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SCHOOL VOUCHERS AND TAX BENEFITS IN FEDERAL AND STATE JUDICIAL CONSTITUTIONAL ANALYSIS

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School choice advocates contend that government aid programs, such as vouchers, tax credits, and tax deductions, increase educational opportunities for students from lower income households to attend private schools that perform better than their local public schools. Opponents contend, however, that such aid programs threaten the viability of the public school system and compel or encourage taxpayer funding of sectarian schools, fueling concerns about unconstitutional government overreach. Such concerns have instigated a variety of constitutional challenges against government aid programs. This Article presents a comprehensive review of the constitutionality of government aid programs under the Establishment Clause, the Free Exercise Clause, standing, and the Equal Protection Clause. It also examines religion-based challenges to government aid programs under state constitutional provisions such as the Blaine Amendment and the compelled support clause. Besides challenges involving government aid and sectarian schools, government aid programs are also susceptible to challenge when secular private schools receive government funding. For these challenges, petitioners rely on state constitutional provisions rather than the federal Constitution, which does not

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proscribe government aid programs benefitting secular schools. This Article examines judicial precedents on the efficacy of challenges to government aid programs under state constitutional provisions governing educational efficiency, uniformity, state control, local control, new debt, anti-gift, no aid, and public purpose. Finally, this Article discusses the implications of the federal and state government aid jurisprudence for tax benefit and voucher legislation.

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INTRODUCTION

According to a 2015 Friedman Foundation for Educational Choice study, 41% of Americans, when given the choice, would select private

school for their children's education while 36% would select their local public school.[1] In the same study, respondents were asked to grade their local schools: 83% of respondents gave their local private school an A or B grade compared to 46% for their local public schools.[2] Study respondents cited smaller class sizes, more individualized attention from teachers, and better education quality as reasons for the perceived higher quality of private school education.[3] Given many Americans' dissatisfaction with their local public schools, some municipalities have looked to vouchers and tax credits or tax deductions—collectively, tax benefits—to help fund their children's education at private schools (including sectarian schools) or at public schools outside their local school district.[4] The United States Supreme Court has advised, however, that the Establishment Clause guards against government "sponsorship, financial support, and active involvement" in religion.[5] Thus, one has

1. Paul DiPerna, Friedman Found. for Educ. Choice, 2015 Schooling in America Survey: Perspectives on School Choice, Common Core, and Standardized Testing 23 (2015). The data provided in the 2015 Schooling in America Survey was gathered from interviews with around 1,000 adults across the United States regarding the direction and quality of K–12 education. *Id.* at 2.

2. *Id.* at 23.

3. *Id.* at 24.

4. Tax credits differ from tax deductions. As the Supreme Court of Arizona explained, tax deductions "are subtracted from gross income, reducing the net amount on which a tax is assessed," while tax credits "are taken directly from the tax as tentatively calculated." Kotterman v. Killian, 972 P.2d 606, 612 (Ariz. 1999) (en banc) (citing Elizabeth A. Baergen, Note, *Tuition Tax Deductions and Credits in Light of* Mueller v. Allen, 31 WAYNE L. REV. 157, 172–73 (1984); JAMES J. FREELAND ET AL., CASES AND MATERIALS ON FUNDAMENTALS OF FEDERAL INCOME TAXATION 969 (7th ed. 1991)).

> The calculation of personal income tax can be broken into several stages. First comes a determination of adjusted gross income, achieved by combining all sources of income and subtracting certain expenditures, such as contributions to individual retirement and medical savings accounts. . . . Next, taxpayers may take certain deductions and exemptions. The resulting subtotal is taxable income. . . . This figure is then referenced to the tables for a determination of preliminary tax liability. But the process does not end there. In fact, this point occurs about midway through the tax calculation and is, at most, a determination of *tentative*, not *actual*, tax liability. The tax preparer may continue to reduce this amount by subtracting credits and other payments. Only after exhausting all of these opportunities does the taxpayer arrive at the bottom of the tax form and the inevitable—amount owed.

Id. at 618 (citations omitted).

5. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)). Additionally, the Supreme Court has noted that "[t]he potential for political divisiveness related to religious belief and practice is aggravated . . . by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow." *Id.* at 623.

to wonder if voucher and tax benefit programs—collectively, government aid programs—used for sectarian schools violate the Establishment Clause.[6] This wonder should further pique curiosity as to whether these programs may violate other constitutional provisions.

This Article seeks to inform the public, policymakers, educators, and public and private school officials about the constitutional viability of government aid programs.[7] Part I provides a general overview of the legal issues regarding school vouchers and tax benefits. Part II reviews federal constitutional issues implicated in government aid programs. With respect to federal issues, this Article discusses case law regarding the Establishment Clause, the Free Exercise Clause, standing, and the Equal Protection Clause.[8] Part III examines state constitutional challenges to government aid programs.[9] These state challenges include religion-based challenges,

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6. *See* Strout v. Albanese, 178 F.3d 57, 61 (1st Cir. 1999) ("Separation of church and state constituted a paramount principle and goal in the minds of some of the most influential of the Framers both by dint of historical experience, and personal conviction." (footnotes omitted)). Note that at various points in this Article, we might simply refer to vouchers, tax deductions, and tax credits as government aid programs.

7. *See Kotterman*, 972 P.2d at 612 ("Petitioners contend that credits are constitutionally different from deductions, which they concede to be perfectly proper. At oral argument they asserted that a tax credit is the 'functional equivalent of depleting the state treasury by a direct grant,' while a tax deduction merely serves as 'seed money' to encourage philanthropy. We disagree.").

8. The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." *Id.* The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. As the Supreme Court has noted, "the Establishment Clause and the Free Exercise Clause[] are frequently in tension." Locke v. Davey, 540 U.S. 712, 718 (2004) (citing Norwood v. Harrison, 413 U.S. 455, 469 (1973); Tilton v. Richardson, 403 U.S. 672, 677 (1971)). The Supreme Judicial Court of Maine has articulated a great distinction between the Free Exercise Clause and the Establishment Clause: "The Free Exercise Clause addresses the 'negative,' it prevents the government from interfering with religious practice, while the Establishment Clause addresses the 'affirmative,' it prevents the government from sponsoring or establishing a religion." Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 135 (Me. 1999). It is important to note that the Establishment Clause can sometimes provide the compelling reason to infringe on rights under the Free Exercise Clause. *Strout*, 178 F.3d at 61, 65.

9. *See Locke*, 540 U.S. at 723 ("Most States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry."); *see also* K. Hollyn Hollman, Gen. Counsel, Baptist Joint Comm. for Religious Liberty, *School Choice: The Blaine Amendments & Anti-Catholicism*, U.S. COMM'N ON CIV. RTS. 15 (2007), http://www.usccr.gov/pubs/BlaineReport.pdf (noting that "[t]he principle that

such as the Blaine Amendment challenges, as well as non-religion challenges, such as efficiency, uniformity, state control, local control, new debt, anti-gift, no-aid, and public purpose provision challenges.[10] The final section discusses some principles that a government aid program must satisfy to comply with federal and state constitutions.

I. OVERVIEW OF VOUCHERS AND TAX BENEFITS

Vouchers, tax credits, and tax deductions are designed to ease the financial burden on parents who send their children to private schools. Tax deductions are offered to individuals and businesses to reduce the net amount upon which their tax liability is calculated based on specified educational expenses such as tuition, transportation, and textbooks.[11] Tax credits can be either individual tax credits for dependents' educational expenses or individual or corporate tax credits for contributions to an organization offering scholarships for students to attend private schools:

> Scholarship tax credit programs, sometimes referred to as tuition tax credits, allow individuals, corporations or both to allocate a portion of their owed state taxes to private nonprofit organizations that issue private school scholarships to K-12 students. The scholarship allows a student to choose among a list of private schools approved by the scholarship organization. The scholarship is used to pay tuition, fees and other related expenses. As a result, the state does not have to appropriate per-pupil education funding for students that receive scholarships.[12]

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citizens should not be taxed to support religion harkens back to the fights for disestablishment in the states"). Some states, such as Alabama, Illinois, Maine, North Carolina, New Jersey, and Pennsylvania, interpret their state constitution religion clauses in line with federal Establishment Clause jurisprudence. Frank Kemerer, *School Vouchers: Constitutional Questions Remain*, EDUC. COMM'N OF THE STS. GOVERNANCE NOTES (2002).

10. For the language of several of these constitutional provisions, see generally Preston C. Green III & Peter L. Moran, *The State Constitutionality of Voucher Programs: Religion Is Not the Sole Determinant*, 2010 B.Y.U. EDUC. & L.J. 275 (2010).

11. Mueller v. Allen, 463 U.S. 388, 390–92 (1983); *Kotterman*, 972 P.2d at 612 (citing Baergen, *supra* note 4, at 172–73; FREELAND ET AL., *supra* note 4).

12. JOSH CUNNINGHAM, NAT'L CONF. OF ST. LEGISLATURES, FISCAL IMPACT OF SCHOOL VOUCHERS AND SCHOLARSHIP TAX CREDITS 1 (2013), http://www.ncsl.org/research/education/fiscal-impact-of-school-vouchers-and-scholarship-tax-credits.aspx; *see also* DIPERNA, *supra* note 1, at 55 ("A 'tax credit' allows an individual or business to reduce the final amount of a tax owed to government. Some states give tax credits to individuals and businesses if they contribute money to nonprofit organizations that distribute private school scholarships. A 'tax-credit scholarship system' allows parents the option of sending their child to the school of their choice, whether that school is public or private, including both religious and non-religious schools.").

School vouchers, on the other hand, are state-funded scholarships that provide students with the opportunity to attend a private or public school other than their local public school.[13]

The key distinction between tax benefits and vouchers is that vouchers constitute a direct state expenditure whereas tax benefits generally represent state loss of potential revenue.[14] Another distinction is that, while voucher programs offer tuition support "at or near the state per pupil allocation," the tuition support from tax benefit programs is generally well below the state per pupil allocation.[15] Florida, Georgia, Louisiana, Maine, Mississippi, Oklahoma, and Vermont provide vouchers at the state per pupil allocation for public schools while Arizona, Indiana, Ohio, and Wisconsin provide vouchers at less than the state per pupil allocation.[16] Students and schools seeking to be voucher recipients must meet minimum standards set forth in various state laws.[17] These requirements could include eligibility restrictions that limit vouchers to students who meet certain income thresholds or to special populations of students, such as military families, foster care students, students with disabilities, or students from chronically low-performing schools.[18]

Under a tax credit program, individuals or businesses lower their tax liability by either the entire amount or a percentage of tuition paid to send children to private school. *Id.*

13. CUNNINGHAM, *supra* note 12, at 1; *see also* RICHARD D. KOMER & CLARK NEILY, INST. FOR JUST. & AM. LEGIS. EXCH. COUNCIL, SCHOOL CHOICE & ST. CONSTITUTIONS: A GUIDE TO DESIGNING SCHOOL CHOICE PROGRAMS 2–3 (2007) (defining voucher programs and tax credit programs).

14. CUNNINGHAM, *supra* note 12, at 1. Tax credits can also constitute expenditures when a taxpayer's tax credit exceeds his tax liability, entitling the taxpayer to a rebate. Magee v. Boyd, 175 So. 3d 79, 119–20 (Ala. 2015).

15. CUNNINGHAM, *supra* note 12, at 2; *see also* Elaine S. Povich, *Tax Dollars for Private School Tuition Gain in States*, PEW CHARITABLE TR. STATELINE (Aug. 6, 2013), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/08/06/tax-dollars-for-private-school-tuition-gain-in-states (stating that purchasing power for students under the tax credit and voucher programs can vary from Iowa's maximum of $250 for tax credits to Maine's 115% of per pupil allocation for vouchers).

16. CUNNINGHAM, *supra* note 12, at 2. The exception would be for students with disabilities in a state like Utah where the student with disabilities might get more than the state per pupil allocation depending on the tuition of the private school. Nonetheless, under no circumstance can the student get more than the school charges in tuition. *Id.*

17. *See generally id.* at 1–4 (setting parameters for student eligibility, typically targeting low-income students, students attending chronically under-performing schools, students with disabilities, or students in military families or foster care).

18. *Id.* at 1.

Americans generally support school vouchers and tax credits as mechanisms to ease the financial burden on parents who send their children to private schools. In 2014, 63% of Americans favored vouchers with a slight, statistically insignificant decrease to 61% in 2015.[19] The intensity of support for vouchers relative to opposition is high, with 34% strongly favoring it in 2015 (35% in 2014), and 21% strongly disfavoring (20% in 2014).[20] Table 1 below shows the most important reasons that people who strongly or somewhat favor vouchers give for their support:

Table 1: Most Important Reasons that People Favor Vouchers[21]

Reasons for Favoring Vouchers	Percentage of Respondents Strongly or Somewhat Favoring Vouchers
Access to schools with better academics	38%
More parental freedom and flexibility	28%
More individual attention	17%
Access to sectarian schools	6%
Access to safer schools	6%
Something else/Other	3%

Six out of ten Americans in 2015 favored tax credit programs—a slight, statistically insignificant decrease from 64% favoring such programs in 2014.[22] Like vouchers, the intensity of support for tax credits relative to opposition is high, with 28% strongly favoring it in 2015 (27% in 2014) and 16% strongly disfavoring (14% in 2014).[23]

Vouchers and tax credits are gaining popularity among state legislatures as well, as states are increasingly enacting voucher and tax credit programs. In 2015, 41% of respondents in the Friedman Foundation for Educational Choice study recommended vouchers as the appropriate state intervention for low-performing public schools.[24] Thus, it is not surprising that parental choice and student

19. DIPERNA, *supra* note 1, at 39.

20. *Id.* at 39, 45.

21. Table adapted from DIPERNA, *supra* note 1, at 43. Similar data is unavailable for tax credits.

22. *Id.* at 53. Similar data is not available for tax deductions.

23. *Id.*

24. *Id.* at 62–64. By comparison, 26% recommended conversion of traditional public schools to charter schools, 25% recommended personnel (school leadership and other staff) dismissals, and 18% recommended school closure. Thus, vouchers at 41% was the highest-recommended intervention. *Id.*

choice increasingly appear to be buzzwords in various state legislative halls and political circles as many states enact laws providing for school vouchers and tax benefits.[25] As of 2014, thirteen states and the District of Columbia had enacted voucher programs, while as of 2016, sixteen had enacted tax benefit programs.[26] Table 2 sets forth the school choice programs in various states:

Table 2: State school choice programs[27]

State	Title of Program	Type of Program
Alabama	Alabama Accountability Act of 2013 School Choice Tax Credit/Rebate	Individual Tax Credit
	Alabama Accountability Act of 2013 School Choice Scholarships	Tax Credit Scholarship
Arizona	Personal Tax Credits for School Tuition Organizations	Tax Credit Scholarship
	Corporate Tax Credits for School Tuition Organizations	Tax Credit Scholarship
	Lexie's Law Corporate Tax Credits	Tax Credit Scholarship
	Empowerment Scholarship Accounts	Educational Savings Account

25. *Scholarship Tax Credits: Overview*, NAT'L CONF. OF ST. LEGIS., http://www.ncsl.org/research/education/school-choice-scholarship-tax-credits.aspx (last visited Aug. 18, 2016); Povich, *supra* note 15; ALEXANDRA USHER & NANCY KOBER, CTR. ON EDUC. POL'Y, KEEPING INFORMED ABOUT SCHOOL VOUCHERS: A REVIEW OF MAJOR DEVELOPMENTS AND RESEARCH 13 (2011), http://cep-dc.org/cfcontent_file.cfm?Attachment=Kober%5FFullReport%5FVouchers%5F060100%2Epdf%20.

26. *Scholarship Tax Credits: Overview*, *supra* note 25; *School Vouchers*, NAT'L CONF. OF ST. LEGIS., http://www.ncsl.org/research/education/school-choice-vouchers.aspx (last visited Aug. 18, 2016); *see also* Povich, *supra* note 15 ("Thirteen states created or expanded tuition tax credits, private school scholarships or traditional vouchers in 2013, according to the National Conference of State Legislatures. Eight states did so in 2012 and seven states in 2011, according to the group.").

27. Table adapted from Povich, *supra* note 15 (citing the FRIEDMAN FOUND. FOR EDUC. CHOICE). Note that town tuition programs target students from remote rural areas. USHER & KOBER, *supra* note 25, at 13.

State	Title of Program	Type of Program
Colorado	Choice Scholarship Pilot Program	Voucher
District of Columbia	Opportunity Scholarship Program	Voucher
Florida	John M. McKay Scholarships for Students with Disabilities Program	Voucher
	Florida Tax Credit Scholarship Program	Tax Credit Scholarship
Georgia	Georgia Special Needs Scholarship Program	Voucher
	Private School Tax Credit for Donations to Student Scholarship Organizations	Tax Credit Scholarship
Iowa	Education Expense Credit	Individual Tax Credit
	School Tuition Organization Tax Credit	Tax Credit Scholarship
Illinois	Tax Credits for Educational Expenses	Individual Tax Credit
Indiana	School Scholarship Tax Credit	Tax Credit Scholarship
	Choice Scholarship Program	Voucher
	Tuition Tax Deduction	Individual Tax Deduction
Louisiana	Elementary and Secondary School Tuition Deduction	Individual Tax Deduction
	Student Scholarships for Educational Excellence Program	Voucher
	School Choice Pilot Program for Certain Students with Exceptionalities	Voucher

State	Title of Program	Type of Program
	Tax Credit for Donations to School Tuition Organizations	Tax Credit Scholarship
Maine	Town Tuitioning Program	Voucher
Minnesota	K-12 Education Subtraction and K-12 Education Credit	Individual Tax Credit/Deduction
Mississippi	Mississippi Dyslexia Therapy Scholarship for Students with Dyslexia Program	Voucher
	Nate Rogers Scholarship for Students with Disabilities Program	Voucher
North Carolina	Tax Credits for Children with Disabilities	Individual Tax Credit
	Opportunity Scholarship Program	Voucher
New Hampshire	School Choice Scholarship Program	Tax Credit Scholarship
Ohio	Autism Scholarship Program	Voucher
	Cleveland Scholarship and Tutoring Program	Voucher
	Educational Choice Scholarship Program	Voucher
	Jon Peterson Special Needs Scholarship Program	Voucher
Oklahoma	Lindsey Nicole Henry Scholarships for Students with Disabilities	Voucher
	Oklahoma Equal Opportunity Education Scholarships	Tax Credit Scholarship
Pennsylvania	Educational Improvement Tax Credit	Tax Credit Scholarship

State	Title of Program	Type of Program
	Educational Opportunity Scholarship Tax Credit	Tax Credit Scholarship
Rhode Island	Tax Credits for Contributions to Scholarship Organizations	Tax Credit Scholarship
Utah	Carson Smith Special Needs Scholarship Program	Voucher
Virginia	Educational Opportunity Scholarship Tax Credits	Tax Credit Scholarship
Vermont	Town Tuitioning Program	Voucher
Wisconsin	Milwaukee Parental Choice Program	Voucher
	Parental Private School Choice Program (Racine)	Voucher

These programs are designed to offer public support to parents who want to send their children to schools other than their local public schools.[28] Expectedly, vouchers and tax benefits have significantly more support from low-income earners than high-income earners,[29] but these benefits are being increasingly extended to middle-income earners.[30]

Although some taxpayers have challenged the constitutionality of these programs,[31] advocates argue that the programs lead to taxpayer savings because the cost of educating the choice students in their local public schools exceeds the cost of supporting their tuition under government aid programs.[32] That is not necessarily the case with every school, however. For instance, Alabama anticipated a huge

28. The electorate has voiced opposition to private choice programs through defeated referenda in states such as Utah, California and Michigan. *See* USHER & KOBER, *supra* note 25, at 20–21 (discussing defeated referenda).

29. DIPERNA, *supra* note 1, at 43, 53–54. This data is not available for tax deductions.

30. USHER & KOBER, *supra* note 25, at 5. However, not everyone agrees with the expansion to middle-income earners. *Id.* at 6.

31. *See generally* Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 146 (2011) (indicating the United States Supreme Court's unwillingness to entertain taxpayer-based challenges to tax credit programs by dismissing the case based on a lack of Article III standing).

32. CUNNINGHAM, *supra* note 12, at 1.

loss of about $40 million from its tax credits, so it had to account for that loss in the state budget.[33] The state director of the Legislative Fiscal Office conceded that "[o]ur sense is that $40 million is going to be enough but we don't know. It's a question of how many are going to opt for private schools."[34] Additionally, a study of Arizona's tax credit program concluded similarly, noting that

> From the estimates, the net cost to the General Fund ranges from $42 million to $54 million, with the average net cost to the General Fund being $49 million, showing unequivocally that regardless of whatever educational merit the program has, the tax credits do not pay for themselves, and contribute to the shortfall in the General Fund.[35]

Despite the growing movement to adopt vouchers and tax benefits in various states,[36] these programs might not be leading to improved academic achievement.[37] For instance, the Center on Education Policy reports that studies since 2000 reveal that there is generally "no clear advantage" in student achievement for those who use vouchers to attend private schools.[38] Even voucher advocates, such as Rick Hess of the American Enterprise Institute, appear to recognize this fact: "First off, 20 years in, it's hard to argue that the nation's biggest and most established voucher experiment has 'worked' if the measure is whether vouchers lead to higher reading and math scores."[39] Similarly, Charles Murray of the American Enterprise Institute opined that "[a]s an advocate of school choice, all I can say is thank heavens for the Milwaukee results. Here's why: If my fellow supporters of charter schools and vouchers can finally be pushed off their obsession with test scores, maybe we can focus on the real

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33. Povich, *supra* note 15.

34. *Id.*

35. DAVE WELLS, ARIZONA'S TUITION TAX CREDIT PROGRAM'S LIMITED IMPACT ON PRIVATE SCHOOL ENROLLMENT 16 (2010), http://www.public.asu.edu/~wellsda/research/ArizonasTuitionTaxCreditProgramandPrivateSchoolEnrollment.pdf.

36. *See, e.g.*, Povich, *supra* note 15 (showing the expansion of school voucher adoption).

37. *See, e.g.*, USHER & KOBER, *supra* note 25, at 9 ("While some studies have found limited test score gains for voucher students in certain subject areas or grade levels, these findings are inconsistent among studies, and the gains are either not statistically significant, not clearly caused by vouchers, or not sustained in the long run."). *See generally id.* at 22–46 (discussing various studies on the impact of voucher programs).

38. *Id.* at 3, 8–12; *see also id.* at 5 ("In study after study, students utilizing vouchers appear to perform no better than their peers left behind in the public schools." (quoting Michael J. Crossey, Vice President of the Pennsylvania State Education Association)).

39. *Id.* at 4.

reason that school choice is a good idea."[40] Consequently, proponents now harp on parent and student choice as an intrinsic and capable value, parent satisfaction, and improved student graduation rates as rationales for enacting voucher programs.[41]

Table 3 sets forth the most important reasons that people who strongly or somewhat oppose vouchers give for their opposition:

Table 3: Most important reasons for opposition to vouchers[42]

Reasons for Opposing Vouchers	Percentage of Respondents Strongly or Somewhat Opposing Vouchers
Divert funds from public schools	57%
Something else/Other	12%
Cause fraudulent behavior	9%
Benefit unaccountable private schools	7%
Cause student transportation problems	6%
Send funding to religious schools	4%

As a result of government aid programs, public school districts face great pressure from the threatened loss of their student population, affecting their student funding, which is based on state per pupil allocation, and thus their continued viability.[43] Some of the 57% of

40. *Id.* at 5. A University of Arkansas School Choice Demonstration Project (SCDP) study of Milwaukee's voucher program found no significant differences between the academic performance of third-grade through eighth-grade voucher students and Milwaukee public school students. *Id.* at 9.

41. *Id.* at 3–4, 10; *see id.* at 48 ("[P]olicy decisions about vouchers are often influenced by factors other than evidence from research about their impact or effectiveness. Many policymakers and other influential players in voucher debates have strong opinions about vouchers that are based on philosophy and values. Perhaps this is why the evidence that vouchers have not had a strong impact on student achievement has not slowed the push for new voucher programs in many states.").

42. Table adapted from DIPERNA, *supra* note 1, at 44. Similar data is not available for tax credits; however, tax credits are opposed for similar reasons. *Scholarship Tax Credits: Overview*, *supra* note 25; *see also* Povich, *supra* note 15 ("[T]he Alabama Education Association, like the American Federation of Teachers and other teachers' groups across the country, opposes the private school tuition tax credit program, on both fiscal and ideological grounds. 'It's very disheartening, at a time when we are seeing revenue actually go up,' said Amy Marlowe of the association. 'That's money we do have available to spend on (public) education and it's going to be funneled to private schools.'").

43. CUNNINGHAM, *supra* note 12, at 4; *see also* Povich, *supra* note 15 ("The effect on states' treasuries is up for debate. In a widely-cited 2008 study, Florida estimated

Americans interviewed who said they opposed vouchers due to fund diversion might be able to bring state constitutional challenges against voucher programs in their states, as discussed later in this Article. Government aid programs could also be subject to federal and state constitutional challenges,[44] particularly when they allow parents to use their vouchers and tax benefits for sectarian schools.[45] We discuss these constitutional challenges next.

II. FEDERAL CONSTITUTIONAL ISSUES RELATED TO VOUCHERS AND TAX BENEFITS

This section reviews federal constitutional challenges that have been brought against vouchers and tax benefits, as well as the hurdles that these challengers have to clear. These challenges involve issues of standing, the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause.[46]

A. Standing

Although some taxpayers might want to bring federal constitutional challenges in federal court against jurisdictions with government aid programs based on their status as taxpayers, the

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it saved $1.49 in per-pupil costs for every $1 it lost in revenue due to the private school tax credits, for a total of $39 million. But other estimates say states lose money on the tax incentives.").

