedom and equal protection for former slaves.²³¹ Despite its primary goal, the Equal Protection

227. *Id.* at 2494. The Court found the drawing of the school district boundary to meet the exact shape of the Jewish village to be equivalent to defining a political subdivision on the basis of a religious criteria. *Id.* at 2487, 2490. Furthermore, the Court noted that "the [village] did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law." *Id.* at 2491. Since there was no assurance that a similarly situated group in the future would be granted its own school district and because a failure to act on the part of the legislature in the future is unreviewable, the law violated the rule of neutrality. *Id.*

228. See *supra* note 168.

229. See *infra* section III.B., notes 230-66 and accompanying text for an analysis of an equal protection challenge to a voucher program.

230. The Fourteenth Amendment was enacted during the reconstruction era in 1868. LOCKHART, *supra* note 127, at 342. Prior to the enactment of the Fourteenth Amendment, Congress, in 1865, enacted the Thirteenth Amendment which abolished slavery. *Id.* However, due to the "Black Codes," blacks did not obtain the full freedom enjoyed by other persons. *Id.* Consequently, the Civil Rights Act of 1866 was enacted, which gave blacks the same rights as enjoyed by white citizens in areas such as contract and property rights. *Id.* See also 42 U.S.C. §§ 1981-83 (1988) (protecting property and contract rights, as well as creating a cause of action for conduct which deprives persons of their constitutional or federal statutory rights while acting under color of state law). Shortly after the Civil Rights Act of 1866 was passed, Congress began work on the creation of the Fourteenth Amendment. LOCKHART, *supra* note 127, at 342. Two years after the enactment of the Fourteenth Amendment, Congress conveyed the right to vote to all citizens, irrespective of "race, color or previous conditions of servitude." U.S. CONST. amend XV.

231. GERALD GUNTHER, CONSTITUTIONAL LAW—CASES AND MATERIALS 676 (Foundation Press, 10th ed. 1980). See also *Slaughter-House Cases*, 83 U.S. 36, 81 (1872) (noting that the pervading purpose of the Fourteenth Amendment was to protect against state laws which discriminated against blacks and that discriminatory state action not directed at blacks as a class was not within the purview of the amendment).

Clause²³² of the Fourteenth Amendment has been interpreted to impose a general restraint on the intentional use of discriminatory classifications.²³³

232. The Fourteenth Amendment to the United States Constitution states, in pertinent part, “[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

233. GUNTHER, *supra* note 231. While the Equal Protection Clause of the Fourteenth Amendment only applies to the states, the Due Process Clause of the Fifth Amendment has been held to have an equal protection component that applies the same equal protection analysis to the federal government. See *Califano v. Webster*, 430 U.S. 313, 315-17 (1977) (holding that a social security provision allowing women to exclude from the computation of an “average monthly wage” three or more lower earning years than a similarly situated man is constitutional since the provision was substantially related to an important government interest); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (noting “that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups”); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (stating that the Court’s analysis of a Fifth Amendment equal protection claim has always been the same as its analysis of equal protection claims under the Fourteenth Amendment); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (applying the equal protection component of the Fifth Amendment to hold racial segregation in Washington D.C. public schools unconstitutional). However, the federal government has been shown some deference by the Court in its equal protection analysis in certain subject areas. See *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) (allowing Congress to deny or condition the benefit of Medicare to aliens because of Congress’ broad power in the area of immigration and naturalization); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 596-97 (1990) (holding that “congressionally mandated, benign, race-conscious” programs need only substantially advance important government interests to survive an equal protection challenge).

The Equal Protection Clause has prohibited improper classifications in several areas. Most notably, the Equal Protection Clause prohibits classifications based on racial grounds. See *Strauder v. West Virginia*, 100 U.S. 303 (1879) (holding that the practice of prohibiting blacks from sitting on a jury violates the Equal Protection Clause); *Loving v. Commonwealth of Virginia*, 388 U.S. 1, 11 (1967) (noting that “the Equal Protection Clause demands that racial classifications . . . be subjected to the most rigid scrutiny”). Likewise, classifications based on alienage are also subject to a strict scrutiny review by the courts. See *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (holding unconstitutional a state welfare law which conditioned benefits on citizenship because aliens are an inherently suspect class). *But see* *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (noting that a state may create classifications based on alienage for positions that are tied up with the political process or representational democracy); *Ambach v. Norwick*, 441 U.S. 68, 75-76 (1979) (validating a New York law forbidding certification of any person who is not a U.S. citizen as a public school teacher because public school teachers perform “a task that goes to the heart of representational government”). Further, classifications based on gender or illegitimacy, while having a lower level of scrutiny than race-based classifications, have also been prohibited by the Equal Protection Clause. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (invalidating a state-supported university policy which limited enrollment in its nursing program to only women because the policy did not substantially advance an important government interest); *Clark v. Jeter*, 486 U.S. 456, 464 (1988) (invalidating a six-year statute of limitations for bringing a paternity action because the limitation did not substantially advance an important government interest). Finally, classifications created by economic regulation or based on age or mental retardation are only subject to the minimal traditional equal protection standard of review. See *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2406 (1991) (noting that since age is not a suspect classification under the Equal Protection Clause, a rational basis review is applied); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (holding that a classification created by a zoning

The Equal Protection Clause could pose a barrier to a poorly drafted voucher program. Opponents of educational vouchers contend that vouchers will promote racial segregation.²³⁴ Further, opponents claim that a voucher program may exclude low-income families from the voucher's benefits if the amount of the voucher is insufficient to cover the total cost of private education.²³⁵ Because low-income families will be unable to "add-on" to the voucher,²³⁶ the children of these families will be left behind in poorly funded, understaffed, and low quality schools.²³⁷ The inability to "add-on" to the voucher and the alleged result of this inability are the root of many equal protection concerns.²³⁸

