Articles

The Constitutional Dimension of School Vouchers

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I. Introduction

Immediately upon legislative enactment, a publicly funded voucher program encompassing sectarian private schools runs headlong into the wall of separation between church and state evident in the anti-establishment provisions of both federal and state constitutions. This is so because eighty-five percent of the nation's private schools are religiously affiliated.[1] If voucher systems encompassing religious private schools cannot withstand constitutional challenge, they cease to have value as a school reform measure. This article explores whether school vouchers that channel public funding to sectarian private schools are constitutional under both federal and state constitutions. The discussion encompasses research on relevant state constitutional provisions and interpretive law in all fifty states.

The matter is more complex than most believe because vouchers force judges to determine the proper relationship between constitutional restraints on establishment of religion and protection for individual free exercise of religion, an area of the law where there is profound disagreement. Complicating the matter further is concern for the relationship between state and federal law inherent in the concept of federalism. Lack of consensus on these issues together with the controversial nature of school vouchers serve to highlight the political character of the judiciary and the role that judges' values play in judicial decision making. In addition, differences in constitutional provisions among the states raise significant design issues for voucher proponents. This article addresses these concerns.

II. A Tale of Two Judges

A. The "Non-Political" Judicial Process

Perceptions to the contrary, the judicial process is significantly political. This is especially true at the state level where thirty-eight states use elections to

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1. Bruce COOPER, *The Changing Universe of U.S. Private Schools*, COMPARING PUBLIC AND PRIVATE SCHOOLS (THOMAS JAMES & HENRY M. LEVIN, eds., New York: Falmer Press, 1988). The fastest growing private school segment is Christian schools. See Jeff Archer, *Today, Private Schools Span Diverse Range*, EDUC. WK., Oct. 9, 1996, at 1, 12-15.

choose or retain judges.[2] Political factors also are important at the federal level where the President appoints judges with the advice and consent of the Senate. The tumultuous debate over the nominations of Robert Bork and Clarence Thomas to the U.S. Supreme Court attests to this fact. It is often said that when Americans elect a President, they also choose federal judges.

The influence of politics and the value system a judge brings to the bench is clearly evident in conflicting decisions handed down by two trial judges in different states over the constitutionality of school vouchers. Because of the insight the decisions offer into the judicial decision making process, the tale of these two judges is set forth here.

B. The Choice Programs: Milwaukee and Ohio

For most of its existence, the Milwaukee Parental Choice Program (MPCP) has been undersubscribed, slow to reach its cap of one percent of the Milwaukee Public School enrollment.[3] The primary reason for this undersubscription is that the program included only nonsectarian private schools, thus restricting the number of schools that could participate and consequently, the number of parents who would choose.[4] In 1994-95 only twelve nonsectarian private schools within the boundaries of the Milwaukee public school system chose to participate in the program.[5] Under pressure from Republican Governor Tommy Thompson to expand the range of choices available to parents and to expand the number of parents who could participate, the legislature in 1995 eliminated the provision barring participation by sectarian private schools and raised the cap on the number of eligible participants to seven percent of the Milwaukee Public School enrollment in 1995-96 and fifteen percent in 1996.[6] The latter would encompass some 15,000 students.[7] Each student would receive the lesser of the amount of per-pupil state aid to Milwaukee public schools or the amount equal to the public school's per-pupil educational programming costs.[8] The per-pupil state aid to the Milwaukee public school system in 1996-97 was approximately $4,400,[9] considerably more

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2. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725 (1995). Croley notes that in only twelve states judges are chosen by legislative or executive appointment.

3. JOHN F. WITTE, ET AL., *Fourth-Year Report: Milwaukee Parental Choice Program*. Dept. of Political Science and the Robert M. La Follette Institute of Public Affairs, University of Wisconsin-Madison, Madison, WI (December 1994) (on file with author) [hereinafter FOURTH-YEAR REPORT].

4. WIS. STAT. ANN. § 119.23 (2)(b) (West 1990).

5. FOURTH-YEAR REPORT, *supra* note 3, at 11.

6. WIS. STAT. ANN. § 119.23(3)(b) (West Supp. 1997).

7. Since there are slightly less than 99,000 students enrolled in the Milwaukee Public School System, the cap of fifteen percent would be just shy of 15,000 students. Jackson v. Benson, No. 95 CV 1982 at 7 (Wis. Cir. Ct.), *aff'd*, 570 N.W. 2d 407 (Wis. App. 1997).

8. WIS. STAT. ANN. § 119.23(4) (West Supp. 1997).

9. *Jackson*, No. 95 CV 1982 at 13.

than the tuition of most religious schools.[10] The legislature placed no restrictions on how the schools spent the money they received. In addition, the legislature eliminated some of the reporting and accountability measures required by the earlier law.

The state supreme court upheld the original MPCP in 1992 by a four to three vote.[11] The decision, however, had no bearing on the matter of aiding religion since only nonsectarian private schools were eligible to receive state vouchers. In 1995 the justices on the Wisconsin Supreme Court divided equally on the constitutionality of the 1995 amendments and sent the case back to the trial court in 1996 for a hearing before Dane County Circuit Judge Paul Higginbotham.[12]

The Cleveland public scholarship program began on a pilot basis in the fall of 1996 following heavy promotion from Republican Governor George V. Voinovich.[13] The program allows parents with children in grades kindergarten through three to select private schools within the Cleveland City School District and public schools located in adjacent school districts.[14] