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Constitutional Law: Vouchers, Sectarian Schools, and Constitutional Uncertainty: Choices for the Unites States Supreme Court and the States

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COMMENT

Constitutional Law: Vouchers, Sectarian Schools, and Constitutional Uncertainty: Choices for the United States Supreme Court and the States

I. Introduction

The First Amendment of the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1] While the First Amendment applies to the states through the Fourteenth Amendment, states have developed, without violating that constitutional limit, a variety of approaches to church and state issues.[2] Some state constitutions follow the U.S. Constitution, but other states have chosen to follow Virginia in placing more specific restrictions on state involvement with religion.[3] Oklahoma's constitution is one of the most restrictive.[4] Article II, section 5 of the Oklahoma Constitution provides:

> No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.[5]

This Oklahoma provision, on its face, appears to prohibit any aid to sectarian schools and thus prohibit any voucher program that includes sectarian schools.[6] However, constitutional language is open to interpretation. For example, the U.S. Supreme Court, scholars, and political leaders continue to debate whether the First Amendment permits some forms of government aid to sectarian schools.[7] Even

1. U.S. CONST. amend. I.

2. *See* G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 76 (1989) (analyzing how state courts have interpreted state constitutional provisions).

3. *See generally* Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 EDUC. L. REP. 1 (1997) (discussing the broad range of state constitutional provisions on aid to sectarian institutions and their relevance to voucher proposals).

4. *See id.* at 5.

5. OKLA. CONST. art. II, § 5. A 1995 proposal to change the Oklahoma Constitution to allow the state to fund private school scholarships failed to pass the Senate. *See* Heritage Foundation, *School Choice: What's Happening in the States 2000* (visited Oct. 3, 1999) <http://www.heritage.org/schools/oklahoma.html>.

6. In *Gurney v. Ferguson*, 122 P.2d 1002, 1003 (Okla. 1941), the Oklahoma Supreme Court held that sectarian schools are sectarian institutions and ruled that aid to sectarian schools was unconstitutional under article II, section 5. However, in other instances the court has taken a more flexible view of sectarian institutions. *See infra* Part VII.A.3 (discussing Oklahoma case law).

7. *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT

when the U.S. Supreme Court used the Fourteenth Amendment to apply the Establishment Clause to the states in *Everson v. Board of Education*,[8] the Court called for separation of church and state and then held that New Jersey could pay for bus rides for children attending sectarian schools.[9]

The meaning of state as well as federal constitutional provisions concerning aid to sectarian institutions is especially important in the debate over school vouchers. Even in states whose constitutions, like that of Oklahoma, provide specific limits on state aid to sectarian institutions, courts have allowed some forms of aid.[10] Therefore, restrictive constitutions do not seem to deter governors and state legislators who favor aid. For example, Florida has a constitutional provision limiting state aid to sectarian institutions.[11] Nonetheless, in May 1999, Florida passed a state-wide publicly funded voucher program for students from poorly performing public schools.[12]

Despite the restrictions in the Oklahoma Constitution, Oklahomans have been debating various school choice programs, including vouchers, for several years. In 1999, Oklahoma Governor Frank Keating and Fourth District U.S. Representative J. C. Watts spoke in favor of school vouchers.[13] Also in 1999, Oklahoma became the thirty-sixth state to approve charter schools, and the Oklahoma Christian Coalition was leading an effort to have the legislature approve a voucher program.[14] On the other side, the Oklahoma State School Boards Association

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xvi-xvii (2d ed. rev. 1994).

8. 330 U.S. 1 (1947).

9. LEVY, *supra* note 7, at 149-51. *Everson* is one of several precedents, dating back to at least 1930, that uses the "child benefit" theory. *See id.* at 152-53. The "child benefit" theory allows aid to go directly to children (or their parents) and to provide public services that promote the health, safety, or welfare of the children under state police power. *See id.* Such services are available regardless of religion and, according to the "child benefit" theory, aid religion only indirectly. *See id.* In addition, denying a general benefit on the basis of religion conflicts with the Free Exercise Clause. *See id.*

10. In *Burkhardt v. City of Enid*, 771 P.2d 608, 612 (Okla. 1989), the court held it did not violate article II, section 5 for a city to buy the campus of a church-related college and lease the campus back at below market value. *See infra* notes 448-52 and accompanying text.

11. "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." FLA. CONST. art. I, § 3.

12. *See* Matthew Miller, *A Bold Experiment to Fix City Schools*, ATLANTIC MONTHLY, July 1999, at 15, 16; *see also* David Byrd, *Vouching for Vouchers*, 31 NAT'L J. 1953, 1953 (1999). The Florida plan offers students in poorly performing schools either a chance to transfer to another public school or an "opportunity scholarship" to attend a private sectarian or nonsectarian school. Opponents sued, claiming the plan violated article I, section 3 of the Florida Constitution. *See* Stanley M. Elam, *Why Florida's Voucher Plan is Unconstitutional*, PHI DELTA KAPPAN, Sept. 1999, at 81, 84 (summarizing the arguments in the ACLU brief against the Florida plan); Institute for Justice, *Florida School Choice Case* (visited Oct. 4, 1999) <http://www.ij.org/cases/school/florida/florida.shtml>. On March 14, 2000, a Florida judge declared the plan violated the state constitutional requirement of free public schools. *See* Ben Wildavsky, *Vouchers Lose in Court: Florida Program is Out*, U.S. NEWS & WORLD REP., Mar. 27, 2000, at 30, 30.

13. Paul English, *Legislature Poised for Bow at 'Encore' Session*, DAILY OKLAHOMAN, Feb. 8, 1999, at 1; Paul Leavitt, *Politicians Greet Students with Education Proposals*, USA TODAY, Sept. 8, 1999, at 11A.

14. *See* Heritage Foundation, *supra* note 5.

opposes vouchers. As of March 1999, 160 school boards (slightly less than one-third of all state school boards) were on record as opposing school vouchers.[15] Before Oklahoma has a full debate over whether to commit substantial time, energy, and money to any voucher program, it is valuable to look at other states' experiences with voucher programs. In 1998, 1999, and 2000, a series of state and federal court decisions on school voucher laws in Wisconsin,[16] Maine,[17] Vermont,[18] Florida,[19] and Ohio[20] demonstrated that these programs raise constitutional questions that the U.S. Supreme Court has not yet fully addressed.[21] Looking beyond the legal issues, the voucher programs in Wisconsin and Ohio have sharpened the national debate over whether vouchers are good public policy.

Part II of this comment first examines voucher programs and the practical and legal issues related to voucher programs. Part III analyzes U.S. Supreme Court decisions on aid to sectarian schools before 1998 and disputes over the 1997 *Agostini v. Felton*[22] decision. Part IV focuses on state school voucher cases, particularly the 1998 and 1999 post-*Agostini* decisions. Part V examines the possible reasons for the range of decisions in those post-*Agostini* decisions. The comment then moves in Part VI to a consideration of the choices available to the U.S. Supreme Court if it accepts voucher cases for review. Part VII analyzes the policy choices for Oklahoma and the other states, given the uncertainty of current state and federal law and the nature of voucher programs.

II. Voucher Programs: The Nature of the Problem

A. Types of School Voucher Programs

The modern school voucher movement dates from a 1955 suggestion by Milton Friedman, who argued that school choice, including school vouchers, would give parents an alternative to the public schools and that the resulting competition with

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15. *See* Bobby Ross, Jr., *City School Board to Discuss Vouchers*, DAILY OKLAHOMAN, Mar. 1, 1999, at 1.

16. *See* Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998).

17. *See* Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me. 1999).

18. *See* Chittenden Town Sch. Dist. v. Vermont Dep't of Educ., 738 A.2d 539 (Vt. 1999).

19. *See* Holmes v. Bush, No. 97-3370, 2000 WL 526364 (Fla. Cir. Ct. Mar. 14, 2000), *rev'd and remanded*, 767 So. 2d 668 (Fla. Dist. Ct. App. 2000).

20. *See* Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999); Simmons-Harris v. Zelman, 54 F. Supp. 2d 725 (N.D. Ohio 1999); Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999), *aff'd* 234 F.3d 945 (6th Cir. 2000).

21. The U.S. Supreme Court has denied certiorari in the Wisconsin, Maine, and Vermont cases and did not accept a voucher case for the 1999-2000 term. In addition, the Court refused to hear the Arizona Supreme Court's decision upholding tax deductions to foundations supporting sectarian schools. *See* Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999), *cert. denied*, 120 S. Ct. 283 (1999). The Court did accept a Louisiana case about public money in sectarian schools which some observers believed could provide insight into the Court's views on vouchers. *See States Can't Subsidize Parochial School Tuition*, NORMAN TRANSCRIPT, Dec, 14, 1999, at A9; *see infra* notes 138-44 and accompanying text (summarizing ruling in the Louisiana case, *Mitchell v. Helms*).

22. 521 U.S. 203 (1997).

private schools would produce better public schools.[23] Since that time, school choice programs have grown to include not only vouchers but also privately funded scholarship programs, tuition tax credits, and charter schools.[24] Generally, officials have created these voucher and other choice programs in response to pressure for alternatives to the perceived failures of the public schools, especially schools in central cities.[25]

School vouchers, however, are not new. States have long used voucher programs to provide public education for small towns that lack the funds or the students needed to support a public school system.[26] Maine has had a rural voucher program since the eighteenth century, and Vermont's program is over one hundred years old.[27] But no one challenged the Maine and Vermont systems until the states excluded sectarian schools from their voucher programs.

Government-sponsored voucher programs provide money to parents of qualified students. In the Vermont and Maine voucher programs, students qualify if their town has no public school.[28] In the Milwaukee and Cleveland voucher programs, students qualify because of economic status or a variety of other factors.[29] Under Florida's state-wide program, students qualify for vouchers if their public school fails to meet state standards for two consecutive years.[30] Parents can then use the voucher to subsidize their children's education at a participating public or private school.[31] Thus, some students may use vouchers to attend public schools.[32]

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23. *See* Kathy Koch, *School Vouchers*, CQ RESEARCHER, April 9, 1999, at 290-91; *see also* Miller, *supra* note 12, at 18 (discussing Milton Friedman's goal of minimal government involvement in education).

24. *See* John F. Witte, THE MARKET APPROACH TO EDUCATION: AN ANALYSIS OF AMERICA'S FIRST VOUCHER PROGRAM 32-33, 44-46, 74-81 (2000) (describing the range of public and private choice programs in Milwaukee and other cities); Koch, *supra* note 23, at 283; *see also Frontline: The Battle over School Choice* (PBS television broadcast, May 23, 2000) (visited May 27, 2000) <http://www.pbs.org/wgbh/pages/frontline/shows/vouchers/> (providing transcript and web links showing variety of issues involved).

25. *See* Miller, *supra* note 12, at 15-16.

26. These are called "necessary vouchers" and "multidistrict vouchers" in Ellen M. Wasilausky, *Jane Read the Bible: Does the Establishment Clause Allow School Choice Programs to Include Sectarian Schools After* Agostini v. Felton?, 56 WASH. & LEE L. REV. 721, 724-25 (1999).

27. *See* Koch, *supra* note 23, at 290.

28. *See* Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 129 (Me. 1999); Chittenden Town Sch. Dist. v. Vermont Dep't of Educ., 738 A.2d 539, 544 (Vt. 1999).

29. Such means testing is constitutional because economic status is not a suspect class and education is not a fundamental right. *See infra* note 48 and accompanying text.

30. *See* Lynette Clemetson, *A Ticket to Private School*, NEWSWEEK, Mar. 27, 2000, at 30, 32.

31. For example, adjacent public school districts could participate in the Cleveland voucher program. None did so. *See* Simmons-Harris v. Goff, Nos. 96 APE08-982, APE08-991, 1997 WL 217583, at *1-*2 (Ohio Ct. App. May 1, 1997).

32. *See Sorting Out School Choice*, ECONOMIST, Sept. 4, 1999, at 33, 34 (describing the Arizona voucher plan where students choose between traditional and charter public schools). Public charter schools are funded by tax money but are encouraged to experiment with different approaches to education by being freed from many state regulations on hiring and curriculum. *See id.*; *see also* Koch *supra* note 23, at 283.

Voucher programs that allow students to use the vouchers at private schools may include or exclude sectarian schools.[33] As noted earlier, Maine and Vermont include nonsectarian private schools but specifically exclude sectarian schools. Other programs, such as those in Ohio and Wisconsin, include all public and private (both sectarian and nonsectarian) schools that qualify to participate.[34]

Voucher programs may be publicly or privately funded.[35] They can be targeted voucher programs, designed to help particular populations such as the urban poor attending underfunded public schools, or universal voucher programs, available to all students regardless of their income levels or the quality of their public schools.[36] Some supporters of voucher programs targeted at the urban poor express concern that targeted programs could expand to universal programs and believe that universal vouchers may undermine support for the public schools and create expensive, politically irreversible middle class entitlement programs.[37] Other targeted voucher supporters either believe the value of choice outweighs the risks of universal vouchers[38] or see universal vouchers as the ultimate goal.[39] For all voucher programs, issues of cost and effectiveness are important.[40]

B. School Financing Issues

State rules for public school financing vary, but most school funds are tied, at least in part, to the average daily attendance.[41] In Oklahoma, for example, in the 1992-93 school year, the state general fund provided 69.9% of school funding.[42] The allocation for each district was based on the weighted average daily attendance.[43] Local governments provided 23.1% of the funding, and the remaining 7.0% came from the federal government.[44]

Local funding is usually based on the property tax, leading to better schools and lower tax rates in the wealthier districts.[45] Frustration with this inequality led to several court challenges claiming that local funding calculations denied the poor equal protection.[46] In one of these cases, *San Antonio Independent School District*

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33. *See* Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 837 (1999) (describing the different types of voucher systems).

34. *See infra* Part IV (discussing voucher cases).

35. *See* Kim K. Metcalf & Polly A. Tait, *Free Market Policies and Public Education: What Is the Cost of Choice?*, PHI DELTA KAPPAN, Sept. 1999, at 65, 66.

36. *See* Witte, *supra* note 24, at 196-97.

37. *See id.* at 190; *infra* notes 386-401 and accompanying text (discussing these concerns).

38. *See* Metcalf & Tait, *supra* note 35, at 74.

39. *See* Witte, *supra* note 24, at 184-85.

40. *See infra* Part VII.A.1 (discussing policy concerns).

41. *See, e.g.*, 70 OKLA. STAT. § 615 (Supp. 2000); *id.* § 18-200.1; 70 OKLA. STAT. § 10-103.1 (1991).

42. *See* OKLAHOMA ALMANAC 711-12 (45th ed. rev. 1995).

43. *See id.* The weighted average daily attendance is called the weighted average daily membership and is calculated according to a formula designed to protect schools against sudden shifts in funding. *See id.* at 712; *see also* 70 OKLA. STAT. § 18-200.1. Local funding is tied to annual millage levies. *See* OKLAHOMA ALMANAC, *supra* note 42, at 712; *see also* 70 OKLA. STAT. § 5-134 (Supp. 2000).

44. *See* OKLAHOMA ALMANAC, *supra* note 42, at 711.

45. *See* Miller, *supra* note 12, at 17-18.

46. *See id.* at 18.

v. Rodriguez,[47] the U.S. Supreme Court rejected arguments that funding based on property taxes denied students a constitutional right to equal educational opportunities. The Court held that Texas's property-based school funding did not violate the U.S. Constitution because the poor are not a suspect class and education is not a fundamental constitutional right.[48]

Despite *Rodriguez*, further litigation and political pressures at the state level caused Texas and several other states to modify their school funding systems.[49] Nonetheless, some supporters of school funding equity litigation turned to educational vouchers as another approach to equalizing educational opportunities.[50] Using vouchers, children from poorer families could either bring more money to their local public schools or transfer from poorly performing schools to better schools.[51]

In voucher programs, all or part of this per pupil expenditure moves with the child to the new school, whether it is another public school, a public charter school, or a private school.[52] Urban voucher programs, which attract large numbers of students, thus can significantly cut the money going to public school districts. For example, the Milwaukee program began in 1990 with 337 students, taking $733,000 from the public schools.[53] By 1998-99, there were 5830 students participating, diverting $28 million from the public schools to private schools participating in the voucher program.[54]

An additional funding issue is accountability for the use of funds. While public support for voucher programs had grown to a slight majority in 1998, in one poll 74% said there needed to be accountability.[55] However, accountability would involve state assessment of school programs, and only eighteen percent of private religious schools said they were "definitely willing" to participate in voucher programs that involved state assessment.[56]

Assessment and other accountability measures are controversial. For example, some analyses of student achievement in Milwaukee and Cleveland found significant improvement, while others have found none.[57] In addition, accountability for public

47. 411 U.S. 1 (1973).