44. USHER & KOBER, *supra* note 25, at 20–21. Government aid programs have existed, and faced opposition, for a long time. *See, e.g.*, Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 48–49 (1997) ("The single most famous American statement on disestablishment, James Madison's *Memorial and Remonstrance Against Religious Assessments*, was written in opposition to the general assessment bill in the Virginia legislature, which would have provided tax support for teachers of the Christian religion. If history settles anything in this area, it is that a general assessment would be unconstitutional. . . . The general assessment was a tax solely for the support of clergy in the performance of their religious functions. The reason for supporting religious functions was not that they fell within the neutrally drawn boundaries of some larger category of activities to be supported by the state. Rather, religion was to be singled out for special support because the state deemed it to be of special value.").

45. *See generally* CUNNINGHAM, *supra* note 12; *Scholarship Tax Credits: Overview*, *supra* note 25.

46. *See* Norwood v. Harrison, 413 U.S. 455, 462 (1973) ("It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.").

Supreme Court has rejected taxpayer standing except in Establishment Clause cases.[47]

The Court has examined the standing doctrine for taxpayers and noted that, to have standing, a taxpayer must have a specific grievance to challenge the allotment of federal funds. "Standing determines whether the person is the proper party to request adjudication of a certain issue and does not decide the issue itself."[48] The Supreme Court first recognized the standing doctrine in *Frothingham v. Mellon*,[49] by holding that a federal taxpayer could not rely on taxpayer status to challenge the use of government funds under a federal law.[50] The Court reasoned that because a taxpayer has only a minor interest in the government's use of funds, similar to that of millions of other taxpayers, allowing suit based on taxpayer standing would allow taxpayers to use the judiciary to dictate and disrupt public policies and discretionary decisions of the other branches of government.[51] To have standing, a taxpayer must show that he has suffered, or is facing immediate threat of suffering, a direct injury rather than a generalized injury shared with other taxpayers.[52] Despite the Court's holding, taxpayers continued to bring suits challenging government use of funds based solely on taxpayer standing.[53]

The *Frothingham* Court also ruled that municipal taxpayers have taxpayer standing to bring suit challenging expenditures by

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47. Flast v. Cohen, 392 U.S. 83, 99–102 (1968). Without relying on taxpayer standing, taxpayers can also bring suit if they show that they suffered personal injury or face immediate threat of injury that is redressable through judicial relief. Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 598 (2007) (plurality opinion); *see also Flast*, 392 U.S. at 99 ("'The gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))).

48. Wells Fargo Bank, N.A. v. Heath, 280 P.3d 328, 332 (Okla. 2012).

49. 262 U.S. 447, 487 (1923).

50. *See Flast*, 392 U.S. at 91–92; *Frothingham*, 262 U.S. at 453, 487 (denying a taxpayer standing in a challenge to the appropriation of federal funds to help states reduce maternal and infant mortality); Joseph O. Oluwole & Preston C. Green III, Hein v. Freedom From Religion Foundation *and Taxpayer Standing*, 54 WAYNE L. REV. 1203, 1214 (2008).

51. *Frothingham*, 262 U.S. at 487–88. The Court explained that a taxpayer's self-interest in treasury funds is nearly indeterminable, providing the taxpayer with no basis to appeal to a court of equity. *Id.* at 487.

52. *Id.* at 488.

53. *See, e.g.*, Doremus v. Bd. of Educ. of Hawthorne, 342 U.S. 429, 435 (1952) (dismissing the case for lack of standing).

municipal corporations because of the "peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation."[54] Because of this relationship, municipal taxpayers have a "direct and immediate" interest in municipal spending that, unlike generalized grievances, is justiciable.[55]

Finally, in *Flast v. Cohen*,[56] the Court ruled on whether federal taxpayers could rely on taxpayer standing to bring Establishment Clause and Free Exercise Clause challenges to government use of funds. The plaintiffs claimed taxpayer standing in filing suit against the federal appropriation of funds under the Elementary and Secondary Education Act of 1965, supporting the education of students from low-income families as well as the acquisition of instructional materials in private schools.[57] The plaintiffs claimed that, since the funding benefited sectarian schools, the appropriation violated the Establishment and Free Exercise Clauses.[58] The Free Exercise Clause claim argued that the federal expenditures in question amounted to compelled taxation in violation of the taxpayers' right to free exercise of religion.[59] The compelled taxation similarly formed the crux of the Establishment Clause claim.[60] The Court ruled that the taxpayers had standing to bring their Establishment Clause claim but did not rule on taxpayer standing for the Free Exercise Clause claim.[61]

Although federal taxpayers can establish standing in federal court, they must first satisfy their burden of proof. The Court stated that federal taxpayers seeking to establish standing in federal court must satisfy two nexuses to prove that their claim is more than a generalized taxpayer grievance: (1) there must be a logical connection between the party's status as a taxpayer and the type of

54. *Frothingham*, 262 U.S. at 487.
55. *Id.* at 486; *see also* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 349 (2006).
56. 392 U.S. 83 (1968).
57. *Id.* at 85–86.
58. *Id.* at 86–87.
59. *Id.* at 87.
60. *Id.*
61. *Id.* at 104 n.25. The Court stated, however, that "standing requirements will vary in First Amendment religion cases depending upon whether the party raises an Establishment Clause claim or a claim under the Free Exercise Clause." *Id.* at 102; *see also id.* at 105 ("We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8. Whether the Constitution contains other specific limitations can be determined only in the context of future cases.").

legislative enactment being challenged; and (2) there must be a logical connection between the party's status as a taxpayer and the alleged constitutional infringement's precise nature.[62]

A taxpayer cannot satisfy the first nexus by simply claiming that the government has engaged in incidental spending for administration of what fundamentally constitutes a regulatory statute.[63] A federal taxpayer can only have standing under the first nexus when challenging the constitutionality of legislative power under Article I, Section 8—the Taxing and Spending Clause.[64]

To establish the requisite precision under the second nexus, a taxpayer must show that the expenditure exceeded a particular constitutional restriction on Taxing and Spending Clause power;[65] merely showing that the expenditure exceeded general limitations under Article I, Section 8 is insufficient.[66] Two such constitutional limits are the Establishment Clause and the Free Exercise Clause.[67]

The Court ruled that the taxpayers in *Flast* satisfied both nexuses because their constitutional claim was that the substantial expenditure in question exceeded the Establishment Clause restriction on legislative power to provide for the general welfare under the Taxing and Spending Clause.[68] The Court singled out the Establishment Clause because "[o]ur history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general."[69]

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62. *Id.* at 102–03.

63. *Id.* at 102.

64. *Id.* The Taxing and Spending Clause provides, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." U.S. CONST. art. I, § 8, cl. 1.

65. *Flast*, 392 U.S. at 102–03; *see id.* at 106 ("The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power.").

66. *Id.* at 102–03.

67. *Id.* at 103, 104 n.25 ("This Court has recognized that the taxing power can be used to infringe the free exercise of religion." (citing Murdock v. Pennsylvania, 319 U.S. 105, 130 (1943)).

68. *Id.* at 103.

69. *Id.*; *see also id.* at 103–04 ("The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause . . . operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred

The Court has limited its *Flast* ruling to only giving standing to federal taxpayers unless the state-taxpaying petitioner satisfies the *Flast* standing requirements in relation to the state legislature's taxing and spending power.[70] The Court in *DaimlerChrysler Corp. v. Cuno*[71] reasoned that the impact of state expenditures on individual taxpayers is too remote to simply allow standing based only on taxpayer status.[72] Additionally, the Court explained that

> [A]ffording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as 'virtually continuing monitors of the wisdom and soundness' of state fiscal administration, contrary to the more modest role Article III envisions for federal courts.[73]

In order to satisfy *Flast*, state taxpayers must show that the State exceeded the Establishment Clause limitation on its taxing and spending powers.[74]

Furthermore, taxpayers cannot avail themselves of taxpayer standing when challenging a state tax credit. In *Arizona Christian School Tuition Organization v. Winn*,[75] taxpayers claimed that Arizona's tax credits for contributions to student tuition organizations ("STOs") that offer scholarships to private schools, including religious schools, violated the Establishment Clause.[76] Under the program, individual taxpayers could receive up to $500 in dollar-for-dollar tax credits—$1,000 for married couples—annually for their STO contributions.[77] The Court rejected the taxpayers' standing

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by [Article I, Section 8]." (citations omitted)); Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 139 (2011) ("Confirming that *Flast* turned on the unique features of Establishment Clause violations, this Court has declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause." (quoting Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 609 (2007) (plurality opinion)) (internal quotation marks omitted)).

70. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 345–46 (2006); *see id.* at 345 (likening state taxpayers to federal taxpayers in the context of standing analysis (citing ASARCO Inc. v. Kadish, 490 U.S. 605, 613 (1989)); Doremus v. Bd. of Educ. of Hawthorne, 342 U.S. 429, 435 (1952) (dismissing an appeal for lack of standing); *see also Winn*, 563 U.S. at 149 (Kagan, J., dissenting) (explaining state taxpayer status).

71. 547 U.S. 332 (2006).

72. *Id.* at 344–46.

73. *Id.* at 346.

74. *Id.* at 342–48.

75. 563 U.S. 125 (2011).

76. *Id.* at 129.

77. *Id.* at 130; *see also id.* (explaining that if a taxpayer qualifies for a tax credit that is more than taxes owed, he can use the remaining credit each subsequent year for up to five years).

claim based on their taxpayer status.[78] Accordingly, the Court dismissed as speculative the taxpayers' argument that the STO tax credits would lead to state budget deficits, thus increasing taxpayers' tax liability, causing them direct injury.[79] This dismissal was justified, the Court explained, because the average value of a scholarship might actually be less than the cost of educating students in a public school, saving the state money.[80]

Even so, it is presumptive to assume that the STO tax credits were, in fact, the cause of any increase or decrease in taxpayer burden. Additionally, the Court opined that the connection between implementing an STO tax credit and a tax increase would be tenuous.[81] Furthermore, the Court found it speculative to think that the government would pass along savings to taxpayers in the form of lower taxes if the STO tax credit program was invalidated.[82] Consequently, an injunction in this case might not redress the alleged injury.[83] The Court concluded that "[e]ach of the inferential steps to show causation and redressability depends on premises as to which there remains considerable doubt. . . . The rule against taxpayer standing, a rule designed both to avoid speculation and to insist on particular injury, applies to respondents' lawsuit."[84] While the Court dismissed the taxpayers' arguments as speculative, the majority hypocritically engaged in conjecture about the potential impact of STOs on state budgets, as evident in the Court's use of words such as "might" or "could": "the STO program *might* relieve the burden placed on Arizona's public schools. The result *could* be an immediate and permanent cost savings for the State."[85]

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78. *Id.*

79. *Id.* at 137 ("Even assuming the STO tax credit has an adverse effect on Arizona's annual budget, problems would remain. To conclude there is a particular injury in fact would require speculation that Arizona lawmakers react to revenue shortfalls by increasing respondents' tax liability.").

80. *Id.*

81. *Id.*; *see also id.* at 137–38.

82. *Id.*; *see also id.* at 136 ("When a government expends resources or declines to impose a tax, its budget does not necessarily suffer. On the contrary, the purpose of many governmental expenditures and tax benefits is to spur economic activity, which in turn *increases* government revenues." (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344 (2006)) (internal quotation marks omitted)).

83. *Id.* at 136 (citing ASARCO Inc. v. Kadish, 490 U.S. 605, 614 (1989)).

84. *Id.* at 138.

85. *Id.* at 137 (emphasis added). The italicized words in the following quote further highlight the Court's conjecture: "Underscoring the *potential* financial benefits of the STO program, the average value of an STO scholarship *may* be far less than the average cost of educating an Arizona public school student. Because it

The *Winn* Court ruled that the *Flast* taxpayer standing standard does not apply to tax credits due to the distinction between tax credits and government expenditures: government expenditures involve money already collected by the government in the form of taxes, whereas tax credits involve money belonging to the taxpayer.[86] Since government expenditures are already in the government's possession, they can form the basis of a standing claim. Tax credits, on the other hand, represent the government declining to impose a tax, giving the taxpayer more control over his money.[87] Thus, with the taxpayer retaining control, the Court ruled that tax credits do not entail the compelled contribution necessary to make a *Flast* Establishment Clause standing claim.[88]

Even when some citizens avail themselves of tax credits, according to the Court, other citizens remain free to use their money the way they see fit.[89] The Court opined that Arizona taxpayers had choices as to what to do in the case of tax credits: they could take advantage of the STO tax credit, opt for some other tax credit or deduction through contribution to another charitable organization, or simply use the money to pay their tax liability.[90] Taxpayers could also choose not to contribute to STOs that fund sectarian scholarships.[91] Therefore, beyond the government's role in setting up the tax credit opportunity, the government gives private citizens the keys to run the STOs and gives taxpayers the private choice of whether to take advantage of tax credits and which tax credits to claim.[92] In essence, the Court ruled that private choice was a circuit breaker between the tax credit system and any subsequent sectarian uses of the STO contributions that formed the basis of the tax credit.[93]

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encourages scholarships for attendance at private schools, the STO tax credit *may* not cause the State to incur any financial loss." *Id.* (emphasis added) (citation omitted).

86. *Id.* at 141–42.

87. *Id.*

88. *Id.* at 142–43 (suggesting that similar reasoning would apply to tax deductions); *see* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789 (1973) (finding no constitutional significance in Establishment Clause government aid jurisprudence between tax credits and tax deductions); *see also* Kotterman v. Killian, 972 P.2d 606, 621 (Ariz. 1999) (en banc) ("[W]e see no constitutional difference between a credit and a deduction . . . .").

89. *Winn*, 563 U.S. at 142.

90. *Id.*

91. *Id.*

92. *Id.* at 143.

93. *Id.*; *see id.* at 144 ("Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations. Respondents' contrary position

On the other hand, "[w]hen the government collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth. In that case a resulting subsidy of religious activity is, for purposes of *Flast*, traceable to the government's expenditures."[94] In other words, all taxpayers are obligated to contribute to government expenditures. Consequently, any use of such funding for sectarian purposes presents the threat of using "a conscientious dissenter's funds in service of an establishment [of religion]."[95] The same threat exists in the case of a sectarian STO receiving money from the general tax revenues, as opposed to a private contribution.[96]

As critics note, however, the Court's distinction between tax credits and government expenditures in order to preclude standing for tax credit challenges effectively sanctions indirect government support of sectarian education. Justice Kagan aptly captured the absurdity of this distinction-without-a-difference:

> [C]onsider an example far afield from *Flast* and, indeed, from religion. Imagine that the Federal Government decides it should pay hundreds of billions of dollars to insolvent banks in the midst of a financial crisis. Suppose, too, that many millions of taxpayers oppose this bailout on the ground (whether right or wrong is immaterial) that it uses their hard-earned money to reward irresponsible business behavior. In the face of this hostility, some Members of Congress make the following proposal: Rather than give the money to banks via appropriations, the Government will allow banks to subtract the exact same amount from the tax bill they would otherwise have to pay to the U.S. Treasury. Would this proposal calm the furor? Or would most taxpayers respond by saying that a subsidy is a subsidy (or a bailout is a bailout), whether accomplished by the one means or by the other? Surely the latter; indeed, we would think the less of our countrymen if they failed to see through this cynical proposal.[97]

Nevertheless, taxpayers might not be able to constitutionally challenge indirect sectarian support due to the private-choice circuit breaker. Moreover, districts losing funding or students to private

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assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands. That premise finds no basis in standing jurisprudence. Private bank accounts cannot be equated with the Arizona state treasury.").

94. *Id.* at 143.

95. *Id.* at 142.

96. *Id.* at 144.

97. *Id.* at 156–57 (Kagan, J., dissenting).

schools might not be able to bring constitutional challenges due to a lack of standing. This is because school districts are merely vehicles of the State to accomplish the State's obligation to provide free public education.[98] Additionally, since school districts do not pay taxes, they cannot rely on taxpayer status to bring such challenges.[99]

State taxpayers might also find it difficult to rely on taxpayer standing to challenge vouchers and tax benefits in state court. In *Duncan v. New Hampshire*,[100] for instance, the Supreme Court of New Hampshire confronted this issue when taxpayers challenged a tax credit program for businesses donating to organizations that provide scholarships for students to attend private schools, including sectarian schools.[101] Under the program, 85% of a business's donation to the scholarship organization can be counted against its profit-tax or enterprise-tax liability.[102] The court refused to hear the merits of a state constitutional challenge against the State's tax credit program after finding that the plaintiffs had no standing to bring the case.[103] A state statute authorizing taxpayer standing existed, but the court found it unconstitutional.[104] The court reasoned that authorizing standing without requiring the taxpayer to show personal injury that is redressable through judicial action would unconstitutionally open the door to providing advisory opinions to private citizens.[105] It would also engage the judiciary in policymaking areas reserved for the other branches of government.[106] Withal, the court ruled that taxpayers cannot show personal injury by alleging school district loss of students or district loss of funding due to the

98. Indep. Sch. Dist. No. 5 of Tulsa Cty. v. Spry, 292 P.3d 19, 20 (Okla. 2012).

99. *Id.*

100. 102 A.3d 913 (N.H. 2014).

101. *Id.* at 918; *see also id.* (noting that the program also allowed students to attend public schools outside their local school district).

102. *Id.*

103. *Id.* at 917.

104. *Id.*; *see also id.* at 919 ("The taxpayers . . . have an equitable right and interest in the preservation of an orderly and lawful government within such district; therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief . . . ." (citing N.H. REV. STAT. ANN. § 491:22 (2013))).

105. *Id.* at 921–22, 924–25, 928.

106. *Id.* at 923–24 ("[T]he requirement of a concrete, personal injury 'has . . . separation-of-powers significance.' . . . When the concrete, personal injury requirement is eliminated, courts 'assume a position of authority over the governmental acts of another and co-equal department.'" (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992))).

tax credit.[107] Thus, showing redressable personal injury is vital in most constitutional challenges by taxpayers unless the *Flast* Establishment Clause exception is satisfied.

B. Establishment Clause Challenges

1. Background on the Supreme Court's government aid jurisprudence under the Establishment Clause

Taxpayers have long challenged government use of public funds for any form of support of sectarian education.[108] Because such use of public funds could be seen as promoting government support of sectarian education, these cases are generally challenged under the Establishment Clause.[109] As the Supreme Court has acknowledged, however, the Establishment Clause is a particularly difficult area for judicial interpretation.[110] The Court has even remarked that the Establishment Clause is "at best opaque."[111]

Lemon v. Kurtzman[112] is the cardinal Supreme Court case in government aid jurisprudence,[113] responsible for the creation of the *Lemon* test—the flagship test for determining if government aid to sectarian institutions violates the Establishment Clause.[114] Under the *Lemon* test, government aid complies with the Establishment Clause if it satisfies three conditions: (1) the government aid has at least one secular purpose;[115] (2) the principal or primary effect of the aid is not

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107. *Id.* at 926–27 (noting that the court declared any such loss purely speculative).

108. *See* Comm. For Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973) (identifying the two categories of cases in which the relationship between religion and education usually arises as "those dealing with religious activities within the public schools, and those involving public aid in varying forms to sectarian educational institutions").

109. *Id.* at 786.

110. Mueller v. Allen, 463 U.S. 388, 392–93 (1983).

111. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); *see also* Kotterman v. Killian, 972 P.2d 606, 610 (Ariz. 1999) (en banc) ("The Establishment Clause, applicable to the states by authority of the Fourteenth Amendment, proclaims that 'Congress shall make no law respecting an establishment of religion.' The simplicity of this language belies its complex and continually evolving interpretation by the United States Supreme Court." (citations omitted)).

112. 403 U.S. 602 (1971).

113. *See id.* at 612 (indicating that government aid jurisprudence governs vouchers, tax credits, and tax deductions because those are forms of government aid).

114. *Id.* ("*Every* analysis in this area must begin with consideration of the cumulative criteria developed by the Court . . . ." (emphasis added)).

115. *Id.*

the inhibition or advancement of religion;[116] and (3) the aid must not foment "excessive government entanglement in religion."[117]

The Court developed the *Lemon* test at a time when states were supporting white flight from public schools by providing funding to private, and often sectarian, schools in an attempt to resist desegregation.[118] Professor Douglas Laycock pointed out that the Court was "at the height of its battle 'to achieve the greatest possible degree of actual desegregation' in public schools," and the prospect of subsidized private schools posed a formidable obstacle to the Court's efforts.[119] Aware of these concerns, the lawyers who brought *Lemon* named an African-American man as the lead plaintiff and "devoted ten pages of their brief to a segregation claim."[120] Although none of the Justices ruled on the segregation claim, "it is hard to believe that no Justice was influenced by it."[121]

In *Lemon*, the Court reviewed two government aid programs to private schools: a Rhode Island teacher salary program and a Pennsylvania textbook and teacher salary reimbursement program.[122] The Rhode Island program paid teachers of secular courses in private schools supplemental income worth 15% of their salary.[123] The state

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116. *Id.* One commentator has described the importance of the distinction between advancement and inhibition in the Court's Establishment Clause jurisprudence since *Lemon*:

> Disaggregating the inquiry made it easy for advocates of the no-aid position to implicitly use government inactivity as the baseline. . . . The disaggregated inquiry did not require the Court to compare the 'advancing' effects of aid to the 'inhibiting' effects of funding secular schools but not religious schools, so the Court did not have to decide which was the greater departure from neutrality. And anyway, the Court never took the 'inhibiting' prong of *Lemon* seriously in the context of school finance. The Court summarily rejected claims that refusing to fund religious schools discriminates against those who wish to attend them, and it also rejected arguments that funding should be permitted under the Establishment Clause because it serves free exercise values.

Laycock, *supra* note 44, at 56 (footnote omitted).

117. *Lemon*, 403 U.S. at 613; *see also* Hernandez v. Comm'r, 490 U.S. 680, 696–97 (1989) (explaining that excessive government entanglement requires more than "routine regulatory interaction" with religious bodies but would prohibit "inquiries into religious doctrine," "delegation of state power to a religious body," and "detailed monitoring and close administrative contact between secular and religious bodies").

118. Laycock, *supra* note 44, at 61.

119. *Id.* (quoting Davis v. Bd. of Sch. Comm'rs, 402 U.S. 33, 37 (1971)).

120. *Id.* at 62.

121. *Id.*

122. *Lemon*, 403 U.S. at 606–07.

123. *Id.* at 607.

implemented this program to stave off threats to private school education from increased competition for quality teachers.[124] It provided, however, that private school teachers could not earn more than the maximum salary of Rhode Island's public school teachers.[125] To monitor private school compliance with various program conditions, the State required financial records of eligible private schools.[126] All teachers who applied for the program taught at sectarian schools, and approximately 95% of the state's private school students attended sectarian schools.[127] Pennsylvania designed the program to support secular education within private schools and to counteract the increased costs of education in those schools to keep them viable.[128] The program reimbursed private schools for textbooks and teacher salaries.[129] Participating private schools could be audited to ensure that reimbursement was only for secular purposes.[130] The majority of participating teachers taught in sectarian schools; these schools accounted for over 96% of the state's private school students.[131]

After finding that the secular purposes of each program stated above were satisfactory, the Court centered its analysis on the third prong of the *Lemon* test due to overwhelming evidence suggesting excessive government entanglement.[132] The excessive entanglement prong requires inquiry into the nature of the government aid, the sectarian school's character and purpose, and the consequent relationship between the school and the government.[133] Based on these factors, the Court held that both programs involved excessive government entanglement in violation of the Establishment Clause.[134]

The Court found the sectarian schools in the Rhode Island program pervasively intertwined with religion. As evident by the nearly universal presence of religious symbols in the schools, the religiously-oriented extracurricular activities, and the predominance of nuns as teachers

124. *Id.*
125. *Id.*
126. *Id.* at 607–08.
127. *Id.* at 608.
128. *Id.* at 609.
129. *Id.*
130. *Id.* at 609–10.
131. *Id.* at 610.
132. *Id.* at 613–14.
133. *Id.* at 615.
134. *Id.*

created a prominently religious climate.[135] The apparent religious character and purpose of the sectarian schools, the Court concluded, would lead to prohibited "entangle[d] church-state relationships."[136] State monitoring of school compliance with the requirement that government aid only support secular education further fueled this entanglement due to the nature of the aid to the teachers.[137]

The government aid went directly to teachers, further intensifying the entanglement issue. Unlike monitoring sectarian schools' use of government aid for transportation, lunch, and even textbooks, monitoring whether teachers are using government aid to teach impermissible sectarian content is very challenging.[138] The Court expressed concern that a regime of "comprehensive, discriminating, and continuing state surveillance" would follow, further entangling government in religion.[139]

The Court also found the sectarian schools in Pennsylvania were pervasively religious,[140] meaning that the close relationship between the schools and the government created by the government aid created a threat of excessive government entanglement in religion.[141] In large part, this resulted from the State's efforts to ensure compliance with the program's requirement that participating teachers not teach sectarian courses.[142] The nature of the aid—direct reimbursement of sectarian schools, as opposed to aid given directly to *students or parents*—further heightened concerns of excessive entanglement: "[A] direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant

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135. *Id.* at 615–18 ("We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals.").

136. *Id.* at 616.

137. *Id.*

138. *See id.* at 617 ("In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education.").

139. *Id.* at 619.

140. *Id.* at 620; *see* Anderson v. Town of Durham, 895 A.2d 944, 950 n.7 (Me. 2006) ("A school is pervasively sectarian when a 'substantial portion of its functions are subsumed in the religious mission.'" (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973))).

141. *Lemon*, 403 U.S. at 620–21.