The contention that segregation will occur because of choice stems from the "Freedom of Choice" programs of the 1960s that were designed to evade desegregation of public schools.²³⁹ Rather than taking affirmative steps to integrate segregated schools, many school systems allowed students to opt for a transfer to an all-white or black school. These evasive programs led the Supreme Court to rule, in *Green v. County School Board of New Kent County*,²⁴⁰ that choice programs designed to promote discrimination are

ordinance excluding group homes for the mentally retarded is only subject to a rational basis analysis); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (deferring to the legislature the wisdom of the discrimination created by economic legislation by only requiring a rational relation to a legitimate state interest).

While the Equal Protection Clause protects against improper classifications, the Court has required intent for any such classifications to violate the clause. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (holding that proof of discriminatory intent is required to show a violation of the Equal Protection Clause); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (requiring *de jure* discrimination to implicate the Equal Protection Clause). Thus, a law which is not intentionally discriminatory, either facially or as applied, will not implicate the clause.

234. Bolick, *supra* note 29, at 3. Such a program, which requires the state to provide tuition for parents whose children attend private schools, has recently been discovered by an Atlanta attorney. *Choice Reality*, *supra* note 3, at A22. While this 1961 law was originally enacted to escape desegregation, choice advocate Senator Roy Allen stated, "[w]e now have a chance to [take] something born in a darker historical era, and turn it into a bright opportunity for children of all races." *Id.*

235. Hevly, *supra* note 143, at 474 (noting also that the cost of transportation to a private school may deteriorate the value of the voucher).

236. See *supra* notes 76-79 and accompanying text.

237. See Hevly, *supra* note 143, at 474.

238. See FAMILY CONTROL, *supra* note 13 (arguing that an "add-on" will lead to increased segregation because low-income families are at a severe disadvantage in taking advantage of the "add-on" feature).

239. Bolick, *supra* note 29, at 3. See also *Choice Reality*, *supra* note 3, at A22 (noting that one of these such laws, a 1961 Georgia law which was long forgotten, has been targeted by choice advocates as a source of power to implement a choice program in Georgia).

240. 391 U.S. 430 (1968).

unconstitutional.²⁴¹ While earlier choice programs may have had discriminatory intent, no such intent exists with respect to modern choice programs.²⁴² In fact, minority ethnic groups are the most likely to benefit from modern choice programs.²⁴³ Thus, while equal protection concerns about earlier choice programs were genuine, there are no constitutional infirmities with a modern choice through voucher programs provided that it is carefully drafted. As in *Mueller*,²⁴⁴ voucher legislation should require all schools, where the vouchers are redeemable, to adhere to federal and state anti-discrimination laws²⁴⁵ and to specifically prohibit improper classifications. Any school

241. The *Green Court* held, in light of *Brown II*, 349 U.S. 294 (1955), that the "Freedom-of-Choice" plan was not a sufficient step to effectuate a transition to a unitary school system. *Id.* at 441. The Virginia choice plan allowed every student, except those entering first and eighth grade, to choose between the New Kent and Watkins schools. *Id.* at 434. Under the plan, students who do not make a choice between the two schools were assigned to the school that they previously attended. *Id.* During the three years in which the "Freedom-of-Choice" program operated, not a single white child opted to attend the predominately black school. *Id.* at 441. Also, while some black children did opt to attend the white school, approximately 85% of all black children attended an all-black school. *Id.* Thus, the Court found that despite the option to choose the school, a dual school system continued to exist. *Id.*

242. Bolick, *supra* note 29, at 3. Bolick notes that the objective of modern choice proposals is to avoid segregation and to expand the opportunities of education. *Id.* To support his assertions, Bolick cites an Oregon choice proposal that would have enabled young black students to attend white-suburban schools. *Id.* The Oregon proposal was ultimately defeated in November of 1990. *Id.*

Further, choice programs are more likely to benefit minority, economically disadvantaged students in inner city schools. *Id.* But see Susan Chira, *Research Questions Effectiveness of Most School-Choice Programs*, N.Y. TIMES, Oct. 26, 1992, at A1 (explaining that a study by the Carnegie Foundation for the Advancement of Teaching shows that choice primarily benefits children of better-educated parents and may actually widen the gap between the rich and poor schools). As noted by Bolick in a separate work, private inner city schools are often more racially diverse than public inner city schools. CLINT BOLICK, *CHANGING COURSE: CIVIL RIGHTS AT THE CROSSROADS* 108 (Transaction Books 1988). Thus, a program which would allow students to opt for private education in these instances would promote racial desegregation. It has also been argued that vouchers will encourage racial commingling that does not occur in the present public school system. Jeffrey A. Tucker, *Evils of Choice; The Danger of Governmental Vouchers for School Choice*, 45 NAT'L REV. 44 (1993) (citing John Miller, an associate for the New American Community).

243. Bolick, *supra* note 29, at 3 (noting that a defeated Oregon choice program would have enabled black children to attend predominately white suburban schools).

244. It should be noted that the Minnesota statute challenged in *Mueller* was not challenged on equal protection grounds but rather under the Establishment Clause. See *Mueller v. Allen*, 463 U.S. 388 (1983).