48. *See id.* at 25.

49. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 754 (Kermit L. Hall et al. eds., 1992).

50. *See* Miller, *supra* note 12, at 18.

51. *See id.*

52. *See* Koch, *supra* note 23, at 293.

53. *See id.* at 292-93.

54. *See id.* The amount per pupil rose from $2446 in 1990-91 to $4894 in 1998-99. *See id.*

55. *See id.* at 283; *see also* Clemetson, *supra* note 30, at 32 (noting problems resulting from lack of accountability in schools receiving voucher funds); Editorial, *Folks Favor Public Schools*, OKLA. OBSERVER, Sept. 25, 1999, at 5 (reporting that 77% want accountability if public funds are used in private schools).

56. *See* Koch, *supra* note 23, at 289.

57. *See* Eric Hirsh & Shelby Samuelson, *Turning Away from Public Education*, STATE LEGISLATURES, Sept. 1999, at 12, 15-16; Koch, *supra* note 23, at 298-99; *see also infra* Part VI (discussing policy considerations); *American Federation of Teachers* (visited Oct. 4, 1999)

funds going to sectarian schools has included the restriction that no public money be spent on religious activities.[58] The U.S. Supreme Court has often ruled that such financial accounting violates the First Amendment because detailed state auditing produces excessive entanglement of church and state.[59] Thus, financing issues blend into constitutional issues.

C. Constitutional Issues

Voucher programs that include or exclude sectarian schools raise several constitutional issues.[60] Not all voucher programs include sectarian schools.[61] However, 77.1% of private schools are sectarian,[62] so excluding sectarian schools limits the impact of vouchers. If sectarian schools are excluded, parents wanting sectarian schools may claim these programs violate both the Free Exercise and Equal Protection Clauses.[63] If sectarian schools are included, voucher opponents challenge the programs as a violation of the Establishment Clause or of state constitutional provisions against aid to religion.[64]

In addition, voucher opponents raise Equal Protection issues. Sectarian schools usually have lower tuition than the nonsectarian private schools, so voucher money covers a larger percentage of the tuition at sectarian schools.[65] Also, private schools in low-income neighborhoods are usually sectarian.[66] Either because of cost or location or both, voucher opponents note that poorer families with vouchers choose sectarian schools.[67] The NAACP has claimed that this has the effect of segregating the private schools, with racial minorities concentrated in the sectarian schools.[68] Thus, the NAACP argues that tax-funded vouchers promote segregation in violation of the Equal Protection Clause.[69]

<http://www.aft.org/research/vouchers> (discussing and critiquing the competing studies).

58. *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 230-31 (1977) (allowing aid for textbooks and for testing, diagnostic, and remedial services, but not for instructional equipment and field trips); *see also infra* note 138 (noting *Mitchell v. Helms* overruled *Wolman*).

59. *See* Lemon v. Kurtzman, 403 U.S. 602, 620 (1971).

60. *See* Hamilton, *supra* note 33, at 837 (noting the issues associated with each type of program). Only the use of public voucher money in public schools does not raise constitutional issues. *See id.*

61. For example, the Milwaukee program initially excluded sectarian schools. *See* Jackson v. Benson, 578 N.W.2d 602, 608 (Wis. 1998).

62. *See* Koch, *supra* note 23, at 284.

63. *See, e.g.*, Bagley v. Raymond School Dep't, 728 A.2d. 127 (Me. 1999).

64. *See* Witte, *supra* note 24, at 21-23; *see also, e.g.*, Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999).

65. Churches usually subsidize sectarian schools, either by cash subsidies or by allowing the schools to use church buildings at reduced or no cost. *See* Koch, *supra* note 23, at 289.

66. *See id.*

67. *See id.* at 284, 289.

68. *See id.* at 284; Evan Thomas & Lynette Clementson, *A New War over Vouchers*, NEWSWEEK, Nov. 22, 1999, at 46, 46.

69. The *Jackson* court rejected this argument. *See* Jackson v. Benson, 578 N.W.2d 602, 630-32 (Wis. 1998). The African-American community is divided over whether the NAACP should pursue this argument. *See* Koch, *supra* note 23, at 284.

III. Aid to Sectarian Schools: The Relevant Law Before 1998

A. The Lemon Test

In *Lemon v. Kurtzman*,[70] the U.S. Supreme Court formulated a three-part test for determining whether state aid to sectarian schools violates the First and Fourteenth Amendments: "[f]irst, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[71] However, even the U.S. Supreme Court has had trouble applying the *Lemon* test,[72] and several Justices have expressed dissatisfaction with the test.[73]

B. From Lemon to Agostini

Applying *Lemon*, the U.S. Supreme Court held unconstitutional in *Committee for Public Education and Religious Liberty v. Nyquist*,[74] a New York program that provided cash for maintenance and equipment to nonpublic schools serving low-income families. The program also provided a partial tuition reimbursement to low income parents of students in nonpublic schools and a tax deduction for other parents of nonpublic school students.[75] The *Nyquist* Court determined that the program had a secular purpose.[76] However, the Court found that all three provisions of the program impermissibly advanced religion.[77] Because there were no restrictions on the use of the direct maintenance, repair, and equipment grants to subsidize only secular activities, the Court found that the "primary effect" was to "advance religion."[78] The tuition reimbursements and tax deductions, even though the assistance went through the parents, also failed.[79] The Court determined that the tax money provided an incentive to parents to send their children to sectarian schools.[80] There was no assurance that tax-subsidized tuition payments would be used only for secular education.[81]

The Court particularly noted that these tuition subsidies are not available to parents of public school students and suggested that the holding might be different in a case in which the aid was "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted."[82]

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70. 403 U.S. 602 (1971).
71. *Id.* at 612-13 (citations omitted).
72. *See* LEVY, *supra* note 7, at 158.
73. *See id.* at 161; *see also* Suzanne H. Bauknight, *The Search for Constitutional School Choice*, 27 J.L. & EDUC. 525, 536 (1998).
74. 413 U.S. 756, 762, 798 (1973).
75. *See id.* at 764-69.
76. *See id.* at 773.
77. *See id.* at 794.
78. *Id.* at 774.
79. *See id.* at 785-86.
80. *See id.* at 786.
81. *See id.* at 780.
82. *Id.* at 782 n.38.

The Court pointed out that "neutral, nonideological aid, assisting only the secular functions of sectarian schools" and having only "an indirect and incidental effect beneficial to religious institutions" was permissible.[83] However, "assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion."[84] Even though the *Nyquist* Court ruled against the tuition-aid program, voucher supporters point out that the opinion also suggests neutral and indirect aid programs available to all students would be acceptable.[85]

From the *Nyquist* decision in 1972 until 1986, the Court attempted to clarify what types of state and federal aid to sectarian schools were permissible. In *Meek v. Pittenger*,[86] the Court found that state loans of textbooks were permissible, but not loans of instructional equipment that could be used for religious purposes.[87] In *Mueller v. Allen*,[88] the Court approved tax deductions for tuition, textbooks, and transportation because the deductions went to all parents, not just parents of nonpublic school students. The parents chose where to spend the money, and the deduction was only one of many available to taxpayers. Therefore, even though most of the money indirectly benefitted sectarian schools, the Court did not find a violation of the Establishment Clause.[89] However, in *Aguilar v. Felton*,[90] the Court held that the state could not provide remedial instruction to children in sectarian schools inside the school building.[91]

In 1986, Chief Justice Warren Burger retired and William Rehnquist became Chief Justice.[92] As an Associate Justice, Rehnquist had often objected to the *Lemon* test and was on record as supporting a "nonpreferentialist," rather than a "separation of church and state," interpretation of the First Amendment.[93] In addition to Chief Justice Burger, Associate Justices Powell, Brennan, and Marshall also retired during the Reagan and Bush presidencies. Justices O'Connor, Scalia, Kennedy, Thomas, and Souter joined the Court.[94]

Because of the conservative Christian support for Reagan and Bush, these new Justices were expected to be more conservative on issues important to those

83. *Id.* at 775.
84. *Id.* at 794.
85. *See* Mark E. Chopko, *Vouchers Can Be Constitutional*, 31 CONN. L. REV. 945, 957 (1999).
86. 421 U.S. 349 (1975).
87. *See id.* at 362-63; *see also infra* note 138 (noting *Mitchell v. Helms* overturned *Meek*).
88. 463 U.S. 388 (1983).
89. *See* CHOPKO, *supra* note 85, at 958.
90. 473 U.S. 402 (1985).
91. *See id.* at 414.
92. *See* JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 8-9 (1995).
93. *See id.* at 238-39.
94. During the Clinton presidency, Associate Justices Blackmun and White retired, and Associate Justices Ginsburg and Breyer took their places. *See id.* at 297-302.

voters.[95] In particular, U.S. Supreme Court decisions in *Witters v. Washington*,[96] *Zobrest v. Catalina Foothills School District*,[97] and *Agostini v. Felton*[98] have led many observers to conclude that the Court has become so receptive to aid for sectarian primary and secondary schools that it would accept a carefully structured voucher program.[99] Others believe these cases must be read more narrowly.[100]

For example, in *Witters*, a unanimous Court held that when a blind student receives state vocational rehabilitation assistance, the use of that aid to attend a private Christian college to study for the ministry does not violate the Establishment Clause.[101] Applying the *Lemon* test, the Court determined that rehabilitation of the visually impaired was a secular purpose.[102] The Court reasoned that "the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education [does not] confer any message of state endorsement of religion."[103] The aid went directly to the recipient and "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."[104] *Witters* thus approves aid that is generally available to qualified students. However, the aid in question in *Witters* was for college students who rarely used the aid at religious schools. The Court has long been more receptive to programs that aid sectarian colleges.[105] On remand, the Washington Supreme Court found the program invalid because it violated the Washington Constitution.[106]

In *Zobrest*, the Court held that a state-provided sign language interpreter for a student in a sectarian high school does not violate the Establishment Clause.[107] As in *Witters*, the Court determined that the aid was available to those who qualified and that the aid went to the student, not to the school.[108] In addition, the aid was the same whether the student attended a public or a nonpublic school.[109] Although earlier decisions had barred state-supported teachers in the

95. *See id.* at 237. Simon concludes such expectations have not always been accurate. *See id.* at 287-90.

96. 474 U.S. 481 (1986).

97. 509 U.S. 1 (1993).

98. 521 U.S. 203 (1997).

99. *See* CHOPKO, *supra* note 85, at 960-63.

100. *See* HAMILTON, *supra* note 33, at 839.

101. *Witters*, 474 U.S. at 488-89.

102. *See id.* at 485-86.

103. *Id.* at 488-89.

104. *Id.* at 488.

105. *See* Alan E. Brownstein, *Evaluating School Voucher Programs through a Liberty, Equality, and Free Speech Matrix*, 31 CONN. L. REV. 871, 934-37 (1999).

106. *See* Kemerer, *supra* note 3, at 19-20; Witte, *supra* note 24, at 22.

107. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13-14 (1993).

108. *See id.* at 13.

109. *See id.* at 10.

sectarian schools, the *Zobrest* court said that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school."[110]

C. Agostini and Its Aftermath

The U.S. Supreme Court overturned *Aguilar* in *Agostini v. Felton*[111] and held "that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees" who are monitored for religious neutrality in monthly visits.[112] In *Agostini*, Justice O'Connor stressed that "the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided."[113]

Nonetheless, Justice O'Connor noted two changes as a result of *Witters* and *Zobrest*.[114] First, the Court "[has] abandoned the presumption . . . that the placement of public employees on parochial school grounds inevitably results in . . . state-sponsored indoctrination or constitutes a symbolic union between government and religion."[115] Second, the Court no longer believes "that all government aid that directly assists the educational function of religious schools is invalid."[116] However, the Court majority did not abandon the *Lemon* test.[117] Justice O'Connor emphasized that the Court continues to ask "whether the government acted with the purpose of advancing or inhibiting religion" and "whether the aid has the 'effect' of advancing or inhibiting religion."[118] She merged "entanglement" with "effect" because entanglement and effect are judged by the same factors: "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority."[119]

The four *Agostini* dissenters countered that the majority had misinterpreted *Zobrest*.[120] Supporting their viewpoint, Alan E. Brownstein argues that *Witters*, *Zobrest*, and *Agostini* represent the Court's commitment to an "ad hoc, case-by-case analysis."[121] Thus, he concludes that it is wrong to read these cases as broad statements of support for voucher programs.[122]

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110. *Id.* at 13.
111. 521 U.S. 203 (1997).
112. *Id.* at 234-35.
113. *Id.* at 222.
114. *See id.* at 223.
115. *Id.*
116. *Id.* at 225.
117. *Agostini* was a 5-4 decision. Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas were in the majority, while Justices Souter, Stevens, Ginsburg, and Breyer dissented.
118. *Agostini*, 521 U.S. at 222-23.
119. *Id.* at 232 (quoting Lemon v. Kurtzman, 403 U.S. 602, 615 (1971)).
120. *See id.* at 248-50.
121. BROWNSTEIN, *supra* note 105, at 942.
122. *See id.*

Still, most analyses of *Agostini* conclude that the decision marks a significant shift in the Court's view of the Establishment Clause.[123] These analyses find that *Agostini* has abandoned the "entanglement" test because Justice O'Connor states that "the factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.'"[124] Justice O'Connor also states that the criteria the Court uses to decide "whether government aid has the effect of advancing religion" are whether the funded program "result[s] in governmental indoctrination; define[s] its recipients by . . . religion; or create[s] an excessive entanglement."[125] Since most programs of aid have fallen because of the "Catch-22" between the second and third prongs,[126] elimination of the entanglement prong should make it easier for aid programs, including vouchers, to win court approval.[127]

There are alternative interpretations of *Agostini*'s significance. First, it can be argued that the *Aguilar* Court erred on both the facts and the precedents. The Court's majority opinion ignored the fact that New York had created many safeguards to ensure the public school teachers who provided the remedial instruction were only accountable to public school officials.[128] Thus, Edwin G. West and Leonard W. Levy find no evidence to support Brennan's contention in *Aguilar* that the program entangled church and state.[129] While Justice O'Connor's *Agostini* opinion states that *Aguilar* is "no longer good law,"[130] her *Aguilar* dissent demonstrates that she did not believe *Aguilar* was good law in 1985 either.[131] In addition, *Aguilar* and *Agostini* both involved a federal Title I program that offered

123. *See* Jeremy T. Bunnow, *Reinventing the Lemon: Agostini v. Felton and the Changing Nature of Establishment Clause Jurisprudence*, 1998 WIS. L. REV. 1133, 1178-80 (1998) (finding that the Court has taken an activist, accomodationist position that allows more direct state aid to parochial schools); *see also* Kimberly M. DeShano, *Educational Vouchers and the Religion Clauses Under Agostini: Resurrection, Insurrection and a New Direction*, 49 CASE W. RES. L. REV. 747, 756 (1999) (finding that *Agostini* has weakened the *Lemon* test and virtually eliminated the entanglement prong); Gary N. Mozer, *The Crumbling Wall Between Church and State: Agostini v. Felton, Aid to Parochial Schools, and the Establishment Clause in the Twenty-First Century*, 31 CONN. L. REV. 337, 339 (1998) (finding that the decision is "a significant rejection of the separationist interpretation of the Establishment Clause").

124. *Agostini*, 521 U.S. at 232.

125. *Id.* at 234.

126. *See* Aguilar v. Felton, 473 U.S. 402, 420-21 (1985) (Rehnquist, J., dissenting) (calling the conflict between the two prongs a "Catch-22").

127. *See* Bauknight, *supra* note 73, at 540, 549-50.

128. *See* LEVY, *supra* note 7, at 175-76. The safeguards included a prohibition against religious symbols in the rooms and monitoring by city officials. In addition, the public school teachers involved in the program used secular materials, did the testing themselves, did not participate in religious activities, and did not teach with the parochial school teachers. *See id.*

129. *See id.* at 177; *see also* Edwin G. West, *Constitutional Judgment on Non-Public School Aid: Fresh Guidelines or New Roadblocks*, 35 EMORY L.J. 795, 803 (1986) (stating there was no evidence of proselytizing in the publicly funded remedial classes challenged in *Aguilar*).

130. *See Agostini*, 521 U.S. at 236.