142. *Id.* at 621.

programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards."[143] The Court also held that the nature of the aid would lead to political divisions as supporters of sectarian schools lobby for more government aid while opponents lobby against such aid.[144] As the Court cautioned, however, "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[145]

Government aid to sectarian schools was also challenged in *Committee for Public Education & Religious Liberty v. Nyquist*,[146] in which the plaintiffs brought an Establishment Clause challenge against a New York law. The law provided private school grants and benefits to low-income families.[147] Additionally, legislators facilitated these grants to assist private schools facing urgent financial distress.[148] A direct grant for facilities maintenance was made available to each school at $30 per student annually.[149] The law also provided for a tuition program, which reimbursed up to 50% of the private school tuition bill of a parent earning less than $5,000 annually.[150] Finally, for those who did not qualify for the tuition reimbursement program, the law offered parents making up to $25,000 in adjusted gross income the opportunity to deduct a certain graduated amount from

143. *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 675); *see also id.* at 621–22 (noting that the government's post-audit power ensures an intimate and continuing church/state relationship because the government can inspect and evaluate a church school's financial records and then pass judgment on its findings); *cf.* Laycock, *supra* note 44, at 55 (characterizing the Court's classification of "pervasively sectarian" institutions as "inconsistent and incoherent," making it difficult to determine whether direct or indirect aid is permissible).

144. *Lemon*, 403 U.S. at 622–23.

145. *Id.* at 622.

146. 413 U.S. 756 (1973).

147. *Id.* at 762–63.

148. *Id.* at 768 n.22, 795; Zelman v. Simmons-Harris, 536 U.S. 639, 661 (2002).

149. *Nyquist*, 413 U.S. at 763. If the facilities were older than twenty-five years, the grant was valued at $40. The law also tied the grant value to the average per-student facilities and equipment maintenance costs in public schools by noting that the grant may not exceed 50% of that average per-student cost. *Id.*

A number of consumer price index (CPI) inflation calculators estimate that $30 in 1972 equates to roughly $173 in 2016. *See, e.g.*, *CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS (2016), http://data.bls.gov/cgi-bin/cpicalc.pl. This dollar value, and the values that follow, are merely for comparison—they are necessarily speculative and may not be equivalent to the amounts that legislatures today would use.

150. *Nyquist*, 413 U.S. at 764. In 2016 dollars, this is roughly $29,000. *CPI Inflation Calculator*, *supra* note 149.

their adjusted gross income for every dependent that the parents spent at least $50 on in private school tuition.[151]

Using the *Lemon* test, the Supreme Court accepted the promotion of diversity and pluralism in public and private schools as secular purposes for the New York grants law.[152] The law, however, failed the second prong of the *Lemon* test.[153] The law did not restrict use of the maintenance grants to secular purposes, allowing sectarian schools to use the grants to fund sectarian ends.[154] Consequently, the unrestricted nature of the maintenance grant could have the primary effect of advancing religion.[155] Similarly, the unchecked tuition reimbursement program also seemingly had the primary effect of advancing religion because the program allowed parents unfettered use of the tuition grant at sectarian schools, furthering sectarian purposes.[156] Furthermore, as with the maintenance grants, the law did not limit sectarian schools' use of the tuition grants to secular purposes.[157] Therefore, the State could not rely on the fact that parents, rather than the schools, received the tuition grants.[158] By giving parents the grants, the State sought to accomplish indirectly what it could not constitutionally do directly through direct tuition payments to sectarian schools.[159]

The Court also viewed the tuition reimbursements as incentivizing parents to send their children to private schools, including sectarian schools; the primary effect of this was advancement of religion.[160]

> [I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian

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151. *Nyquist*, 413 U.S. at 765–66. The Supreme Court observed that it is difficult to determine whether to characterize this income tax benefit as a tax deduction or a tax credit; nonetheless, that distinction has no constitutional relevance to the decision in the case. *Id.* at 789.

The dollar amounts here—$25,000 and $50 in 1972—equal about $144,000 and $290, respectively, in 2016 dollars. *CPI Inflation Calculator*, *supra* note 149.

152. *Nyquist*, 413 U.S. at 773.

153. *Id.* at 779–80, 791.

154. *Id.* at 774–80.

155. *Id.* at 780, 783.

156. *Id.* at 780.

157. *Id.* at 783.

158. *Id.*

159. *Id.* at 780, 783, 787–88.

160. *See id.* at 788 ("In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one 'advancing' religion.").

> institutions. Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same.[161]

The tax benefit program failed to satisfy the primary-effects prong of the *Lemon* test for the same reason as the tuition reimbursement program[162]: legislators designed it to incentivize parents to send their children to private schools that included sectarian schools.[163] According to the Court, the only difference between the tuition reimbursement program and the tax benefit program was one of form. The reimbursement program involved a direct cash payment to the parents whereas the tax benefit program reduced a parent's tax liability.[164] Besides, the tax benefit program failed to account for parents' actual expenditures on tuition, thus creating potential net windfalls for parents that incentivized them to choose sectarian schools.[165] The Court rebuffed the argument that the parents served as a circuit breaker between the government and the sectarian use of the tax credits, reasoning that no provision in the program assured that the benefits served only secular—rather than sectarian—ends.[166] The Court, however, left open for future cases whether aid made generally available to private recipients without respect to the sectarian or non-sectarian nature of the schools benefiting from the aid would violate the Establishment Clause.[167]

The Court dismissed comparisons of the tax benefit program to the tax-exempt status afforded to churches. The Court reasoned that, while tax exemptions have a historical tradition in the United States dating back to the pre-revolutionary colonial era, the challenged educational tax benefits in the case *sub judice* were a relatively new innovation lacking a historical foundation.[168] Moreover, given that taxation could be a vehicle of hostility and oppression against

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161. *Id.* at 786 (footnote omitted).

162. *Id.* at 794, 804; *see id.* at 791 ("The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools.").

163. *Id.* at 790–91.

164. *Id.* at 791.

165. *Id.* at 766; *id.* at 790 ("The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula contained in the statute. The formula is apparently the product of a legislative attempt to assure that each family would receive a carefully estimated *net benefit*" (emphasis added) (footnote omitted)).

166. *See id.* at 791 (applying the same rationale it relied on in rejecting the parent-as-a-circuit-breaker argument to the tuition reimbursement program); *cf. id.* at 783.

167. *Id.* at 782 n.38. This statement essentially hinted at the introduction of the neutrality principle discussed *infra* note 192.

168. *Id.* at 792.

sectarian institutions, tax exemption assures government neutrality, minimizing such dangers.[169] The tax benefits, however, cannot ensure neutrality:

> Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court. To the contrary, insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions.[170]

Finally, the tax exemption is provided to all charitable organizations, including churches; no evidence was offered that churches are the exclusive or predominant beneficiaries of the exemption.[171] Per contra, tax benefits predominantly benefit sectarian schools.[172] This very fact, the Court opined, portended "grave potential for entanglement in the broader sense of continuing political strife over aid to religion,"[173] as competing constituencies lobby, and even jockey for, increased aid—fueling deep political divides.[174]

Additionally, on the same day the Court decided *Nyquist*, in *Levitt v. Committee for Public Education & Religious Liberty*,[175] the Court ruled on the constitutionality of a New York law that appropriated $28 million to reimburse private schools for recordkeeping costs and expenses for state-created as well as teacher-created tests.[176] Every year, each school received $27 per first- through sixth-grade student based on average daily attendance, and $45 per student for the other grade levels.[177]

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169. *Id.*; *see also* Lemon v. Kurtzman, 403 U.S. 602, 624 (1971) ("In *Walz* it was argued that a tax exemption for places of religious worship would prove to be the first step in an inevitable progression leading to the establishment of state churches and state religion. That claim could not stand up against more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present."); *cf. Nyquist*, 413 U.S. at 793 (emphasizing that such financial aid was designed to limit the government's involvement in religious matters).

170. *Nyquist*, 413 U.S. at 793.

171. *Id.* at 793–94.

172. *Id.* at 793.

173. *Id.* at 794.

174. *Id.* at 796–98. Various state courts have used the *Nyquist* rationales to invalidate state programs that benefitted sectarian schools for violating the Establishment Clause. For instance, in *State ex rel. Rogers v. Swanson*, 219 N.W.2d 726 (Neb. 1974), the Supreme Court of Nebraska ruled that a tuition grant program to support students' private school education violated the Establishment Clause because schools where students could use the tuition grants were predominantly sectarian, and the law did not restrict the use of the grants to secular ends. *Id.* at 728, 735.

175. 413 U.S. 472 (1973).

176. *Id.* at 474–75.

177. *Id.* at 476.

While the reimbursement program seemingly had a secular purpose, it failed the *Lemon* test's second prong.[178] Specifically, as in *Nyquist*, the program included no mechanism or attempt to assure that the funds would only be used for secular purposes at the sectarian school.[179] Indeed, the Court found that secular and sectarian uses of the aid would be indistinguishable and inseparable from each other. Because teacher-created tests are so integral to teaching, it would be difficult to monitor if teachers integrate sectarian content; and efforts to distinguish sectarian and secular uses would foster excessive entanglement under the *Lemon* test's third prong.[180]

When addressing concerns of disabled individuals receiving government aid used at sectarian schools, the Court generally finds for the government. In *Witters v. Washington Department of Services for the Blind*,[181] the Court upheld government funding for the sectarian education of a blind student studying to become a pastor.[182] Washington's vocational rehabilitation program authorized funding to provide vocational services, including education, for blind students.[183] The state denied funding to the pastoral student, who otherwise qualified for funding under the program, because he planned to use the funds to continue his education at his bible school.[184] The Court upheld the program against the Establishment Clause challenge because it satisfied the first two prongs of the *Lemon* test.[185] The Court found a secular purpose in both the program's design to support vocational services and the fact that only miniscule aid would go toward sectarian education.[186]

Under the second *Lemon* prong, the Court focused on whether providing aid for the blind student's sectarian education would

178. *Id.* at 480.

179. *See id.*; *Nyquist*, 413 U.S. at 794.

180. *Levitt*, 413 U.S. at 480–81. Moreover, the Court ruled that the mere fact that tests are state-mandated does not mean the State has to fund them in contravention of the Establishment Clause. *Id.* at 481.

181. 474 U.S. 481 (1986).

182. *Id.* at 482.

183. *Id.* at 483.

184. *Id.*

185. *Id.* at 485–89.

186. *Id.* at 485–86; *see also* Mitchell v. Helms, 530 U.S. 793, 824 (2000) (plurality opinion) ("[W]e have 'not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.'" (quoting Comm. for Pub. & Religious Liberty v. Regan, 444 U.S. 646, 658 (1980))). This was a shift from prior cases discussed herein in which the Court considered the proportion of aid to sectarian schools under the second or third prong of the *Lemon* test.

constitute prohibited direct government aid of a sectarian purpose or permissible aid of a sectarian purpose mediated by private choice.[187] The Court likened permissible sectarian aid to a government employee's use of his government-funded salary to support sectarian ends, even when the government is fully aware of the employee's intentions.[188] The Court reasoned that, as with a government employee's salary, "the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution,"[189] especially when private choices are the conduit for the fund transfer to sectarian ends.[190]

To pass muster under the *Lemon* test's second prong, the government must satisfy both the private-choice principle and the neutrality principle. The private-choice principle authorizes government aid to sectarian schools only when a private citizen receiving aid independently chooses to use his aid at a sectarian school.[191] The neutrality principle approves aid generally available to beneficiaries, irrespective of the sectarian or non-sectarian nature of the educational institution, provided that the program has no underlying incentive to enroll in sectarian schools.[192] This financial incentive element actually ensures that individual decisions under the private-choice principle are genuinely independent: "For to say that a program does not create an incentive to choose religious schools is to say that the private choice is truly 'independent.'"[193] In providing the Court an avenue to uphold government aid to sectarian schools, these two principles effectively represent a departure from the Court's strong declaration in *Lemon* that "[u]nder our system the

187. *Witters*, 474 U.S. at 488.

188. *Id.* at 487–88; *see also Mitchell*, 530 U.S. at 819 n.8 (plurality opinion) ("Similarly, we doubt it would be unconstitutional if, to modify *Witters*' hypothetical, a government employer directly sent a portion of an employee's paycheck to a religious institution designated by that employee pursuant to a neutral charitable program." (citation omitted)).

189. *Witters*, 474 U.S. at 486.

190. *Id.* at 488.

191. *Id.*; *see also Mitchell*, 530 U.S. at 810 (plurality opinion) ("We have viewed as significant whether the 'private choices of individual parents,' as opposed to the 'unmediated' will of government, determine what schools ultimately benefit from the governmental aid, and how much." (citations omitted)).

192. *Witters*, 474 U.S. at 488. Another definition of the neutrality principle can be found in *Mitchell*, 530 U.S. at 827 (plurality opinion) ("If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be.").

193. *Mitchell*, 530 U.S. at 814 (citing *Witters*, 474 U.S. at 487).

choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government."[194]

Under the vocational rehabilitation program in *Witters*, the blind student's bible school would only receive government aid because of the student's private choice to use the aid at that school.[195] Pursuant to the private-choice principle, the program design did not include any incentives to encourage sectarian use of the fund.[196] Additionally, the program satisfied the neutrality principle because the government aid was generally available to blind students without respect to whether they used the funds at a sectarian or non-sectarian school.[197] The Court also concluded that the program satisfied the neutrality principle because the sectarian options under the program were a fraction of the overall options for government funding use available to blind students under the program.[198] In essence, the Court considered the proportion of aid going to sectarian use as an index under the first two prongs of the *Lemon* test.[199]

Zobrest v. Catalina Foothills School District[200] was another case where the Court had to decide the constitutionality of government aid that ultimately benefitted sectarian schools.[201] In that case, the school district provided the student with a sign-language interpreter, pursuant to the Individuals with Disabilities Act (IDEA), while he was a student at its middle school. When he transferred to a sectarian high school, however, the district refused to provide an interpreter for classes at his sectarian school, citing a potential Establishment Clause violation.[202] The student filed suit against the district, claiming that providing the interpreter would not violate the Establishment Clause.[203] The Supreme Court, applying the neutrality principle, ruled that if aid is generally available to a broad class of recipients defined without regard to religion, then the government aid did not undercut the Establishment Clause, even if the sectarian schools benefited from the government program.[204] Such was the

194. Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).
195. *Witters*, 474 U.S. at 488.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 486, 488.
200. 509 U.S. 1 (1993).
201. *Id.* at 13, 14.
202. *Id.* at 4.
203. *Id.* at 4.
204. *Id.* at 8.

case with the IDEA's provision for interpreters, which made interpreters available to students without reference to whether the aid was used at a public, private, sectarian, or secular school.[205]

Further, since the IDEA's interpreter provision included no financial incentive designed to sway students toward sectarian schools, the interpreter's presence at a sectarian school would only be a result of the student's private choice.[206] Accordingly, the interpreter's aid at the sectarian school could not be attributed to the government due to the mediating private choice of the student.[207] The Court declared that, because the interpreter would not affect the school's obligation to educate students, "the only indirect economic benefit a sectarian school might receive by dint of the IDEA is the disabled child's tuition."[208] Consequently, the Court ruled that deaf students were the primary beneficiaries, while sectarian schools were merely the incidental beneficiaries.[209]

With this background as the framework for the Supreme Court's government aid Establishment Clause jurisprudence, we next examine how tax deductions and vouchers have fared under the jurisprudence.

2. *The fate of tax deductions and vouchers in the United States Supreme Court*

The Court first examined the constitutionality of educational tax deductions under the Establishment Clause in *Mueller v. Allen*.[210] This case involved a Minnesota tax deduction program that authorized

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205. *Id.* at 10.

206. *Id.*; *see also* Mitchell v. Helms, 530 U.S. 793, 814 (plurality opinion) ("We hasten to add, what should be obvious from the rule itself, that simply because an aid program offers private schools, and thus religious schools, a benefit that they did not previously receive does not mean that the program, by reducing the cost of securing a religious education, creates . . . an 'incentive' for parents to choose such an education for their children. For any aid will have some such effect.").

207. *Zobrest*, 509 U.S. at 10; *see also Mitchell*, 530 U.S. at 817 (plurality opinion) (underscoring the similarity in having the government provide funds to parents to hire an interpreter and the government directly hiring one, as described in *Zobrest*).

208. *Zobrest*, 509 U.S. at 10, 12. The Court observed that the sectarian school would only receive such economic benefit if three conditions were proved: (1) the student would not have attended the sectarian school without the interpreter, (2) the school would have been unable to enroll a replacement for that student, and (3) the school made a profit per student. *Id.* at 10. The essence of this analysis is that government aid can only have an impact where it functions as a direct subsidy or windfall to a sectarian school. *Id.* at 12 (citing Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986)).

209. *Zobrest*, 509 U.S. at 12.

210. 463 U.S. 388, 390 (1983).

taxpayers to deduct tuition, transportation, and textbook expenses from their gross income.[211] Taxpayers could deduct a maximum of $500 for each kindergarten through sixth-grade dependent and $700 for each dependent in other grades.[212] The law specifically excluded expenses for textbooks used for sectarian purposes.[213] Approximately 95% of the state's private school students attended sectarian schools.[214] Consequently, some taxpayers challenged the tax deduction program, claiming that it violated the Establishment Clause by providing aid to sectarian schools.[215]

The Court acknowledged the recondite nature of the Establishment Clause and its interpretative challenges, especially the government aid jurisprudence, despite the seemingly simple words of the Establishment Clause.[216] Nevertheless, the Court saw a clear path to its decision in the case through applying the *Lemon* test.[217] As with other cases discussed herein, the Court was quick to find a secular purpose for the tax deduction program—assisting parents with educational expenses.[218]

The Court found that the tax deduction program satisfied the second prong of the *Lemon* test based on the neutrality principle as well as the private-choice principle.[219] The program satisfied the neutrality principle for two reasons. First, it was one of several tax benefits, which included medical and charitable tax deductions, in the tax deduction statute.[220] Second, the tax deduction was available to a broad class of recipients that included secular private school parents, sectarian private school parents, and public school

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211. *Id.* at 390–91.
212. *Id.* at 390 n.1.
213. *Id.*
214. *Id.* at 391.
215. *Id.* at 392.
216. *Id.* at 392–93.
217. *Id.* at 394.
218. *See id.* at 394–95 (citing Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)) ("Little time need be spent on the question of whether the Minnesota tax deduction has a secular purpose. Under our prior decisions, governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the *Lemon* framework."). The Court indicated that the State had a number of potential secular reasons for the tax deduction program including maintenance of a viable and quality private education system, reduction of the level of tax burden that would otherwise be placed on taxpayers if those students stayed in public school, the need to support private schools to serve as benchmarks and competition to private schools, and the need to share the tax burden more equitably. *See id.* at 395–96.
219. *Id.* at 396, 399–401.
220. *Id.* at 396.

parents.[221] These reasons precluded state imprimatur for tax deductions for educational expenses at sectarian schools.[222] This is in contrast to tax deduction programs that single out sectarian schools or sectarian school parents as beneficiaries.[223]

The program also satisfied the private-choice principle because parents were the conduit of the tax deduction's benefits to sectarian schools through genuine independent private choices that were not driven by a financial incentive designed to induce parents to select sectarian schools.[224] In essence, by providing the tax deduction to parents, rather than as direct aid to a sectarian school, the program was able to break away from state imprimatur of sectarian use-making any sectarian benefits attenuated.[225] Further, the Court contended that, when balanced against the educational benefits offered by sectarian schools, any attenuated benefits to such schools would be acceptable given the Court's continuing jurisdiction over Establishment Clause concerns.[226] The Court rejected the argument that the proportion of parents using the tax deduction at sectarian schools should have constitutional significance because any embrace of such an argument would create instability in government aid

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221. *Id.* at 397.

222. *See id.* (articulating that "the provision of benefits to so broad a spectrum of groups is an important index of secular effect" (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981))).

223. *Id.* at 397 n.7, 398.

224. *Id.* at 399 (recognizing that "the means by which state assistance flows to private schools is of some importance" because "'the fact that aid is disbursed to parents rather than to . . . schools' is a material consideration in Establishment Clause analysis, albeit 'only one among many to be considered'" (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 781 (1973))); *see also* Mitchell v. Helms, 530 U.S. 793, 814 (2000) (plurality opinion) ("When such an incentive does exist, there is a greater risk that one could attribute to the government any indoctrination by the religious schools.").

225. *Mueller*, 463 U.S. at 399–400 ("The historic purposes of the 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 the neutrally available tax benefit at issue in this case."); *see also Mitchell*, 530 U.S. at 810 ("For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment. Private choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program . . . .").

226. *Mueller*, 463 U.S. at 399.

jurisprudence, providing little guidance to governments offering such aid and promoting inconsistencies in subsequent court rulings.[227]

Nineteen years after the Court's ruling on tax deductions, the Court for the first time considered whether voucher programs violate the Establishment Clause. In *Zelman v. Simmons-Harris*,[228] the plaintiffs challenged an Ohio law that authorized implementation of a voucher program in Cleveland as a response to the academic crisis in the Cleveland City School District.[229] The voucher program included tuition aid for kindergarten through eighth-grade students in Cleveland to attend a private school or a public school other than the Cleveland City School District.[230] Students from families 200% below the poverty line were eligible to receive 90% of the private school tuition, but not more than $2,250, while other students could receive 75% with a cap of $1,875.[231] Parents were issued a check and given the freedom to use this tuition aid at sectarian or non-sectarian schools.[232] Sectarian schools made up 82% of the private schools participating in the program and 96% of the participating students used their tuition at sectarian schools during the 1999-2000 school year.[233]

The Court's analysis focused on the second prong of the *Lemon* test because the program had a clear secular purpose of providing

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227. *See id.* at 401 ("We 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. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled-under a facially neutral statute-should be of little importance in determining the constitutionality of the statute permitting such relief."). Additionally, the Court found that the tax deduction program did not create excessive entanglement even though state officials might have had to continuously examine textbooks used in sectarian schools to ensure that deductions were not taken for sectarian textbooks. According to the Court, such monitoring would not differ from those presented in prior cases where the Court already upheld state loans of textbooks to sectarian school parents. *See id.* at 403 (citing Wolman v. Walter, 433 U.S. 229, 233, 236–38 (1977); Meek v. Pittenger, 421 U.S. 349, 359–62 (1975), *overruled by Mitchell*, 530 U.S. 793; Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 238 (1968)).

228. 536 U.S. 639 (2002).

229. *Id.* at 643–44, 647; *see also id.* at 644 (showing that Cleveland public schools continuously appear on the list of worst performing public schools in the country).

230. *Id.* at 645.

231. *Id.* at 646.

232. *Id.* (explaining that the program also included tutorial aid for those students who opted to stay in the Cleveland City School District).

233. *Id.* at 647.

educational support to low-income families.[234] Under the second prong, the Court applied the private-choice principle as well as the neutrality principle to the voucher program.[235] The Court determined that, under the program, sectarian schools received tuition aid only because parents exercised true independent private choice with no financial incentive in the program nudging parents toward sectarian schools.[236] Indeed, if students used their vouchers at a public school, that school got two to three times the tuition aid of a private school, creating a disincentive for parents to use the voucher at any private school.[237] Moreover, while parents who used the voucher at private schools had to copay at least part of the private school tuition, those using the voucher at public schools did not, posing a further disincentive to choose sectarian schools.[238] The program also gave parents the opportunity to make a truly independent choice about where to use the money among a variety of schools, including participating public schools, secular private schools, sectarian schools, or simply staying in the Cleveland City School District.[239]

Besides satisfying the private-choice principle, the voucher program satisfied the neutrality principle because it was made available to a broad class of recipients defined without respect to religion.[240] Accordingly, the Court concluded that the presence of the government aid at the sectarian schools could not be attributed to the government, but rather to private individuals; thus, the aid could not be regarded as direct subsidies, which are constitutionally prohibited.[241] Whereas earlier cases, such as *Witters*, found the

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234. *Id.* at 649.

235. *Id.*

236. *Id.* at 653–54, 662; *see also id.* at 653–54 ("Such incentives '[are] not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.' The program here in fact creates financial disincentives for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools." (citations omitted)).

237. *Id.* at 654.

238. *Id.*

239. *Id.* at 655 (noting that parents could also opt to send their children to magnet or charter schools).

240. *Id.* at 662–63.

241. *Id.* at 649, 653–55; *see* Mitchell v. Helms, 530 U.S. 793, 816 (2000) (plurality opinion) ("If aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'" (citing Witters v. Wash.

proportion of aid used at sectarian schools consequential to Establishment Clause analysis, *Zelman* found the proportion of aid inconsequential.[242] The Court echoed its decision in *Mueller*, explaining that decisions on the constitutionality of government aid would be unpredictable if the legal fate of vouchers were tied to either the fluctuating numbers of people using vouchers at sectarian schools, or the number of sectarian schools benefitting from vouchers.[243] According to the Court, such a link would lead to absurd results:

> Indeed, by all accounts the program has captured a remarkable cross-section of private schools, religious and nonreligious. It is true that 82% of Cleveland's participating private schools are religious schools, but it is also true that 81% of private schools in Ohio are religious schools. To attribute constitutional significance to this figure, moreover, would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are religious schools, but not in inner-city Cleveland, where Ohio has deemed such programs most sorely needed, but where the preponderance of religious schools happens to be greater.[244]

Furthermore, the Court rightly stated that if one accounted for student enrollment in all the schooling options, such as magnet

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Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986))); *see also* Agostini v. Felton, 521 U.S. 203, 225 (1997) ("[W]e have departed from the rule . . . that all government aid that directly assists the educational function of religious schools is invalid."); *cf. Mitchell*, 530 U.S. at 815–16 (stating that, in 2000, government aid jurisprudence focused primarily on private choice and neutrality rather than on whether aid was a direct or an indirect subsidy).

242. *Zelman*, 536 U.S. at 650, 658; *see also* Jackson v. Benson, 578 N.W.2d 602, 615 n.12 (Wis. 1998) (highlighting that the Court's previous decisions held that the proportion of aid used at sectarian schools is inconsequential to Establishment Clause analysis).