245. See *Grove City College v. Bell*, 465 U.S. 555 (1984) (concluding that federal scholarship funds, even though channeled directly to the students, expose private schools to regulatory coverage under Title IX). While the exact scope and dimensions of federal nondiscrimination regulations has not been determined with respect to federal funding of school vouchers, the *Grove City* decision indicates that private schools participating in the program will be subject to these regulations. Also, the Civil Rights Restoration Act allows the federal government to require an assurance of non-discrimination for an entire entity, even where only a discrete program within the entity receives federal funds. 20 U.S.C. § 1687(2) (1988).

operating contrary to federal or state law would be disqualified from participating. With this precaution, the voucher program may actually help to ensure an end to discrimination in education.²⁴⁶

Voucher opponents also argue that a voucher program will lead to inequality in school funding.²⁴⁷ Even if such disparity results, the Supreme Court has rejected this claim as an equal protection violation in *San Antonio Independent School District v. Rodriguez*.²⁴⁸ In *Rodriguez*, a class action²⁴⁹ was instituted challenging the rather complicated Texas school funding scheme under the Equal Protection Clause of the Fourteenth Amendment.²⁵⁰ In general, the distribution scheme resulted in students in wealthier districts receiving greater funding than students in lower income districts.²⁵¹ The district court ruled that the funding scheme violated the Equal Protection Clause.²⁵² However, the Supreme Court reversed the district court's decision, finding that wealth is not a suspect classification and education is not a

246. The anti-discrimination regulations would refuse reimbursement to parents if they send their children to a racially discriminatory school. Since the voucher will have no value at these schools, parents and students will migrate away from these schools towards schools which do not illegally discriminate and where the voucher can be used to help reduce the cost of education. Since schools naturally have an interest in retaining students in order to retain funding, market forces will ensure that schools adhere to federal and state anti-discrimination laws and thus remain eligible for participation in the voucher program.

247. See *supra* text accompanying note 25.

248. 411 U.S. 1 (1973).

249. *Id.* at 5. The class action was brought on behalf of school children throughout the state who were members of minority groups and other poor groups residing in an area with a low property tax base.

250. *Id.* at 4. The scheme distributed funds for schools within the Texas counties on the basis of property values within each district. More specifically, local funds were raised from property taxes imposed on each district. *Id.* at 10-11. A combination of state and local funds were dispersed to counties based on the amount of the contribution that county made to the state's income and the county's share of property taxes. *Id.* at 10. The county then distributed the funds within itself based on property values. *Id.* Districts also subsidized their budgets with income from local property taxes. *Id.*

251. *Id.* at 15. A sampling of 110 Texas school districts revealed a correlation between the taxable property within a district and the level of per-pupil expenditures in that district. *Id.* at 15 n.38. The sampling revealed that in districts where the market value of taxable property per pupil was above \$100,000 and median family income was \$5900, state and local revenues per pupil equaled \$815. *Id.* However, only eight percent of the pupils in these districts were minorities. *Id.* On the other hand, where the market value of taxable property per pupil was below \$10,000 and the median family income was \$3325, state and local revenues per pupil equaled \$305. *Id.* In these districts with lower property values and median incomes, 79% of the students were from a minority. *Id.* While the sampling revealed a strong inverse relation between minority status and per pupil expenditures at the extremes, only a partial correlation was found between a family's median income and expenditures on pupils within the districts. *Id.*

252. *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971) (holding that wealth is a suspect class and that education is a fundamental right).

fundamental right.²⁵³

In deciding that education is not a fundamental right protected by the Equal Protection Clause,²⁵⁴ the Court noted that the right to an education is not explicit in the Constitution.²⁵⁵ Moreover, the guarantee of absolute equality of education is also not implicitly guaranteed.²⁵⁶ Further, even though education may be linked to fundamental rights, such as speech²⁵⁷ and voting,²⁵⁸ education itself is not a fundamental right since the most effective speech or electoral choice is not guaranteed.²⁵⁹

The Court commented that anything short of “an absolute deprivation of a meaningful opportunity to enjoy [the state] benefit” will not offend the Equal Protection Clause.²⁶⁰ The *Rodriguez* Court found that although some school

253. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973) (disagreeing with the lower court’s analysis and commenting that, “[it found] neither the suspect-classification nor the fundamental-interest [in education] analysis persuasive”).

254. To determine whether education is a fundamental right under the Equal Protection Clause, the Court will assess whether a right to education is explicitly or implicitly guaranteed by the Constitution. *Id.* at 33-34.

255. *Id.* at 35.

256. *See id.* The Court noted that the relative social importance of education is not indicative of whether education is a fundamental right. *Id.* at 33.

257. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35-37 (1973). The Court discussed but failed to specifically reject the argument that education is essential to the effective exercise of first amendment freedoms. *See also id.* at 63 (Brennan, J., dissenting) (“[T]here can be no doubt that education is inextricably linked to the . . . rights of free speech . . . guaranteed by the First Amendment.”); *id.* at 112 (Marshall & Douglas, JJ., dissenting) (commenting that education has a direct causal effect on a person’s exercise of his or her first amendment freedoms).

258. *Id.* at 35-37. As with the discussion pertaining to the relationship between education and free speech, *see supra* note 257, the Court discussed but failed to specifically reject the argument that education is a necessary prerequisite to the effective exercise of the right to vote. *See also id.* at 63 (Brennan, J., dissenting) (noting that education is closely tied to the right to participate in the electoral process); *id.* at 113 (Marshall & Douglas, JJ., dissenting) (noting that education serves the essential role of instilling an understanding and appreciation for the principles and operation of the political process); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (“Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.”).

259. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35-36 (1973).