131. *See Aguilar*, 473 U.S. at 428 (O'Connor & Rehnquist, J.J., dissenting) (noting that "not a single incident of religious indoctrination has been identified . . . over the past two decades," is evidence that public school teachers continue to act like public school teachers even inside a parochial school).

supplemental aid to provide help to "educationally deprived" students.[132] The program benefits the students directly and the school only indirectly, and thus fits into the "child benefit" test, which the Court has used since the 1930s to allow indirect aid to sectarian schools.[133]

Second, assuming the *Aguilar* Court was correct in 1985, it can still be argued that the experience with the *Aguilar* decision showed it did not work in practice. New York set up mobile classrooms so the children could get remedial instruction outside the parochial school building.[134] As Justice O'Connor stressed in *Agostini*, the subsidy exists whether the program is inside or outside the building.[135] Thus, Marci A. Hamilton concludes that the *Agostini* Court was simply correcting a decision that had produced an absurd result.[136]

Third, *Agostini* is not a clear decision. Some of its language suggests that the Court is much more open to direct aid to sectarian schools, but the holding is narrow: it applies to federal funds used to provide disadvantaged children with remedial instruction by government employees.[137] In fact, *Mitchell v. Helms*,[138] decided June 28, 2000, demonstrates that U.S. Supreme Court Justices are divided on how to interpret and apply *Agostini*. Justice Thomas, writing for a plurality of four,[139] cited *Agostini* as evidence that "aid that is offered to a broad range of groups of persons without regard to religion" is neutral and therefore constitutional.[140] However, Justice O'Connor[141] disagreed with the plurality's view of *Agostini*, stating that "the Court has never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid."[142] Justice O'Connor concluded that *Agostini* controlled *Mitchell* simply because the facts in the cases were so similar.[143]

Thus, *Mitchell* shows that the Court remains divided over the constitutionality of government aid to sectarian schools and the significance of *Agostini*.[144] Until the

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132. *See* LEVY, *supra* note 7, at 175.

133. *See id.* at 168.

134. *See* Hamilton, *supra* note 33, at 834.

135. *See Agostini*, 521 U.S. at 230.

136. *See* Hamilton, *supra* note 33, at 834.

137. *See Agostini*, 521 U.S. at 234-35.

138. 120 S. Ct. 2530 (2000) (ruling 6-3 that using federal funds to provide books, computers, and other instructional equipment to public, religious, and other private schools does not violate the First Amendment). The six Justices overruled *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977) as inconsistent with *Mitchell*. *See Mitchell*, 120 S. Ct. at 2555; *see also* Stuart Taylor Jr., *The War Over the Court*, NEWSWEEK, July 10, 2000, at 18, 21.

139. Chief Justice Rehnquist and Justices Thomas, Scalia, and Kennedy.

140. *Mitchell*, 120 S. Ct. at 2541.

141. Concurring in the result for herself and Justice Breyer.

142. *Id.* at 2534.

143. Both programs were authorized by the Education Consolidation and Improvement Act of 1981, neither provided funds directly to sectarian schools, neither supported the regular program of sectarian schools, and neither supported religious indoctrination. *See id.* at 2562-64.

144. Justice Souter's dissent, joined by Justices Ginsburg and Stevens, reviews the cases involving government aid to sectarian schools and analyzes the principles and factors involved. *See id.* at 2572-97. Justice O'Connor agreed with the dissenters that there is no single test for constitutionality of government

Court takes and decides a voucher case, *Agostini*'s impact on the voucher issue remains open to speculation. The cases on state voucher programs since *Agostini* demonstrate that state and lower federal courts also disagree over how to interpret and apply *Agostini*.

IV. State School Voucher Cases: Confusion in the Lower Courts

In 1998, 1999, and 2000, state and federal courts decided cases involving vouchers. A school voucher case in Florida was decided solely on state constitutional grounds.[145] In Vermont and Maine, cases arose out of challenges to the exclusion of sectarian schools.[146] On the other hand, cases in Florida, Wisconsin, and Ohio involved challenges to the inclusion of sectarian schools.[147] The Vermont and Maine plans focus on rural areas, while the Wisconsin and Ohio plans reflect concerns about the failure of urban school systems. Some of the issues examined in these cases are unique to each state. However, with the exception of the Florida case, court reasoning in all these cases analyzes the same U.S. Supreme Court decisions and the same federal constitutional issues.

One reason for this similarity is the interest group involvement in these cases. Since the 1970s, both liberal and conservative groups have sought to influence court policy. Interest groups do not lobby courts directly, but indirectly they can and do influence courts to promote or protect their interests. Some groups have established public interest law firms. Groups may initiate litigation or offer support to a party already in litigation. In addition, groups may submit amicus curiae briefs to supplement the arguments of one side in existing litigation.[148] Supporting or opposing judicial nominees is another group activity.[149] Groups hope such activities either increase the chance a court will adopt a policy favored by the group or at least not adopt a policy that the group opposes.[150] From the 1940s through the 1960s, the NAACP and the ACLU were quite successful at the Supreme Court level. Since the 1970s, the federal courts have been more sympathetic to conservative groups such as the American Center for Law and Justice.[151]

Groups and public interest law firms appearing in support of voucher programs include the Institute for Justice (Ohio, Wisconsin, Vermont, and Florida cases), American Center for Law and Justice (both Maine cases) and Becket Center for

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aid to sectarian schools and that even if the funds are distributed in an even-handed manner, the aid will be unconstitutional if the aid is diverted to promote religion or is perceived as a government promotion of religion. *See id.* at 2557, 2559.

145. *See* Holmes v. Bush, No. 97-3370 2000 WL 526364, at *1 (Fla. Cir. Ct. Mar. 14, 2000) (finding Florida's Scholarship Opportunity Plan violated Article IX, section 1 of the Florida Constitution requiring Florida to provide free public education), *rev'd and remanded*, 767 So. 2d 668 (Fla. Dist. Ct. App. 2000).

146. *See infra* Parts IV.A., IV.D.

147. *See infra* Parts IV.B., IV.C.

148. *See* LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY 277 (4th ed. 1998).

149. *See id.* at 276.

150. *See id.* at 278.

151. *See id.* at 278-81.

Religious Liberty (Ohio and Vermont). The ACLU appeared against vouchers in all the cases, as did Americans United for Separation of Church and State.[152] When the same interest groups help parties in several different cases, it is not surprising that the same arguments recur. These cases demonstrate the broad range of interest groups involved in the school voucher issue and how essential group assistance can be to a party. For example, Pat Robertson's American Center for Law and Justice provided legal assistance to parents who wanted Maine to pay their children's tuition to attend a sectarian high school.[153] On the other side, Americans United for Separation of Church and State provides help to challengers of vouchers.[154]

A. The Maine Multidistrict Transfer Voucher Program

Since 1981, Maine has excluded sectarian schools from its voucher program. Parents who enrolled their children in sectarian schools and who wanted the state to pay the tuition brought suit in federal and state court, claiming violation of the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause, the Due Process Clause, and the Free Speech Clause.[155] In a very brief opinion in a 1998 case, the U.S. District Court in Maine held that the First Amendment does not require Maine to include sectarian schools in its voucher program.[156]

In 1999, the Supreme Judicial Court of Maine reached the same conclusion in *Bagley v. Raymond School Department*.[157] The *Bagley* court held that "Maine's tuition program does not violate the Free Exercise or Establishment Clauses of the First Amendment or the Equal Protection mandates of the Fourteenth Amendment."[158] The court examined U.S. Supreme Court decisions through *Agostini* and concluded that direct grants to religious schools that support, rather than supplement, the school's regular program do violate the Establishment Clause.[159] Since the Maine tuition program provides direct grants to support the school's regular program, the court determined Maine's reason for excluding religious schools from the program was consistent with the Establishment Clause.[160]

The Maine parents who lost in federal district court appealed. After the *Bagley* decision, on May 27, 1999, the First Circuit affirmed the Maine federal district court in *Strout v. Albanese*.[161] The First Circuit rejected the Establishment claim

152. *See, e.g.*, Witte, *supra* note 24, at 177-78 (discussing group involvement in the Milwaukee school voucher cases).

153. *See* Steve Benen, *Upholding the Wall*, CHURCH & STATE, July/Aug. 1999, at 16. For a second example, see the Institute for Justice homepage, which includes a list of the cases they have argued or supported, with "victory" flags by the Milwaukee and Arizona cases (visited Oct. 3, 1999) <http://www.ij.org/cases/index.html>.

154. *See* Benen, *supra* note 153.

155. *See* Strout v. Albanese, 178 F.3d 57, 59 (1st Cir. 1999).

156. *See* Strout v. Commissioner, 13 F. Supp. 2d 112, 113-14 (D. Me. 1998).

157. 728 A.2d 127 (Me. 1999).

158. *Id.* at 147.

159. *See id.* at 140-42.

160. *See id.* at 143-47.

161. 178 F.3d 57, 66 (1st Cir. 1999).

for five reasons. First, the court found "the somewhat inscrutable guidelines of the Supreme Court" offered "*no* binding authority" that direct tuition payments to sectarian schools are constitutional.[162] Second, the court stated that the Framers meant the Establishment Clause to prevent the entanglement of church and state.[163] Third, the court concluded that, while U.S. Supreme Court decisions do allow some targeted funding of programs in religious schools, those decisions do not permit "broad sponsorship of religious schools."[164] Fourth, the First Circuit determined that "approving *direct* payments of tuition by the state to sectarian schools represents a quantum leap . . . best left for the Supreme Court to undertake."[165] Fifth, the court noted that the Establishment Clause is a limit on government action and cannot be used to create an individual entitlement to state funds.[166]

Relying heavily on the Maine Supreme Judicial Court's *Bagley* decision, the First Circuit noted that, even if there were an Equal Protection problem, Maine's need to avoid violating the Establishment Clause is a compelling reason for restricting the use of the funds.[167] The court then rejected the Free Exercise claim for four reasons. First, some appellants chose St. Dominic's, a Catholic school, for academic, not religious, reasons.[168] Second, although they could not use voucher money, the parents were free to choose St. Dominic's for their children.[169] Third, the state was not interfering with the parents' freedom of religion because parochial school education is not a church-mandated belief or practice.[170] Fourth, there was no evidence that religious prejudice motivated the Maine legislature.[171] The court then dismissed the free speech and due process claims, finding no support for the argument that the parental right to choose their children's education entitled them to funding to achieve that right.[172] The American Center for Law and Justice supported an appeal to the U.S. Supreme Court.[173] However, on October 12, 1999, the U.S. Supreme Court denied the petition for writ of certiorari.[174]

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162. *Id.* at 60-61.

163. *See id.* at 61.

164. *Id.* at 62.

165. *Id.* at 64.

166. *See id.* at 64.

167. *See id.* at 64-65. In his concurrence, Judge Levin H. Campbell stated that since the Free Exercise claim failed, the statute did not violate a fundamental right. *See id.* at 67. Therefore, the Equal Protection Clause only required the Maine legislature to have a rational basis for its choice, which the Attorney General had provided. *See id.* He saw no need to examine the Establishment Clause claim. *See id.* at 68. However, he noted that this would change if the Supreme Court decided that direct tuition payments were constitutional and that "[a] strong argument can be made to that effect." *Id.* (Campbell, J., concurring).

168. *See id.* at 65.

169. *See id.*

170. *See id.*

171. *See id.*

172. *See id.* at 66.

173. *See* Benen, *supra* note 153, at 16.

174. *See* Strout v. Albanese, 120 S. Ct. 329 (1999).

B. The Wisconsin Voucher Program

Wisconsin's voucher program, which focuses on resolving problems in urban schools, began in Milwaukee in 1990.[175] The legislature limited participation to students whose family income did not exceed 175% of the official poverty rate.[176] The state aid of approximately $2500 per student was deducted from the Milwaukee public school system and given directly to participating, nonsectarian private schools.[177] The schools had to comply with state nondiscrimination laws, submit annual reports, and permit extensive evaluation and financial audits.[178] The initial 1990-91 enrollment of 341 students in these private schools increased to 830 students by 1994-95.[179]

In 1995, the state legislature expanded the program to include sectarian schools if students could opt out of the religious activities. In addition, the money was sent to the schools in the name of the parents, and the amount (approximately $4400 per student in 1996-97) was limited to the lesser of the Milwaukee state aid per pupil or the cost of the private school. The legislature dropped the financial and performance audits.[180] Facing a constitutional challenge to the expanded program, the Wisconsin Supreme Court deadlocked on whether to remove an injunction against the program.[181] Both the trial and appeals courts found the program unconstitutional.[182] However, by 1998 the balance on the Wisconsin Supreme Court had shifted: a pro-voucher judge had replaced an anti-voucher judge.[183]

In 1998, the Supreme Court of Wisconsin, voting four to two, held that the expanded Milwaukee Parental Choice Program (MPCP) did not violate either the Wisconsin Constitution or the Establishment Clause of the First Amendment.[184] The court's Establishment Clause analysis applied the *Lemon* test. First, the court concluded that the program had a secular purpose: helping low income parents send their children to private schools.[185] Second, the court analyzed U.S. Supreme Court decisions through *Agostini* and concluded

> that state educational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both

175. *See* Witte, *supra* note 24, at 36-44; Ted C. Olsen, *Voucher Victory: School-Choice Advocates Win in Wisconsin, But Can the Movement Gain Momentum?* CHRISTIANITY TODAY, Sept. 7, 1998, at 72-73.

176. *See* Jackson v. Benson, 570 N.W.2d 407, 411-12 (Wis. Ct. App. 1997).

177. *See id.* at 412.

178. *See id.*

179. *See* Witte, *supra* note 24, at 55. Participation was capped at 1%-1.5% of the Milwaukee Public School System enrollment, 1450 in 1994-95, but there were not enough seats in the nonsectarian schools to reach that maximum. *See id.* at 55-56.

180. *See Jackson*, 570 N.W.2d at 412-13.

181. *See* Olsen, *supra* note 175, at 73.

182. *See Jackson*, 570 N.W.2d at 427.

183. *See* Olsen, *supra* note 175, at 73.

184. *See* Jackson v. Benson, 578 N.W.2d 602, 632 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998).

185. *See id.* at 612.

> sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children.[186]

Third, the court concluded that there was no excessive entanglement because there was no increased state supervision of private schools participating in the program.[187]

Supporters and opponents of voucher programs saw the Wisconsin case as a chance for the U.S. Supreme Court to take a position on vouchers.[188] However, the U.S. Supreme Court denied certiorari on November 9, 1998.[189]

C. The Ohio Voucher Programs

1. Simmons-Harris v. Goff

In 1995, the U.S. District Court supervising implementation of *Reed v. Rhodes*[190] determined the crisis in the Cleveland, Ohio, schools was so serious that direct state management was necessary.[191] The Ohio legislature created both a tutorial program and a voucher program for Cleveland.[192] In the voucher or Pilot Scholarship Program recipients (chosen by lot) could attend either private schools in the Cleveland school district or public schools in adjacent districts.[193] If the family income exceeded 200% of the poverty level, students could receive up to 75% of tuition.[194] If the family income did not exceed 200% of the poverty level, students could receive 90% of tuition.[195] However, in either case, the maximum grant in 1995 was $2500.[196] If the family chose a public school, the check went directly to the school.[197] If the family chose a private school, the check bearing the names

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186. *Id.* at 617.

187. *See id.* at 619-20.

188. *See* Steve France, *A New Test for Lemon: Will the Courts Give Passing Grade to School Vouchers?*, A.B.A. J., Sept. 1998, at 30, 30-31.

189. *See* Jackson v. Benson, 525 U.S. 997 (1998).

190. 869 F. Supp. 1274 (N.D. Ohio 1994).

191. *See* Reed v. Rhodes, 1 F. Supp. 2d 705, 710 (N.D. Ohio 1998). The *Reed v. Rhodes* litigation began in 1976. *See* Reed v. Rhodes, 422 F. Supp. 708 (N.D. Ohio 1976). In 1994, the Cleveland Board of Education agreed to a Consent Decree aimed at integrating the public schools and improving the quality of education. *See Reed*, 869 F. Supp. at 1276. The required tax levy did not pass, and the financial situation was desperate. *See Reed*, 1 F. Supp. 2d at 710. In 1995, the court directed the State Superintendent to take over and run the system to fulfill the Consent Decree. *See id.* The 1998 *Reed* court determined that the schools had demonstrated good faith in their efforts to end segregation; therefore, the court terminated federal court supervision. *See Judge Ends Supervision of Schools in Cleveland*, N.Y. TIMES, Mar. 3, 1998, at A26.

192. *See* Simmons-Harris v. Goff, Nos. 96-APE08-982, 96 APE08-991, 1997 WL 217583, at *1 (Ohio Ct. App. May 1, 1997).