243. *Zelman*, 536 U.S. at 650–51, 656–59, 659 n.5. The Supreme Court of Ohio upheld the Cleveland program against a federal Establishment Clause challenge for the same reasons as the United States Supreme Court. Simmons-Harris v. Goff, 711 N.E.2d 203, 207–11 (Ohio 1999). Additionally, the Supreme Court of Ohio interpreted the state's compelled support clause in accord with the federal Establishment Clause and adopted the *Lemon* test for its analysis. *Id.* at 211–12. This compelled support clause provision states that "[n]o person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent." OHIO CONST. art. I, § 7. Based on the *Lemon* test, the court ruled that the voucher program did not violate the compelled support clause. *Goff*, 711 N.E.2d at 211–12 (citing Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)).

244. *See Zelman*, 536 U.S. at 657–58 (citations omitted) ("Likewise, an identical private choice program might be constitutional in some States, such as Maine or Utah, where less than 45% of private schools are religious schools, but not in other States, such as Nebraska or Kansas, where over 90% of private schools are religious schools.").

schools, charter schools, and tutorial aid, for Cleveland City School District students, the proportion of students in sectarian schools would fall from 96% to 20%.[245]

The *Zelman* decision was hailed as a historic decision for school-choice advocates. As Professor Frank Kemerer observed, "[v]oucher proponents consider *Zelman v. Simmons-Harris* to be in the same league as *Brown v. Board of Education.*[246] By enabling parents to use public money to choose the schools their children attend, advocates say, the Court has liberated low-income parents much as it liberated black children in 1954."[247] Although the *Zelman* decision is not a *Brown*-scale bellwether of civil rights, it has parallels to *Brown* in that the Court reversed prior courts as it did in *Brown*, which reversed *Plessy v. Ferguson.*[248] In *Zelman*, the Court effectively abandoned its ruling in *Nyquist* that government programs that offer benefits for sectarian purposes cannot be justified by the parents-as-circuit-breakers rationale[249] and its ruling that such programs "cannot be squared with the principle of neutrality."[250] Yet, in *Zelman*, the Court claimed that *Nyquist* was distinguishable because, in contrast to the program in *Zelman*, the *Nyquist* program provided aid only to private schools and private school parents. Further, the program was designed to help struggling sectarian schools.[251] In essence, the Court found that, unlike the *Zelman* program, the *Nyquist* program failed to make funds generally available in its quest to assist struggling sectarian schools.[252] Instead, the *Nyquist* program accorded regard to the public/nonpublic and sectarian/non-sectarian nature of the

245. *Id.* at 659; *cf. id.* at 647 (discussing the 96% enrollment). The Court castigated the plaintiffs for not accounting for the fact that the increase in students' sectarian use of vouchers from 78% in the 1997–98 school year to 96% in the 1999–2000 school year was due to two secular private schools that had comprised 15% of voucher students opting to become charter schools; thus, pulling out of the voucher program. *Id.* at 659–60.

246. 347 U.S. 483 (1954).

247. Kemerer, *supra* note 9.

248. *See* Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) (defining the key aspect of the majority's opinion as "separate but equal"). *But see* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (denouncing the concept of "separate but equal").

249. *See Zelman*, 536 U.S. at 661–62; Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780–83, 787–88 (1973).

250. *Nyquist*, 413 U.S. at 792–93.

251. *Zelman*, 536 U.S. at 661.

252. *Id.* at 661–62.

school benefitting from the program in violation of the newly-minted approach to religious neutrality—the neutrality principle.[253]

The *Lemon* test, including the neutrality principle and the private-choice principle, has become a staple of Establishment Clause jurisprudence and a guide to decisions in federal and state courts on the Establishment Clause. Plaintiffs sometimes look to state courts for their Establishment Clause claims, particularly when they also have state constitutional claims. The general feeling that the Supreme Court provides plaintiffs with less recourse for Establishment Clause claims has contributed to the flocking of challengers to the state courts, especially with the neutrality and private-choice principles effectively endorsing well-designed government aid programs. In spite of what seems like a grim future for Establishment Clause plaintiffs challenging government aid programs, plaintiffs still bring Establishment Clause claims in state court in hopes that a state court would invalidate the program. This might be a wise decision because the Supreme Court only accepts a minute percentage of cases for review. In the next section, this Article examines state court Establishment Clause decisions.

3. Establishment Clause challenges in state courts

State courts play a significant role in interpreting the United States Supreme Court's Establishment Clause jurisprudence and, consequently, the validity of their state's aid programs under the Establishment Clause. Thus, it is essential to review the Establishment Clause aid jurisprudence in state courts. State courts might also review Establishment Clause claims where the United States Supreme Court has refused to. For instance, while the Supreme Court ruled on taxpayer standing for tax credit programs in *Winn*, it did not address whether such programs violate the Establishment Clause.[254] The Supreme Court of Arizona, however, considered this issue in *Kotterman v. Killian*.[255]

Kotterman involved an Arizona program that provided up to $500 in annual tax credits for contributions to student tuition organizations (STOs) that offered students scholarships to private schools, including sectarian schools.[256] Pursuant to the *Lemon* test, the

253. *Id.*

254. Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 136–37.

255. 972 P.2d 606 (Ariz. 1999) (en banc).

256. Unlike in *Winn*, the $500 maximum applied to both individuals and married couples. *Compare Winn*, 563 U.S. at 130, *with Kotterman*, 972 P.2d at 609. Married couples filing joint tax returns could claim up to $500, and those filing separately

Arizona Supreme Court found that the tax credit program had at least two secular purposes: (1) provision of educational options to students and (2) support for the continued viability of private schools to ensure quality education.[257]

Moreover, the court ruled that tax credits are not constitutionally distinct from the tax deduction the U.S. Supreme Court upheld in *Mueller*.[258] As with the U.S. Supreme Court's tax deduction neutrality-principle ruling in *Mueller*, the Arizona Supreme Court in *Kotterman* found that the State's tax credit was one of many tax benefit options for taxpayers in the statutory scheme.[259] Additionally, the tax credits here were generally available to a broad class of recipients defined without regard to religion, as the tax deductions were in *Mueller*.[260] Indeed, any taxpayer could take advantage of the tax credit, irrespective of whether the taxpayer had a child in school, as long as the taxpayer donated to an STO.[261]

The tax credit program also satisfied the private-choice principle.[262] The mediating private choices that the Arizona Supreme Court found sufficient to preclude state imprimatur of religion included the taxpayer's choice to donate to an STO, the taxpayer's choice on amount to donate to an STO, the taxpayer's choice to take advantage of the tax credit, the decision of individual parents to select the STOs they donate to, the choice of individual parents to apply for STO scholarships, and the choice of individual parents to use the scholarships at sectarian schools.[263] These same mediating private choices forestalled a finding of excessive entanglement because, according to the court, the government was relegated to an "entirely passive" role in a system run by taxpayers, parents, and STOs.[264]

While the tax credit program might not create an incentive to select sectarian schools, the court conceded that it could incentivize taxpayers to donate to STOs: "This tax credit may provide incentive

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could claim up to $250 each. *Kotterman*, 972 P.2d at 609. Additionally, where a taxpayer qualified for a tax credit that was more than taxes owed, he could use the remaining credit each subsequent year for up to five years. *Id.* at 610.

257. *Kotterman*, 972 P.2d at 611–12.

258. Mueller v. Allen, 463 U.S. 388, 394–400 (1983); *Kotterman*, 972 P.2d at 612.

259. *Kotterman*, 972 P.2d at 613; *Mueller*, 463 U.S. at 396.

260. *Kotterman*, 972 P.2d at 613; *Mueller*, 463 U.S. at 397.

261. *Kotterman*, 972 P.2d at 613 ("Arizona's class of beneficiaries is even broader than that found acceptable in *Mueller*, and clearly achieves a greater level of neutrality.").

262. *Id.* at 616.

263. *Id.* at 614.

264. *Id.* at 616.

to donate, but there is no arm twisting here. Those who do not wish to support the school tuition program are not obligated to do so. They are free to take advantage of a variety of other tax benefits, or none at all."[265] The STOs thus provided the bridge between the tax credit program and the sectarian schools, creating mediating private roles that precluded attribution of the ultimate sectarian school benefit to the government.[266] Furthermore, similar to the Court's holding in *Mueller* regarding tax deductions, the Supreme Court of Arizona refused to base its tax credit decision on the number of taxpayers taking advantage of the tax credit or the number of STO-scholarship recipients choosing to use their scholarships at sectarian schools.[267]

As evident above, when plaintiffs bring Establishment Clause cases, they generally seek to preclude the participation of sectarian schools in government aid programs.[268] In *Bagley v. Raymond School Department*,[269] however, the Supreme Judicial Court of Maine confronted a different question: whether the Establishment Clause actually requires *inclusion* of sectarian schools in government aid programs.[270] The Maine tuition program required school districts without secondary schools to pay tuition for students to attend private schools or other public schools.[271] Under the program, the tuition was paid directly to the school.[272] Sectarian schools were excluded from participation in the program to assure compliance with the Establishment Clause.[273] The court ruled that the Establishment Clause has no applicability when government chooses *not* to aid

265. *Id.* at 615. The court also concluded it was immaterial that the challenged tax credit program did not include public schools for eligible STO contributions. The court arrived at this conclusion particularly because the local public schools do not require scholarships or tuition payments and partly because there was another statute that allowed tax credits for extracurricular expenses at public schools. *Id.* at 616.

266. Moreover, the court ruled that sectarian schools were "no more than indirect recipients of taxpayer contributions, with the final destination of these funds being determined by individual parents." *Id.* at 614. Consequently, "[t]he decision-making process is completely devoid of state intervention or direction and protects against the government 'sponsorship, financial support, and active involvement' that so concerned the framers of the Establishment Clause." *Id.* at 614 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

267. *See* Mueller v. Allen, 463 U.S. 388, 397–98 (1983); *Kotterman*, 972 P.2d at 614.

268. *See, e.g.*, Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 130–32 (Me. 1999).

269. 728 A.2d 127 (Me. 1999).

270. *Id.*

271. *Id.* at 130.

272. *Id.*

273. *Id.* at 130–31.

sectarian purposes.[274] As the court noted, the Establishment Clause imposes no obligation on the State to provide government aid to make one's exercise of religion easier or more accessible.[275] Instead, the Establishment Clause only precludes the government from aiding, rather than refusing to aid, sectarian purposes.[276]

Another case in which a state court considered an Establishment Clause challenge against a government aid program was *Alabama Education Ass'n v. James*.[277] In that case, the Supreme Court of Alabama upheld a student grant program against an Establishment Clause challenge.[278] The program paid direct grants to private post-secondary schools in support of students' education; however, the grants could not be used at pervasively sectarian schools or for sectarian purposes.[279] The program had a secular purpose under the *Lemon* test because it was designed to ensure thriving, quality private schools; support private choice of schools and narrow cost gaps between public and private schools.[280] Furthermore, the court ruled that since the grant was generally available to all qualified students and all qualified institutions, it satisfied the second prong of the *Lemon* test; accordingly, sectarian institutions did not have to be "quarantined" from the grants.[281] Based on the character of the recipient schools, the government aid program was also upheld under the excessive-entanglement prong: unlike primary and secondary schools, post-secondary schools have less impressionable

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274. *Id.* at 136.

275. *Id.*

276. *Id.* The U.S. Court of Appeals for the First Circuit held similarly in upholding the Maine tuition program in a different case when it ruled,

> [W]e are at a loss to understand why plaintiff-appellants believe that the Establishment Clause gives them a basis for recovery. The Establishment Clause forbids the making of a law respecting the establishment of any religion. There is *no* relevant precedent for using its negative prohibition as a basis for extending the right of a religiously affiliated group to secure state subsidies.

See Strout v. Albanese, 178 F.3d 57, 64 (1st Cir. 1999); *see also id.* at 60–64 (discussing the court's Establishment Clause analysis).

277. 373 So. 2d 1076 (Ala. 1979).

278. *Id.* at 1079.

279. *Id.* at 1078.

280. *See id.* at 1079; *see also* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

281. *James*, 373 So. 2d at 1079–80 (citing Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 745–46 (1976) (plurality opinion)). The court also found that the program satisfied the second prong because grants did not go to pervasively sectarian schools. *Id.* at 1080.

students, creating a less urgent need for government monitoring of sectarian influences of the aid.[282]

What is evident from these state cases is that the private-choice and neutrality principles effectively present a near death knell to Establishment Clause claims in state courts, as well as in federal courts. It also amplifies the importance of plaintiffs' incorporating other constitutional claims in any challenge to government aid programs. The next section of this Article examines one of those potential challenges—Free Exercise Clause claims.

C. Free Exercise Clause Challenges

In order to establish that government action violates the Free Exercise Clause, four conditions must be established: (1) the plaintiff's religious belief is sincerely held, (2) the government action creates a substantial burden on the plaintiff's ability to fulfill a central religious belief or practice, (3) the government has no compelling interest justifying the burden, and (4) the least restrictive means to the compelling interest is the government action.[283] However, as evidenced by the cases analyzed below, courts do not consistently apply all four conditions.[284]

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282. *Id.*; *cf.* Strout v. Albanese, 178 F.3d 57, 63 (1st Cir. 1999) ("The historic barrier that has existed between church and state throughout the life of the Republic has up to the present acted as an insurmountable impediment to the direct payments or subsidies by the State to sectarian institutions, particularly in the context of primary and secondary schools." (citing Tilton v. Richardson, 403 U.S. 672, 684–87 (1971) (plurality opinion))).

283. Hernandez v. Comm'r, 490 U.S. 680, 699 (1994); Murphy v. Arkansas, 852 F.2d 1039, 1041 (8th Cir. 1988); *see also* Anderson v. Town of Durham, 895 A.2d 944, 959 (Me. 2006) ("A burden upon religion exists when 'the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" (quoting Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 717–18 (1981)).

284. *See, e.g.*, *Hernandez*, 490 U.S. at 699 (applying two of the four compelling interests); *cf.* Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 133 (Me. 1999). It is also critical to keep in mind that a program "that is neutral and of general applicability need not be justified by a compelling governmental interest, even if the law has the incidental effect of burdening a particular religious practice." *Anderson*, 895 A.2d at 958 (citing Emp't Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879–80 (1990); Goodall v. Stafford Cty. Sch. Bd., 60 F.3d 168, 171 (4th Cir. 1995)).

1. Free Exercise Clause challenges in the United States Supreme Court

In *Locke v. Davey*,[285] the Supreme Court considered whether preventing students from using government aid for a sectarian degree violates the Free Exercise Clause.[286] The case involved a Washington state program that offered scholarships from the state's general funds to ease gifted students' educational financial burdens.[287] Students could use the scholarship at either public or private schools.[288] The program, however, prohibited students from using the scholarship for a theology degree at any school.[289] The scholarship funds were distributed from the State to the school and then to the student.[290] The plaintiff opted to use his scholarship toward a degree in pastoral ministries and another in business management; his sectarian college, however, declined to release funds to him for the pastoral ministries degree, prompting the lawsuit challenging the scholarship program's interdiction of funds for a theology degree.[291]

Finding no animus against religion in the program's exclusion of government aid for the theology degree, the Supreme Court ruled that the exclusion did not violate the Free Exercise Clause.[292] In fact, as the Court observed, the program allowed students to use their scholarships at sectarian schools.[293] Consequently, the exclusion imposed a minimal burden on students.[294] Further, the State had a substantial interest in the exclusion given its intent to avoid the possibility of an Establishment Clause violation.[295] This was a heightened concern echoed in the state's constitution because it, like those of many other states, prohibits use of taxpayer funds for sectarian purposes.[296] Moreover, these state constitutional

285. 540 U.S. 712 (2004).
286. *Id.* at 715.
287. *Id.*
288. *Id.* at 716.
289. *Id.* (noting that "the statute simply codifies the State's constitutional prohibition on providing funds to students to pursue degrees that are devotional in nature or designed to induce religious faith"); *see* WASH. CONST. art. I, § 11. The participating schools were required to verify that the scholarship student was not there for a theology degree. *Locke*, 540 U.S. at 717.
290. *Locke*, 540 U.S. at 717.
291. *Id.* at 717–18. The pastoral ministries degree was indubitably a theology degree. *Id.* at 717.
292. *Id.* at 725.
293. *Id.* at 724.
294. *Id.* at 725.
295. *Id.* at 722, 725.
296. *Id.* at 723.

prohibitions resulted from a desire to address fears of establishment of religion through government support—fears that prevailed during the nation's founding and underlie the Establishment Clause.[297] What *Locke* makes clear is that the Supreme Court is not opposed to exclusion of sectarian schools from government aid programs; and the Free Exercise Clause is not necessarily a viable vehicle for those seeking to mandate inclusion of sectarian schools in government aid programs unless the exclusion imposes a substantial burden on the sectarian schools. Even with the Supreme Court ruling on government aid programs under the Free Exercise Clause, state courts often take on the role of interpreting and applying the Supreme Court's Free Exercise Clause jurisprudence to their state aid programs. The next section of this Article discusses Free Exercise Clause cases in state courts.

2. Free Exercise Clause challenges in state courts

One of the questions presented to the Supreme Judicial Court of Maine in *Bagley*, discussed earlier, was whether the exclusion of sectarian schools from the Maine tuition program violated the Free Exercise Clause.[298] Recall that the program required school districts with no secondary schools to pay the tuition of students who chose to attend private schools or other public schools.[299] The plaintiffs claimed that the program burdened their fundamental right to educate their children in sectarian schools.[300] The Supreme Judicial Court of Maine found that, even though one of the plaintiffs established a sincerely held religious belief, none proved that sectarian education was a central religious belief.[301]

Further, the court ruled that the government does not violate the Free Exercise Clause simply by making it more expensive to fulfill a religious belief or practice.[302] The Maine tuition program did not bar or restrict parents from sending their children to sectarian schools; it only

297. *Id.* at 721–23.

298. Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 133, 135 (Me. 1999); *see supra* notes 268–76 and accompanying text.

299. *Bagley*, 728 A.2d at 130.

300. *Id.* at 133.

301. *Id.* at 134; *see infra* Section II.C. In its Free Exercise Clause analysis, the Supreme Judicial Court of Maine conceded that the judiciary must exercise judicial restraint in determining the centrality of a person's religious belief as there are few clear guidelines available for such determinations; as such, the court only conducted a cursory analysis on this issue. *Bagley*, 728 A.2d at 134.

302. *Bagley*, 728 A.2d at 134 (citing Goodall v. Stafford Cty. Sch. Bd., 60 F.3d 168, 171 (4th Cir. 1995); Braunfeld v. Brown, 366 U.S. 599, 605 (1961)).

made it more expensive for parents who chose to send their children to such schools and paid out-of-pocket without the benefit of the tuition program.[303] As the court aptly observed, "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."[304] Accordingly, the court held that the Free Exercise Clause did not require the Maine tuition program to fund sectarian education.[305]

The Supreme Judicial Court of Maine reaffirmed this holding in *Anderson v. Town of Durham*[306] after certain parents asked the court to reconsider its *Bagley* decision in light of the intervening Supreme Court decisions in *Zelman* and *Locke*.[307] The Supreme Judicial Court of Maine noted, however, that *Zelman* and *Locke* actually reinforced its *Bagley* decision.[308] As the court observed, the Maine tuition program simply barred government funding of sectarian school choice.[309] There was no evidence that the plaintiffs' exercise of their religion was burdened, for they failed to show that the government aid program pressured them to change their beliefs; penalized them for conduct required by their faith; or prohibited them from attending secular schools in violation of their faith.[310] Besides, the court ruled, a government aid program "does not lose its neutrality and become subject to strict scrutiny simply because it precludes state funding of a religious educational choice."[311]

For those seeking to challenge government aid in state courts under the Free Exercise Clause, the key lesson from state court treatment of such challenges can be summed up as follows: "[t]he fact that government cannot exact from [a citizen] a surrender of one iota of [her] religious scruples does not, of course, mean that

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303. *Bagley*, 728 A.2d at 135.

304. *Id.* at 134–35. For the reasons given by the *Bagley* court, the U.S. Court of Appeals for the First Circuit upheld the Maine tuition program against a Free Exercise Clause challenge in *Strout v. Albanese*. 178 F.3d 57, 68 (1st Cir. 1999).

305. *Bagley*, 728 A.2d at 135.

306. 895 A.2d 944 (Me. 2006).

307. *Id.* at 947–49, 959; *supra* notes 209–35 and accompanying text.

308. *Anderson*, 895 A.2d at 958–59 (holding that *Zelman* allowed the legislature to extend tuition funding to sectarian schools and that *Locke* recognized that states may have discretion not to fund sectarian schools even if a choice to fund religious education indirectly might not violate the Establishment Clause).

309. *Id.* at 959.

310. *Id.*; *see also* Chittenden Town Sch. Dist. v. Dep't. of Educ., 738 A.2d 539, 563 (Vt. 1999) (finding that a program does not violate the Free Exercise Clause if one is not forced into a choice between following religious beliefs and foregoing government benefits).

311. *Anderson*, 895 A.2d at 959.

[she] can demand of government a sum of money, the better to exercise them."[312] With little room for success with the Establishment Clause and Free Exercise Clause, plaintiffs sometimes turn to the Equal Protection Clause or include it as part of their Free Exercise Clause claim when raising concerns about government aid to sectarian schools. The next section examines Equal Protection Clause cases challenging government aid to sectarian schools.

D. Equal Protection Clause Challenges

The Maine tuition program was also challenged in *Bagley* as violating the Equal Protection Clause for its exclusion of sectarian schools.[313] The Supreme Judicial Court of Maine characterized the plaintiffs' Equal Protection challenge as "somewhat unusual" because the plaintiffs did not claim that their children were denied education available to others on the basis of their religion; rather, they claimed that the program failed to fund their sectarian school choice.[314] The court reviewed the program using the strict scrutiny standard, which requires that, when a fundamental right is infringed or a suspect classification is involved, courts must scrutinize the government action to determine if it is narrowly-tailored to a compelling government interest.[315] Government use of religious classifications in legislation, as well as infringement of the fundamental right to free exercise of religion, demands strict scrutiny.[316] As discussed in the

312. Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 134 (Me. 1999) (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

313. *Id.* at 136; *supra* notes 257–68 and accompanying text.

314. *Bagley*, 728 A.2d at 136. As the court noted, the parents had choices of other schools that would have been funded under the program, and they had more choices for schooling that were unavailable in districts with a public high school. Moreover, the plaintiffs acknowledged that there was no constitutional requirement that districts *with* public high schools pay for sectarian high school education, and the constitution did not bar the tuition program from paying only for public school education if the State opted for that choice. Thus, the plaintiffs' Equal Protection claim had a weak premise from the start. Additionally, the plaintiffs asserted rights of the sectarian school rather than their own. Nevertheless, the court decided to review the Equal Protection Clause claim because it presented a vital issue. *Id.*

315. *Id.* at 136–37; *see also* JOSEPH OLUWOLE, THE SUPREME COURT AND WHISTLEBLOWERS: TEACHERS AND OTHER PUBLIC EMPLOYEES 135–50 (2008) (discussing the history of the Court's Equal Protection Clause jurisprudence); Joseph O. Oluwole, *Revisiting* Parents Involved v. Seattle School District*: Race Consciousness and the Government-Speech Doctrine*, 43 GOLDEN GATE U. L. REV. 393, 410–11 (2013) (describing the Equal Protection Clause review framework).

316. *Bagley*, 728 A.2d at 137–38 (citing Emp't Div., Dep't Human Res. of Or. v. Smith, 494 U.S. 872, 886 n.3 (1990) (plurality opinion)) (explaining that when neither a fundamental right nor a suspect classification is involved, courts apply

previous section, the court ruled that the Maine tuition program did not implicate the fundamental right to free exercise of religion;[317] as such, the Free Exercise Clause was not violated.[318]

The court instead examined the tuition program as a religious classification under the strict scrutiny standard.[319] The state claimed that it had a compelling interest in excluding sectarian schools from the program in order to avoid an Establishment Clause violation.[320] In essence, the Equal Protection Clause violation hinged on whether inclusion of sectarian schools would indeed violate the Establishment Clause.[321] As the court observed, Maine had excluded religious schools from the challenged tuition program because its initial program, which provided direct payments to sectarian schools, included no measures to assure that payments would only serve secular purposes.[322] The challenged program likewise made direct payments to beneficiary secular schools and included no restrictions on the use of the funds;[323] therefore, inclusion of sectarian schools within such a program would violate Supreme Court Establishment Clause precedent.[324]

The court ruled that, even though the program allowed parents to choose schools, "*choice* alone cannot overcome the fact that the tuition program would directly pay religious schools for programs that include and advance religion."[325] Besides, with no restrictions on

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rational basis review, which requires a plaintiff to establish that the government action is not rationally related to a legitimate government interest); *see also* OLUWOLE, *supra* note 315, at 135–50; Oluwole, *supra* note 315, at 410–11 (describing rational basis review).

317. *Bagley*, 728 A.2d at 137.

318. *See supra* notes 257–69 and accompanying text.

319. *Bagley*, 728 A.2d at 137–38.

320. *Id.* at 138.

321. *Id.* ("If the exclusion of religious schools is not required by the Establishment Clause of the First Amendment, it must be struck down because the State offers no other reason for its existence. If the exclusion is required in order to comply with the Establishment Clause, the State will have presented a compelling justification for the disparate treatment of religious schools, and the parents' Equal Protection claim will fail." (citing Widmar v. Vincent, 454 U.S. 263, 271 (1981))).

322. *Id.* at 140. This exclusion decision by Maine was based on the United States Supreme Court's *Nyquist* decision, which found unconstitutional a government aid program that failed to include a mechanism for ensuring that government aid would also serve secular purposes. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 791 (1973).