260. *Id.* at 20. The Court cited as authority for this proposition: *Bullock v. Carter*, 405 U.S. 134 (1972) (invalidating a Texas filing-fee requirement for primary election which effectively barred potential candidates who were unable to pay the fee); *Tate v. Short*, 401 U.S. 395 (1971) and *Williams v. Illinois*, 399 U.S. 235 (1970) (invalidating criminal penalties which subjected indigents to incarceration because of a failure to pay a fine which they were unable to pay); *Douglas v. California*, 372 U.S. 353 (1963) (establishing an indigent’s right to court appointed counsel on a direct appeal only when the indigent cannot pay for counsel from private resources and has no other manner of acquiring representation); *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that a state law requiring payment for acquiring a stenographic transcript was invalid because indigent criminal defendants were unable to pay for the transcripts and stating that no constitutional violation would

districts received a smaller share of the educational resources, there was no absolute deprivation of education.²⁶¹ Since there was not an absolute deprivation of education, the state easily met the rational basis standard of review.²⁶²

The Court also reasoned that because the classification did not possess any indication of suspectness, strict judicial review would not be employed.²⁶³ Rather, the Court employed a rational basis review. Just as with the fundamental right analysis, the state easily met this standard.²⁶⁴

While it is undoubtedly true that relative inequalities between schools will continue to exist even with a voucher plan, the Court has made clear that this is not sufficient to violate the Equal Protection Clause.²⁶⁵ As long as no absolute deprivation of education exists, any disparity in education caused by a voucher program will not offend the Equal Protection Clause.²⁶⁶

have existed had the state provided some "adequate substitution" for a stenographic transcript).

261. *Rodriguez*, 411 U.S. at 23-25.

262. *Hevly*, *supra* note 143, at 475. Under a rational basis review, there is a presumption of constitutionality and the court will only require that the challenged classification be rationally related to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Further, the court will assume all facts necessary to find a rational basis and sustain the law. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Moreover, under a rational basis review, the legislature may act one step at a time to eradicate a problem without violating the Equal Protection Clause. *Dukes*, 427 U.S. at 303.

263. As noted by the Court, classifications based on wealth are not endowed with the disabilities traditionally found in suspect classifications. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Furthermore, there was no indication that the class had suffered a history of intentional discrimination. *Id.* Likewise, members of a classification based on wealth have not been disadvantaged by a history of political powerlessness. *Id.* Thus, the Court concluded that a classification based on wealth, unlike traditional suspect classifications, did not require protection from the majoritarian political process. *Id.*

264. *See supra* note 262.

265. *See supra* notes 247-64 and accompanying text.

266. *See supra* note 262 and accompanying text. Although education is not a fundamental right under the federal constitution, several state constitutions have granted such status to education. *See Shofstall v. Hollins*, 515 P.2d 590, 592 (Ariz. 1973) (holding that the state constitution establishes that "education [is] a fundamental right of pupils between the ages of six and twenty-one"); *State v. Stecher*, 390 A.2d 408, 410 (Conn. Super. Ct. 1977) (holding that the right to education "is so basic and fundamental that any infringement of . . . [it] must be strictly scrutinized"); *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993) (holding that in light of the importance of education, as well as the explicit language used in the state constitution, education is a fundamental right); *Milliken v. Green*, 203 N.W.2d 457, 468-69 (Mich. 1972) (holding that in light of the state history respecting education, it is a fundamental right under the state constitution); *Seattle Sch. Dist. No. 1 of King County v. State*, 585 P.2d 71, 91-92 (Wash. 1978) (en banc) (holding that a paramount right to a public education flows from the existence of the paramount duty imposed upon the state legislature by the state constitution to provide a public education); *Kukor v. Grover*, 436 N.W.2d 568, 579 (Wis. 1989) (holding that the right to equal educational opportunity is fundamental under the state's constitution); *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 333

IV. PROPOSAL FOR A FEDERAL VOUCHER PROGRAM

While various states have attempted to implement numerous types of choice or voucher systems,²⁶⁷ none have taken the step to dedicate and implement a comprehensive choice through voucher program. Such a program must adequately subsidize the parents' and child's choice so as to make nonpublic education a realistic alternative. The legislation proposed by this Note will provide parents and children with that realistic choice.

As opponents of voucher programs correctly note, all of society has a stake in an individual's education.²⁶⁸ Thus, the government should promote quality education. The public school system's failure to adequately educate its students must be remedied. Therefore, the federal government, acting according to its spending²⁶⁹ and Commerce Clause powers,²⁷⁰ should implement a voucher program to inject competition into the public school marketplace. Without question, an attempt to improve the nation's educational system is within the

(Wyo. 1980) (holding that the state constitution requires the conclusion that education is of fundamental interest). However, since this note proposes federal voucher legislation, an analysis of state constitutional law respecting the right to an education is beyond the scope of this note.

267. See Nathan, *supra* note 95 (stating that 80 % of the states have school choice programs of some sort); *supra* notes 95-116 and accompanying text (discussing several state choice and voucher programs).

268. Raywid, *supra* note 60, at 763 (arguing that the concept of education as a public good is crucial to the maintenance of a proper public education system).

269. The Spending Clause of the Constitution states, in pertinent part, "The Congress shall have Power To lay and collect Taxes . . . and [to] provide for the . . . general Welfare of the United States" U.S. CONST. art. I, § 8.