193. *See id.*

194. *See id.*

195. *See id.*

196. *See id.*

197. *See id.*

of the parents or guardians went to the school.[198] The parents or guardians then endorsed the check to the school.[199]

Opponents challenged the voucher program in state court, claiming it violated both the Ohio and U.S. Constitutions. Although the *Goff* trial court held in 1996 that the voucher program violated neither the Ohio nor the U.S. Constitutions, the Court of Appeals of Ohio in 1997 found that the program was "not facially neutral" because it "create[d] an impermissible incentive for parents to send their children to sectarian schools."[200] Since no public schools participated in the program, the result was "direct and substantial, nonneutral government aid to sectarian schools" that had "the primary effect of advancing religion in violation of the Establishment Clause."[201]

In 1999, in *Simmons-Harris v. Goff*,[202] the Supreme Court of Ohio, relying heavily on *Agostini*, reversed the Ohio Court of Appeals.[203] The Supreme Court of Ohio held that the voucher program did not violate the Establishment Clause for three reasons. First, there was no evidence that Ohio was helping sectarian schools indoctrinate students.[204] Second, with one exception, which the court severed from the statute, allocation of the money did not define beneficiaries by religion.[205] Third, there was no entanglement of church and state because the money went to the parents for the benefit of the children and not to the school, and because state supervision was minimal.[206] However, the court held that the program violated the Ohio Constitution because the legislature created the program in a general appropriations bill.[207] Since there were independent state grounds for the decision, a U.S. Supreme Court review would not have been appropriate.

2. Simmons-Harris v. Zelman

On June 29, 1999, the Ohio legislature corrected the state constitutional deficiencies and passed the voucher program again.[208] In July, opponents filed suit in the U.S. District Court in the Northern District of Ohio, claiming the revised program violated the First and Fourteenth Amendments of the U.S. Constitution. On August 13, the court heard arguments in *Simmons-Harris v. Zelman*[209] on whether to grant a preliminary injunction. On August 25, the court held that because the plaintiffs had "a very substantial chance of succeeding on the merits" and "there is

198. *See id.*
199. *See id.*
200. *Id.* at *9.
201. *Id.* at *10.
202. 711 N.E.2d 203 (Ohio 1999).
203. *See id.* at 211.
204. *See id.* at 209.
205. *See id.* at 210.
206. *See id.* at 211.
207. *See id.* at 216.
208. *See* Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 840 (N.D. Ohio 1999).
209. 54 F. Supp. 2d 725 (N.D. Ohio 1999).

a substantial likelihood that they will suffer irreparable harm," "it is substantially in the public interest to grant an injunction."[210]

In its reasoning, the court determined that the Ohio Pilot Scholarship Program probably violated the Establishment Clause for three reasons. First, the court found that, like the parents in *Nyquist*, nearly all the Cleveland parents were sending their children to sectarian schools and that *Nyquist*, which held that states cannot provide unrestricted grants to parents who send their children to sectarian schools, controlled the Cleveland program.[211]

Second, the court determined that the money in the Ohio Pilot Scholarship Program was not generally available. The money went only to selected children who attended approved schools. All participating schools were private and 80% of them were sectarian.[212] Therefore, the court concluded that Cleveland parents lacked both a genuine choice between public or private schools,[213] and a genuine choice between sectarian and nonsectarian schools.[214] Third, the court noted that the money in the Cleveland program went to the schools, not to the student,[215] and the "monies would go directly to support the regular educational program of a religious institution including, in some cases, religious instruction."[216] As a result, "the Cleveland Program has the primary effect of advancing religion."[217]

Three days after the court granted the preliminary injunction, the judge granted a partial stay, ruling that students who were enrolled in the old program could continue to receive aid either for another semester or until a final decision on the injunction request, whichever came first.[218] The court set trial for December 13, 1999.[219] However, voucher supporters did not wait for the trial; they appealed the injunction to the Sixth Circuit Court of Appeals.[220] Ohio also appealed to the U.S. Supreme Court, which voted 5-4 to stay the preliminary injunction until the Sixth Circuit disposed of the appeal.[221]

On December 20, 1999, the U.S. District Court held in *Zelman* that "a program which provides no meaningful choice to scholarship recipients other than to attend sectarian schools violates the Establishment Clause."[222] The court issued a

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210. *Id.* at 741.
211. *See id.* at 734-35.
212. *See id.* at 728-29.
213. *See id.* at 737.
214. *See id.*
215. *See id.* at 728.
216. *Id.* at 741.
217. *Id.*
218. *See* Simmons-Harris v. Zelman, Nos. 1740, 1818, 1999 WL 669222, at *2 (N.D. Ohio Aug. 27, 1999).
219. *See id.*
220. *See Newshour with Jim Lehrer: Vouchers on Trial* (PBS Broadcast, September 2, 1999)(visited Aug. 23, 2000) <http://www.pbs.org/newshour/bb/education/july-dec99/vouchers_9-2a.html>.
221. *See* Zelman v. Simmons-Harris, 120 S. Ct. 443, 443-44 (1999) (Stevens, Souter, Ginsburg, & Breyer, J.J., dissenting).
222. Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 861 (N.D. Ohio 1999).

permanent injunction against the state's operation of the Cleveland voucher program, although the injunction was stayed pending appeal to the Sixth Circuit.[223]

In its reasoning, the *Zelman* court first noted that the *Lemon* test — whether the law has a secular purpose, whether its primary effect is to advance or inhibit religion, and whether there is excessive entanglement of church and state — remains the applicable standard for deciding whether any government program violates the Establishment Clause of the First Amendment.[224] The court found that *Agostini* "did not substantially alter" Establishment Clause jurisprudence.[225] The *Agostini* court had simply combined the entanglement and effects prongs and declared that the effects prong forbids programs that "result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."[226]

Next, the court determined that *Nyquist*, decided under *Lemon*, had not been overruled and was applicable to the Cleveland voucher program.[227] The *Nyquist* Court found the New York program unconstitutional because the aid went primarily to sectarian schools and "[t]here was no attempt to separate secular from religious educational functions and to ensure that the monies provided by the State supported only the former."[228] In Cleveland, all schools participating in the program in 1999-2000 were private, 82% of those schools were sectarian, 96% of voucher students attended sectarian schools, and religious instruction was central to the mission of these schools.[229] Therefore, the *Zelman* court determined that the Cleveland program, like that of New York, "overwhelmingly benefits sectarian schools."[230] Furthermore, "the grants provided under the Program are not restricted to supporting only secular functions of a participating school's educational program[s]."[231] Thus, the two programs were "indistinguishable for Establishment Clause purposes."[232]

The court then rejected the defendants' contentions that the Cleveland voucher program was constitutional because it fit the exceptions to *Nyquist* suggested in footnote 38 of *Nyquist* and U.S. Supreme Court decisions following *Nyquist*.[233] The *Zelman* court noted that the U.S. Supreme Court did allow public assistance to sectarian institutions and groups in *Mueller*, *Witters*, *Zobrest*, and *Agostini*.[234]

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223. *See id.* at 865.
224. *See id.* at 844.
225. *Id.*
226. *Id.* (quoting *Agostini v. Felton*, 521 U.S. 203, 234 (1997)).
227. *See id.* at 850.
228. *Id.* at 845-46.
229. *See id.* at 836-37.
230. *Id.* at 849.
231. *Id.*
232. *Id.*
233. *See id.* at 847. In footnote 38, the *Nyquist* Court noted that it was not deciding "whether the significantly religious character of the statute's beneficiaries might differentiate [*Nyquist*] from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." *Id.* (quoting *Nyquist*).
234. *See supra* notes 88-119 and accompanying text (discussing these four cases). The State of Ohio also argued that *Rosenberger v. University of Va.*, 515 U.S. 819 (1995), meant the state would violate

However, the *Zelman* court's analysis of these four cases showed the programs to be very different from the Cleveland voucher program. In *Mueller*, parents could qualify for the tax deduction whether their children attended public or private, sectarian or nonsectarian schools.[235] However, in Cleveland, the state is funding a program where "parents and their children do not have a significant choice between parochial and nonparochial schools."[236] The lack of choice means the state is promoting the sectarian choice.[237]

In contrast with the Cleveland program, recipients of the vocational rehabilitation funds in *Witters* "had a genuine choice between attending sectarian or nonsectarian and public or nonpublic institutions."[238] Very little aid actually went to sectarian institutions.[239] In *Zobrest*, the aid went to the student and did not replace funds the school would have spent on the student.[240] However, the *Zelman* court stressed that Cleveland's voucher money went directly to the schools and "as the funds are unrestricted, there are no safeguards in the Voucher Program to ensure that they will be used only for secular instruction."[241]

These aspects of the Cleveland program also distinguished it from the program involved in *Agostini*, which used Title I funds to pay public school teachers to provide remedial education to students regardless of the school attended.[242] No money actually went to sectarian schools, the sectarian schools did not control the use of the funds, and "the services could be utilized at any school."[243] In contrast, the *Zelman* court noted that the Cleveland money went to the schools, the schools did control the use, and students could only receive the funds at elected schools that were almost all sectarian.[244]

Thus, the court distinguished the Cleveland program from *Mueller*, *Witters*, *Zobrest*, and *Agostini* because the Cleveland program provided unrestricted money to selected schools that were overwhelmingly sectarian, depriving parents of any real choice and creating "an incentive for persons to utilize state funds . . . to attend religious institutions."[245] Therefore, the court concluded that the Cleveland voucher program violated the Establishment Clause because "[a] program that is so skewed

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the Constitution by excluding sectarian schools from the program, but the *Zelman* court found the voucher program did not raise that issue. *Zelman*, 72 F. Supp. 2d at 860.

235. *See Zelman*, 72 F. Supp. 2d at 851.

236. *Id.* at 853.

237. *See id.*

238. *Id.* at 855.

239. *See id.* at 854.

240. *See id.* at 855.

241. *Id.* at 857.

242. *See id.*

243. *Id.* at 859.

244. *See id.* at 860.

245. *Id.* at 863. The court did not examine choices available outside the voucher program because "the Supreme Court has always assessed the question of 'choice' within the context of the challenged program." *Id.* at 862.

toward religion necessarily results in indoctrination attributable to the government and provides financial incentives to attend religious schools."[246]

Thus, the district court grounded its decision on the U.S. Constitution and U.S. Supreme Court precedents, not on state law or the state constitution. Many analysts expect the case to eventually reach the Supreme Court.[247] The U.S. Supreme Court's November 5, 1999, *Zelman*[248] memorandum staying the injunction pending the Sixth Circuit's decision on the appeal may indicate a willingness to take the case.

Indeed, Supreme Court review seemed even more likely by late 2000. On December 11, 2000, a sharply divided Sixth Circuit affirmed the district court's *Zelman* decision.[249] Cases which involve both civil liberties issues and lower court divisions have a very good chance of a U.S. Supreme Court hearing.[250]

D. The Vermont Tuition Reimbursement Program

Vermont, like Maine, allows local school boards that do not have complete K-12 school systems to pay the tuition for local students to attend other public or private schools. After the Chittenden School Board voted in December 1995 to pay tuition at a local sectarian high school, the state stopped state aid to Chittenden.[251] On June 11, 1999, the Supreme Court of Vermont held, in *Chittenden v. Vermont*, that it is a violation of article 3 of the Vermont Constitution for a school district to make unrestricted tuition payments to a sectarian high school.[252] The *Chittenden* court noted that, because the Vermont tuition reimbursement statutes provided no restrictions on the use of state-funded tuition money, tuition money given to a

246. *Id.* at 865.

247. *See, e.g.*, Jodie Morse, *Poor Grade for Vouchers: A Judge Flunks Cleveland's Use of Vouchers for Parochial Schools. But Will that Stall the Movement?*, TIME, Dec. 31, 1999, at 220.

248. 120 S. Ct. 443 (1999).

249. *See* Simmons-Harris v. Zelman, No. 00-3055/3060/3063, 2000 U.S. App. Lexis 31367, at *3, *53 (6th Cir., Dec. 11, 2000). The Sixth Circuit's reasoning closely followed the reasoning of the district court. The circuit court determined that *Nyquist* applied and that the Cleveland program fit none of the exceptions to *Nyquist*. *See id.* at *39, *42-47. In fact, the major difference between the circuit and district court reasoning is that the circuit decision occurred after *Mitchell*. *See supra* notes 138-44 and accompanying text. The Sixth Circuit majority made a point of noting that *Mitchell* was a plurality decision and that the Cleveland program was the kind of direct subsidy of religion that Justice O'Connor — concurring in *Mitchell* — "found impermissible." *Id.* at *45. Therefore, the Sixth Circuit concluded that the *Nyquist* exceptions did not apply and held "that the voucher program has the primary effect of advancing religion, and that it constitutes an endorsement of religion and sectarian education in violation of the Establishment Clause." *Id.* at *47.

The lengthy dissent found the Cleveland program was the type of neutral choice program permitted by the exceptions to *Nyquist* and accused the majority of being hostile to vouchers. *See id.* at *53-90. However, the majority countered that, because of the sectarian nature of the schools in the program, almost 95% of students enrolled in 1999-2000 were in sectarian schools. *See id.* at *41. Thus, Cleveland parents had only an "illusory choice." *Id.* at *51.

250. *See* ROBERT A. CARP & RONALD STIDHAM, JUDICIAL PROCESS IN AMERICA 341 (3d ed. 1996).

251. *See* Chittenden Town Sch. Dist. v. Vermont Dep't of Educ., 738 A.2d 539, 542-43 (Vt. 1999).

252. *See id.* at 563-64.

sectarian high school would support religious education.[253] However, the court did not find an explicit statutory bar to the Chittenden board's action, so it turned next to an examination of the Vermont Constitution.[254]

The *Chittenden* court stated that, because federal law on school aid and the Establishment Clause was not clear,[255] it was basing its decision on the Compelled Support Clause of the Vermont Constitution.[256] Looking to the historical record, the court found that, for three reasons, the Chittenden School Board's policy compels "dissenting . . . Vermont taxpayers to 'support [a] place of worship . . . contrary to the dictates of conscience.'"[257] First, the court noted that Vermont consistently has viewed article 3 as forbidding "any public financial support of religious activity."[258] Second, the debate over the "Virginia Bill for Religious Liberty" influenced the Vermont Constitution, and in that debate, Thomas Jefferson and James Madison were specifically concerned with preventing tax-funded religious education.[259] Third, the Pennsylvania Constitution, which was an influence for Vermont, had a clause that was a broad ban on aid to religion.[260] The *Chittenden* court also found the reasoning in the *Jackson v. Benson*[261] and *Goff* decisions did not apply in Vermont because the Wisconsin Constitution had a different provision and the Ohio Supreme Court equated Ohio's Compelled Support Clause with the Establishment Clause of the First Amendment.[262] On December 13, 1999, the U.S. Supreme Court denied a petition for a writ of certiorari, so the *Chittenden* decision stands.[263]

E. The Florida Opportunity Scholarship Program

The voucher proposals of then-Texas Governor and 2000 Republican presidential candidate George W. Bush resembled the statewide voucher plan in Florida, promoted by his brother and Florida Governor Jeb Bush.[264] The Florida Opportunity Scholarship Program provided scholarship money to students who attended a public school that received a failing performance grade for two years.[265] Students

253. *See id.* at 545-46.

254. *See id.* at 546.

255. *See id.*

256. *See id.* at 547. Article 3, the Compelled Support Clause, reads in part: "That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place or worship, or maintain any minister, contrary to the dictates of conscience, ..." VT. CONST. ch. I, art. 3, *cited in Chittenden*, 738 A.2d at 547.

257. *Chittenden*, 738 A.2d at 547 (citing the Vermont Constitution).

258. *Id.* at 554-55.

259. *Id.* at 555-56.

260. *See id.* at 556.

261. 578 N.W.2d 602 (Wis. 1998).

262. *See Chittenden*, 738 A.2d at 559-60.

263. *See* Andrews v. Vermont Dep't of Educ., 120 S. Ct. 626 (1999).

264. *See* June Kronholz, *Florida Judge Rejects School Vouchers That Are Pet Project of Gov. Jeb Bush*, WALL ST. J., Mar. 15, 2000, at A4.

265. *See* Lyle Denniston, *School Vouchers Nullified in Fla.; State Judge Blocks Use of Public*

could use the money (up to $3389 per year) to attend any private school, sectarian or nonsectarian, or a higher-rated public school.[266]

In the 1999-2000 school year, only about fifty-three students from two schools used vouchers to attend private schools.[267] But the state expected the program to expand to perhaps eighty schools and 65,000 students by the 2000-2001 school year.[268] Thus, absent judicial challenge, the Florida program, if successful, could have had a greater impact both in Florida and in the nation than any other voucher program.