323. *Bagley*, 728 A.2d at 143–44.

324. *Id.* at 144–45 (mentioning cases such as *Witters*, *Mueller*, and *Zobrest*); *see also supra* notes 100–80, 246–55 and accompanying text.

325. *Bagley*, 728 A.2d at 144 (emphasis added); *see also id.* at 144–45 ("The direct, substantial, and unrestricted nature of the financial benefit provided to a recipient

the use of the funds, including sectarian schools would have allowed those schools to "supplant" rather than "supplement" expenses they would otherwise be responsible for, creating a windfall.[326] Ergo, including sectarian schools would have a primary effect of advancing religion in violation of the *Lemon* test's second prong.[327] Including sectarian schools would also have created excessive entanglement with religion due to the pervasive religious character of some of the sectarian schools—the same character that caused the aid to violate the *Lemon* test's second prong.[328] The court observed that "[i]n the entire history of the Supreme Court's struggle to interpret the Establishment Clause it has never concluded that such a direct, unrestricted financial subsidy to a religious school could escape the strictures of the Establishment Clause."[329] Thus, Establishment Clause concerns certainly justified Maine's excluding sectarian schools from its program.

Even after the Supreme Court's *Zelman* decision post-*Bagley*, the U.S. Court of Appeals for the First Circuit echoed the Supreme Judicial Court of Maine's *Bagley* decision, ruling that the Maine tuition program could continue to exclude sectarian schools without

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school is starkly demonstrated by the record in this case."); *see also* Strout v. Albanese, 178 F.3d 57, 60–61 (1st Cir. 1999) ("[T]here is *no* binding authority for the proposition that the *direct* payment of tuition by the state to a private sectarian school is constitutionally permissible.").

326. *Bagley*, 728 A.2d at 145 ("According to the calculations of the Department of Education, if Cheverus [a sectarian school that would have benefited from the program] had been approved to receive tuition under the program, it could have received up to $5,379.63 per student, per year. The 1997–1998 tuition for a student attending Cheverus was $5,450. Thus, the tuition program would have covered almost the entire payment expected from parents. While the standard tuition payment at Cheverus does not cover the entire cost to the school per student, it does cover approximately 70% of those costs. That kind of direct cash aid from the State to a religious institution is neither the 'attenuated financial benefit' approved in *Mueller* nor 'aid that directly aids [only] the educational functions' approved in *Agostini*. . . . Full tuition payments to a religious school such as Cheverus would provide a direct, not attenuated, benefit and would directly aid the religious as well as the educational functions of the school."); *accord Strout*, 178 F.3d at 64 (noting that avoidance of an Establishment Clause violation provided a compelling interest under the strict scrutiny standard for Equal Protection Clause analysis).

327. *Bagley*, 728 A.2d at 145, 147.

328. The court noted that, even though the State required program beneficiaries to submit documents and reports to the State for review, an excessive entanglement determination could not be made based on this monitoring relationship because the record before the court was not fully developed on this issue. *Id.* at 146. The court acknowledged, however, an "appearance of . . . an excessive entanglement." *Id.*

329. *Id.* at 147.

violating the federal Constitution.[330] In *Eulitt v. Maine, Department of Education*,[331] the court ruled that *Zelman* did not change the fact that, for Equal Protection Clause claims, the right at issue is the fundamental right to free exercise of religion.[332] As the court stated, if this fundamental right or religious animus is not implicated, then only rational basis review applies, which would almost certainly guarantee the constitutionality of the program's sectarian-school exclusion.[333]

Because the program did not bar parents from choosing religious schools for their children, it did not substantially burden their religious beliefs or practices.[334] Accordingly, the fundamental right to free exercise was not implicated.[335] Moreover, the court rejected the appellants' argument that their right to practice their religious beliefs was substantially burdened because of the financial burden imposed on those attending sectarian schools compared to students that attended non-sectarian schools and were eligible for the state's tuition program.[336] As the court noted, there is no constitutional requirement that the government fund a parent's choice of a sectarian school in order to make the practice of the parent's religious beliefs easier.[337] The court ruled that governments could justify excluding sectarian schools from government programs by showing that the exclusion was grounded in an effort to avoid violating the Establishment Clause.[338]

To determine whether the Maine program violated the Establishment Clause, the court investigated the justification for excluding sectarian schools. The court found no religious animus in the program's exclusion of sectarian schools for the following

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330. Eulitt v. Me., Dep't of Educ., 386 F.3d 344, 346 (1st Cir. 2004). The court stated that *Zelman* "altered the landscape of Establishment Clause jurisprudence" in upholding a voucher program based on the neutrality principle and the private-choice principle. *Id.* at 348. Yet the court declared it "fairly debatable whether or not the Maine tuition program could survive an Establishment Clause challenge [after *Zelman*] if the state . . . allowed sectarian schools to receive tuition funds." *Id.* at 349.

331. 386 F.3d 344 (1st Cir. 2004).

332. *Id.* at 350–51, 353.

333. *Id.* at 350–51, 353, 355–56; *see id.* at 356 ("Like any other challenger confronting rational basis review, they must rule out every plausible rationale that might support the law at issue. Under the best of circumstances, this is a steep uphill climb for a plaintiff." (citations omitted)).

334. *Id.* at 354.

335. *Id.*

336. *Id.*

337. *Id.* (basing this conclusion on the Supreme Court's ruling in *Locke*); *see supra* notes 285–97 and accompanying text.

338. *Eulitt*, 386 F.3d at 355.

reasons: (1) the program included no criminal or civil penalty for following religious belief or practice; (2) the program did not preclude political participation on account of religious belief or practice; and (3) the program did not force people into a choice between adhering to religious belief or practice and receiving a government benefit—there was no evidence the plaintiffs' religious beliefs required them to educate their children in sectarian schools.[339]

Peter v. Wedl[340] was another case that involved an Equal Protection challenge to a government aid program.[341] In that case, parents of a severely disabled student filed suit after their local school district refused to provide him a full-time paraprofessional to support his educational needs at a sectarian school.[342] The district claimed that it followed state law, which clearly prohibited providing government-funded special education services at sectarian schools.[343] The U.S. Court of Appeals for the Eighth Circuit found that the state law prohibition violated the Equal Protection Clause because it "explicitly discriminated against" sectarian school students.[344] This discrimination, the court explained, was evident in the fact that the law only excluded sectarian school students while allowing government-funded services at secular private schools.[345]

In determining the constitutionality of the Minnesota program, the *Wedl* court was forced to assess the protections guaranteed by the Equal Protection Clause against the Establishment Clause's prohibitions. The court ruled that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[346] Because the law was facially discriminatory, the court reviewed whether it could be justified by the State's asserted compelling interest—prevention of an Establishment Clause violation.[347] In this regard, the court ruled that provision of special education services at a sectarian school presents no threat of an Establishment Clause violation in light of Supreme Court precedent such as *Zobrest*.[348] The problem with the court's reasoning

339. *Id.*
340. 155 F.3d 992 (8th Cir. 1998).
341. *Id.* at 994.
342. *Id.*
343. *Id.* at 994–95.
344. *Id.* at 996.
345. *Id.*
346. *Id.*
347. *Id.* at 996–97.
348. *Id.* at 997.

is that *Zobrest* merely held that government aid could be used to provide services at sectarian schools without violating the Establishment Clause.[349] It did not hold that the federal Constitution *requires* the government to provide aid to sectarian schools. As such, the *Wedl* court should not have used *Zobrest* as rationale to allow government aid at sectarian schools. The *Wedl* court seemed aware of the correct interpretation of the Supreme Court's *Zobrest* view even though it failed to apply it to the Establishment Clause part of its Equal Protection Clause analysis. Indeed, this awareness is evident in the court quoting a Supreme Court ruling that clearly weakens the *Wedl* court's *Zobrest* rationale:

> It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.[350]

Moreover, if we follow the *Wedl* decision to its logical end, then all government programs discussed in this Article that prohibited government aid to sectarian schools would be unconstitutional and based on "religious animus."[351]

Jackson v. Benson[352] was another case that considered an Equal Protection Clause challenge to a government aid program.[353] In that case, the Supreme Court of Wisconsin rejected the Equal Protection Clause challenge to the Milwaukee Parental Choice Program—the nation's first voucher program.[354] The NAACP argued that the voucher program would increase segregation within Milwaukee Public Schools, given the .disparate racial composition of the Milwaukee Public Schools relative to those of private schools likely to benefit from the voucher program.[355] The court pointed out that the NAACP presented no evidence showing that the voucher program

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349. *See supra* notes 196–201 and accompanying text.

350. *Wedl*, 155 F.3d at 1002 (citing Norwood v. Harrison, 413 U.S. 455, 462 (1973)). The court cited this Supreme Court statement in the section of the case focused on the plaintiffs' Free Exercise Clause claim, a claim the court chose not to rule on. *Id.* at 1002.

351. *Id.* at 998 (pointing to "the religious animus contained in [the] Minnesota Rule").

352. 578 N.W.2d 602 (Wis. 1998).

353. *Id.* at 609.

354. *Id.* at 630.

355. *Id.* at 631.

was created with discriminatory intent.[356] The NAACP also failed to present evidence that the participating private schools were discriminating on the basis of race.[357] Indeed, as the court noted, the voucher program expressly required participating private schools to comply with federal anti-discrimination laws.[358] It also required those schools to admit students based on random selection, further undermining the NAACP's racial discrimination claim.[359] While the court acknowledged that invidious racial intent could be implied in cases of disparate program impact on a specific race, there was no evidence in the record that the program had such an impact.[360] Accordingly, the NAACP's Equal Protection claim failed.[361]

As plaintiffs increasingly find little to no viable claims under the Federal Constitution against government aid programs, they often turn to state constitutional provisions, which often have clearer and sometimes more explicit prohibitions against government aid programs benefitting sectarian and secular private schools. State constitutional grounds for such claims are discussed in the next section of this Article.

III. STATE CONSTITUTIONAL ISSUES RELATED TO VOUCHERS AND TAX BENEFITS

After the Supreme Court's decision in *Zelman*, greenlighting voucher programs under the federal Constitution,[362] opponents of government aid programs looked to state constitutions to halt these programs.[363] This section examines state constitutional challenges against vouchers

356. *Id.*
357. *Id.* at 631.
358. *Id.*
359. *Id.*
360. *Id.* at 631–32.
361. *Id.* at 632.
362. *See supra* notes 228–45 and accompanying text.
363. Kemerer, *supra* note 9. Pertinent to this move by opponents to halt these programs is that at least 78% of private schools in the United States are sectarian schools. *Id.*

and tax benefits,[364] some being religion-based challenges under no aid clauses—sometimes referred to as Blaine Amendments.[365]

United States Senator James G. Blaine introduced the original Blaine Amendment during the forty-fourth Congress as a Constitutional amendment to prevent government funding of sectarian schools.[366] The amendment provided that

> [N]o money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.[367]

Some critics of the Blaine Amendment claim that, because it was proposed during a time of intense concerns about burgeoning Catholic education—an era in which government support of Protestant education was more generally acceptable—it was primarily grounded in "anti-Catholic animus."[368] As government aid continued

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364. Constitutional provisions in states, such as California, Colorado, Florida, Georgia, Montana, New York, and Oklahoma, prohibit direct and indirect government aid to sectarian schools, while the Michigan Constitution explicitly prohibits not only direct and indirect aid but also vouchers. *Id.* On the other hand, states, such as Massachusetts, have constitutional provisions that simply dictate that aid only go to public schools. *Id.*

365. *See* Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295, 295–96, 310 (2008) (noting that the "[f]unding of religious education violated nonestablishment in three ways, according to contemporaries: it violated rights of conscience to force one person to pay for another's religious instruction; it would bring about religious dissension over the competition for funds; and it would result in ecclesiastical control over public monies").

366. William P. Gray, Jr., *The Ten Commandments and the Ten Amendments: A Case Study in Religious Freedom in Alabama*, 49 ALA. L. REV. 509, 526–27 (1998). The Blaine Amendment was introduced in 1876, seven years after the Fourteenth Amendment's ratification. *Id.* at 526. It was intended to apply the Establishment Clause to the states, as the Fourteenth Amendment had not been interpreted at the time as applying the First Amendment to the states. Green, *supra* note 365, at 295; *see* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 256–58 (1963) (Brennan, J., concurring) (discussing the Religious Freedom Clause's application to the states based on the Framers' intent). In fairness, Senator Blaine's daughters attended Catholic school, his mother was Catholic, and he denied any anti-Catholic bigotry. Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 64 (2005).

367. Goldenziel, *supra* note 366, at 64 (citing Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 53 n.9 (1992)).

368. *See* Green, *supra* note 365, at 295, 315–16 ("Catholic requests for a share of the public school funds were fiercely opposed by public officials, educators, and Protestant leaders. Protestant nativists seized on the no-funding principle as a tool to maintain Protestant hegemony in the culture and the schools and used charges of papal designs to fuel anti-Catholic bigotry. The ensuing funding conflict resulted in

flowing to Catholic immigrants for Catholic school education, non-Catholics rallied against the funding, culminating in the Blaine Amendment.[369] The sponsors of the amendment saw it as "a political device designed to maintain (or regain) Republican political hegemony"[370] by rallying constituents, including Protestants, against an influx of immigrants—especially Catholics who were viewed as illiterate and uncultured.[371] After the amendment failed to pass in

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religious suspicion, acrimony, dissension, and violence in many eastern cities."); *cf.* Hollman, *supra* note 9, at 13–14, 16–18; Ellen Johnson, Panelist Statement, *School Choice: The Blaine Amendments & Anti-Catholicism*, U.S. COMM'N CIV. RIGHTS 23, 26, 29 (2007), http://www.usccr.gov/pubs/BlaineReport.pdf (disagreeing with the notion that the state amendments were driven by anti-Catholic animus). Justices Breyer, Souter, and Stevens, however, have recognized anti-Catholic animus as the origin of the Blaine Amendment:

> Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools. But the Protestant position on this matter, scholars report, was that public schools must be nonsectarian (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support sectarian schools (which in practical terms meant Catholic). And this sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for sectarian (i.e., Catholic) schooling for children.

Zelman v. Simmons-Harris, 536 U.S. 639, 721 (2002) (Breyer, J., dissenting) (internal quotation marks and citations omitted).

369. Goldenziel, *supra* note 366, at 63; Anthony R. Picarello, Jr., Panelist Statement, *School Choice: The Blaine Amendments & Anti-Catholicism*, U.S. COMM'N CIV. RIGHTS 5 (2007), http://www.usccr.gov/pubs/BlaineReport.pdf; *see also* Laycock, *supra* note 44, at 56–59 (observing that these anti-Catholic sentiments existed even around the time of the *Lemon* test and that many evangelicals who oppose the *Lemon* test today supported it at the time of its creation).

370. Green, *supra* note 365, at 322. A Blaine Amendment supporter characterized the Democratic Party, which opposed the amendment, as "the party of Rum, Romanism, and Rebellion." Laycock, *supra* note 44, at 52 (citation omitted).

371. Green, *supra* note 365, at 321–22; *see* Laycock, *supra* note 44, at 52 ("Badly tainted by anti-Catholicism, these debates produced instead a nativist Protestant victory over Catholic immigrants. There was only a pretense of neutrality; the end result sustained a Protestant establishment in the public schools at public expense, with no relief for religious minorities. Major Jewish groups responded with their long effort to secularize the public schools. Catholics continued their long effort to build and finance private schools. Anti-Catholicism continued; the most extreme achievement of the attack on Catholic schools was Oregon's law to close all private schools, struck down in 1925."); *see also* Richard D. Komer, Panelist Statement, *School Choice: The Blaine Amendments & Anti-Catholicism*, U.S. COMM'N CIV. RIGHTS, 31, 33–34 (2007), http://www.usccr.gov/pubs/BlaineReport.pdf (discussing the battle between Protestants and Catholics).

Congress,[372] some states opted to enact their own version of the amendment to protect their public school systems, prevent sectarian competition for government funds, and assure public fund integrity.[373] Besides being referred to as Blaine Amendments, these state amendments are sometimes called "Baby Blaines."[374]

In at least one case on record, plaintiffs have attempted to challenge a tax credit program under the federal Blaine Amendment. In *Kotterman v. Killian*, the Supreme Court of Arizona rejected the contention that the state's tax credit program was invalid pursuant to the federal Blaine Amendment for, as the court observed, the amendment failed to pass.[375] Moreover, even though several states have a provision similar to the Blaine Amendment, Arizona is not one of them. This further undermined the plaintiffs' credibility in a constitutional claim based on non-existent federal and state constitutional amendments.[376] Indeed, seemingly agitated by the plaintiffs' argument, as well as the entire Blaine Amendment historical narrative, the court characterized the Blaine Amendment

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372. Green, *supra* note 365, at 295–96. The Blaine Amendment passed in the House of Representatives but fell four votes short in the Senate. Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 38 (1992).

373. Wyoming's Blaine Amendment is unique because it prohibits use of government funds to support individuals and not just schools or institutions. As a result, it appears that the private-choice principle cannot even penetrate through the state's Blaine Amendment's strict language. *See* WYO. CONST. art. III, § 36 ("No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any *person*, corporation or community not under the absolute control of the State, nor to any denominational or sectarian institution or association." (emphasis added)).

374. *See* Goldenziel, *supra* note 366, at 61, 66–68 (noting that the actual number of Baby Blaines in existence is unknown because the term is often applied indiscriminately to state constitutional provisions that preclude funding for religious education in an effort to attach anti-Catholic bigotry to such provisions); *cf.* Komer, *supra* note 371, at 32 (explaining that Blaine Amendments are "provisions found in [thirty-seven] state constitutions that prohibit state and local governments from providing aid to 'sectarian' or religious institutions, particularly schools"); *Blaine Amendments*, THE BECKETT FUND FOR RELIGIOUS FREEDOMS, http://www.becketfund.org/blaineamendments-old/ (indicating thirty-seven states have Blaine Amendments); Anti-Defamation League, Additional Statement, *School Choice: The Blaine Amendments & Anti-Catholicism*, U.S. COMM'N CIV. RIGHTS, 47, 48, 53–54 (2007), http://www.usccr.gov/pubs/BlaineReport.pdf (identifying and tabulating thirty-eight states with Blaine Amendments as well as the dates of their adoption). What appears clear, however, is that "the state constitutions of all states established after 1876 contain Blaine Amendments." Komer, *supra* note 371, at 32.

375. 972 P.2d 606, 624 (Ariz. 1999) (en banc); *see supra* notes 255–67 (discussing *Kotterman v. Killian*).

376. *Kotterman*, 972 P.2d at 624.

as a "crusade" born of "religious bigotry" against Catholics with no applicability to the tax credit program.[377]

The next subsection of this Article examines cases that have addressed religion-based challenges to government aid programs, including those challenges under extant state Blaine Amendments—no aid clauses—and compelled support clauses.

A. Religion-Based Challenges

The *Kotterman* tax credit program was challenged under two religion clauses in the Arizona Constitution.[378] One clause provides that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment."[379] The other clause provides that "[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."[380] As mentioned earlier, the Supreme Court of Arizona has declared that the state has no Blaine Amendment; accordingly, these religion clauses are not Blaine Amendments.[381]

Additionally, the court held that the *Kotterman* tax credits did not constitute either public property or public money under either religion clause.[382] This is because no property or money came into government control under the tax credit program.[383] This fact keys the distinction between government expenditures and tax credits: while government expenditures involve money or property already in government control, tax credits do not.[384] The court rejected the

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377. *Id.*

378. *Id.* at 617. Note that, even though these two clauses do not read like the United States Constitution's Establishment Clause, the Supreme Court of Arizona has indicated that the state constitution's prohibition of government aid for sectarian purposes is not necessarily stricter than that of the Establishment Clause. *Id.* at 621–22. However, the Supreme Court of Arizona has also declared that

> *Kotterman* . . . [does] not compel us to interpret the [a]id [c]lause as a mirror image of the [r]eligion [c]lause or to interpret the [a]id [c]lause as no broader than the federal Establishment Clause. More importantly, both the text and purpose of the [a]id [c]lause support the conclusion that the clause requires a construction independent from that of the [r]eligion [c]lause.

Cain v. Horne, 202 P.3d 1178, 1182 (Ariz. 2009) (en banc); *see also id.* at 1182–83 (discussing the distinctions between Arizona's aid clause and its religion clause).

379. ARIZ. CONST. art. 2, § 12.

380. *Id.* art. IX, § 10.

381. *Kotterman*, 972 P.2d at 624.

382. *Id.* at 617–18.

383. *Id.*

384. *Id.* at 618–19.

State's assertion that it had "quasi-ownership" of taxpayer money claimed as tax credits because the money might have ended up in the state treasury.[385] Such an assertion, the court explained, is a dangerous proposition as it suggests that all taxpayer money or property that could be taxed constitutes state property; after all, all money or property could similarly end up in the state treasury based on this assertion.[386] The court refused to accept this assertion, however, as it threatened to effectively obliterate any distinction between private and public monetary ownership.[387] Accordingly, the court ruled that "[i]t is far more reasonable to say that funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed to the government, and upon which the state has a legal claim."[388]

Additionally, for the same reasons that the Supreme Court of Arizona rejected the characterization of tax credits as public money or property, it also ruled that tax credits do not constitute appropriations under either religion clause.[389] As a companion point, the court observed that only the legislature can appropriate public funds for the executive branch to use for a specified purpose.[390] In essence, an appropriation involves government spending, in contrast to a tax credit, which is a reduction in taxpayer liability and money that never enters public revenue.[391] Further, since the tax credits did not constitute appropriations, the tax credit program did not violate the second religion clause mentioned above, which makes it unconstitutional to appropriate public money to support any private school.[392] Also, since the tax credit was not a tax levy, the religion clause's prohibition of a tax levy to support private schools was inapplicable.[393]

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385. *Id.* at 618.

386. *Id.*

387. *Id.* at 617–20. The court declared, "For us to agree that a tax credit constitutes public money would require a finding that state ownership springs into existence at the point where taxable income is first determined, if not before. The tax on that amount would then instantly become public money." *Id.* at 618.

388. *Id.* at 618.

389. *Id.* at 618, 620.

390. *Id.* at 620.

391. *Id.*

392. *Id.* at 621.

393. *See id.* ("We cannot say that the legislature has somehow imposed a tax by declining to collect potential revenue from its citizens. Nor does this credit amount to the laying of a tax by causing an increase in the tax liability of those not taking advantage of it.").

The Supreme Court of Arizona likewise found that the tax credit program did not violate the first religion clause, which prohibits appropriation of public property or money for "any religious worship, exercise, or instruction, or to the support of any religious establishment."[394] In so holding, the court found that the tax credit program afforded parents, as taxpayers, ample choice over religious donations and where their children attended school.[395] This, the court reasoned, fulfilled the private-choice principle.[396] The terms of the program also satisfied the neutrality principle, further removing state imprimatur when sectarian schools benefitted from STO donations and attendant tax credits.[397]

Arizona's scholarship program for students with disabilities—Empowerment Scholarship Accounts, or "ESAs"—was challenged in *Niehaus v. Huppenthal*[398] for violating the state constitution's religion clause.[399] The program provided students with disabilities scholarships, worth up to 90% of the cost the State would have otherwise spent to educate the student at a public school, to attend private schools meeting certain curriculum standards.[400] As long as their children were on scholarship, parents were prohibited from enrolling their children in any public school and were required to release their local district from educational obligations to their children.[401] In its review of the program, the Arizona Court of Appeals interpreted the state's religion clause in line with the federal Establishment Clause jurisprudence.[402] Thereupon, the court ruled that, since parents had the exclusive choice of private schools for their children, any benefits flowing to sectarian schools were too attenuated to be attributable to government action.[403]

The court also determined that the program created neither a preference for sectarian schools over private schools, nor a preference for particular sectarian schools over others.[404] The court concluded that the program created no incentive to attend sectarian

394. ARIZ. CONST. art. 2, § 12.
395. *Kotterman*, 972 P.2d at 620.
396. *Id.*
397. *Id.*
398. 310 P.3d 983 (Ariz. Ct. App. 2013).
399. ARIZ. CONST. art. 2, § 12; *Niehaus*, 310 P.3d at 985.
400. *Niehaus*, 310 P.3d at 984. The parents could also use the scholarship for educational therapy services or tutoring. *Id.* at 984–85.
401. *Id.*
402. *Id.* at 986–87.
403. *Id.*
404. *Id.* at 987.

schools.[405] Indeed, because the program required participating parents to forfeit their children's rights to a public education and that the scholarship covered only 90% of the cost of public education, the program arguably provided a *disincentive* to choose private school education.[406] The court also found that the program satisfied the neutrality principle because it was generally available to students with special needs without defining recipients by religion.[407] Thus, based on the private-choice and neutrality principles, the court concluded that the program did not violate the state's religion clause.[408]

As with Arizona, Illinois' tax credit program was challenged as unconstitutional under the state constitution's religious provisions.[409] In pertinent part, the first religion clause provides that "[n]o person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship."[410] The second religion clause provides that

> Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, [or] academy . . . controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.[411]

Under the Illinois tax credit program, taxpayers could claim up to $500 for 25% of tuition, textbooks, and lab expenses for public or private school education.[412] The plaintiffs contended that the program violated both religion clauses because most of the qualified

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405. Because the absence of incentives suggested that parents made truly independent private choices in selecting schools for their children, the court also concluded that the program satisfied the private-choice principle. *Id.*

406. *See id.* at 984, 989 (setting forth the program requirements); *cf. id.* at 989 ("Parents are free to enroll their children in the public school or to participate in the ESA [Empowerment Scholarship Accounts]; the fact that they cannot do both at the same time does not amount to a waiver of their constitutional rights or coercion by the state.").

407. *Id.* at 987.