Initially, there were two competing views as to the Framers' intent regarding the scope of the "general welfare" provision. ROSALIE BERGER LEVINSON & IVAN E. BODENSTEINER, CIVIL RIGHTS LEGISLATION AND LITIGATION I-32 (1994); James V. Corbelli, Note, *Tower of Power: South Dakota v. Dole and The Strength of The Spending Power*, 49 U. PITT. L. REV. 1097, 1100 (1988). James Madison and Thomas Jefferson viewed this provision as limited by the enumerated powers set forth in Article I, § 8. LEVINSON & BODENSTEINER, *supra*; Corbelli, *supra*. However, Alexander Hamilton and James Monroe viewed the general welfare clause as conferring spending power beyond the enumerated powers to any "national purpose" within the term "general welfare." LEVINSON & BODENSTEINER, *supra*, at I-32. The Court, in 1936, adopted the Hamilton view of the general welfare clause. *United States v. Butler*, 297 U.S. 1 (1936).

However, spending power is nonetheless limited. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). The Court has expressed at least four limits on this power possessed by Congress. *Id.* First, any exercise of spending power must be in pursuit of the general welfare, a fairly deferential standard. *Id.* Next, any conditioning of federal funds must be done unambiguously, so as to enable the states to exercise their choice cognizant of the consequences of their participation. *Id.* Third, any condition on federal funds must be related to the national interest, in particular national programs. *Id.* Finally, other constitutional provisions may provide an independent bar to the conditional grant of federal funds. *Id.* at 208.

270. The Commerce Clause states, in pertinent part, "The Congress shall have power to regulate commerce . . . among the several states" U.S. CONST. art. I, § 8, cl. 3.

easily met "general welfare" requirement. Clearly, it is possible for Congress to rationally perceive that education affects interstate commerce.²⁷¹ The Supreme Court has held that Congress can regulate state schools through its Commerce Clause power.²⁷² The Court has shown considerable deference to Congress in determining whether an expenditure program is within this provision.²⁷³ Thus, Congress has the power to remedy what the states have

271. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). The court in *Hodel* demonstrated that the Court will only inquire into two elements when determining if Congress has acted within its commerce power. First, there must be a rational basis supporting a congressional finding that the regulated activity affects interstate commerce. *Id.* at 276 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964)). Second, the means adopted by Congress must be reasonably adapted to a legitimate end. *Id.* (citing *Heart of Atlanta*, 379 U.S. at 262; *United States v. Darby*, 312 U.S. 100, 121 (1941)). Under this very lax standard, a congressional determination that education affects interstate commerce will be sustained. In fact, the model legislation that this note proposes authorizes parents and students to choose schools which are outside their state. See *infra* section IV.A. With this potential for traffic across state lines, Congress will certainly have a rational basis for concluding that the commerce clause power authorizes such a statute.

272. See *Maryland v. Wirtz*, 392 U.S. 183 (1968). In *Wirtz*, the state of Maryland, joined by 27 other states and one school district, sought to enjoin the application of the Fair Labor Standards Act to schools and hospitals operated by the states or its branches, contending that coverage of state-operated schools and hospitals was beyond the commerce power. *Id.* at 187. As amended, the Act extends protection to all employees of any enterprise engaged in commerce or production for commerce, so long as the enterprise also falls within certain enumerated categories. 29 U.S.C. § 206 (1988). With respect to schools, the amended Fair Labor Standards Act would apply to "[an] elementary or secondary school . . . regardless of whether or not such . . . school is public or private or operated for profit or not for profit." 29 U.S.C. § 203(s)(5) (1988).

The *Wirtz* Court concluded that there was a rational basis for congressional action prescribing minimum labor standards for schools and hospitals. *Wirtz*, 392 U.S. at 195. The Court noted that schools are major users of goods imported from other states. *Id.* at 194 (citing that \$38.3 billion will be spent by state and local public education institutions in the United States). Furthermore, the Court noted that 87% of the \$8 million spent by Maryland's public school system during the 1965 fiscal year represented direct interstate purchases. *Id.* Thus, the Court found a rational basis for congressional action based on the Commerce Clause. *Id.*

As in *Wirtz*, congressional action based on the Commerce Clause will satisfy the rationality standard. Clearly, modern public education systems engage in interstate purchases. *Id.* While some schools may purchase textbooks, others may purchase chalk or blackboards from other states. Furthermore, any de minimis character of discrete instances of interstate commerce activity will not foreclose commerce power. The Court, in *Wickard v. Filburn*, held that if the cumulative effect of an activity affects interstate commerce, then Congress may regulate that activity. 317 U.S. 111 (1942). Thus, even if one act would not affect interstate commerce, that activity can be reached by Congress when the aggregate effect of the activity would substantially effect interstate commerce. Therefore, Congress has commerce power to enact legislation which reaches public schools.

273. See *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (discussing the scope of the general welfare clause the Court stated, "[t]he discretion . . . is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgement"); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) ("In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgement of Congress.").

been unable to correct. Importantly, an improved education system will allow American students to better compete with those from abroad and will also improve industry within the country.²⁷⁴

The federal government could promote a higher quality of education by amending the Internal Revenue Code. An amendment to the Internal Revenue Code could implement a voucher program that would achieve substantially the same benefits as one implemented by the states. In light of the states' failure to remedy the nation's troubled education system, the need for federal legislation is evident.²⁷⁵ The proposed amendment will implement a voucher system that will better enable parents and students to choose from the variety of alternative private schools, thereby forcing public schools to attempt to attract students to retain the state funding that is determined on a per pupil attendance basis.²⁷⁶ Public schools will be forced to compete with private schools for students and, as in any competitive market, the quality of services will rise.²⁷⁷ The twin goals of returning greater parental control and improving the quality of education will both be served by the proposed legislation. The amendment proposed to the Internal Revenue Code will reach all Americans who have children in either elementary or secondary education. The following Section proposes model legislation for an educational choice through voucher program.