In March 2000, though, opponents challenged the Florida program, claiming that it violated both article I, section 3 of the Florida Constitution[269] and the Establishment Clause of the First Amendment of the U.S. Constitution as well as article IX, sections 1 and 6 of the Florida Constitution (dealing with education and public school funding).[270] Judge L. Ralph Smith, Jr. of the Florida Circuit Court held in *Holmes v. Bush*,[271] that the Florida voucher program violated article IX, section 1 of the Florida Constitution.[272] Unlike the courts in Vermont, Maine, Ohio, or Wisconsin, the Florida court saw no need to address either federal or state constitutional provisions against establishment of religion.[273] Judge Smith thus did not need to analyze U.S. Supreme Court decisions; he relied entirely on Florida statutes, the Florida Constitution, and Florida case law. The court noted that article IX, section 1 of the Florida Constitution requires the state to provide "a uniform, efficient, safe, secure, and high quality system of free public schools."[274] The court concluded that "free public schools" means that the legislature must provide education through public schools only.[275]

Governor Jeb Bush appealed the *Holmes* ruling, and implementation was stayed pending appeal.[276] On October 3, 2000, the First District Court of Appeals in Florida reversed, holding that the trial court had "erred in finding" the Florida voucher program "facially unconstitutional under article IX, section 1."[277] Because the circuit court had not considered whether the Florida voucher program violated

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Money for Private Education, BALTIMORE SUN, Mar. 15, 2000, at 3A.

266. *See* Sue Anne Pressley & Kenneth J. Cooper, *School Vouchers Rejected; Judge: Fla. Program Unconstitutional*, CHI. SUN-TIMES, Mar. 15, 2000, at 32.

267. *See* Kronholz, *supra* note 264.

268. *See id.*

269. *See supra* note 11 (citing text of article I, section 3 of the Florida Constitution).

270. *See* National School Board Association, *Summary: Circuit Court Rules That Florida Voucher Program Violates State Constitution (March 2000)* (visited Jan. 18, 2001) <http://www.nsba.org/novouchers/vsc_report.cfm?id=473&item=Court%20Cases> (summarizing the issues, arguments, and findings of the court in *Holmes v. Bush*).

271. No. CV 97-3370, 2000 WL 526364 (Fla. Cir. Ct. Mar. 14, 2000), *rev'd and remanded*, 767 So. 2d 668 (Fla. Dist. Ct. App. 2000).

272. *See id.* at *8.

273. *See id.* at *1 n.1.

274. *Id.* at *1.

275. *Id.* at *4-5.

276. *See* Denniston, *supra* note 265.

277. Bush v. Holmes, 767 So. 2d 668, 677 (Fla. Dist. Ct. App. 2000).

article I, section 3 or article IX, section 6 of the Florida Constitution or the Establishment Clause of the U.S. Constitution, the appeals court declined to rule on those issues and remanded the case to the circuit court.[278] Further proceedings are needed to determine whether this case raises any federal constitutional issues that can be appealed to the U.S. Supreme Court.[279]

V. Reasons for the Conflicting Opinions Concerning the Constitutionality of Vouchers

A. Problems Applying Current Supreme Court Precedents

1. Comparing the Voucher Cases: Mixed Messages from Agostini

These post-*Agostini* cases dealing with voucher programs are not in agreement about whether *Agostini* supports voucher programs. In *Bagley* and *Zelman*, the courts view *Agostini* as having only a limited effect on Establishment Clause jurisprudence. For those courts, *Lemon* and *Nyquist* are still good law, although *Agostini* does allow limited forms of direct aid carefully restricted only to supplement the programs of sectarian schools.[280] However, the *Jackson* and *Goff* courts conclude that *Agostini* has changed *Lemon* and *Nyquist* and that, so long as the programs channel the aid through the parents and let the parents choose the child's school, no restrictions on the use of the money are needed and the aid can pay for the regular school program.[281]

2. Confusion Over Applying Agostini

There are at least two sources of this confusion over *Agostini*. First, the *Agostini* Court seems more open to direct state aid to sectarian schools, but does not overturn *Nyquist* or reject the *Lemon* test. Second, *Agostini* is about New York's effort to implement a federal grant program that supplements existing educational programs and offers assistance to private schools that already serve lower-income students. The remedial instruction is provided in the private schools, but by state employees. Depending on the specifics of the particular voucher program, *Agostini* may or may not be relevant.

B. Specifics of Programs Aiding Sectarian Schools

Details in these programs make a big difference. Does the tax money go to and stay with the child (or the parents) or is it quickly transferred to the school? Is the aid restricted to clearly secular education or could it be used for religious purposes? Does the government aid supplement the private education or actually subsidize the regular school program? Is the program available to all students or only those in

278. *See id.*

279. *See* Denniston, *supra* note 265.

280. *See* Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 844, 850 (N.D. Ohio 1999), *aff'd* 234 F.3d 945 (6th Cir. 2000); Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 141-42, 146 (Me. 1999).

281. *See* Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999); Jackson v. Benson, 578 N.W.2d 602, 615-17 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998).

private schools? Are sectarian schools specifically included or excluded? Is the program supplementing the public school system or is it taking students and tax money from the public schools?[282]

A 1985 analysis of cases noted that programs providing direct aid were likely to be found unconstitutional whether courts found entanglement or not.[283] However, programs providing indirect aid were constitutional if there was no evidence of excessive entanglement.[284] Programs that served all taxpayers, such as tax credits for all, were likely to be constitutional, while those that were selective were more likely to fail.[285] Especially important from a public policy point of view is the relative cost of the program to the public school system. A program that grants a small tax credit, which is still large enough to encourage parents to transfer a child to a private school, leaves the public schools with more dollars per pupil.[286] However, a program that assigns all (or a significant percentage) of the tax dollars per pupil to the private school selected by the child's parents (the approach preferred by Milton Friedman and used in most voucher programs) takes substantial funds from the public schools and gives a much higher incentive to parents to choose private schools.[287]

The specifics of a program raise many other practical policy issues. For example, supporters, such as Kenneth Blackwell, Secretary of State for Ohio and Chair of the Steve Forbes 2000 presidential campaign, assert voucher and other school choice programs empower parents, free children trapped in poorly performing public schools, and create the competition needed to improve the public schools.[288] Blackwell says the academic performance of students in the Cleveland voucher program improved.[289] Opponents, such as Sandra Feldman, President of the American Federation of Teachers, counter that the $10 million spent on the Cleveland voucher program took funds from the public schools that could have been used to pay for reading programs or reduce class size, which are known to improve student learning.[290] According to Feldman, private schools opened in Cleveland, took voucher money, and then had to close because the students did so poorly.[291]

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282. *See* Abner S. Greene, *Why Vouchers are Unconstitutional, and Why They're Not*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397, 404-06 (1999) (reviewing factors affecting the constitutionality of government aid to sectarian schools).

283. *See* West, *supra* note 129, at 796, 844.

284. *See id.*

285. *See id.* at 846-49.

286. *See id.* at 847.

287. *See id.* at 847-49.

288. *See CBS News: Face the Nation* (CBS broadcast, Sept. 5, 1999), transcript *available in* 1999 WL 16237919; STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 195-200 (1993) (arguing that parental choice in favor of sectarian schools is more influenced by the values taught than by the difference in academic quality, which may not exist).

289. *See CBS News: Face the Nation*, *supra* note 288.

290. *See id.*

291. *See id.*

For some supporters of vouchers, the point is not whether the schools are better, but that parents who have a choice are more likely to be involved in their children's education.[292] Parental involvement, they point out, improves student success. Opponents agree with this last statement, but note that is one of the main problems with comparing successes of voucher students and students staying in the public school. Parents who take advantage of vouchers are parents who are involved in their children's education.[293]

C. How Parties Frame the Issues for the Courts

Arguments before the courts raise a variety of issues: Establishment Clause, First Amendment, Equal Protection, and state constitutional questions. The *Bagley* court responded at length to Equal Protection concerns.[294] The *Chittenden*, *Jackson*, *Holmes*, and *Goff* courts are particularly concerned about state constitutional issues.[295] *Zelman* concentrates on Establishment Clause questions.[296] Different issues produce different results.

As the *Chittenden* decision illustrates, state constitutions do not contain identical religion clauses. Some states follow the First Amendment, while others have some form of the Compelled Support Clause. Except for Vermont and Maryland, all states specifically ban either tax support to any religious institution or school or taxpayer aid to any private school.[297] Fourteen of the seventeen most restrictive states, including Oklahoma, are in the West.[298] Because of the variety of constitutional provisions, courts in about half of the states do not apply federal interpretation of the First Amendment to state constitutional provisions.[299] Decisions that rest on state constitutional provisions do not apply to other states. However, courts in other states might be influenced by the reasoning and adopt it.

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292. *See* Witte, *supra* note 24, at 65-66, 118-19 (noting that parents of Milwaukee voucher students were more involved before their children were selected and that their involvement increased, partly because voucher schools required parental involvement).

293. *See id.*

294. Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 136-38 (Me. 1999).

295. Holmes v. Bush, No. 97-3370, 2000 WL 526364, at *1 n.1 (Fla. Cir. Ct. Mar. 14, 2000), *rev'd and remanded*, 767 So. 2d 668 (Fla. Dist. Ct. App. 2000); Simmons-Harris v. Goff, 711 N.E.2d 203, 211-16 (Ohio 1999); Chittenden Town Sch. Dist. v. Vermont Dep't of Educ., 738 A.2d 539, 547, 554-63 (Vt. 1999); Jackson v. Benson, 578 N.W.2d 602, 620-30 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998).

296. Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 850-60 (N.D. Ohio 1999), *aff'd* 234 F.3d 945 (6th Cir. 2000).

297. *See* Chittenden v. Vermont, 738 A.2d 539, 558 (citing Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State through State Constitutional Provisions*, 71 VA. L. REV. 625, 631-45 & nn.31-47 (1985)); *see also* Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 670-72 (1998) (claiming these restrictions are rooted more in anti-Catholic prejudice than in convictions about separation of church and state).

298. *See* Viteritti, *supra* note 297, at 674-75. The other states are: Florida, Georgia, Montana, and New York. *See id.* at 675 & n.87.

299. *See id.* at 680-81.

D. Political Dynamics and Policy Concerns

Most of the arguments for and against the wisdom of voucher plans concern policy choices made by the executive and legislative branches. However, judges also make policy choices, and the political dynamics of judicial selection and judges' personal policy preferences can influence judicial decisions.[300] For example, Judge Higginbotham, the trial court judge who found the Wisconsin plan unconstitutional, was both liberal and the only African American on the bench. Ohio's Republican governor appointed Judge Sadler, the trial judge who ruled in favor of the governor's voucher plan.[301] In Wisconsin and Ohio, where appellate judges are selected by nonpartisan election,[302] the state supreme courts upheld the voucher plans as constitutional. In Vermont, where appellate judges are chosen by merit selection, and in Maine, which uses gubernatorial appointment,[303] the judges also upheld the voucher plans, but this time ruling against those who wanted to expand the program. Federal court judges have life tenure, which in theory insulates them from political pressures and promotes independent judgment.[304] So far, the federal judges in both Ohio and Maine have indicated that they are not inclined to find a voucher program that includes sectarian schools consistent with the Establishment Clause as applied to the states through the Fourteenth Amendment.

At the U.S. Supreme Court level, the Justices have split 5-4 on recent aid to sectarian schools questions. The general consensus is that, if the U.S. Supreme Court were hearing a voucher case today, Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas would support vouchers and Justices Souter, Ginsburg, Stevens, and Breyer would not.[305]

Despite the optimism her *Agostini* opinion generated in voucher supporters, Justice O'Connor is harder to predict. She prefers narrow, case-specific decisions and tends to support only programs that do not advance religion.[306] Some analysts believe *Mitchell*[307] shows that O'Connor and Breyer "would oppose any parochial-aid program that, in their eyes, jeopardized the wall between church and state."[308] On

300. *See generally* CARP & STIDHAM, *supra* note 250, at 229-87.

301. *See* Kemerer, *supra* note 3, at 37.

302. *See* CARP & STIDHAM, *supra* note 250, at 258 tbl.8-4.

303. *See id.*

304. *See* HENRY J. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 42 (7th ed. 1998).

305. *See* Byrd, *supra* note 12, at 1954. Professor John Yoo of Berkeley Law School says the plurality in *Mitchell v. Helms* (Chief Justice Rehnquist, Justices Thomas, Kennedy, and Scalia) would clearly support a voucher program that provided benefits to all students. *See Newshour with Jim Lehrer: Supreme Court Wrap* (PBS television broadcast transcript, June 29, 2000) (visited July 9, 2000) <http://www.pbs.org/newshour/bb/law/jan-june00/scotus_wrap_6-29.html> (interviewing four constitutional law professors).

306. *See* Byrd, *supra* note 12, at 1954. Professor Sanford V. Levinson has said: "trying to predict O'Connor is like slaughtering a sheep and reading the entrails." *Id.* Professor Jesse Choper also notes Justice O'Connor's preference for narrow, specific decisions in cases involving aid to religion. *See The Court's Manoeuvres*, ECONOMIST, Sept. 4-10, 1999, at 34, 34.

307. *See supra* notes 138-44 and accompanying text.

308. Taylor, *supra* note 138, at 22.

the other hand, Professor Laurence Tribe of Harvard Law School reads *Mitchell* as evidence that the Court is "moving . . . toward a simple rule that, if aid is neutral and secular and doesn't create a great danger of government endorsement of religion, it's fine" and that O'Connor will soon provide a fifth vote for vouchers.[309]

The dynamics on the Court could change by the time the Court takes a voucher case. Justice Ginsburg had cancer surgery in September 1999, and Justice Stevens turned eighty in 2000. Close Court votes on many contentious issues, combined with the health and age of some Court members, fueled speculation about the impact of the 2000 presidential election on future Court appointments.[310]

Vouchers continue to be a hot political issue. Even before 1999, Republican presidential candidates and several Republican governors were on record as supporting vouchers.[311] Governor George W. Bush supported vouchers and advocated federal voucher funding.[312] Vice President Al Gore labeled vouchers a "mistake" in his presidential campaign ads.[313] Significant numbers of Democratic voters opposed vouchers, while many conservative Republican voters supported them.[314] However, this does not mean that all Democrats oppose all voucher programs or that all Republicans support vouchers. In 1999, the Republican leadership in the U.S. House of Representatives pushed hard to provide vouchers in the Title I education program that aids poor and disadvantaged children.[315] They failed twice, and fifty-two Republicans voted with Democrats to defeat a proposal by Majority Leader Dick Armey (R.-Tex.).[316] The 2000 Democratic candidate for Vice President, Sen. Joseph Lieberman (D.-Conn.), was on record supporting vouchers.[317] In addition, many Democrats do support other choice proposals.[318]

So far, despite the policy debates and the media attention given to vouchers,[319] national public opinion still strongly supports public education. In the 1999 Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools, 49% gave the public schools an "A" or "B" grade, and another 31% gave the schools a "C."[320]

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309. *Newshour with Jim Lehrer: Supreme Court Wrap*, *supra* note 305.

310. *See* Taylor, *supra* note 138, at 20-23.

311. *See* Rob Boston, *State of the States: Religious School Aid Battles Around the Country*, CHURCH & STATE, Feb. 1999, at 11, 11 (providing state by state summaries of voucher proposals).

312. *See* Pressley & Cooper, *supra* note 266.

313. *See* Morse, *supra* note 247, at 220.

314. *See* Clemetson, *supra* note 30, at 30.

315. *See* Rob Boston, *Congressional Alert*, CHURCH & STATE, Feb. 1999, at 13, 13. Both *Aguilar v. Fenton*, 473 U.S. 402 (1985) and *Agostini v. Fenton*, 521 U.S. 203 (1997), involved the use of Title I funds in New York. If Congress had transformed Title I into a voucher program, voucher supporters could have claimed Congress saw *Agostini* as a U.S. Supreme Court endorsement of vouchers.

316. *See* Sue Kirchhoff, *House Passes Title I Overhaul Bill Minus Vouchers and Broad Block Grants*, 57 CONG. Q. WKLY. REP. 2521, 2521-22 (1999). Only three Democrats voted for Armey's proposal. The Senate proposal did not include vouchers. *See id.*

317. *See* Terence Samuel, *Lieberman's Edgier Than He Appears: Like Cheney's, A Rich Record for Friends and Foes*, U.S. NEWS & WORLD REP., Aug. 21, 2000, at 19, 20.

318. *See* Koch, *supra* note 23, at 285.

319. *See* Witte, *supra* note 24, at 171-77 (describing simplified media stories of failing students and schools saved by vouchers).

320. *See* Lowell C. Rose & Alec M. Gallup, *The 31st Annual Phi Delta Kappa/Gallup Poll of the*

When parents were asked to grade the school attended by their oldest child, 66% gave the school an "A" or "B."[321] When respondents were asked whether they would prefer "improving and strengthening the existing public schools or providing vouchers for parents to use in selecting and paying for private and/or church related school," 70% preferred to improve the public schools, and 28% wanted vouchers.[322]

Public opinion is sharply divided on vouchers. The 1999 Phi Delta Kappa poll found that 41% favored letting parents and students choose a private school at public expense, while 55% were opposed.[323] From 1966 through 1998, voters rejected twenty-one of twenty-two state referenda proposing vouchers or tuition tax credits.[324] Whether public officials support or oppose vouchers, they will offend a significant percentage of the voters. While some candidates are convinced that supporting vouchers can gain them votes from particular voting blocs,[325] judges may see no advantage in taking on such a divisive issue.