408. *Id.*

409. Griffith v. Bower, 747 N.E.2d 423 (Ill. App. Ct. 2001).

410. ILL. CONST. art. I, § 3.

411. *Id.* art. X, § 3.

412. *Bower*, 747 N.E.2d at 425.

beneficiary schools were sectarian.[413] Plaintiffs believed that the tax credit was a risky expenditure because the program did not limit sectarian schools' use of tuition, which they believed would lead to increased taxes.[414] The appellate court disagreed, ruling that the tax credits did not constitute an expenditure because they did not result in any money entering into state coffers.[415] Rather than constituting appropriations, taxpayers were simply allowed to "keep more of their own money."[416] Additionally, choosing to apply the *Lemon* test to its state's religion clauses, the court ruled that the tax credit satisfied both the private-choice principle and the neutrality principle.[417]

In *Toney v. Bower*,[418] Illinois' tax credit program was also challenged as unconstitutional under the state constitution's no aid clause, which provides that the government shall not "make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever."[419] The state allowed taxpayers to deduct 25% of their expenses between $250 and $500 for tuition, book, and lab fees as tax credits for each child younger than twenty-one years old enrolled at a public or private school.[420] The appellate court ruled that the tax credits did not constitute an "appropriation" or a "public fund" under the no aid clause.[421] The court characterized a public fund as government money or government revenue; an appropriation, the court defined, is the setting aside of money from government revenue for a particular purpose.[422] Tax credits, on the other hand, involve the government allowing taxpayers to keep more of the taxpayer's own money by authorizing the taxpayer to deduct a certain sum from his total tax obligation.[423] Since the tax credits never entered into the government's possession, the court ruled that they did not fall within the ambit of the no aid clause's prohibition.[424]

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413. *Id.* at 425–26.
414. *Id.* at 426.
415. *Id.*
416. *Id.*
417. *Id.*
418. 744 N.E.2d 351 (Ill. App. Ct. 2001).
419. ILL. CONST. art. X, § 3; *Toney*, 744 N.E.2d at 356.
420. *Toney*, 744 N.E.2d at 355.
421. *Id.* at 357–58.
422. *Id.*
423. *Id.* at 357.
424. *Id.*

The tax credit program was also challenged under Illinois' religion clause, which states that "[n]o person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship."[425] The appellate court ruled that this clause was the functional equivalent of the federal Establishment Clause, and its interpretation tracks the Supreme Court's Establishment Clause interpretation.[426]

Pursuant to the first prong of the *Lemon* test, the court found that the tax credit program had secular purposes: (1) adequate education for all students and (2) financial viability for private schools, as those schools mitigate the tax burden and state expenditure for educating private schools students in public schools.[427] Under the second prong, the court observed that the tax credits were generally available to taxpayers without definition by religion; additionally, sectarian schools merely received attenuated benefits from the tax credits because parents made a private, independent choice of schools.[428] Finally, the tax credit program satisfied the excessive entanglement prong because monitoring the program to ensure the legitimacy of tax credit claims was already standard practice for other tax credits and deductions in the state.[429]

The Supreme Court of Nebraska invalidated a government grant program in *State ex rel. Rogers v. Swanson*[430] that paid tuition for students to attend private schools.[431] The program was challenged under a constitutional provision that prohibits the State from making "any appropriation from any public fund . . . in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state."[432] Though the grant was paid to the student rather than the school, the court ruled that the program was simply a "conduit" for the funds to get to the schools.[433] After all, the program was created out of solvency concerns about private schools greatly below capacity in student enrollment.[434] For these reasons, the court ruled that the

425. ILL. CONST. art. I, § 3; *Toney*, 744 N.E.2d at 357.
426. *Toney*, 744 N.E.2d at 358–60.
427. *Id.* at 362.
428. *Id.*
429. *Id.* at 362–63.
430. 219 N.W.2d 726 (Neb. 1974).
431. *Id.* at 729.
432. *Id.* (quoting NEB. CONST. art. VII, § 11).
433. *Id.* at 730.
434. *Id.* at 730–31.

grant program constituted an unconstitutional appropriation of government funds in support of sectarian schools.[435]

In *Simmons-Harris v. Goff*,[436] previously discussed in this Article, the Supreme Court of Ohio upheld the Cleveland voucher program against constitutional challenge to the state's school funds clause.[437] This clause provides that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state."[438] The court found that sectarian schools participating in the voucher program did not have exclusive right to or control of the state's school funds, even though those schools received state funds under the voucher program.[439] The court reasoned that, because the sectarian schools only received the funds as a result of the private independent choices of parents, exclusive right or control of the funds could not be attributed to the government.[440] Besides, it was impossible under the program for funds to flow directly to the sectarian schools without the private, mediating choices of parents and students.[441]

Colorado's Douglas County School District's voucher program was challenged in *Taxpayers for Public Education v. Douglas County School District*[442] as unconstitutional under the state's no aid clause.[443] Colorado's clause is very similar to Illinois' clause:

> Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school [or] academy . . . controlled by any church or sectarian denomination whatsoever . . . .[444]

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435. *Id.* at 733.

436. 711 N.E.2d 203 (Ohio 1999).

437. *Id.* at 207. For a discussion of the Cleveland voucher program, see *supra* Section II.B.3.

438. OHIO CONST. art. VI, § 2.

439. *Goff*, 711 N.E.2d at 212.

440. *Id.*

441. *See id.* (interpreting the statute to hold that "no money can reach a sectarian school based solely on its efforts or the efforts of the state").

442. 351 P.3d 461 (Colo. 2015).

443. *Id.* at 466.

444. COLO. CONST. art. IX, § 7; *Douglas Cty. Sch. Dist.*, 351 P.3d at 470. The Supreme Court of Colorado refused to review this no aid clause as a Blaine Amendment despite the defendants' insistence. *Id.* at 471. The court, however, ruled that Colorado's no aid clause is more restrictive than the federal Establishment Clause. *Id.* at 474.

Douglas County School District created the Choice Scholarship Pilot Program to help district students pay to attend partnering private schools.[445] About 93% of voucher recipients attended sectarian schools and sixteen of the twenty-three partner schools were sectarian schools.[446] While partner schools could maintain their pre-existing admission standards, they were required to administer district assessment tests to their students.[447]

Despite their actual enrollment in private schools, voucher students were required to enroll in a nominal charter school, allowing the district to count the students in its total enrollment for purposes of receiving state funding.[448] The district kept 25% of its per pupil revenue from the state and remitted 75% to the private school in a check that the parent had to restrictively endorse to the school for tuition.[449] As the Supreme Court of Colorado pointed out, the voucher program was effectively "a recruitment program, teaming with various religious schools (i.e., the Private School Partners) and encouraging students to attend those schools via the inducement of scholarships."[450] As such, the voucher program did "support or sustain any school [or] academy . . . controlled by any church or sectarian denomination whatsoever" in contravention of the no aid clause's plain language.[451] Even though the voucher program incorporated parental private choice, the no aid clause's blanket prohibition of government aid to sectarian schools made private choice immaterial.[452] For the same reason, the court also found the direct or indirect nature of aid immaterial.[453]

The court found it troubling that the voucher program did not bar sectarian schools from profiting from the program by simply raising voucher students' tuition rates or lowering the students' financial aid by the voucher amount. The court's concern was merited because profiting would directly benefit a sectarian school and constitute support or sustenance of a sectarian school in violation of the no aid clause.[454] Additionally, the fact that the voucher program allowed

445. *Douglas Cty. Sch. Dist.*, 351 P.3d at 470.
446. *Id.* at 466.
447. *Id.* at 465.
448. *Id.* (emphasizing that the charter school had no curriculum, teachers, or buildings).
449. *Id.*
450. *Id.* at 470.
451. COLO. CONST. art. IX, § 7; *Douglas Cty. Sch. Dist.*, 351 P.3d at 470, 475.
452. *Douglas Cty. Sch. Dist.*, 351 P.3d at 470–71.
453. *Id.* at 470.
454. *Id.* at 471.

admission decisions to be based on religion and did not preclude funding of religious activities at schools, justifiably placed the Choice Scholarship Pilot Program on constitutionally-shaky ground.[455]

Besides no aid clauses, another basis for religion-based challenges in state constitutions are compelled support clauses. Compelled Support provisions are state constitutional provisions rooted in Thomas Jefferson's *Bill for Establishing Religious Freedom*, which was enacted into law in Virginia in 1786 with broad Protestant support and subsequently added to the state's constitution.[456] These provisions prohibit a state from compelling anyone to support or attend religious worship.[457]

The Supreme Court of Vermont invalidated a district's tuition reimbursement program under the state constitution's compelled support clause in *Chittenden Town School District v. Department of Education*.[458] The clause states in pertinent part that "no person ought to, or of right can be *compelled* to attend any religious worship, or erect or *support* any place of worship, or maintain any minister, *contrary to the dictates of conscience*."[459] Under the program, pursuant to state law, school districts without a high school could pay tuition for students to attend another school district's high school or a private school.[460] The state law did not mention anything about sectarian education and did not limit use of government funds under the program to secular purposes.[461] The Chittenden Town School District, however, allowed parents to choose a sectarian school as their children's private school.[462]

One of the beneficiaries of the district's program was a pervasively religious school where both students and teachers were heavily engrossed in the religious identity of the school.[463] Since the Chittenden Town School District did not restrict the beneficiary schools' use of the tuition reimbursement, pervasively religious schools could use the funds to support sectarian education.[464] After

455. *Id.* at 472.
456. Goldenziel, *supra* note 366, at 64–65.
457. *Id.*
458. 738 A.2d 539, 563–64 (Vt. 1999).
459. *Id.* at 547 (citing VT. CONST. ch. I, art. 3); *see also id.* at 562 ("[W]e see no way to separate religious instruction from religious worship. The limited record we have before us indicates that there is no line between these concepts.").
460. *Id.* at 542.
461. *Id.* at 545.
462. *Id.* at 542.
463. *Id.* at 542–43.
464. *Id.* at 545–46.

the state commissioner of education learned of the district's program, the district's state aid was cut off, prompting the district to bring suit seeking a court judgment that its program complied with the compelled support clause.[465] The court ruled that the district's failure to include safeguards or restrictions in the tuition program against the use of government aid for sectarian purposes doomed the program.[466] As the court noted, there was a real risk under the program that government aid would fund sectarian education, even pervasively sectarian education.[467] The court also ruled that the private-choice principle could not remedy this constitutional defect.[468]

The Supreme Court of Indiana upheld Indiana's voucher program—Choice Scholarship Program—against a compelled support clause challenge in *Meredith v. Pence*.[469] The clause provides that "no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent."[470] The program provided low-income families with vouchers that were capped at 90% of the tuition amount the public school would otherwise receive for the student.[471] Most of the participating private schools were sectarian schools.[472] Beyond requiring the participating private schools to meet minimum educational standards applicable to public schools, the program did not regulate the schools' religious activities or curricula.[473] The voucher payments were remitted to the school—after the school and parents endorsed the voucher—with no limits on the school's use of the funds.[474] The Supreme Court of Indiana cursorily dismissed the challenge, noting that the compelled support clause merely "prohibited government compulsion of individuals and was neither intended nor understood to limit government expenditures."[475]

The Indiana voucher program was also challenged under the state's no aid clause, which provides that "[n]o money shall be drawn from the

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465. *Id.* at 543.
466. *Id.* at 562–63.
467. *Id.*
468. *Id.* at 563. The court also signaled that, in analyzing its state constitution, it would not use the private-choice principle as it is used for the Federal Constitution's Establishment Clause. *Id.*
469. 984 N.E.2d 1213, 1216–17, 1219 (Ind. 2013).
470. IND. CONST. art. I, § 4; *Meredith*, 984 N.E.2d at 1225.
471. *Meredith*, 984 N.E.2d at 1219.
472. *Id.* at 1220.
473. *Id.* at 1219.
474. *Id.* at 1220.
475. *Id.* at 1226.

treasury, for the benefit of any religious or theological institution."[476] The court found that the voucher program satisfied the two-pronged review for determining if a government aid program violates the no aid clause: (1) whether the voucher program's expenditures are for benefits prohibited by the no aid clause and (2) whether eligible schools constitute "religious or theological institution[s]."[477]

A program fails the first prong if the government expenditure directly benefits a theological or religious institution.[478] If the government expenditure indirectly benefits the theological or religious institution, as happens when the government provides the institution police and fire services, the primary beneficiary is the general public or the segment of the general public associated with the institution.[479] Along this line of reasoning, the court ruled that "the principal actors and direct beneficiaries under the voucher program are neither the State nor program-eligible schools, but lower-income Indiana families with school-age children."[480] Chiefly, the court ruled that, pursuant to the private-choice principle, when a program authorizes parents to exercise independent private choice, the benefit to the school is indirect and incidental.[481]

Under the second prong, the court concluded that sectarian schools participating in the voucher program did not constitute "religious or theological institutions."[482] At the time the State adopted the no aid clause, sectarian schools were the primary avenues for primary and secondary education in Indiana.[483] Given their widespread nature, the court determined that the no aid clause could not have been "intended to prohibit government support of primary and secondary education which at the time included a substantial religious component."[484] In sum, since the voucher program satisfied the two-pronged review for determining violation of the no aid clause, it withstood the constitutional challenge.[485]

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476. IND. CONST. art. I, § 6.

477. *Meredith*, 984 N.E.2d at 1227.

478. *Id.*

479. *Id.* at 1227 ("To hold otherwise would put at constitutional risk every government expenditure incidentally, albeit substantially, benefiting any religious or theological institution.").

480. *Id.* at 1228.

481. *Id.* at 1228–29.

482. *Id.* at 1229–30.

483. *Id.* at 1230 ("It was generally accepted that the teaching of religious subject matter was an essential component of such *general* education." (emphasis added)).

484. *Id.*

485. *Id.*

The Supreme Court of Wisconsin upheld the Milwaukee Parental Choice Program against a religion-based constitutional challenge in *Jackson v. Benson.*[486] The program, designed to provide parental choice and non-sectarian private school education for low-income students in Milwaukee, was challenged under Wisconsin's version of the Establishment Clause, known as the benefits clause.[487] This clause states, "[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."[488] Under the Milwaukee Parental Choice Program, the State remitted checks directly to the private school of the parents' choice.[489] The parents were then required to endorse these checks, payable to the parents, to the school for their children's tuition.[490] For each participating student, the check was valued at the lesser of either the state aid per student for a Milwaukee Public Schools education, or the private school's actual educational cost per student.[491] The court dismissed the argument that this setup, involving a check payable to parents, was merely a "sham" to circumvent the unconstitutionality of direct payments to sectarian schools.[492] The court's explanation for rejecting this licit argument was deflecting, obviating, and vacuous of acute consideration: "In our assessment, the importance of our inquiry here is not to ascertain the path upon which public funds travel under the . . . program, but rather to determine who ultimately chooses that path."[493] Because the design of the program made the parents the ultimate choosers, the court found the Milwaukee Parental Choice Program constitutional.[494]

Relying on the primary-effects prong of the *Lemon* test, the Supreme Court of Wisconsin held that the voucher program did not violate the benefits clause.[495] Specifically, the court found that the sectarian schools received government funds only as a result of the private independent choices of parents who opted to send their

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486. 578 N.W.2d 602 (Wis. 1998).

487. *Id.* at 607, 610, 620.

488. WIS. CONST. art. I, § 18; *Jackson*, 578 N.W.2d at 620.

489. *Jackson*, 578 N.W.2d at 609, 618.

490. *Id.*

491. *Id.* at 609.

492. *Id.* at 618.

493. *Id.*

494. *See id.* at 618 (arguing that "not one cent flows from the State to a sectarian private school under the [Milwaukee Parental Choice Program] except as a result of the necessary and intervening choices of individual parents").

495. *Id.* at 620 (holding that the program "provides a neutral benefit directly to children of economically disadvantaged families on a religious-neutral basis").

children to the sectarian schools.[496] The program also satisfied the neutrality principle because the vouchers were generally available to low-income families in Milwaukee who were selected randomly for vouchers without regard to religion.[497] Moreover, with the exception of sibling preferences, participating private schools were required to randomly select students for admission irrespective of religion.[498]

In addition to the benefits clause, the Milwaukee voucher program was also challenged under the state's compelled support clause. Wisconsin's compelled support clause states, "[N]or shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent . . . ."[499] The plaintiffs argued that, under the voucher program, they were being forced to support worship places.[500] The court, however, found the element of compulsion missing, as the program did not force any parent to choose a sectarian school, any student to attend a sectarian school, or any student to take part in religious activities.[501]

Alabama's tax credit program was challenged as violating the state's establishment clause in *Magee v. Boyd*.[502] The clause states,

> That no religion shall be established by law . . . that no one shall be compelled by law to attend any place of worship; nor to pay any tithes, taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or ministry.[503]

The tax credit program, enacted in the Alabama Accountability Act, was comprised of two different forms of tax credit.[504] The first took the form of tax credits for parents of students attending failing public schools, allowing them to send their children to nonfailing public schools or private schools.[505] The tax credit was set at "80 percent of the 'average annual state cost of attendance' for a public K-12 student during the relevant tax year or the actual cost of attending a nonfailing public school or nonpublic school, whichever is less."[506] If the parent's total tax credit exceeded the parent's

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496. *Id.* at 618, 620–21.
497. *Id.* at 617–18, 620–21.
498. *Id.* at 617.
499. WIS. CONST. art. I, § 18; *Jackson*, 578 N.W.2d at 622.
500. *Jackson*, 578 N.W.2d at 620.
501. *Id.* at 623.
502. 175 So. 3d 79, 137 (Ala. 2015).
503. ALA. CONST. art. I, § 3.
504. *Magee*, 175 So. 3d at 90.
505. *Id.*
506. *Id.* at 119 (citing ALA. CODE § 16-6D-8(a)(1) (2013) (abrogated by the *Magee* court)).

income tax liability, the State paid the parent—as a rebate—the tax credit amount in excess of the tax liability.[507] These tax credit rebates were designed to be funded by the Education Trust Fund, which held state sales tax revenues designated for public education.[508] The second form of tax credits was for individual and corporate donations to scholarship-granting organizations (SGOs) that provided scholarships to students from failing public schools—as well as low-income students from nonfailing public schools—to attend nonfailing public schools or private schools.[509]

The plaintiffs claimed that the tax credits channeled government funds to sectarian schools, forcing taxpayers to pay "taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or ministry" in violation of the state's establishment clause.[510] The Supreme Court of Alabama adopted the *Lemon* test for the state's establishment clause because it viewed the state provision as a "counterpart" to the federal Establishment Clause.[511]

The court's analysis centered on the primary-effects prong of the *Lemon* test, which involved the application of the neutrality and private-choice principles.[512] Because the tax credits were neutrally available to recipients without regard to religion, the program satisfied the neutrality principle.[513] The program also satisfied the private-choice principle because sectarian schools only received funds because of parents' independent private choices.[514] As a result, the court dismissed the plaintiffs' establishment clause challenge for failure to state a claim, declaring that "the State's interest in authorizing the tax credits in this case was not building or repairing places of worship or maintaining ministers and ministries."[515]

The plaintiffs also challenged the tax credit under Alabama's no aid clause, which states that "[n]o money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school."[516] They claimed that the program unconstitutionally diverted public school funds from the

507. *Id.* at 119.
508. *Id.*
509. *Id.* at 90, 120.
510. *Id.* at 137 (quoting ALA. CONST. art. I, § 3).
511. *Id.* at 137–38.
512. *Id.* at 138.
513. *Id.*
514. *Id.*
515. *Id.*
516. *Id.* at 131 (quoting ALA. CONST. art. XIV, § 263).

Education Trust Fund to sectarian schools.[517] The plaintiffs further alleged that the program was unconstitutional because fifty-three of the fifty-six private schools for which parents could claim the tax credits were sectarian.[518] The Supreme Court of Alabama rejected both arguments based on federal Establishment Clause jurisprudence.[519]

Just as it did in its analysis under the state's establishment clause, the court found that the program satisfied the private-choice principle as well as the neutrality principle.[520] The court found that any incentives in the program were not "deliberately skewed" toward religion, and parents made independent choices about schools for their children as part of a facially religion-neutral program.[521] The court also ruled that the amount of aid provided to sectarian schools via tax credits to parents, as well as the number of sectarian schools incidentally benefitting from that aid, is constitutionally insignificant because the neutrality and private-choice principles are satisfied.[522] Finally, the court ruled that tax credits do not constitute government expenditures because tax credits involve private citizens' money rather than government treasury money.[523] Accordingly, the tax credits did not constitute an appropriation under the no aid clause, making the no aid clause wholly inapplicable.[524]

B. Non-Religion-Based Challenges

This subsection of the Article reviews non-religion challenges based on state constitutional grounds, such as efficiency, uniformity, public purpose, new debt, anti-gift, and both state and local control provisions.

1. Efficiency

Some states have education clauses guaranteeing that the State will provide a thorough and efficient education for its students. Opponents of state programs benefitting private schools have

517. *Id.* at 131, 135.

518. *Id.* at 131.

519. *Id.* at 132–35 (relying extensively on the Supreme Court's decision in *Zelman*); *see also supra* Section II.B.2 (discussing Establishment Clause Challenges in the Supreme Court and accompanying discussion of *Zelman*).

520. *Magee*, 175 So. 3d at 132–35.

521. *Id.* at 135.

522. *Id.* (noting that the program had more than one secular purpose such as the provision of educational options for students from failing schools and increased accountability for public schools).

523. *Id.*; *see also supra* Part II (discussing how the court's rationale was heavily influenced by the Supreme Court's decision in *Winn*).

524. *Magee*, 175 So. 3d at 135–37.

sometimes looked to these thorough-and-efficient provisions in seeking to invalidate such programs. For instance, in *Simmons-Harris v. Goff*, the Cleveland voucher program that the United States Supreme Court upheld in *Zelman v. Simmons-Harris*[525] was challenged in state court as violating the state's thorough-and-efficient provision, which provides that "[t]he general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State."[526]

The court summarily ruled that the Cleveland voucher program did not violate the thorough-and-efficient provision because the amount of government funding invested in the program did not compromise the State's ability to fulfill its constitutional duty to provide public education.[527] This clearly suggests that if the plaintiffs could provide data showing that continued funding of the voucher program would jeopardize the State's ability to fund public education, the court would have found the program unconstitutional. The court further noted that, even though the education clause requires the State to provide "a thorough and efficient system of common schools throughout the State,"[528] this provision does not exclude government funding of private schools as long as funding of public education is not imperiled.[529]

2. Uniformity

Some state constitutions have uniformity provisions that have served as petitioners' basis for constitutional challenges to government aid programs. These provisions generally require states to provide a uniform system of education to its citizens. Florida's uniformity provision, for instance, provides that the State has a "paramount duty" to ensure adequate provision of education for all students in the state;[530] and the adequate provision must be accomplished through "a uniform, efficient, safe, secure, and high

525. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 663 (2002) (discussing the constitutionality of the Cleveland voucher program under the Establishment Clause).

526. Simmons-Harris v. Goff, 711 N.E.2d 203, 212 (Ohio 1999) (quoting OHIO CONST. art. VI, § 2).

527. *Id.* at 212.

528. OHIO CONST. art. VI, § 2.

529. *Goff*, 711 N.E.2d at 212.

530. Bush v. Holmes, 919 So. 2d 392, 398 (Fla. 2006) (quoting FLA. CONST. art. IX, § 1(a)).

quality system of free public schools" that allows students to obtain a high quality education.[531]

Florida's voucher program—the Opportunity Scholarship Program—was challenged under this uniformity provision in *Bush v. Holmes*.[532] The program entitled students in struggling schools to state treasury funds for private school education—funds that would otherwise be allotted to the local school district for that student.[533] The program required parents to endorse the vouchers, made payable to a parent, to the private school.[534]

The Supreme Court of Florida ruled that the uniformity provision obligated the State to fulfill its responsibility by providing adequate education through a "system of free public schools."[535] Therefore, any attempt to fulfill this obligation outside of the public school system would violate the uniformity provision.[536] Because the voucher program diverted funds, otherwise allotted to public schools, to private school education, it was unconstitutional.[537] Additionally, the voucher program did not include any measure to ensure that schools benefiting from the program would be part of a uniform system of public schools, as evidenced by the State's lack of oversight over private schools.[538] For instance, the private schools were neither regulated, nor subject to state-accreditation requirements, nor did they have to follow the same curriculum and teacher certification

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531. *Id.* at 405.

532. 919 So. 2d 392 (Fla. 2006). The vouchers are also sometimes simply referred to as opportunity scholarships. *Id.* at 400. The program also allowed sectarian schools to participate in the voucher program, though that was not at issue in this case. *Id.*

533. *Id.* at 397, 400.

534. *Id.* at 402.

535. *Id.* at 407–08.

536. *Id.* The court also rejected the State's contention that the requirement of adequate education through the public school system merely set a minimum requirement that allows the State to meet its obligation through other means such as private education. The court explained that the uniformity provision instead provides the public school system as the *only* means for the State to fulfill its obligation. *Id.* at 408–09.

537. *Id.* at 408–09, 412. The court added that, in some cases, "the tuition paid to the private school is less than the amount transferred [by the State] from the school district's funds and therefore does not result in a dollar-for-dollar reduction" is immaterial to "the constitutionality of public funding of private schools as a means to making adequate provision for the education of children." *Id.* at 409; *see also id.* ("The systematic diversion of public funds to private schools on either a small or large scale is incompatible with article IX, section 1(a) [of the Florida Constitution].").