274. A better educated population will be more suited to adapt to changing working conditions and will generally learn job skills more quickly. See Kirkland, *supra* notes 6 & 41. Furthermore, the House of Representatives made a congressional finding that superior education better enables one to compete "fully and successfully in the world economy." H.R. 2460, 102d Cong., 1st Sess., Title I, § 101(2); S. 1411, 102d Cong., 1st Sess., Title I, § 101(2) (1991).

275. While some states have taken steps to improve their educational system, even these attempts have had little success. See H.R. 2460, 102d Cong., 1st Sess., § 3(2); S. 1411, 102d Cong., 1st Sess., § 3(2) (1991) (noting that "educational reforms of the 1980s were too slow and too timid; a bolder and more comprehensive effort that involves the citizens of every American community is needed"). Thus, Congress should intervene in this crucial area and help improve a sector of our nation which is of vital importance to the nation's prosperity.

276. See *McClerkin v. San Mateo Sch. Dist.*, 49 P.2d 830, 831-32 (Cal. 1935) (holding that where children attend school in a neighboring school district with the consent of that district, the district that the child attends is entitled to receive funds which are based upon attendance from the state school fund); *Smith v. Maynard*, 107 S.E.2d 815, 818 (Ga. 1959) (holding that contracts between county and city school boards, which obligated city schools to teach certain children residing outside the city's school system, obligated the county to pass on to the city school board state funds it received based on pupil attendance); *Durant v. Department of Educ.*, 463 N.W.2d 461, 474 (Mich. Ct. App. 1990) (holding that when a local school district contracts with an intermediate school district for the provision of special education programs, the students of the local school district become students of the intermediate school district for purposes of calculating state aid); *Schools*, *supra* note 9, § 95 (noting that where a child attends a school in a district other than the district in which the child resides, the district in which the child attends school generally receives the apportionment of the school funds); *Tellier*, *supra* note 68 (noting that funding to public schools is calculated on a per pupil basis).

277. *HYMAN*, *supra* note 12, at 455 (noting that in a competitive market the maximum net benefit can be squeezed out of all resources).

A. The Educational Revitalization Choice Through Voucher Act

Section 1—Purpose: This Act shall be known as the Educational Revitalization Choice Through Voucher Act. The purpose of this Act is to revitalize America's educational system by introducing competition into the market for educational services through supporting and assisting the parental choice of education in a non-discriminatory manner. This Act will support and assist any choice, or group of possible choices, of education that is within the meaning of this Act without discrimination or favoritism towards any one.

Section 2—Definitions: This Act shall be interpreted in accordance with the following subsections.

Section 2.1—Tuition: The term "tuition" shall include any expense or amount charged or required and tendered for attendance at the chosen educational institution, but shall not include any taxes paid that may support public educational institutions.

Section 2.2—Related Expenses: The term "related expenses" shall include any expense or amount charged or required and tendered for transportation to and from the educational institution, as well as textbooks and other instructional material used in teaching and educational instruction of only those subjects legally taught in the state's public schools. Transportation to or from any noneducational activity in connection with the school, such as extracurricular activities, or any other expenses incurred in such activities, are not within the meaning of this subsection.

Section 2.3—Educational Institution: The term "educational institution" shall include any institution, public, private, or sectarian, which is accredited by the Department of Education in the respective state, and which adheres to the provisions of Section 4 of this Act.

Section 2.4—Elementary and Secondary: The term "elementary and secondary" shall be construed to include grade levels Kindergarten through twelve.

Section 3—Tuition and Expenses: Any amount paid for tuition and related expenses at an approved elementary or secondary educational institution per academic year, as established by the educational institution, the local school district, or other authorized body, regardless of the location of that educational institution, may be deducted from the taxpayer's gross taxable income, not to

exceed one thousand five hundred dollars (\$1500)²⁷⁸ per dependent. In the event that the gross taxable income is less than an amount equal to one thousand five hundred dollars (\$1500) multiplied by the number of dependents utilizing this Act, the taxpayer may apply for a credit with the Department of Treasury for the difference, not to exceed one thousand five hundred dollars (\$1500) per dependent.

Section 3.1—Promulgation of Rules: The Internal Revenue Service is authorized and directed to promulgate rules respecting procedures for the application and receipt of any credit authorized under this Act.

Section 4—Equal Educational Opportunity: In order to qualify as an educational institution within the meaning of this Act, the institution's policies, practices, customs, and admissions requirements shall not discriminate on the basis of gender, religion, race, color, disability, or national origin; the institution shall also adhere to the Civil Rights Acts of 1964 and 1991 and any statutory counterpart in the respective state in which the educational institution is located.

B. An Analysis of The Revitalization Act

The Revitalization Act will inject competition into the public school system through a voucher plan that better enables parents and children to choose among alternative forms of education. This legislation provides parents and children with the ability to leave the public school system and pursue nonpublic education. The Revitalization Act levels the playing field between public and private schools. Without a voucher program, consumers of education have a choice between free public education and costly private education. Thus, while competition among schools has never been forbidden, in reality, public schools enjoy a distinct advantage over private schools because there is no price associated with public education.²⁷⁹ If parents and children are given the

278. As noted earlier, the exact value of the voucher can be the entire cost of educating a child in the public school system or less so as to provide a savings to the government. See *supra* note 73 and accompanying text. It is beyond the scope of this note to determine a precise amount for such a proposal. The amount expressed in this model legislation was selected for illustrative purposes only.