VI. Alternatives for the U.S. Supreme Court

A. Continue to Deny Certiorari to Voucher Cases and Let the States Decide

So far the U.S. Supreme Court has denied certiorari to the Wisconsin, Maine, and Vermont voucher cases and to the Arizona Tax Credit case that raises similar issues. The Court has not given reasons for the denials. In addition, the Ohio Supreme Court decision in *Goff* could not be appealed because it was decided on state constitutional grounds. While Court members have often said that denial of certiorari does not mean the Court agrees with the lower court's decision,[326] denial does mean that the party who won in the lower court often claims a victory in the U.S. Supreme Court as well.[327]

U.S. Supreme Court observers, and even Justices who have written about the Court, offer many possible reasons for denial of certiorari other than a consideration of the merits. First, the Court may simply believe that an issue is not yet ripe for a decision.[328] Second, the Court may believe that a case is so atypical that deciding it

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Public's Attitudes Toward the Public Schools, PHI DELTA KAPPAN, Sept. 1999, at 41, 42.

321. *See id.*

322. *Id.* at 44.

323. *See id.* at 53. The public was also sharply divided over whether publicly funded vouchers should pay all the tuition at private schools, but the public was more willing to support partial payments or tuition tax credits. *See id.* at 53-54.

324. *See* Albert J. Menendez, *Voters Versus Vouchers: An Analysis of Referendum Data*, PHI DELTA KAPPAN, Sept. 1999, at 76-80 (arguing that thirty years of voter rejection of vouchers shows that lawmakers should focus not on vouchers but on improving public schools attended by ninety percent of students).

325. *See id.*

326. *See* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 240-41 (4th ed. 1996).

327. *See* Richard Carelli, *School Aid Tax Breaks Allowed*, DAILY OKLAHOMAN, Oct. 5, 1999, at 1 (reporting that aid supporters see this as support for voucher programs).

328. *See* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 230-34 (1991).

will not guide later cases.[329] Third, the Court may conclude that there is no clearly presented federal question.[330] Fourth, a case may be asking about a settled question of law that the Court does not believe needs changing. Fifth, the Court may see no need to take a case because there are "adequate and independent state grounds" for resolving the issues raised.[331]

While federal constitutional questions are present in the voucher cases, the U.S. Supreme Court may want to see a range of voucher cases before accepting one or several for review. Perhaps the Court denied certiorari in the Maine case because the Maine voucher program is not typical. In addition, all the voucher cases have focused at least in part on state constitutional provisions. The Maine and Vermont cases looked specifically to the state constitutional provisions on aid to sectarian schools. The Wisconsin and the first Ohio case (*Simmons-Harris v. Goff*) looked in detail at the appropriations requirements in their state constitutions.

The extent to which this state focus may be a successful tactic of either the voucher supporters or the voucher opponents is not clear.[332] If voucher opponents rely on a state constitution that appears to restrict aid to sectarian schools, they may get a court that interprets the provision to mean the same as the First Amendment and use *Agostini* to allow vouchers. On the other hand, voucher supporters may believe that the state supreme court will be able to use the state constitution to permit more aid to sectarian schools, but may be left with an unfavorable decision that lacks grounds for appeal.[333]

If the U.S. Supreme Court concludes that the lower courts based their decisions mainly on their state constitutions, the Court may decide that there are no grounds for granting review.[334] Furthermore, the Court in recent years has been supportive of the role of the states in the federal system. The Court could therefore decide that, because education funding is primarily a state function, vouchers are an issue that the states should decide.[335] This reasoning could enable the Court to stay out of the voucher issue either because of restraint, or because of federalism, or both. Letting the state courts decide the issue, however, would essentially mean the Court was letting the states decide a First Amendment issue that the framers saw as fundamental for the entire country and that both sides in the voucher dispute claim the Court needs to

329. *See id.* at 234-36.

330. *See* O'BRIEN, *supra* note 326, at 204-13.

331. WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW: CASES — COMMENTS — QUESTIONS 56-57 (8th ed. 1996).

332. *See* Viteritti, *supra* note 297, at 659 (indicating that opponents of school vouchers are counting on restrictive state constitutions to limit aid to parochial schools).

333. *See* Kemerer, *supra* note 3. *But cf.* Witte, *supra* note 24, at 179-80 (arguing that voucher supporters are using vouchers for poor children to create sympathetic pro-voucher precedents that can then be used to support universal vouchers).

334. *See* 28 U.S.C. § 1257 (1994) (discussing the grounds for granting certiorari in state court decisions).

335. *See* Viteritti, *supra* note 297, at 659-60 (stressing the importance of the Court's federalism views in its interpretation of state choices in school aid). Certainly, the Court is not likely to tell Vermont and Maine to end their rural multidistrict voucher programs.

decide. In addition, if the Court continues to let lower courts decide what *Agostini* means, the Court's influence would decline.

B. Use Agostini to Find All Voucher Programs Constitutional

Some observers believe there are enough votes on the Court to use *Agostini* to find all voucher programs constitutional.[336] Even if there are not enough votes now, there might be enough by the time a case reaches the Court. Voucher supporters note that the Court's emphasis on neutrality and parental choice in *Mueller*, *Witters*, *Zobrest*, and *Agostini* points to a Court that is ready to allow vouchers so long as the aid is indirect and does not differentiate between public and private or sectarian and nonsectarian schools.[337]

Voucher opponents, however, argue that finding voucher programs that pay tuition to sectarian schools constitutional would present the Court with two big problems. First, these programs are "neutral" with regard to religion only if one does not look at the actual effect of the programs.[338] Because most of the private schools in the United States are sectarian and because poor families receiving vouchers rarely can afford the extra costs of the nonsectarian private schools, voucher programs in practice limit the choice most poorer children have to attend sectarian schools.[339] In effect, the tax money induces parents to choose sectarian over nonsectarian education and thus the programs are not neutral. Lower court decisions against voucher programs have emphasized that the programs are not neutral in practice.

Second, one of the arguments made by voucher supporters is that parents who pay taxes to support the public schools should be able to spend those taxes as they feel is best for their children.[340] However, to create a precedent for individual tax expenditure in one area would likely lead to cases asking for choice in tax expenditures in other policy areas. Such a result could be disruptive to state and local governments and would go against the Court's suggestion that the federal courts should, to the extent possible, let state and local governments make their own decisions.

C. Limit Agostini and Find Only Selected Vouchers Constitutional

Existing precedents appear consistent with voucher programs that exclude religious schools or are narrowly targeted to help a student rather than a school. This seems the more likely and desirable alternative for the Court. Voucher supporters have read *Witters*, *Mueller*, *Zobrest*, and *Agostini* as allowing a broad range of state and federal aid to sectarian schools. However, the holdings in these cases have been quite narrow. *Mueller* stresses that the tax deduction for tuition is only one of many tax deductions and is provided to all parents regardless of what type of school their children

336. *See* Chopko, *supra* note 85, at 960-63.

337. *See id.* at 957.

338. *See* Hamilton, *supra* note 33, at 838. This point is found in the reasoning of the Ohio Court of Appeals, the Wisconsin Court of Appeals, and the United States District Court for the Northern District of Ohio. *See* Koch, *supra* note 23, at 284, 289.

339. *See* Koch, *supra* note 23, at 284, 289.

340. *See* Miller, *supra* note 12, at 16.

attend.[341] However, though the *Mueller* Court emphasizes the "neutrality," it is also significant that administration of deductions by the tax commission does not involve the detailed supervision common in voucher programs. Thus, *Mueller* deals with a program that requires little interaction of church and state. Vouchers go to particular students in particular schools that must comply with specific state requirements. The interaction of church and state is much greater, then, in voucher situations.

In *Witters* and *Zobrest*, the Court stresses that public money can go to a sectarian school. But, in both cases the aid goes to the student, and in both cases the amount of aid to sectarian schools is quite small. Voucher supporters note that giving the money to the student means the decision of where to spend the money is private. Voucher opponents point to the limited nature of the aid. Voucher programs that involve millions of dollars in a single metropolitan school system clearly do not involve limited aid.

Accepting the argument that precedents do allow some indirect aid to go to students who spend it on tuition at sectarian schools does not mean that all programs that pay tuition at sectarian schools are constitutional. While criticisms of the Court's decisions on aid to sectarian schools use such adjectives as "unhelpful" and "confusing," one reason is that the decisions are very fact-specific.[342] The Court has looked at how programs affect students, how programs impact schools, how the programs are administered, and the motivation behind the programs. This case-specific approach has allowed the Court to approve programs that, on balance, seem to benefit the students as individuals and disapprove programs that seem to benefit sectarian schools as a whole.

VII. Alternatives for Oklahoma and Other States

A. Areas of Concern for State Policy-Makers

Are vouchers good public policy for the states? Both supporters and opponents of vouchers base their arguments on ideology rather than facts.[343] As discussed in the introduction, supporters of vouchers and related choice programs believe that introducing an element of choice for students will allow students from poorer families to escape failing school systems. In addition, supporters claim vouchers could create competition that would pressure the public schools to improve. Many voucher supporters also believe that the private schools will do a better job with less money because they do not have to deal with the costs of public school administration.[344]

On the other hand, voucher opponents emphasize that public schools, unlike the private ones, have to take all students, including students with learning disabilities and other special needs.[345] In addition, voucher opponents say a major cause of problems in city schools is that there is not enough tax money to provide the special programs

341. *See* Mueller v. Allen, 463 U.S. 388, 395 (1983).

342. CARTER, *supra* note 288, at 110; DAVID M. O'BRIEN, SUPREME COURT WATCH — 1994, at 70 (1994).

343. *See* Metcalf & Tait, *supra* note 35, at 66.

344. *But see* Witte, *supra* note 24, at 105-06 (noting that voucher supporters tend to underestimate both costs of private schools and existing public school responsiveness to political pressure).

345. *See* Koch, *supra* note 23, at 287.

and small classes that would improve the public schools.[346] Opponents further argue that taking money, as well as some of the better students and some of the most committed parents, away from the public schools will simply guarantee that the public schools will get worse.[347]

Therefore, as Oklahoma and other states ponder the issue of school choice and especially the issue of vouchers, there are three main areas that need careful analysis. First, there is the question of whether vouchers are an effective way to improve public education. Second, even if state officials are convinced that vouchers work when properly implemented, the officials also have to determine whether vouchers will solve the educational problems in their particular state. Third, state officials have to decide whether vouchers are permissible under their state constitutional provisions.

1. Are Voucher Programs Effective?

Whether voucher programs work depends in part on what the programs are expected to achieve.[348] Proponents of voucher programs in urban areas usually have three goals: (1) improving education for children from poor families or for children from poorly performing schools; (2) improving the entire public school system; and (3) reducing the costs of public education.[349]

One way to improve the education of children from low-income families is to make it possible for those children to attend better schools. An adequately funded voucher program could allow students to choose to attend private schools. The voucher programs in Milwaukee and Cleveland do provide, as supporters claim, more choices for the participating students who were not attending private schools before they received vouchers. In Milwaukee, for example, parents of choice students were more dissatisfied with the public schools than parents of non-choice students.[350] Parents of choice students reported that they were more satisfied with the schools participating in the voucher program.[351]

However, voucher programs, especially if they become universal, are not likely to increase the percentage of less wealthy students gaining access to private schools. Because of the lack of data on the impact of vouchers below the college level, one analysis examines whether public aid to college students has actually expanded educational opportunities for needy students.[352] U.S. Supreme Court decisions in the

346. *See* Miller, *supra* note 12, at 26.

347. *Cf. id.* at 12-17 (discussing differences between public and private school models).

348. In Maine and Vermont, the programs were designed to provide access to publicly funded education for residents in rural areas. Not all parents like the choices available, but the Maine and Vermont programs do what the legislature intended. *See* Wasilausky, *supra* note 26, at 724.

349. *See* John Cassidy, *Schools Are Her Business*, THE NEW YORKER, October 18 & 25, 1999, at 144, 146-47. *But see* Witte, *supra* note 24, at 208 (concluding that many voucher proponents' ultimate goal is universal vouchers that would primarily help private schools and middle and upper-middle class students).

350. *See* Witte, *supra* note 24, at 66-68.

351. *See id.* at 117-18.

352. *See* F. King Alexander, *The Decline and Fall of the Wall of Separation between Church and State and its Consequences for the Funding of Public and Private Institutions of Higher Education*, 10 U. FLA. J.L. & PUB. POL'Y 103, 122-27 (1998).

1960s and 1970s allowed public aid to go to church-related colleges because such colleges usually lack a pervasively religious atmosphere.[353] Since the 1960s, state and federal student college aid programs have grown substantially. Although this aid goes disproportionately to private colleges, the percentage of lower-income students at private colleges has dropped, not increased.[354] While many private colleges have become dependent on the aid, "[m]eaningful choice for the poor has not been enhanced."[355]

If the college aid analogy is valid, vouchers will not increase choice for the poor in any significant way. In Milwaukee, voucher funds did save some participating schools from bankruptcy and thus preserved those schools as choices for parents. The expansion of the program to include sectarian schools was expected to save many more schools.[356] The importance of public funds to the survival of the schools explains why religious groups are strong supporters of voucher systems.[357]

However, even if vouchers mean more choices are available and more parents are satisfied with those choices, that does not mean that the students who use the vouchers are receiving a better education. Studies of both the Cleveland and Milwaukee programs have reached inconsistent conclusions on this issue. For example, Paul Peterson, Jay Greene, and Jiangtao Du of the pro-voucher Harvard Program on Education Policy and Governance found evidence that voucher students in Milwaukee had better math and reading skills than students who remained in the public schools.[358] However, John Witte, who supports only targeted vouchers and who studied the Milwaukee program for the Wisconsin legislature, finds that Peterson's conclusions rely on invalid data.[359] Witte's analysis of student achievement scores for the first five years of the program determines "that annual change scores are modest, not appreciably differing from zero."[360]

Similar inconsistent results exist in studies of the Cleveland program. One study concluded that the voucher program had not raised test scores,[361] while another study found test scores had risen.[362] Analyzing data from the first two years of the Ohio voucher program for the Ohio Department of Education, Kim Metcalf, Director of the Indiana Center for Evaluation at the University of Indiana School of Education, and her associates found some evidence of improvement in voucher students by the second

353. *See id.* at 119.

354. *See id.* at 126.

355. *Id.* at 127. Alexander concludes that "[i]f the experience in higher education is a valid indicator, then one can expect that state voucher programs at elementary and secondary education levels will only produce a marginal increase in choice for lower-income students while greatly increasing inequalities in state-funded revenue between public and private schools." *Id.*

356. *See* Witte, *supra* note 24, at 116.

357. *See id.* at 161-62.

358. *See id.* at 133.

359. *See id.* at 133-43.

360. *Id.* at 125.

361. *See* Rene Sanchez, *In Cleveland, Vouchers Fail to Raise Test Scores*, WASH. POST, April 8, 1998, at A2.

362. *See Sorting out School Choice*, ECONOMIST, Sept. 4-10, 1999, at 33, 33.

year of the program.[363] However, partly because "voucher students in Cleveland were achieving at slightly higher levels than their public school peers before they entered their voucher schools,"[364] it was unclear whether the improvement was a result of the voucher program. When Jay Greene, William Howell, and Paul Peterson re-analyzed this data, they concluded the voucher students had improved significantly over public school students in the first two years of the program.[365]

Why are there so many disputes over achievement? In part this variation in results reflects inadequate data. The voucher programs are new, small, and selective.[366] The attrition of students from the Milwaukee program meant that some sample sizes were too small for reliable testing.[367] Even counting all students in public and private voucher programs, the total in 1999 was less than one percent of elementary and secondary students.[368] In addition, students selected for the Cleveland and Milwaukee voucher programs differed from public school students in a number of ways, some of which were significant.[369] Thus, finding test and control groups that are large enough and equivalent to each other is not easy.

Another problem with assessments of program effectiveness is possible bias that may influence data collection and analysis. The fourteen privately funded voucher programs and two of the voucher schools in Cleveland use self-evaluation techniques.[370] Metcalf and her associates did not use data from those two Cleveland schools, but Greene and his associates did use it. Cecilia Rouse, who teaches economics and public policy at Princeton University, re-analyzed the Milwaukee data used by Peterson and by Witte and concluded that both studies had statistical flaws.[371] Enthusiasm for or antagonism toward vouchers can create bias in interpreting or using data. Public school critics find positive voucher results more convincing, while public school supporters are more skeptical.[372]

Even proponents of vouchers admit that vouchers only produce modest improvements in performance and that those improvements are best explained by the parents' showing an interest in their child's education[373] or by controlling for family background.[374] When only the "most motivated" parents apply for the limited number

363. *See* Metcalf & Tait, *supra* note 35, at 70-72.