538. *Id.* at 409.

standards as public schools.[539] Finally, the court supported its uniformity provision ruling with the constitution's state school fund provision, which provides that "income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools."[540] The court interpreted both constitutional provisions in *pari materia*, concluding that the voucher program unconstitutionally appropriated state funds in support of private school education.[541]

Wisconsin also has a uniformity provision that formed the basis of a petitioner's challenge to the Milwaukee Parental Choice Program in *Davis v. Grover*.[542] The voucher program's funding of private school education was less than 40% of the cost to educate a student in a Milwaukee Public School.[543] Unlike Florida's voucher program, the Milwaukee program included auditing as well as accountability and reporting requirements relating to student issues such as achievement, attendance, discipline, and parental involvement for participating schools.[544] There was, however, no restriction on the private schools' use of voucher funds as long as they satisfied basic state law requirements for private school education.[545]

The court's interpretation of Wisconsin's uniformity provision, which was inapplicable to the voucher program at issue, gave much deference to the legislature. Wisconsin's uniformity provision states, "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable."[546] Because private schools do not constitute district schools, the Supreme Court of Wisconsin ruled that the uniformity provision was inapplicable to

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539. *Id.* at 409–10.

540. *Id.* at 399 n.1 (quoting FLA. CONST. art. IX, § 6).

541. *Id.* at 410–11.

542. 480 N.W.2d 460, 462–63 (Wis. 1992); *see also supra* Section II.D (discussing the Milwaukee Parental Choice Program).

543. *Davis*, 480 N.W.2d at 463. The value of the voucher was set at $2,500 per student while the cost of public education per student in the Milwaukee Public Schools was $6,451. *Id.* at 476–77. The number of students that could participate in the program was capped at 1% of the total student enrollment in Milwaukee Public Schools. *Id.* at 464, 471.

544. *Id.* at 463, 464. Further, the court stated that the program was an experiment on alternative educational options that could have statewide and nationwide implications for how to address academic achievement problems of students from low-income families. *Id.* at 462–63, 470–72.

545. *Id.* at 475 ("It simply does not matter how the school spends the money so long as it gives the participating student an education that complies with sec. 118.165, Stats., in return for the money.").

546. *Id.* at 473 (quoting WIS. CONST. art. X, § 3).

the voucher program.[547] Conjointly, the mere fact that private schools received public funds under the voucher program did not make them district schools.[548] The court explained that the state's uniformity provision only required of the legislature a minimum duty to offer district schools that are as instructionally uniform as possible.[549] Beyond that minimal duty, the legislature has authority to provide expanded educational opportunities for students through such means as vouchers.[550]

Likewise, in *Jackson*, the Supreme Court of Wisconsin found in favor of the voucher program being used for private education after a challenge based on Wisconsin's uniformity provision.[551] Plaintiffs argued that participating private schools effectively constituted district schools under the uniformity provision because the voucher program did not prevent the schools from being wholly funded by public funds.[552] The Supreme Court of Wisconsin, however, disagreed, ruling that the "mere appropriation of public monies to a private school does not transform that school into a district school," irrespective of the amount.[553] The court also rejected the plaintiffs' argument that the uniformity provision made public schools the exclusive recipients of school tax funding.[554]

According to the Supreme Court of Wisconsin, the uniformity provision's definition of district schools required that, at minimum, the State must create district schools.[555] Indeed, the uniformity provision did not in any way prevent the State from doing more than the minimum.[556] The uniformity provision only required a "uniform character of education" *within* the public school system,[557] and, as the court observed, the voucher program did not prevent students from

547. *Id.* at 473–74.

548. *Id.* at 474 ("In no case have we held that the mere appropriation of public monies to a private school transforms that school into a public school. We decline the opportunity to adopt such a conclusion here.").

549. *Id.* at 473.

550. *Id.*

551. Jackson v. Benson, 578 N.W.2d 602, 627 (1998); *see also supra* Part III (discussing religion-based challenges).

552. *Jackson*, 578 N.W.2d at 627.

553. *Id.*

554. *Id.*

555. *Id.* at 627–28 (citing WIS. CONST. art. X, § 3).

556. *Id.* at 628 ("The State's experimental attempts to improve upon that foundation in no way deny any student the opportunity to receive the basic education in the public school system.").

557. *Id.*

attending a public school with a uniform character of education—it simply offered alternatives.[558]

The Cleveland voucher program was also challenged in *Goff* under the state's uniformity provision, which provides that "[a]ll laws, of a general nature, shall have a uniform operation throughout the State."[559] First, in determining the uniformity provision's applicability, the court ruled that the nature of the voucher law was general, rather than special, because it dealt with education, which affects every part of the state.[560] Second, the court considered whether the voucher law applied uniformly statewide.[561] This uniformity requirement did not mean that the law must impact everyone in the state; instead, the law would be "valid if it contains provisions which permit it to operate upon every locality where certain specified conditions prevail" as long as the localities are not arbitrarily determined.[562]

While the voucher program only operated in Cleveland, the language of the voucher program specifically qualified any district under federal-court-ordered state supervision.[563] This opened the door for other districts to become eligible for the program in the future.[564] Furthermore, the law did not *arbitrarily* restrict the program to the Cleveland City School District.[565] Instead, the program was implemented as a pilot program in the state's largest district, which was in immense distress and, thus, under federal order of state oversight,[566] to experiment with possibilities for addressing similar crisis situations.[567]

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558. *Id.*

559. Simmons-Harris v. Goff, 711 N.E.2d 203, 212 (Ohio 1999) (quoting OHIO CONST. art. II, § 26); *see also supra* Section II.B.2 (discussing the Cleveland voucher program).

560. *Goff*, 711 N.E.2d at 213.

561. *Id.*

562. *Id.* (quoting State *ex rel.* Stanton v. Powell, 142 N.E. 401 (Ohio 1924) (internal quotation marks omitted)). Localities will be deemed arbitrarily determined if they are based on "artificial distinctions where no real distinction exists." *Id.* (quoting *Powell*, 142 N.E. at 401).

563. *Id.* at 213–14.

564. *Id.* at 213 ("This court has also stated that 'a statute is deemed to be uniform despite applying to only one case so long as its terms are uniform and it may apply to cases similarly situated in the future.'" (quoting State *ex rel.* Zupancic v. Limbach, 568 N.E.2d 1206, 1213 (Ohio 1991))).

565. *Id.* at 214.

566. This federal order required the state superintendent of public instruction to supervise and manage the operations of the district given its distress. *Id.* at 213.

567. *Id.*

North Carolina's voucher program, the Opportunity Scholarship Program, was challenged in *Hart v. State*[568] based on the state's uniformity provision, which states that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools."[569] The voucher program, funded by general revenues, provided up to $4,200 per student for a limited number of low-income students to attend private schools in order to combat the grade-level nonproficiency epidemic among that student demographic.[570] After the parents selected a school, the State sent the check directly to the school with the proviso that the parents exclusively endorse the check to the school for payment.[571]

The Supreme Court of North Carolina rejected the plaintiffs' characterization of the voucher program as one of government-funded private schools because the program simply provided scholarships to low-income students for use at the nonpublic school of their choice.[572] The court suggested that, to the contrary, the voucher program merely empowered lower-income parents, and supported their private school choices through "modest" state contributions.[573] Also, as the court noted, the uniformity provision does not apply to private schools, as that provision only governs schools within the public school system.[574]

Indiana's voucher program was challenged in *Meredith* under the uniformity provision in the education clause of the Indiana Constitution, which provides,[575]

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and

568. 774 S.E.2d 281 (N.C. 2015).

569. *Id.* at 289 (quoting N.C. CONST. art. IX, § 2).

570. *Id.* at 285, 286. $10,800,000 was appropriated for the voucher program in the 2014–15 fiscal year. *Id.* at 286.

571. *Id.* at 286. The program imposed a variety of obligations on participating private schools for each voucher student in order to ensure accountability, tuition charge documentation and reports to the State, yearly academic progress reports for parents; graduation rate reports to the State, no additional fee charge simply because the student also got voucher payments, and financial review by a certified public accountant in any year the school received voucher payments in excess of $300,000. Criminal background checks were also required for the school's topmost official. *Id.*

572. *Id.* at 289.

573. *Id.*

574. *Id.* at 290.

575. Meredith v. Pence, 984 N.E.2d 1213, 1220 (Ind. 2013); *see also supra* notes 469–85 and accompanying text (discussing Indiana's voucher program).

> agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.[576]

Like the plaintiffs in *Hart*, the plaintiffs in *Meredith* claimed that the Indiana voucher program unconstitutionally funded an educational system outside of the uniform system of public schools.[577]

The Supreme Court of Indiana disagreed with this argument because the education clause imposed two distinct duties on the state: (1) the duty to encourage education "by all suitable means" and (2) the duty to provide a uniform public school system.[578] According to the court, the word "and" separating both duties within the education clause made the duties distinct from each other.[579] As distinct duties, the State could, therefore, provide a uniform public school system and still support education through such means as the voucher program.[580]

The court also dismissed the argument that, because the voucher program could cause the public school system to lose up to 60% of its students, the State had abandoned its duty to provide a uniform system of public schools.[581] Specifically, the court found no evidence in the record that "maximum participation in the voucher program [would] *necessarily* result in the elimination of the Indiana public school system."[582] Further, the court ruled that as long as the State provided a free and uniform public school system that all students were equally eligible to participate in, the State's obligation under the uniformity provision was fulfilled.[583]

3. Public purpose

Plaintiffs often challenge government aid programs under the public purpose doctrine, which requires that government funds be used only for public purposes.[584] The Milwaukee Parental Choice Program was challenged in *Davis* under the public purpose doctrine.[585] Although the Wisconsin Constitution does not contain a provision embodying the public purpose doctrine, the Supreme

576. *Meredith*, 984 N.E.2d at 1221 (quoting IND. CONST. art. 8, § 1).
577. *Id.* at 1220.
578. *Id.* at 1220–21 (citing IND. CONST. art. 8, § 1).
579. *Id.*
580. *Id.* at 1222, 1224–25.
581. *Id.* at 1222–23.
582. *Id.* at 1223.
583. *Id.*
584. Davis v. Grover, 480 N.W.2d 460, 474 (Wis. 1992).
585. *Id.* For a more detailed discussion of *Davis*, see *supra* Section III.B.2.

Court of Wisconsin has long recognized the doctrine.[586] The *Davis* court emphasized that, in the absence of a clear constitutional violation, the judiciary must defer to the legislature, which is more directly accountable to the electorate and representative of the public.[587] Nevertheless, programs that provide government funding for private school education violate the public purpose doctrine if private schools are not subject to reasonable accountability regulation designed to ensure the funds are used in the public interest.[588] The *Davis* court acknowledged that the Milwaukee voucher program did not restrict private schools' use of voucher funds as long as those schools provide basic education in accordance with state law.[589] Yet, the court concluded that the basic-education requirement was a sufficiently reasonable regulation because the State held public schools similarly accountable for some allotted government funds.[590]

The voucher program in Davis further fulfilled a public purpose because it included various legislative supervision and control measures.[591] It provided for financial and performance audits of participating private schools as well as various reporting requirements to ensure reasonable state supervision of government funds in the public interest.[592] The court also ruled that parental choice within the program constituted sufficient reasonable accountability, thus satisfying the public purpose doctrine.[593] This was because, under the program, parents had the freewill to leave underperforming schools, opting instead for better-performing schools.[594] The court also concluded that the insignificant cost of the voucher program relative to the cost of Milwaukee's public school education provided another reasonable state accountability regulation that controlled program spending.[595] In particular, the court found the $2.5 million cost of the voucher program insignificant relative to the $6.4 billion cost of educating students in the Milwaukee Public Schools.[596]

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586. *Davis*, 480 N.W.2d at 474 (citing State *ex rel.* Warren v. Reuter, 170 N.W.2d 790 (Wis. 1969)).

587. *Id.* at 474–75.

588. *Id.* at 475.

589. *Id.*

590. *Id.*

591. *Id.* at 476.

592. *Id.*

593. *Id.*

594. *Id.*

595. *Id.* at 476–77.

596. *Id.* at 477. The court minimized this significant amount by using a proportionality argument: "The amount of money to fund the [Milwaukee Parental

This voucher program was likewise challenged based on the public purpose doctrine in *Jackson v. Benson*.[597] In *Jackson*, the Supreme Court of Wisconsin ruled that courts must find a public purpose unless it is "clear and palpable" that the government expenditure serves no public end.[598] Withal, the court reaffirmed that the doctrine mandates private schools receiving public funds be subject to reasonable accountability and control regulations to ensure the funds use for public ends.[599] Not only did the court find a public purpose for the voucher spending—education—it also found that private schools participating in the voucher program were subject to reasonable accountability regulations.[600] These regulations included state curriculum and instruction and attendance regulations governing the state's private schools, yearly financial audits of voucher schools, and the parental right to choose more accountable schools for their children.[601] The court deemed these regulations sufficient because private schools receiving government funds do not have to be "controlled as two-fistedly as a government agency . . . [and] should not bog down private agencies with unnecessary government control."[602]

Illinois' tax credit program was challenged in *Toney v. Bower* under the state constitution's public purpose provision, which provides that "[p]ublic funds, property or credit shall be used only for public purposes."[603] The Illinois appellate court ruled that the same secular purposes that satisfied the first prong of the *Lemon* test constituted satisfactory public purposes under the public purpose provision.[604]

Choice Program] represents only about four one-hundredths of one percent (.04 percent) of the public money allocated for public education throughout the state." *Id.*

597. 578 N.W.2d 602 (Wis. 1998). The Supreme Court of Wisconsin iterated that, under this doctrine, public funds will only be expended constitutionally if they are used exclusively for public purposes. *Id.* at 628. For a more detailed discussion of *Jackson*, see *supra* Section III.A.

598. *Jackson*, 578 N.W.2d at 628 (citing State *ex rel.* Hammermill Paper Co. v. La Plante, 205 N.W.2d 784, 798 (Wis. 1973)).

599. *Id.* at 629.

600. *Id.* at 628–29.

601. *Id.* at 629–30.

602. *Id.* at 629 (citing State *ex rel.* Warren v. Reuter, 170 N.W.2d 790, 797 (Wis. 1969)). The court also rejected the argument that the public purpose doctrine precluded government funding for sectarian schools, noting that it had "never interpreted the public purpose doctrine to incorporate an anti-establishment principle." *Id.* at 630.

603. Toney v. Bower, 744 N.E.2d 351, 363 (Ill. App. Ct. 2001) (quoting ILL. CONST. art. VIII, § 1(a)). For a more detailed discussion of *Toney*, see *supra* Section III.A.

604. *Toney*, 744 N.E.2d at 363 ("By creating the Credit, the legislature has recognized that parents who send their children to private schools often do so at considerable expense to themselves and that they provide a benefit to the State

The court further recognized that the tax credits fulfilled a public purpose by facilitating adequate education for all students.[605]

North Carolina's voucher program was challenged in *Hart* under the state constitution's public purpose doctrine.[606] The doctrine is represented in two state constitutional provisions:[607] (1) article V, section 2(1), which provides, "The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away,"[608] and (2) article V, section 2(7), which provides, "The General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only."[609] According to the Supreme Court of North Carolina, the crucial determinant of whether a program fulfills a public purpose is whether the State intended the appropriation to benefit the public.[610]

The *Hart* court found that the funding allotted to the challenged Opportunity Scholarship Program accomplished a public purpose.[611] Under North Carolina's public purpose doctrine, an appropriation of tax revenue must satisfy a two-pronged test: (1) it must be reasonably connected to a state necessity or convenience and (2) it must benefit the general public, rather than special interests, though it does not have to benefit every citizen.[612] The Supreme Court of North Carolina, nonetheless, declared that "public purpose" must be broadly construed.[613] Based on a broad construction, the court found

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treasury by relieving the State and local taxpayers of the expense of educating their children."). For a more detailed discussion of *Toney*, see *supra* notes 418–29 and accompanying text. For an illustration of the secular purposes prong of the *Lemon* test, see *supra* Section III.A.

605. *Toney*, 744 N.E.2d at 363.

606. Hart v. State, 774 S.E.2d 281, 290 (N.C. 2015). For a more detailed discussion of *Hart*, see *supra* Section III.B.2.

607. *See Hart*, 774 S.E.2d at 290 ("Because the power to appropriate money from the public treasury is no greater than the power to levy the tax which put the money in the treasury, we subject both legislative powers to the public purpose requirement." (emphasis omitted) (citing Mitchell v. N.C. Indus. Dev. Fin. Auth., 159 S.E.2d 745, 749–50 (N.C. 1968))).

608. *Id.* at 290 (quoting N.C. CONST. art. V, § 2(1)).

609. *Id.* (quoting N.C. CONST. art. V, § 2(7)).

610. *Id.*

611. *Id.* at 291.

612. *Id.* at 291–92.

613. *Cf. id.* at 291 (stating that the term "public purpose" should not be narrowly construed, and providing examples of its broad application).

that the state's voucher program satisfied the first prong because the program was reasonably connected to education—a necessity for the state's citizens.[614] The program also satisfied the second public-purpose prong because, even though individuals benefitted from the vouchers, it did not negate the benefit and purpose the general public ultimately attained from vouchers.[615] Additionally, the court ruled that the State has the right to create a "laboratory of democracy" through a voucher program and to "experiment with new modes of dealing with old evils."[616]

4. Local control

Some states regulate the use of government aid through constitutional provisions that require local school districts to control education. The Supreme Court of Colorado confronted such a provision in *Owens v. Colorado Congress of Parents, Teachers and Students*,[617] when the plaintiffs challenged the constitutionality of the Colorado Opportunity Contract Pilot Program under the state's local control provision.[618] This program entitled parents of low-income and low-achieving students enrolled in private schools to enter into contracts with their local school districts for checks payable to the parents for the private education.[619] The parents were then required to endorse the checks over to the private school for the school's exclusive use.[620]

The Colorado local control provision requires qualified electors in each district to elect school board directors who "shall have control of instruction in the public schools of their respective districts."[621] The Supreme Court of Colorado pointed out that this provision was adopted by Colorado's constitutional convention delegates out of fear of politicizing education; fear founded in great distrust of state power undermining the local citizenry's voice.[622] The court thus interpreted the local control provision to mean that control of instruction paid for by local funds must always be vested in the local school district.[623] The court reasoned further that, despite the

614. *Id.* at 291–92.
615. *Id.* at 292. The vouchers ultimately inured to the general public's benefit and for the recognized public purpose of educating the citizenry.
616. *Id.* at 294.
617. 92 P.3d 933 (Colo. 2004) (en banc).
618. *Id.* at 936.
619. *Id.*
620. *Id.*
621. COLO. CONST. art. 9, § 15.
622. *Owens*, 92 P.3d at 938–39, 941 n.8.
623. *Id.* at 935 (citing Belier v. Wilson, 147 P. 355 (Colo. 1915) (en banc)).

provision saying nothing about controlling local funds, local school districts must control instruction with local funds.[624]

This local control over local funds trumps the legislature's power to direct education policy.[625] For these reasons, the court found the Colorado Opportunity Contract Pilot Program, which relied on local funds, unconstitutional under the local control provision.[626] The program took away local district control over (1) the amount of local funds expended on private schools, (2) instruction at the private schools supported by the local funds, and (3) which schools and students could participate in the program.[627] In all, local control over local funds and local instruction is essential because "local taxation has traditionally been the means by which taxpayers in the individual districts participate in the management of public school education."[628] Voucher programs that require local funding would clearly violate this principle in states with local control provisions.

5. State control

Some states, such as Virginia, have a constitutional provision that restricts public funds to schools under state control. Virginia's control provision states, "No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof . . . ."[629] This provision was designed to protect funding for,

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624. *Id.* at 935, 939, 941, 943 (citing Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1022 (Colo. 1982) (en banc)).

625. *See id.* at 940 ("[T]he local control provision of section 15 protects school districts against legislative efforts to require them to spend locally-raised funds on instruction that the district does not control, and preserves the districts' democratic framework."). The court rejected the argument that "with greater state funding comes greater state control over educational policy," explaining that "[t]his Court has long recognized . . . that the constitutional division of power between the state and local boards is not measured by funding." *Id.* at 943.

626. *Id.* at 942–44.

627. *Id.* at 942–43. The parents chose the schools and *then* the district was required to make four payments that the parents could use toward their children's education.

628. *Id.* at 941 (citing *Lujan*, 649 P.2d at 1021).

629. VA. CONST. art. 8, § 10; Almond v. Day, 89 S.E.2d 851, 854 (Va. 1955). In full, the constitutional provision states:

> No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students

and the continuing viability of, the state's public school system.[630] In *Almond v. Day*,[631] the provision formed the basis of a constitutional challenge to state funding for the private school education of children of deceased or disabled veterans of World Wars I and II.[632] In that case, the Virginia attorney general filed suit for mandamus after the comptroller, believing voucher payments violated the state control provision, refused payments.[633]

Even though the voucher payments were made to parents, rather than directly to the school, the Supreme Court of Virginia ruled that the vouchers were unconstitutional appropriations because the state control provision did not distinguish between direct and indirect payments.[634] The state provision barred any and all appropriations, which the court defined as the earmarking of funds irrespective of whether the funds went directly to the school.[635] The court observed that appropriations are not often directed to the *beneficiary*, but rather designated for particular *purposes*, which in this case benefitted the school.[636]

The court ruled that the beneficiary of aid must be determined by examining its "natural and reasonable effect"; in this case, the effect was support of private school education with parents simply serving as conduits for the aid.[637] The court observed that the voucher program's tuition payments were different from other government programs that provide textbooks or student transportation:[638] while schools might not directly benefit from textbooks or transportation, tuition is the

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in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; second, that the General Assembly may appropriate funds to an agency, or to a school or institution of learning owned or controlled by an agency, created and established by two or more States under a joint agreement to which this State is a party for the purpose of providing educational facilities for the citizens of the several States joining in such agreement; third, that counties, cities, towns, and districts may make appropriations to nonsectarian schools of manual, industrial, or technical training, and also to any school or institution of learning owned or exclusively controlled by such county, city, town, or school district.

VA CONST. art. 8, § 10.

630. *Almond*, 89 S.E.2d at 855.
631. 89 S.E.2d 851 (Va. 1955).
632. *Id.* at 853–54.
633. *Id.* at 852.
634. *Id.* at 855–56, 858–59.
635. *Id.* at 855–56.
636. *Id.* at 856.
637. *Id.* at 857.
638. *Id.*

"very life blood" of schools.[639] As such, vouchers benefit participating private schools—schools not exclusively owned or controlled by the State—consequently violating the Virginia state control provision.[640]

Private school voucher programs in North Carolina have also been challenged. The plaintiffs in *Hart* challenged the North Carolina voucher program, arguing that public funds should only be expended for schools under the state's exclusive control—i.e., the public school system.[641] The state school fund provision the plaintiffs relied on provides that

> [t]he proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; all moneys, stocks, bonds, and other property belonging to the State for purposes of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State or by the terms of the grant, gift, or devise, shall be paid into the State Treasury and, together with so much of the revenue of the State as may be set apart for that purpose, shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.[642]

The Supreme Court of North Carolina dismissed the plaintiffs' argument, reasoning that the constitutional provision was not intended to restrict the State's ability to spend on education, but rather to protect funding for public schools.[643] In essence, as long as the state's public school funding is protected, the State can spend funds on non-public school education.[644]

As the court noted, the state control provision specified four non-revenue school funding sources—two mandatory and two discretionary—from the state treasury for education.[645] The fifth

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639. *Id.* at 856–57.

640. *Id.* at 854, 857, 859.

641. Hart v. State, 774 S.E.2d 281, 288 (N.C. 2015). For a more detailed discussion of *Hart*, see *supra* notes 570–74.

642. *Hart*, 774 S.E.2d at 288 (quoting N.C. CONST. art. IX, § 6).

643. *Id.* at 288–90.

644. *Id.*

645. The two discretionary non-revenue parts of the constitutional provision are (1) "The proceeds of all lands that have been or hereafter may be granted by the United States to this State, *and not otherwise appropriated by this State or the United States*"; and (2) "and all other grants, gifts, and devises that have been or hereafter may be made to the State, *and not otherwise appropriated by the State or by the terms of the grant, gift, or devise.*" N.C. CONST. art. IX, § 6 (emphasis added). The two mandatory non-revenue parts of the constitutional provision are (1) "*all* moneys, stocks, bonds, and other property

funding source is the revenue clause, which states: "together with so much of the revenue of the State as *may* be set apart for that purpose [public education]."[646] The court observed that the word "may" gave the State discretion on earmarking funds from the state revenue for public education.[647] Although the North Carolina Constitution required non-revenue sources to be used exclusively for public education, the revenue clause did not preclude the State from using some state revenue for non-public school education.[648] Accordingly, school beneficiaries of state revenue funding did not have to be schools under state control.[649]

Other courts have reached different conclusions based on state constitutional provisions. For example, in *Louisiana Federation of Teachers v. Louisiana*,[650] the court upheld a state control provision challenge to Student Scholarships for Educational Excellence, the state's voucher program.[651] The plaintiffs alleged that vouchers were unconstitutionally funding schools outside of the public school system.[652] The plaintiffs relied on the constitutional provision which states, in relevant part, that the State must

> annually develop and adopt a formula which shall be used to determine the cost of a minimum foundation program of education in all public elementary and secondary schools as well as to equitably allocate the funds to parish and city school systems . . . . The legislature shall annually appropriate funds sufficient to fully fund the current cost to the state of . . . a minimum foundation program of education in all public elementary and secondary schools, [and the] funds appropriated shall be equitably allocated to parish and city school systems.[653]

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belonging to the State for purposes of public education"; and (2) "the net proceeds of *all* sales of the swamp lands belonging to the State." *Id.* (emphasis added).

646. *Hart*, 774 S.E.2d at 288 (emphasis added) (quoting N.C. CONST. art. IX, § 6).

647. *Id.* at 289.

648. *Id.*

649. *Id.* at 288–90 ("The framers of the 1868 Constitution sought to constitutionalize the State's obligation to protect the State school fund. In so doing, our framers chose not to limit the State from appropriating general revenue to fund alternative educational initiatives. Plaintiffs' arguments to the contrary are without merit.").