279. Public education is not "free" in the strict sense. Public education is generally financed through state and local taxes. 1 JAMES A. RAPP, EDUCATION LAW 5-20.31 to 20.32 (1994). However, this type of funding is compulsory and shared by all taxpayers. Thus, when one considers whether to attend a public or private school by weighing the costs and benefits, the true price of public education, the taxes paid for public education, is not considered because it must be paid regardless of the choice made. This results in the perception that public education is "free."

An example of the above reasoning may prove helpful. When a person is choosing between buying a Ford and a Chevy, the price and quality of each is generally a major consideration. As a result, both Ford and Chevy respond to the consumer's reaction to the price and quality of their automobiles. However, if the person was previously compelled to finance the production of Ford

financial ability to choose a nonpublic school, public schools will be forced to realistically compete with nonpublic schools, and an increase in the overall quality of education will be realized.

As noted above,²⁸⁰ these alternative forms of education may consist of any public, private, or sectarian institution that meets minimal requirements. The minimal requirements that should be imposed are beyond the scope of this Note. However, these requirements should assure a basic competence of the instructors and facilities and no more.²⁸¹ Accordingly, the Revitalization Act only requires accreditation by the state's department of education.

automobiles and thus was entitled to a Ford without any further financial obligation, the effect of consumer choice on quality is drastically reduced. This person would have a strong preference for the Ford because the Ford is "free." Since there was no choice in whether to finance Ford production, funds taken for such production are a sunken cost. Thus, when faced with the choice between a Chevy, at the normal market price, and a Ford, which is "free" because of the compelled financing, the person will have strong motivation to opt for the Ford. All things equal, including quality, there seems to be no drastic effect to the end result since the person nonetheless obtains an automobile. However, in a market situation as described above, all things will not be equal, especially quality.

Since Ford is aware that it will be financed through compulsion, it will have little incentive to finance its own production through the competitive sale of automobiles. While the two corporations would generally have to compete with each other for sales which would in turn finance their operations, when one corporation knows it will receive financing without having to compete, there is little if any incentive to compete. Thus, Ford will have little concern about the quality of its product because it is assured of adequate financing due to the compulsory financing. Thus, the Ford need not measure up against other automobiles. Likewise, consumers will be satisfied with a lower quality product because there is no price tag associated with the Ford.

The same analogy applies to the educational market. Public education is assured of financing because of compulsory taxation. Thus, public education will have little concern about matters of quality because public education is viewed as "free" while competitors are correctly viewed as having a price tag associated with them. This model legislation removes that price tag image from nonpublic education. In turn, the choice between public and nonpublic schools becomes a realistic possibility. Therefore, public schools will be forced to fairly compete with nonpublic schools. This will compel public schools to focus on the quality of their service so that they may attract consumers away from competitors. As in any competitive market, quality will improve.

280. See *supra* text accompanying note 276.

281. A requirement of any more than minimal standards will open the door to the now existing bureaucracy of the public educational system. So long as the state maintains a minimally acceptable level of service, the market will assure higher standards if parents demand higher standards. This will increase choice among schools because the parents and students, as the consumers of education, will decide what level of education should be maintained. As in any free market, the consumer will seek out the best service for the best price, thus forcing schools to increase the quality of their educational service. Therefore, it should be for the market, not the state, to determine the level of education that will prevail above the minimally established standards.

Terry M. Moe, co-author of *Politics, Markets, and American Schools*, envisions the minimal regulation. Paul Wallich, *The Business of Education*, SCI. AM., Oct. 1992, at 117. A set of nationwide standardized tests that students must pass could be used to maintain school accreditation. *Id.* This would ensure that students are in fact learning, while keeping the bureaucratic red tape out of the schools.

In light of the fact that the model Act seeks to include sectarian schools within the program, an Establishment Clause challenge is imminent.²⁸² However, because the careful drafting of the Revitalization Act is mindful of current establishment clause jurisprudence, particularly the traditional *Lemon* test,²⁸³ the statute will survive a challenge brought under this clause. As to the first prong of *Lemon*, the Court has given considerable deference to the legislature's stated purpose,²⁸⁴ and legislative attempts to improve education, even if they involve benefits to sectarian schools, have been upheld as sufficiently secular.

The true challenge will come under the primary effects prong of *Lemon*. Many of the same factors discussed below also ensure that the Act will pass scrutiny under a *Zobrest* analysis. First, the Act is facially neutral and is available to a broad class of beneficiaries without regard to the nature of the institution chosen. Further, the legislation creates no incentive to attend a sectarian school. Since the voucher can be used at any approved school, rather than solely sectarian schools, there will be no governmentally created incentive to send students to sectarian schools. The assistance provided by the Act is not dependant on the religious nature of the educational institution. Additionally, the benefit to a sectarian school, if any, will occur as a result of private choices by parents. The Revitalization Act provides assistance to the parents of school children, not the educational institution itself. Only through the independent choice of the parent can the institution benefit from the assistance provided by the Revitalization Act. Moreover, even if the bulk of beneficiaries under the statute used the voucher to assist in their choice to send their children to sectarian schools, the Court has made clear that this action will not violate the primary effects prong.²⁸⁵ The above factors will also be of importance if the Court chooses to side-step the *Lemon* analysis,²⁸⁶ as it did in *Zobrest*.²⁸⁷ Modern establishment clause jurisprudence indicates that the Revitalization Act will survive a challenge under the primary effects prong of *Lemon*.