364. *Id.* at 71.

365. *See id.* at 73.

366. *See id.*

367. For discussion of methodological problems, see Edward Muir & F. Howard Nelson, *Social Science Examinations of the Milwaukee Voucher Experiment* (visited Oct. 4, 1999) <http://www.aft.org/research/vouchers/mil/rouse/rouse.htm>.

368. *See* Miller, *supra* note 12, at 16.

369. *See* Metcalf & Tait, *supra* note 35, at 71.

370. *See id.* at 67, 72.

371. *See* Cecilia Elena Rouse, *Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program*, 113 Q.J. OF ECON. 553, 553-59 (1998) (finding statistically significant evidence that children in the program improved their math skills, but not their reading skills).

372. *See* Cassidy, *supra* note 349, at 144, 156.

373. *See id.* at 160.

374. *See* Muir & Nelson, *supra* note 367, ¶ 3.

of vouchers,[375] there is a bias in the data that is difficult for even an objective analyst to overcome.

A second goal of voucher programs is improvement of public schools through competition.[376] The idea is to give vouchers to all students and let the students choose which public or private school to attend. The assumption is that poorly performing public schools will either improve or will close because few students choose to attend them.[377] Research by Caroline Hoxby, who teaches economics at Harvard, has attracted a great deal of attention because she "attempts to show that public schools perform better when they face competition, that class size makes no difference to how students perform, and that teachers' unions make schools less productive."[378] While her research, which compares public schools where there is competition from nearby public and private schools with public schools that lack such competition, has received substantial national and international attention,[379] there is concern that her enthusiasm for vouchers has led her to misread her data and ignore important variables.[380]

In contrast, John Witte, who teaches political science at the University of Wisconsin-Madison, found two reasons why it is impossible to tell whether the Milwaukee voucher program had any effect on public school quality in its first five years.[381] First, the program was too small to create competition.[382] Second, the public schools "are constantly reforming, experimenting, and reorganizing" and that change cannot be separated from any voucher effect.[383] The voucher program did mean the public schools received less money. Also, the public schools were less able to predict enrollment patterns because some students signed up for both public and private schools and because students in private schools that closed at mid-year had to return to the public schools.[384] But there is no evidence that vouchers had a positive or negative effect on the public school programs.[385]

Witte does predict that expanding the Milwaukee program to a universal voucher program would harm the public schools and reduce the choices available to the poor. In the 1990-95 Milwaukee program, participants who met the income limitations were chosen by random selection. But, when voucher programs drop income limitations and

375. Cassidy, *supra* note 349, at 147.

376. *See Sorting Out School Choice*, ECONOMIST, Sept. 4, 1999, at 33.

377. *See* Cassidy, *supra* note 349, at 147.

378. *Id.* at 144.

379. *See id.* at 154-55. Hoxby's analysis substitutes the number of rivers and streams for the number of school districts to avoid one form of statistical bias. Critics note that the number of rivers and streams are often linked with urbanization and industrialization, so she may simply be measuring the link between economic development and improved school performance, not the impact of competition on schools. *See id.* at 155.

380. *See id.* at 154.

381. *See* Witte, *supra* note 24, at 115-16.

382. *See id.* at 115.

383. *Id.* at 115-16.

384. *See id.* at 106-07, 115. Witte also suggests a third reason: some of the participating private schools were financially and academically marginal. *See id.* at 107-09.

385. *See id.* at 115-16.

do not use random selection, vouchers go primarily to middle-class students already enrolled in private schools or skim the best students from the public schools.[386] While Witte supports voucher programs targeted at the urban poor, he is worried that targeted programs create political pressures to expand the programs and he fears that the result would be public funding for many private schools that primarily serve the white middle class.[387] The less wealthy would attend either less selective private schools or a public school system with decreased funding and decreased public support.[388] Funding is a major concern of voucher supporters, voucher opponents, and those who are neutral on the issue of vouchers.

A third goal of voucher proponents is saving money. Voucher supporters claim that private schools do a better job for much less money. Some studies claim private schools cost only half as much as public schools.[389] However, one study that compares public and private school expenditures for similar services finds the differences are not great and that the public schools may even cost less.[390]

Costs and management of funds may be the concerns that need the most analysis by state legislators and executives. For states, spending on elementary and secondary schools is a big percentage of the state budget.[391] Much of state politics focuses on public education. If the experience of Ohio and Wisconsin is typical, voucher programs add to both the cost and the political turmoil of public education programs.[392]

In Milwaukee, for example, the public schools lost about nine students per school.[393] While the school lost the per pupil state funding, they did not lose enough students to justify staff cuts needed to reduce costs.[394] The result was the Milwaukee public school system had a 1999 net funding loss of $22 million.[395]

These disputes over funding reflect the fact that these programs have the potential to shift massive amounts of public money from the public to the private schools. Because state government is responsible for the spending of tax money, audits are required. In Ohio, a financial and performance audit found mismanagement of funds and numerous violations of the eligibility rules.[396] In the 1996-97 and 1997-98 school years, vouchers were given to thirty students from families with incomes above $50,000. Participants were transported to school in taxis, and the program spent $419,000 for taxi rides when the children were absent. Part of the problem was that

386. *See id.* at 74-82.

387. *See id.* at 197, 206-07.

388. *See id.* at 202-05.

389. *See id.* at 106.

390. *See id.*

391. *See* THE WORLD ALMANAC AND BOOK OF FACTS 1999, at 115 (1998) (showing the largest line item in 1996 and 1997 state budgets is spending on elementary and secondary education). Calculations by the author show this line item is almost 27% of state budgets.

392. *See* Witte, *supra* note 24, at 162-71 (describing conflicts in Milwaukee and Cleveland).

393. *See* Hirsh & Samuelson, *supra* note 57, at 12, 16.

394. *See id.*

395. *See id.*

396. *See* Dennis J. Willard, *Voucher Program Receives Bad News*, AKRON BEACON J., Jan. 6, 1999, at 1.

the administrators let the participating schools check residency and income of students.[397]

In addition to financial accountability concerns, one voucher supporter believes that a well-designed voucher program would actually cost a state more, not less, for two reasons. First, if the Supreme Court determines that the programs are constitutional, states or a private foundation would need to fund a multi-year program with millions of children and increased funding to determine whether the programs work.[398] Second, private and especially sectarian schools tend to cost less because they pay teachers less, save the costs of gyms and auditoriums by using church facilities, and don't offer mandated programs like special education classes, English as a Second Language, breakfast, and transportation.[399] For voucher programs to stimulate the growth of new public and private schools that provide a full range of educational services, voucher programs need realistic funding.[400] Many private schools that charge less are in serious financial difficulties and need public funds to survive. Some estimates suggest a universal voucher system would increase public expenditure on education from 11.3% to 27.2%, depending on the level of funding.[401]

Thus, it is not surprising that many voucher opponents fear that vouchers are a plan for cutting public school funding. Achieving broad-based support for vouchers requires adequate funding.[402] In addition, programs that privatize or partially privatize public services have hidden costs: states must develop new bureaucracies to supervise the private entities. If voucher programs cost significantly more than the current system of school funding, Oklahoma and other states with constitutional restrictions on increased taxes would have to cut other programs to fund vouchers.

2. Are Vouchers Appropriate for a Particular State?

States do not have identical educational needs or conditions. Arizona's voucher plan, adopted in 1998, envisions a public education system where students can choose from "voucher-redeeming public schools, voucher-redeeming private or parochial ones, quasi-public charter schools, quasi-private charter schools and home learning."[403] Currently, Arizona students can choose to spend their voucher money at a public charter school or a traditional public school.[404] Almost five percent of the students are able to attend charter schools because "Arizona has a quarter of all the charter schools in the country."[405]

However, the impact of vouchers in many states is much more limited because there are so few private or public school alternatives. If sectarian schools are excluded for federal or state constitutional reasons, the choices are even fewer. One reason the New

397. *See id.*
398. *See* Miller, *supra* note 12, at 27.
399. *See id.*
400. *See id.*
401. *See* Witte, *supra* note 24, at 20.
402. *See* Miller, *supra* note 12, at 16.
403. *Sorting Out School Choice*, ECONOMIST, Sept. 4, 1999, at 33, 34.
404. *See id.*
405. *Id.*

Mexico legislature defeated vouchers was that no private schools existed where most of the targeted poor children lived.[406] In Florida, eight hundred students were eligible in 1999 for vouchers, but there were only fifty-nine slots in eighteen eligible private schools for the ninety-one students who applied for vouchers.[407]

Problems in Oklahoma are representative of the problems facing voucher programs in many states. Oklahoma educational and demographic conditions more closely resemble New Mexico and Florida than Arizona. Statistics, available only for accredited private schools, show private schooling has been growing in Oklahoma. However, most students still attend public school.[408] In Moore, Oklahoma, in the fall of 1999, there were 18,010 public school students and 355 students in three private schools.[409] Norman, Oklahoma, had 12,500 students in public school and 1078 in four private schools.[410] All the private schools in both cities were sectarian.[411]

The Moore and Norman private school choices reflect those across the state. For 1998-99, the Oklahoma Department of Education lists seventy state-accredited elementary and secondary private schools.[412] Four schools are identified as "independent," but two of those are church-related.[413] Three other schools have nonsectarian names.[414] Thus, at least sixty-five (93%) of the seventy private accredited schools in Oklahoma for 1998-99 are sectarian. In addition, 46% of the sixty-one schools are in Oklahoma City or Tulsa, 64% in the greater Oklahoma City and Tulsa areas.[415] Unless new public charter schools or private nonsectarian schools expand the choices available, a voucher program without sectarian schools would provide only the illusion of choice. It is likely that rural students would still have only public schools available.

The current situation of limited nonpublic school choices outside of Oklahoma City and Tulsa points to another practical problem for a voucher program in Oklahoma: most of the "low performing" schools are outside of Oklahoma City and Tulsa. After the passage of the education reform bill (House Bill 1017) in 1991, the state required schools to test students. A school was listed as "low performing" if the students scored at or below Oklahoma's twenty-fifth percentile. A school listed as "low performing" for three consecutive years would be reclassified as "high-challenged."[416] If a school stayed on the "high challenged" list for five years, the state could take over, fine, or even close the school. As of 1998, the state had closed two schools

406. *See* Hirsh & Samuelson, *supra* note 57, at 16.

407. *See id.*

408. *See* Veronica Jackson & Karen Johnston, *Private Schooling on the Rise*, NORMAN TRANSCRIPT, Oct. 3, 1999, at A1.

409. *See Could Public Schools Handle the Students if Private Schools Should Close?*, NORMAN TRANSCRIPT, Oct. 3, 1999, at A3.

410. *See id.*

411. *See id.*

412. *See 1998-99 Oklahoma Accredited Nonpublic Schools* (visited Oct. 24, 1999) <http://sde.state.ok.us/acrob/eddir/private.pdf>.

413. *See* Advertisement, *Oklahoma's Episcopal Schools*, OKLAHOMA TODAY, Mar./Apr. 2000, at 30.

414. *See 1998-99 Oklahoma Accredited Nonpublic Schools*, *supra* note 412.

415. *See id.* Calculations are by the author.

416. Ginnie Graham, *"At Risk" List Takes a Holiday*, TULSA WORLD, July 7, 1999, at 3.

(Alluwe and Langston)[417] and had taken control of two others (Dahlonegah and Oaks Mission).[418]

In 1999, there were fifty schools on the "low performing" list. Ten of those were in Tulsa and six in Oklahoma City, a total of one third of all schools on the list.[419] That means two-thirds of low performing schools are outside of the areas where there are many other schools — public or private — from which to choose. Three schools — one in Muskogee, one in Tillman, and one in Tulsa — were on the list for the third consecutive year, but none in Oklahoma City had been on the list the year before.[420] In one sense, the lists have been successful: few schools stay on these lists for three or more years. Many use tutoring programs or curriculum changes to improve quickly.[421]

However, the lists have generated a lot of controversy. Some critics said the low performance was the fault of the school, but defenders of the schools noted that most "low-performance" schools were in areas of high poverty or high minority enrollment or high mobility and were reflecting community problems.[422] While some schools were still able to respond and improve test performance, others got in trouble for exempting students from the tests or altering test results.[423] In 1995, the high schools shifted from the standardized test to state curriculum tests and thus became exempt from the listing requirements. In 1999, the legislature required the Department of Education to develop another method for measuring student performance for the elementary and middle schools, so the lists may be temporarily on hold.[424] Although the Wisconsin, Ohio, and Florida voucher systems focus on students at low performing schools, until Oklahoma establishes a consistent measure of low performance,[425] that approach to vouchers will not work.

3. Do Vouchers Satisfy State Constitutional Requirements?

The third major consideration for any state contemplating a voucher program is the issue of constitutionality. Until the U.S. Supreme Court settles the First Amendment voucher issue, passing a voucher program is simply an invitation to one or more lawsuits. Even if the Court finds no federal constitutional violation, some state constitutions still pose a potential problem for vouchers.

An analysis of Oklahoma law illustrates some of these problems. The Oklahoma Constitution, together with those of Michigan, Florida, Georgia, Montana, and New

417. *See* Bobby Ross, Jr., *School Test Ranks Show Improvement But Low-Performing Schools Triple Over Last Year in City*, DAILY OKLAHOMAN, June 13, 1998, at 1.

418. *See* Graham, *supra* note 416.

419. *See* Diane Plumberg, *50 State Schools Listed Among Low Performers*, DAILY OKLAHOMAN, June 30, 1999, at A1.

420. *See id.* In Oklahoma City, three of the six had been on earlier lists, and the seven from the previous year had improved and dropped off the list. *See id.*

421. *See* Graham, *supra* note 416.

422. *Id.*

423. *See id.*

424. *See id.*

425. *See* Plumberg, *supra* note 419, at 3. Schools cannot use standardized tests until 2002. *See id.*

York,[426] imposes some of the more rigid restrictions on aid to sectarian schools. In addition to a state constitutional provision against such aid, Oklahoma also has case law and Attorney General's opinions against aid to sectarian schools.[427]

Since 1907, the Oklahoma Supreme Court has decided three cases applying article II, section 5[428] to the issue of state aid to sectarian elementary and secondary schools. In *Oklahoma Railway Co. v. Saint Joseph's School*,[429] the court held that a city franchise contract that requires a tram line to provide half fare rides for all school-children, whether they are public or parochial school students, does not violate article II, section 5. In its reasoning, the court noted that children have a right to attend private school and that the reduced fares help promote education of children. In addition, the court stressed that the city could not discriminate in a contract.[430]

Looking only at this 1912 case, a court could conclude that article II, section 5 does allow indirect aid to benefit students. However, *Gurney v. Ferguson*[431] and *Board of Education of Independent School District No. 52 v. Antone*,[432] the other two cases on the transportation of parochial school students, find article II, section 5 bars state aid for the transportation of such students. The *Gurney* court distinguished *Oklahoma Railway* for two reasons. First, public school buses involve spending public money, but the regulation of the Oklahoma Railway Company did not involve public money. Second, *Oklahoma Railway* was about the railway's contract and franchise agreement with the city, not state involvement in a sectarian institution.[433]

In *Gurney*, the court ruled that a state law requiring public school buses to transport both public school students and parochial school students who lived on or near the regular public school bus routes does violate article II, section 5.[434] The *Gurney*

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426. *See* Kemerer, *supra* note 3, at 5. Twelve other states have only slightly less restrictive provisions. *See id.* at 6.

427. *See id.* at 39-40 tbl.I.

428. *See supra* note 5 and accompanying text for the constitutional language.

429. 127 P. 1087, 1089 (Okla. 1912). However, in its earliest article II, section 5 decision, *Cornell v. Gray*, 127 P. 417, 421 (Okla. 1912), the Oklahoma Supreme Court held that the Board of Regents of A. and M. College (now O.S.U.) could not require students to pay fees that in part went to support sectarian student organizations. The *Cornell* court reasoned that, since article II, section 5 meant that the legislature could not appropriate money for such a purpose or authorize the Board of Regents to spend money for such a purpose, the Board could not require students to pay fees for such a purpose. *See id.* Furthermore, "[s]aid section 5 of article 2 is self-executing, and requires no act of the Legislature to become operative, but by itself controls all legislation upon the subject of appropriating money or other property for such purposes." *Id.* In addition, the *Cornell* court noted that article II, section 5 was rooted in the Jeffersonian tradition of the 1786 Virginia law titled "An act for establishing religious freedom" and reflected similar provisions in other state constitutions. *See id.* In *Rosenburger v. University of Va.*, 515 U.S. 819, 845 (1995), the U.S. Supreme Court ruled that the First Amendment does not prohibit allocating student fees to a student religious group which was only one of many student groups receiving money. However, that does not mean the Oklahoma Supreme Court would necessarily change its interpretation in *Cornell v. Gray*.