650. 118 So. 3d 1033 (La. 2013).

651. *Id.* at 1037, 1039, 1071. The plaintiffs also challenged the Course Choice Program, which provided funding for dual enrollment courses at private or public schools. *Id.* at 1037–39, 1046. The Supreme Court of Louisiana found this program unconstitutional for the same reasons it found the voucher program, discussed below, unconstitutional. *Id.* at 1055.

652. *Id.* at 1039.

653. *Id.* at 1044, 1050 (quoting LA. CONST. art. VIII, § 13(B)).

The voucher program, funded through the minimum foundation program, allowed students from low-performing public schools to attend private schools or other public schools.[654] The state transferred to the private school the minimum foundation program allocation that the student's local district would otherwise receive for that student.[655] While students could use the voucher at public schools outside their local district, most of the schools eligible for the voucher were private schools.[656]

The Supreme Court of Louisiana found the voucher program unconstitutional because it contravened the constitutional provision, which explicitly limited the use of minimum foundation program funds to "all public elementary and secondary schools" and obligated the State to "equitably allocate the funds to parish and city school systems."[657] Furthermore, rather than a conferral of power, Louisiana's state control provision imposed a restriction on state power.[658] Thus, the State could not use minimum foundation program funds for vouchers in support of private schools.[659]

Additionally, the court rejected the State's argument that it could use the minimum foundation program to fund vouchers once the State exceeded a minimum obligation for public schools.[660] The court instead ruled that, once the State implemented the minimum foundation program, all funds under the program must be allocated to public schools.[661] Nonetheless, the State tried to save the voucher program by arguing that voucher recipients remained part of their local school district and that, as a result, the voucher program simply funded the education of public school students.[662] Unsurprisingly, the court repelled this argument because the students actually attended private schools and voucher payments were made directly to the private schools.[663]

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654. *Id.* at 1046.
655. *Id.* at 1037–38, 1047, 1049.
656. *Id.* at 1049 n.16.
657. *Id.* at 1049–52.
658. *Id.* at 1051.
659. *Id.* at 1054, 1071.
660. *Id.* at 1050.
661. *See id.* at 1054 ("Pursuant to Article VIII, § 13(B), whatever discretion existed prior to the funds being dedicated to the MFP [minimum foundation program] is no more; the state funds approved through the unique MFP process cannot be diverted to nonpublic schools or other nonpublic course providers according to the clear, specific, and unambiguous language of the constitution.").
662. *Id.*
663. *Id.* at 1055.

Plaintiffs relied on state control in seeking to invalidate the Alabama tax credit program in *Magee*, which offered tax credits for students' private school education costs and for individual and corporate donations to scholarship-granting organizations.[664] The plaintiffs claimed that the tax credit program violated the state control provision by appropriating the public school Education Trust Fund to reimburse parents for tuition and fees at private schools, which are not under absolute state control.[665]

The state control provision states that

> [n]o appropriation shall be made to any charitable or educational institution not under the absolute control of the state, other than normal schools established by law for the professional training of teachers for the public schools of the state, except by a vote of two-thirds of all the members elected to each house.[666]

The plaintiffs further contended that, because two-thirds of each legislative house did not approve the use of the Education Trust Fund to support private schools, the tax credit program was unconstitutional.[667]

The Supreme Court of Alabama rejected the plaintiffs' contentions because tax credits are not encompassed within time-honored definitions of appropriations: the designation of a specific fund, or specific part of money within the public treasury, or a specific part of government revenue, for a specified object.[668] Furthermore, because the tax credits were paid to parents—rather than schools—the court ruled that, under the express language of the state control provision, tax credits were not "made to *any* charitable or educational institution."[669]

6. New debt clauses

Government aid programs can also be challenged under a state constitution's new debt clause. Such was the case in *Magee* where

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664. Magee v. Boyd, 175 So. 3d 79, 120 (Ala. 2015). For further discussion on this case, see *supra* notes 502–24 and accompanying text.

665. *Magee*, 175 So. 3d at 120. The plaintiffs also claimed that the tax credits for the individual and corporate donations amounted to appropriations because they diverted to private schools funds that would otherwise be allotted to public schools. *Id.*

666. ALA. CONST. art. IV, § 73.

667. *Magee*, 175 So. 3d at 120.

668. *Id.* at 121–22 (citing *Appropriation*, BLACK'S LAW DICTIONARY 93 (5th ed. 1979); Toney v. Bower, 744 N.E.2d 351, 357–58 (Ill. App. Ct. 2001); McAlpine v. Univ. of Alaska, 762 P.2d 81, 87 (Alaska 1988)).

669. ALA. CONST. art. IV, § 73 (emphasis added); *Magee*, 175 So. 3d at 123–24 (stating that "no money is set aside or specified from the public revenue or treasury to be applied to a charitable or educational institution"). The court ruled that, to regard tax credits as appropriations, would be "contrary to the Alabama Constitution existing case law and the commonly accepted definition of the term appropriation." *Id.* at 126.

plaintiffs claimed that Alabama's tax credit program violated the new debt clause, which provides that "[a]ny act creating or incurring any new debt against the state, except as herein provided for, shall be absolutely void."[670] The plaintiffs contended that the tax program created a new state debt without providing a matching revenue source funding the tax credit program.[671] They claimed that the tax credit program imposed a new financial obligation on the State while relying on existing sales taxes deposited in the Education Trust Fund to fund those new obligations.[672] Plaintiffs also argued that, because the State failed to cap the total tax credits allowable as well as the number of possible taxpayer beneficiaries under the program, the program effectively ensured creation of new debt.[673]

The Supreme Court of Alabama ruled, however, that the tax credit program did not create a new debt.[674] As the court explained, contrary to the plaintiffs' assertion, the program authorized spending "only the amount from sales tax revenues within the Education Trust Fund that is sufficient for the Department of Revenue to use to cover the income tax credits *for the applicable tax year.*"[675] In other words, the government funding of the tax credit program was not uncapped; rather, it was based on the revenue commissioner's annual calculation of that year's expected total tax credits.[676] In essence, the program did not anticipate funding of the tax credit program once the sales taxes deposited in the Education Trust Fund for the program ran out.[677]

The court also ruled that, since a new debt under the new debt clause only referred to unconditional debt, contingent debt did not qualify as new debt.[678] Inasmuch as the tax credit program only paid parents from the Education Trust Fund when the parent's tax credit amount exceeded tax liability, the program only created contingent debt.[679] Further, the program design was such that the amount of

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670. ALA. CONST. art. XI, § 213; *Magee*, 175 So. 3d at 128.
671. *Magee*, 175 So. 3d at 128.
672. *Id.* at 128–29.
673. *Id.*
674. *Id.* at 129.
675. ALA. CODE § 16-6D-8(c) (2016) (emphasis added); *Magee*, 175 So. 3d at 129–30.
676. *Magee*, 175 So. 3d at 129–30.
677. *See id.* at 130 (stating that the program "neither makes nor contemplates an obligation of the State further than such as is within the revenues levied and assessed, and in process of collection for the current year or such as may have been already collected for that year").
678. *Id.* at 130.
679. *Id.*

each parent's tax credit was contingent: "[t]he income tax credit shall be an amount equal to 80 percent of the average annual state cost of attendance for a public K–12 student during the applicable tax year *or* the actual cost of attending a nonfailing public school or nonpublic school, *whichever is less.*"[680] Thus, by infusing the element of contingency into the program design, the Alabama legislature avoided violating the new debt clause.

7. Anti-gift clauses

Arizona has an anti-gift clause in its constitution, which bars the State from "giv[ing] or loan[ing] its credit in the aid of, or mak[ing] any donation or grant, by subsidy or otherwise, to any individual, association, or corporation."[681] While this clause does not expressly include a public purpose provision, the Supreme Court of Arizona has recognized a public purpose exception that allows the State to gift or donate to individuals or private entities for public purposes if the recipient provides sufficient consideration.[682] In *Kotterman*, the Supreme Court of Arizona ruled that a tax credit does not constitute a gift since the government never owned the taxpayer money claimed as a tax credit.[683] This is very similar to the court's reasoning that tax credits do not constitute appropriations because they never entered government control.[684] The court also indicated that the State had a valid public purpose for tax credits similar to that of other states that pursue voucher programs and charter schools: providing for educational choices beyond the public school system in order to further student achievement, and adjusting for dynamic societal and economic needs.[685]

8. Non-religion funding/no aid clause

Various states have clauses in their constitutions that prohibit any and all funding for any form of education other than public school education. These clauses are sometimes similar to Blaine Amendments, particularly those no aid clauses that mention sectarian

680. ALA. CODE § 16-6D-8(a)(1) (emphasis added); *Magee*, 175 So. 3d at 129.

681. ARIZ. CONST. art. 9 § 7; Kotterman v. Killian, 972 P.2d 606, 621 (1999) (en banc).

682. *Kotterman*, 972 P.2d at 621.

683. *Id.* ("One cannot make a gift of something that one does not own."); *see supra* notes 255–67 and accompanying text (discussing the Establishment Clause challenge to *Kotternman*).

684. *Kotterman*, 972 P.2d at 621; *see also supra* notes 375–96 (discussing the challenges in *Kotterman* via two Arizona religion clauses).

685. *Kotterman*, 972 P.2d at 623–24.

schools.[686] However, rather than targeting funding for sectarian schools, these clauses are "primarily designed to protect the public fisc and to protect public schools."[687] Arizona's scholarship program for students with disabilities, the Empowerment Scholarship Accounts was challenged in *Niehaus* under the state's no aid clause which provides that "[n]o tax shall be laid or appropriation of public money made in aid of *any* church, or *private* or sectarian school, or any public service corporation."[688] The Arizona court of appeals held that the scholarship program did not violate the no aid clause because the scholarships did not constitute an appropriation.[689]

The court ruled that three elements were critical to appropriations: first, a certain monetary sum must be set aside from government revenue; second, government officials must be authorized to spend the money; and third, the money must be spent on an appropriate "specified object."[690] Because the scholarship program ostensibly satisfied the first two elements, the court's analysis centered on the third element. Much like with the religion clause analysis, the court relied on the private-choice principle in identifying the actual beneficiary of the scholarship program.[691] The court ruled that parents, not schools, were the specified objects of the program, as the program did not earmark funds for schools.[692] Instead, the State maintained savings accounts for parents to withdraw program funds for use at a multitude of schooling options, several of which were private schools.[693] Parents could wholly avoid using the funds at private schools by using them for educational therapy, tutoring, public post-secondary education, and home-based instruction.[694] Accordingly, parents controlled and disbursed the withdrawn funds.[695]

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686. *See supra* notes 364–74 and accompanying text (discussing the Blaine Amendments).

687. Niehaus v. Huppenthal, 310 P.3d 983, 987 (Ariz. Ct. App. 2013) (citing Cain v. Horne, 202 P.3d 1178, 1183 (Ariz. 2009) (en banc)).

688. ARIZ. CONST. art. 9 § 10 (emphasis added); *Niehaus*, 310 P.3d at 987; *see also supra* notes 398–408 and accompanying text (discussing *Niehaus* and religion-based challenges).

689. *Niehaus*, 310 P.3d at 987.

690. *Id.* (citing League of Ariz. Cities & Towns v. Martin, 201 P.3d 517, 521 (Ariz. 2009) (en banc)).

691. *See supra* notes 404–08 and accompanying text (analyzing the religion clause private-choice principle within *Niehaus*).

692. *Niehaus*, 310 P.3d at 987.

693. *Id.* at 988.

694. *Id.* at 987–88.

695. *See id.* at 988–89 ("This program enhances the ability of parents of disabled children to choose how best to provide for their educations, whether in or out of

Moreover, the no aid clause has never been construed to bar private schools from receiving government funds;[696] the clause merely prohibits *earmarking* funds to private schools.[697] For these reasons, the court found that the program did not violate the no aid clause.[698]

Arizona's no aid clause also formed the basis of the constitutional challenge, in *Cain v. Horne*,[699] to two other government aid programs that each allotted $2.5 million to send special populations of students to private schools: the Arizona Scholarship for Pupils with Disabilities and the Displaced Pupils Grant Program.[700] The Arizona Scholarship for Pupils with Disabilities provided scholarships, capped at the basic state aid otherwise paid for the student's public school education, for students with disabilities.[701] The Displaced Pupils Grant Program provided scholarships, capped at the lesser of $5,000 or tuition costs and fees, for foster care children.[702] Both voucher programs issued checks to parents, who were obligated to specifically endorse them over to the private schools.[703]

The Supreme Court of Arizona ruled that the funding for each voucher program constituted an appropriation of public funds because the funds came out of the state treasury.[704] Furthermore, because the no aid clause prohibited appropriating public funds to private schools, the voucher programs were unconstitutional.[705] Although parents were the initial recipients of the voucher check, they were obligated to endorse the check to the private school.[706] Thus, the parents had no consequential and real control over the check; they merely served as a channel for public funds to private schools.[707]

The court refused to apply the "true beneficiary theory," which holds that individuals benefitting from the government aid are the actual

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private schools. No funds in the ESA [Empowerment Scholarship Accounts] are earmarked for private schools. Thus, we hold that the ESA does not violate the [no] aid clause.").

696. *Id.* at 988.

697. Recall that the no aid clause provided that "[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." ARIZ. CONST. art. 9 § 10.

698. *Niehaus*, 310 P.3d at 988–89.

699. 202 P.3d 1178 (Ariz. 2009) (en banc).

700. *Id.* at 1180–81.

701. *Id.* at 1180.

702. *Id.*

703. *Id.* at 1180–81.

704. *Id.* at 1184.

705. *Id.*

706. *Id.*

707. *Id.*

beneficiaries even though the funding goes to the private schools.[708] As the court observed, sanctioning the true beneficiary theory would make the no aid clause meaningless: the theory would allow the State to interminably divert public funds to private schools by simply claiming that students are the actual beneficiaries.[709] With no refuge in the true beneficiary theory, the voucher programs were invalidated as unconstitutional appropriations under the no aid clause.[710]

IMPLICATIONS AND CONCLUSION

This section discusses implications of the government aid jurisprudence for legislation enacting vouchers and tax benefits for education including ideas that legislation should incorporate to endure constitutional challenges. Inextricably, these same ideas should enlighten challengers of voucher and tax benefit programs evaluating programs for constitutional objections.

As the Supreme Court has noted, there is an Establishment Clause danger of political divisiveness in the religious arena when government aid supports modern innovations:

> [M]odern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the 'verge' of the precipice lies.[711]

Despite the dangers, the federal and state judiciaries have trended toward upholding government funding of innovations in education, such as vouchers and tax benefits. The critical factor for the courts tends to be the program design: programs designed based on the private-choice principle and the neutrality principle tend to survive judicial scrutiny. Courts reason that if the program is designed as

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708. *Id.* at 1183–84.

709. *Id.* at 1184. After all, any government aid to schools ineluctably benefits students.

710. *Id.* at 1184–85.

711. Lemon v. Kurtzman, 403 U.S. 602, 624 (1971).

religiously neutral and empowers parents to choose schools, any benefit to sectarian schools would be attenuated at best. This is so because the private choice and neutrality principles serve as circuit breakers between the government and the sectarian school, giving the parents ownership of the sectarian school's receipt of government funds.

In order to withstand constitutional scrutiny, government aid programs should include private schools, as well as non-local public schools, among the options offered to parents; particularly because some courts like to see public schools as one of the options to assure neutrality. Further, issues of program neutrality arise even if a state constitution does not preclude sectarian school participation in a voucher and tax credit program. Programs must still be designed to avoid favoring sectarian schools both generally and specifically.

Programmatically, voucher programs should be designed such that the checks are either given to the parents—with restrictive endorsement to the parents' chosen school—or sent to the school in the parents' name—with the law requiring the parents to then restrictively endorse the checks over to the school. Either of these designs would satisfy the private-choice principle. If the check is sent to the school and in the school's name the program would most certainly violate the private-choice principle.

The value of the voucher or tax benefit should also be either the actual cost of the private school's tuition, or less than the cost of tuition, so that sectarian schools do not actually reap a bonus from the program; and, so that parents are not incentivized to choose sectarian schools because of the possibility of the extra benefit beyond the actual tuition cost. Regardless, a government aid program must not build in a financial incentive designed to influence parents to choose sectarian schools, otherwise the program would violate the private-choice principle by making the parental choice not truly independent. Where the voucher amount exceeds the sectarian school's actual tuition costs, the sectarian school might end up being able to use the extra funds for sectarian purposes, unless the program design explicitly dictates that all extra funds must be exclusively used for secular purposes.

Despite the fascination of the Supreme Court and various state courts with the private-choice principle, it is noteworthy that some courts reject the idea that the private-choice principle severs the constitutional violation in government funding of sectarian schools. The Supreme Court of Alaska, for instance, has ruled that the private-choice principle does not create a "cleansing effect and somehow cause the funds to lose their identity as public funds. While the ingenuity of man is apparently limitless, the Court has held with

unvarying regularity that one may not do by indirection what is forbidden directly."[712] At heart, the private-choice principle is an artificial judicial construct created to escape the constitutional constraints against government funding of sectarian schools. Therewith, the school choice/government aid jurisprudence generally portends that if program design remits aid directly to sectarian schools without allowing for private choice, or defines recipients of the aid by reference to religion, the program would conventionally violate state religion clauses and the federal Establishment Clause. The program design must not "sell the people . . . a mule and call it a horse, even if [they] believe the public needs a mule."[713]

In tempering the constitutional protections within the federal and state constitutions, courts should soberly heed the following monitorial that could upend the potential for divisiveness in education: "[w]e make no distinction between a small violation of the Constitution and a large one. Both are equally invalid. Indeed, in the system of government envisioned by the Founding Fathers, we abhor the small violation precisely because it is precedent for the larger one."[714] Michigan voters recognized this and approved a constitutional amendment that counters the tempering of constitutional protections; this amendment explicitly excludes funding for vouchers and tax benefits, proactively omitting them from the arena of interminable political divisiveness over religion.[715] Specifically, the Michigan Constitution provides that

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712. Sheldon Jackson Coll. v. State, 599 P.2d 127, 132 (Alaska 1979) (citing Wolman v. Essex, 342 F. Supp. 399, 415 (S.D. Ohio 1972), *aff'd mem.*, 409 U.S. 808 (1972), *vacated*, 421 U.S. 982 (1975)).

713. Fannin v. Williams, 655 S.W.2d 480, 484 (Ky. 1983).

714. Bush v. Holmes, 919 So. 2d 392, 398 (Fla. 2006). An example of political divisiveness along religious lines contemporaneous with the enactment of some no aid clauses can be seen in the following excerpt:

> In 1844, there were riots in Philadelphia and elsewhere as Protestants and Roman Catholics battled in the streets. This conflict reflected issues such as class, economic status and ethnic differences—but one of the issues was whether the Roman Catholic or Protestant version of the Bible should be used in public schools. Catholic leaders desperately wanted public funding for their school system; Protestants wanted the same, but didn't want this government largesse to benefit the Catholics. The status of religion in the public square was fiercely debated throughout the 19th century. . . . Different religious groups proclaimed that their particular religion should be the law of the land; in some cases, this took the form of attempts to enact a constitutional amendment declaring that America was a 'Christian nation.'

Johnson, *supra* note 368, at 23–24.

715. MICH. CONST. art. VIII, § 2; *see Lemon*, 403 U.S. at 622 ("Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy

> No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students.[716]

Furthermore, some states regulate vouchers and tax benefits through no aid clauses that do not explicitly mention vouchers and tax benefits but prohibit all aid—whether direct or indirect—to sectarian schools and in some cases to all private schools. In order to prevent violations in states where the religion clause or the no aid clause prohibits funding of sectarian schools, instruction, or purposes, the program design can avoid constitutional infirmity by excluding sectarian schools as participants. For, as K. Hollman, General Counsel for Baptist Joint Committee for Religious Liberty, pointed out, "The prohibition on government aid for religion has protected against the corrupting influence of government money on religious bodies and served the interest of government neutrality toward religion."[717]

In states where the courts' interpretation of the state's religion clause track that of the federal Establishment Clause, program design must be structured to pass each prong of the *Lemon* test. Even in states that allow vouchers and tax benefits for private school education, it would be prudent for the program to explicitly restrict the schools' use of government funds to secular purposes.

Secular purposes that satisfy the *Lemon* test would also satisfy states' public purpose doctrines. States would be wise to plainly specify the public purposes for their government aid programs in a prominent part of the program's design. For state constitutions that include the term "appropriation" in prohibiting government aid of private schools, program design must account for the fact that tax credits would pass constitutional muster while vouchers, if paid from funds in government treasury, would not. Besides, in order to preclude participating private schools from deriving a windfall, voucher programs must specifically prohibit the schools from raising the tuition of participating students beyond what they ordinarily charge their students; otherwise, some schools could simply raise their tuition by the amount of the government aid, creating a windfall.

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manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.").

716. MICH. CONST. art. VIII, § 2.

717. Hollman, *supra* note 9, at 13, 15.

State constitutional provisions protect the public fisc by prohibiting government funding of private schools in several ways, including: constitutional requirements of a uniform and efficient public school system, state or local control over schools that receive government funding, prohibition of gifts or new debt by the State, and mandates that government funds must be used only for a public end. These provisions also help limit the potential threat from government-funded private schools to the viability and survival of the public school system. This is important because often times, public school is the only school some demographics of students have real access to. For instance, undermining the public school system has previously been used as a weapon of denouement to prevent racial desegregation; and it could be subtly used again, exacerbating educational inequities for minorities.[718] As the Anti-Defamation League notes, "the proud legacy of *Brown v. Board of Education* may be tossed away as tax dollars are siphoned off to deliberately segregated schools," a reference to private schools, which are often segregated.[719]

Courts sometimes require accountability and reporting mechanisms in aid programs in order to oversee their constitutionality and to ensure that private schools that receive government funds use such funds appropriately and as worthy stewards of taxpayer dollars. Policymakers should therefore keep this in mind in program design. Furthering the theme of accountability, in the interest of constitutional stewardships, states would be sensible to fund vouchers and tax benefit refunds from funding sources other than those allotted for public schools—in other words, from funds other than the common school fund, public school fund, or state school fund.[720] This is particularly critical in states where the courts

718. *See* Griffin v. County Sch. Bd. of Prince Edward Cty., 377 U.S. 218, 220–21 (1964) (discussing the closure of public schools in Virginia in a bid to preclude, subvert, or minimize public school desegregation).

719. Anti-Defamation League, *supra* note 374, at 51.

720. *See, e.g.*, ARK. CONST. art. 14, § 2 (stating that "[n]o money or property belonging to the public school fund, or to this State, for the benefit of schools or universities, shall ever be used for any other than for the respective purposes to which it belongs"); CONN. CONST. art. 8, § 4 ("The fund, called the School Fund, shall remain a perpetual fund, the interest of which shall be inviolably appropriated to the support and encouragement of the public schools throughout the state, and for the equal benefit of all the people thereof. The value and amount of said fund shall be ascertained in such manner as the general assembly may prescribe, published, and recorded in the comptroller's office; and no law shall ever be made, authorizing such fund to be diverted to any other use than the encouragement and support of public schools, among the several school societies, as justice and equity shall require."); KY. CONST. § 186 ("All funds accruing to the school fund shall be used for the

or the constitution might require that public school funds be used exclusively for public school education. In the same vein, in a state like Colorado that constitutionally mandates local control over locally raised revenue, government aid programs must not require the use of locally raised funds for private school education if the State wants to avoid constitutional fatality.[721]

States can also hold participating private schools accountable by mandating that they give their students the same state assessments as public schools and that the schools annually report the results to the State. States should similarly require schools to annually inform parents of the results, so that the parents can make educated decisions about the future education of their children, including whether to continue at that school or transfer to another private school or a public school.

As a form of self-accountability that could enhance the constitutionality of government aid program, particularly one benefitting sectarian schools, the State could demand that private schools conduct annual independent audits of their spending of government funds under the program. Further, sectarian schools should be prohibited from mingling program funds from the government with the school's own funds intended for sectarian purposes.

If the State wants to justify shifting funds from public schools to private schools as a means of saving money, it must specify both a maximum number of parents and businesses eligible for the vouchers or tax benefits and a maximum statewide tax credit or voucher amount set at a level that is lower than the cost of educating participating students in the local school districts. Such caps would promote accountability for expenditure of taxpayer money.

Strict accountability is likewise important for government aid programs. Without accountability, "some private schools may promote agendas antithetical to the American ideal," and "it may be difficult to prevent schools run by the Nation of Islam or the Ku Klux Klan from receiving public funds to subsidize their racist and anti-Semitic agendas."[722] The public school system might be the last bastion to promote and perpetuate values of diversity and tolerance

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maintenance of the public schools of the Commonwealth, and for no other purpose, and the General Assembly shall by general law prescribe the manner of the distribution of the public school fund among the school districts and its use for public school purposes.").

721. Owens v. Colo. Cong. of Parents, Teachers & Students, 92 P.3d 933, 934 (Colo. 2004) (en banc).

722. Anti-Defamation League, *supra* note 374, at 51.

that could help carry on the legacy of *Brown v. Board of Education*; therefore, states implementing government aid programs must ensure that their public school systems are not thereby imperiled.[723]

Policymakers, educators, and the public should consider the following perspective as the debate over vouchers and tax benefits rages on:

> Implementation of voucher [and tax benefit] programs sends a clear message that we are giving up on public education. Undoubtedly, vouchers [and tax benefits] would help some students. But the glory of the American system of public education is that it is for *all* children, regardless of their religion, their academic talents or their ability to pay a fee. This policy of inclusiveness has made public schools the backbone of American democracy.[724]

Irrespective of the innovations in education our nation embraces, we must ensure that a vibrant, inclusive education system endures. We owe this much to our children and future generations.

723. *Id.* at 52.
724. *Id.*

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