Finally, as long as the state injects itself only to assure minimal quality, the Revitalization Act will not run afoul of the excessive entanglement prong of *Lemon*.²⁸⁸ The Revitalization Act calls for the school to meet only the minimal standards of accreditation to which all schools must adhere. Therefore, the proposed statute is likely to survive this third prong of the *Lemon* test.

282. See *supra* note 118.

283. See *supra* text accompanying notes 139-47.

284. See *supra* notes 142-44 and accompanying text.

285. See *supra* note 185 and accompanying text.

286. See *supra* notes 203-09 and accompanying text.

287. 113 U.S. 2462 (1993).

288. See *supra* notes 189-91 and accompanying text.

Alternatively, the Revitalization Act will also satisfy Justice O'Connor's endorsement test²⁸⁹ for many of the same reasons that it will not have the primary effect of advancing religion under *Lemon*.²⁹⁰ The objective observer would not view the model Act as an endorsement of religion because the model Act creates no incentive to attend a sectarian institution, and any benefit to such an institution would be a result of the private decisions of parents. Further, persons with children in an elementary or secondary educational institution can avail themselves of the federal aid. The model Act in no way sends a message to anyone that the government is endorsing religion or that nonadherents are political outsiders. Thus, the statute does not pose establishment clause concerns because the statute will survive a challenge under *Lemon* and does not send a message of religious endorsement by government.

The Revitalization Act will also survive the neutrality test that the Court recently employed in the *Grumet* school district case.²⁹¹ The Revitalization Act neither creates political subdivisions based on religion nor delegates governmental power to religious institutions. While remaining facially neutral towards religion, the Act allows parents to choose the best school for their children. As was significant under the *Lemon* and endorsement tests, the fact that the sectarian schools are benefitted only after private choices of parents will likely be an important element to sustaining the Act under a neutrality analysis. Therefore, the Revitalization Act's validity is not threatened under the scrutiny of the neutrality principle.

Furthermore, because the statute requires all participating schools to adhere to federal and state anti-discrimination laws, as well as to refrain from discrimination on the basis of gender, religion, race, color, disability, or national origin, an equal protection argument will also fail.²⁹² The statute, on its face, does not violate the Equal Protection Clause because it does not infringe on fundamental rights, and it creates no suspect or quasi-suspect classifications. As shown by *Rodriguez*,²⁹³ absolute educational equality is not a fundamental right and any wealth classification created by the Act is not considered suspect. Therefore, a facial equal protection challenge will undoubtedly fail.

Additionally, any challenge to the statute as applied will also be successfully overcome. An "as applied" challenge will fail because the statute disqualifies any institution that does not comport with the broad anti-discrimination requirement of the statute. Moreover, the Revitalization Act indicates no

289. See *supra* text accompanying notes 215-28.

290. See *supra* notes 181-88 and accompanying text.

291. See *supra* notes 226-28 and accompanying text.

292. See *supra* notes 245-46 and accompanying text.

293. See *supra* notes 248-66 and accompanying text.

purpose or intent to discriminate. While a statute that is otherwise facially neutral cannot be applied in a discriminatory manner and remain valid under the Equal Protection Clause,²⁹⁴ the Revitalization Act disqualifies any institution which seeks to apply the neutral requirements of the Act in a discriminatory fashion. Thus, the model Act's language prevents any institution from applying the benefits of the Act in a discriminatory manner and yet remain eligible to participate in the program.

Moreover, any disparity in funding among schools that results from this program will not render the Act violative of the Equal Protection Clause as made clear by the Court in *Rodriguez*.²⁹⁵ So long as the model Act does not completely eliminate the opportunity for education, any disparity in funding will not be of constitutional significance. The Revitalization Act does not deprive any person of the opportunity for an education. In fact, the model Act will increase the overall quality of education, making every person's educational opportunities more meaningful. Therefore, a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment will be unsuccessful.

V. CONCLUSION

Education has and will continue to play a major role in American society.²⁹⁶ However, the quality of some of America's public schools leaves much to be desired. The federal government should address these problems because the states have failed to adequately improve their educational systems. A federal choice through voucher program is an innovative attempt to improve the quality of education. The America 2000 program proposed by the Bush administration was opposed by many groups and such groups are likely to oppose the Revitalization Act.²⁹⁷ However, arguments against the Act based on constitutional grounds are without merit, and policy arguments favor such an innovative solution.

Voucher programs have gained much support but have also come under considerable scrutiny by their opponents. While opponents claim vouchers will cause segregation among students, a choice through voucher program, such as the Revitalization Act, will actually decrease the already existing segregation. The Revitalization Act provides children from lower-income families with a viable choice to attend a school they would otherwise be unable to afford. Further, despite the contentions by voucher opponents, the Equal Protection and

294. See *Washington v. Davis*, 426 U.S. 229, 241 (1976) (noting that the discriminatory purpose need not be expressed in the statute for a law to fail under equal protection scrutiny).

295. See *supra* notes 248-66 and accompanying text.

296. See *supra* notes 6-7, 41.

297. See *supra* notes 85-94 (discussing America 2000).

Establishment Clauses of the Constitution will not prevent a carefully and properly written voucher program from being implemented.

The Revitalization Act, a choice through voucher program, will improve the quality of education by injecting competition into the educational market. Such a program will allow nonpublic schools of all types to compete with public schools for students and thus force the public school system to focus on the quality of its service. The injection of competition in the educational marketplace will cause the quality of all education to rise. The Educational Revitalization Choice Through Voucher Act will enure to the benefit of all Americans by better preparing the nation's children for what awaits them in the world marketplace.

Jack Alan Kramer