430. *See Oklahoma Ry. Co.*, 127 P. at 1088.

431. 122 P.2d 1002 (Okla. 1941).

432. 384 P.2d 911 (Okla. 1963).

433. *Gurney*, 122 P.2d at 1004.

434. *See id.*

court reasoned that schools that are "owned and controlled by a church" and that teach the beliefs of the church to the students are "sectarian institutions."[435] Therefore, article II, section 5's ban on the use of public money to aid "sectarian institutions" applies to sectarian schools.[436]

The *Gurney* court rejected the argument that the aid went to the children and not to the schools for three reasons. First, the child benefit argument would apply just as well to the construction of buildings and to salaries of teachers, but article II, section 5 clearly forbids such expenditures.[437] Second, the legislative justification of public school buses is that buses aid public education. The court reasoned that if the buses aid public schools, then the buses also aid private sectarian schools, which clearly violates article II, section 5.[438] Third, the court reasoned that a small amount of aid would lead the sectarian schools to ask for more aid, and soon the state would be regulating and then controlling the schools, which was not appropriate.[439]

The Oklahoma Supreme Court decided *Gurney* before the U.S. Supreme Court held in *Everson*[440] that the First Amendment, as applied to the states through the Fourteenth Amendment, did not prohibit state transportation of parochial school students. However, in *Antone*, the Oklahoma Supreme Court held that *Everson* does not control application of state constitutional provisions and that an Oklahoma school district policy of transporting parochial school students in public school buses does violate article II, section 5 of the Oklahoma Constitution.[441] The 1963 *Antone* court reaffirmed the *Gurney* decision and its reasoning against the child benefit argument.[442]

In addition, the *Antone* court specifically rejected the argument that "providing for the education of all children . . . and affording facilities therefor . . . should not be measured by whether . . . [the money] aids any particular sectarian institution . . . but whether the purpose is the general welfare."[443] The court stated that, even if transporting parochial school students does promote public welfare, that does not alter the fact that article II, section 5 "prohibits the use of public money or property for sectarian or public schools."[444] The court concluded that: "[t]he law leaves to every man the right to . . . provide for the religious instruction and training of his children . . . . When he chooses . . . educational facilities which combine secular and religious instruction, he is faced with the necessity of assuming the financial burden which that choice entails."[445]

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435. *Id.* at 1003.
436. *Id.*
437. *See id.* at 1004.
438. *See id.*
439. *See id.* at 1004-05.
440. Everson v. Board of Educ., 330 U.S. 1 (1947); *see supra* note 8 and accompanying text.
441. *See* Board of Educ. of Indep. Sch. Dist. No. 52 v. Antone, 384 P.2d 911, 912 (Okla. 1963).
442. *See id.* at 914.
443. *Id.* at 913.
444. *Id.*
445. *Id.* For a discussion of the child benefit and public welfare positions in the *Gurney* and *Antone* courts, see Gary D. Spivey, Annotation, *Constitutionality, Under State Constitutional Provision Forbidding Financial Aid to Religious Sects, of Public Provision of Schoolbus Service for Private School*

Gurney and *Antone* are strong statements against the use of public monies to aid sectarian schools. In both *Gurney* and *Antone*, the aid was indirect aid that went to the children, not direct aid to a sectarian school. Even if the U.S. Supreme Court were to hold that the First Amendment does not forbid the use of educational vouchers to attend sectarian schools, an Oklahoma court following *Gurney* and *Antone* would likely rule that such vouchers violate article II, section 5 of the Oklahoma Constitution.

In situations, however, that do not involve state aid to sectarian elementary and secondary schools, the Oklahoma Supreme Court has ruled that article II, section 5 does not forbid all state involvement with sectarian institutions. For example, in *Sharp v. Guthrie*,[446] the court held that a city does not violate article II, section 5 by selling public land to a sectarian institution for adequate consideration.[447] The court reaffirmed *Sharp* in 1989 in *Burkhardt v. Enid*.[448]

The *Burkhardt* court held that a city could purchase a campus from a church-related college and lease it back to the same college at below market rate without violating article II, section 5.[449] The court gave two reasons for this conclusion. First, the college provided adequate non-monetary consideration to the community in the form of services, reduced-cost educational opportunities for citizens, and economic development support for the city.[450] Second, the college was not a sectarian institution because it was not controlled by the church, did not require students to learn the tenets of the church, had severed its ties with the graduate seminary, had excluded the chapel from the sale, and had agreed to accounting procedures to ensure no public monies were spent on religious activities.[451] Therefore, the court ruled that: "Article 2, section 5 of the Oklahoma Constitution constitutes a bonafide, separate, adequate, and independent ground upon which we rest our decision that the plan does not benefit a sectarian institution."[452]

An Oklahoma court examining a voucher program in light of the *Sharp* and *Burkhardt* decisions might decide that a participating sectarian school was providing adequate consideration in return for any public monies received. However, the *Burkhardt* court strongly emphasizes the nonsectarian nature of the college. Therefore, a court applying *Burkhardt* to a voucher program may be more likely to conclude that only nonsectarian private schools could participate without violating article II, section 5 of the Oklahoma Constitution.

Pupils, 41 A.L.R.3D 344, 356, 362 (1972). Spivey finds courts in most states with similar constitutional provisions conclude that transportation of parochial school students on public school buses does violate the state constitution. *See id.* at 366.

446. 152 P. 403 (Okla. 1915).

447. *See id.* at 408.

448. 771 P.2d 608 (Okla. 1989).

449. *See id.* at 612.

450. *See id.*

451. *See id.* at 612-13.

452. *Id.* at 613.

In addition to these cases, there are others that allow some public money to go to sectarian institutions. For example, in *Murrow Indian Orphans Home v. Childers*,[453] the Oklahoma Supreme Court also concluded that it was not a violation of article II, section 5, for the Oklahoma legislature to authorize paying a sectarian institution for its expenses in caring for deprived and dependent orphans.[454] In *Murrow*, the state had contracted with the Home for the care and education of deprived children but was refusing to pay the for services rendered because the Baptist Church ran the Home.[455]

In *Murrow*, the court determined that *Gurney* did not control because *Gurney* did not, like *Murrow*, involve a contract of payment for service.[456] The *Murrow* court noted that the state knew this was a Baptist institution when it made the contract and that the state could not, after receiving the services, refuse to pay the bills.[457] While one might read *Murrow* to suggest that Oklahoma could spend through contract what it could not spend directly, the *Antone* court limited *Murrow* by noting that the state was not supporting the Home, but simply paying for services rendered.[458]

Two Oklahoma Supreme Court decisions do allow limited state aid to religion on the grounds that no sectarian institution is involved. In *Meyer v. Oklahoma City*,[459] the court determined that article II, section 5 does not prohibit Oklahoma City from maintaining a cross on the state fairgrounds primarily because the cross is in a "commercial atmosphere that obscures whatever suggestions may emanate from its silent form, . . . and vitiate[s] any . . . support for any sect."[460] In addition, the *Meyer* court noted that the purpose of the constitutional provision was "to prevent sectarian bodies from making raids upon the public treasury,"[461] and that the maintenance costs here would be slight.[462] In contrast, in *State v. Williamson*,[463] the court approved the use of trust funds to build a chapel at a state school because "we are a Christian Nation and a Christian State."[464] The court held that none of the precedents suggested that building a chapel would violate article II, section 5 or the First Amendment.[465] However, in *Meyer*, the Oklahoma Supreme Court noted that

453. 171 P.2d 600 (Okla. 1946).

454. *See id.* at 603.

455. *See id.* at 601.

456. *See id.* at 602.

457. *See id.*; *see also* C.C. Marvel, Annotation, *Public Payment of Tuition, Scholarship, or the like, as Respects Sectarian Schools*, 81 A.L.R.2D 1309, 1315 (1961) (noting that, in such contracts, states consistently authorize payments so long as no money is taken from public schools and the contract reflects nonsectarian market price); Witte, *supra* note 24, at 102 (noting that before and after vouchers were adopted, Milwaukee Public Schools had contracts with private schools to service specific student needs).

458. Board of Educ. of Indep. Sch. Dist. No. 52 v. Antone, 384 P.2d 911, 913 (Okla. 1963).

459. 496 P.2d 789 (Okla. 1972).

460. *Id.* at 793.

461. *Id.* at 791.

462. *See id.*

463. 347 P.2d 204 (Okla. 1959).

464. *Id.* at 207-08.

465. *See id.* at 206.

the chapel services were non-sectarian, non-denominational, not required and that the chapel served as a sort of general assembly hall.[466]

Three themes emerge from these article II, section 5 cases. First, the Oklahoma Supreme Court has said that the Oklahoma Constitution means what it says: public money cannot be appropriated to provide direct or indirect aid to a sectarian institution. Second, the Oklahoma Supreme Court has allowed aid when the court has determined the institution or practice is not sectarian. Third, the Oklahoma Supreme Court has permitted some state contracts that involve sectarian institutions when there is no state appropriation of money or when the state has contracted for specific services.

Oklahoma courts applying these decisions to a voucher program that included sectarian schools might conclude that article II, section 5 does not forbid a state contract with a sectarian institution for a specific service (such as teaching calculus or German) that the public schools could not provide. However, it is highly unlikely that this contract argument could be extended to cover a complete educational program that took money from public schools and transferred it to sectarian institutions. It is much more likely that the Oklahoma courts would find that neither the child benefit nor the public welfare arguments can be used to justify direct or indirect aid to sectarian schools. Since nearly all private schools in Oklahoma are sectarian, a voucher program that excluded these schools would be not expand student choice significantly. But to permit any significant aid to sectarian schools, the Oklahoma Supreme Court would have to overturn *Gurney* and *Antone*.[467]

Thus, unless the Oklahoma Constitution or the interpretation of the Oklahoma Constitution changes, both the U.S. and the Oklahoma Constitutions could be used to challenge a voucher program in Oklahoma. While "[s]tate judges often take an independent mind in interpreting state constitutional provisions, and what appears to be restrictive may turn out to be permissive,"[468] current Oklahoma law is against the use of vouchers in sectarian schools. Continuing the ban on aid to sectarian schools would be "more attuned to the differences in language between the federal and state constitutions and to the differing historical experiences underlying their adoption."[469]

Therefore, even state officials who favor vouchers need to consider their choices carefully. Even if officials sift through the contradictory research results and decide that vouchers do improve education of students, there are other considerations. Intense

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466. *See Meyer*, 496 P.2d at 792.

467. There is little evidence that the 2000 Oklahoma legislature wants such a change. The Oklahoma Religious Freedom Act, which went into effect November 1, 2000, specifically states:

> Nothing in the act shall be construed to . . . [a]ffect, interpret, or in any way address those portions of Article 1, Section 2, and Article 2, Section 5, of the Constitution of the State of Oklahoma, the Oklahoma Religious Freedom Act, or the First Amendment to the Constitution of the United States that prohibit laws respecting the establishment of religion.

51 OKLA. STAT. § 255.A.3 (Supp. 2000). By also stating that "[t]his provision does not in and of itself require vouchers," *id.* § 255.B, the Act discourages attempts to use the Act in court to promote voucher programs.

468. Kemerer, *supra* note 3, at 15.

469. Tarr, *supra* note 2, at 98.

interest group involvement, partisan rhetoric, and a divided public all point to political costs for approving or opposing vouchers. Voucher programs are potentially expensive. If a state lacks the alternative schools to provide choices, vouchers will not have much impact. Finally, a voucher plan that tries to expand choices by including sectarian schools invites lawsuits.

B. Choices for Oklahoma and Other States

Given these considerations, what are the choices for Oklahoma and other states?

One possibility is the choice Florida made in 1999: adopt a state-wide program similar to those in Milwaukee and Cleveland.[470] This approach would be divisive and expensive unless there is solid evidence that vouchers are constitutional and effective. Even if there is enough popular support for the program, it would be wise to wait until the Supreme Court rules on the issue.

In addition, one of the benefits of federalism is that states can experiment with ideas to see if they work. Currently, the evidence from Cleveland and Milwaukee does not conclusively show whether vouchers improve student learning. If the Cleveland, Milwaukee, and Florida programs survive the constitutional and political tests ahead, those programs should begin to generate some useful data on the impact of vouchers in the future.[471] By then, the U.S. Supreme Court may have accepted and decided *Zelman* or another voucher case. Then, policy-makers in Oklahoma and other states will be able to approach the issue of vouchers with more realistic expectations of costs and outcomes. However, Oklahoma also needs to consider whether the state has the tax base and the educational infrastructure needed to expand school choice. Even if vouchers work in more urban states, they may not be the best choice for Oklahoma.

A second choice for the states is to adopt more limited and narrowly targeted voucher programs. These are less expensive, less divisive, and *Witters* and *Zobrest* imply such programs are more likely to receive U.S. Supreme Court approval. For example, Governor Frank Keating has suggested vouchers for special education students and disruptive students as well as for students in poorly performing schools.[472] The Oklahoma Supreme Court's decision in *Murrow* may indicate that such a program might even work with sectarian schools. However, private schools usually don't want disruptive students[473] and often lack special education programs. If states choose targeted vouchers, officials also need to be aware of the tendency of small, targeted programs to grow into universal entitlements.[474]

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470. *See* Stanley M. Elam, *Florida's Voucher Program: Legislating What Can't Be Done by Referendum*, PHI DELTA KAPPAN, Sept. 1999, at 81, 81-86 (providing details of the Florida plan and controversies over that plan).

471. *See* Metcalf & Tait, *supra* note 35, at 73-74.

472. *See* Ross, *supra* note 15, at 1.

473. *See* Hirsh & Samuelson, *supra* note 57 (noting that parents choose private schools in part because they feel such schools are safer).

474. *See supra* notes 386-88 and accompanying text. *But see* Metcalf & Tait, *supra* note 35, at 74 (suggesting businesses, bureaucracies, and individuals committed to and dependent on public schools make universal vouchers unlikely, even if cost is not a bar).

The third approach is for state policy-makers to take a different approach to improving public schools. School choice is popular,[475] but vouchers are not the only way to provide school choice. School choice programs so far have included: alternative schools, magnet schools, charter schools, special mentoring or tutoring centers, public state boarding schools for the gifted and talented, expanding internet access for rural schools, open enrollment between and within school districts, tax credits or deductions for part or all of private school tuition, special programs within a single school, and public school contracts with private schools. Only a few of these non-voucher choice programs have faced legal challenges; and *Mueller*[476] and *Kotterman v. Killian*[477] suggest that tax deductions or tax credits that encourage private voucher programs are also unlikely to have constitutional problems.[478]

This seems a better approach for Oklahoma, where voucher programs, even if they are constitutional, will only increase student choices marginally in larger urban areas. Many of Oklahoma's poorly performing schools are in small towns and rural areas. Policy-makers need to use approaches that are flexible enough to address concerns throughout the state.

VIII. Conclusion

Voucher programs may or may not be constitutional. In *Zelman*, the district court decided vouchers violate the Establishment Clause of the First Amendment. Now that the Sixth Circuit has affirmed the district court, the U.S. Supreme Court can, if it chooses, use *Zelman* to provide some guidance to the states on this issue.

However, until the Supreme Court decides the issue, states still have an implicit or explicit (depending on the state constitution) responsibility to provide educational opportunities to their citizens. States need to determine which programs, given the uncertain legal climate, have a realistic chance of being both constitutional in the state and useful in addressing state educational problems.

In Oklahoma, vouchers are not an appropriate solution to educational problems. The Oklahoma Supreme Court is not likely to find vouchers constitutional. Even if there were clear evidence that vouchers improve student performance, at this time Oklahoma does not have a satisfactory method of rating which schools are performing poorly or performing well. Even if Oklahoma included sectarian schools in a voucher plan, the state would still lack the private or public schools needed to provide meaningful choices for Oklahoma children outside the state's urban areas.

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475. *See* Metcalf & Tait, *supra* note 35, at 67.

476. 463 U.S. 388 (1983).

477. 972 P.2d 606 (Ariz. 1999).

478. *See* Hirsh & Samuelson, *supra* note 57, at 16 (noting that Minnesota, Iowa, Arizona, and Illinois offer tax credits or deductions). These programs have survived court challenges in part because even parents of public school students can take deductions for books and fees. In addition, the limits on the deductions and tax credits mean these programs are less of a threat to public school funding. *See id.*; *see also supra* notes 320-23 and accompanying text (reporting public opinion supporting tax credits).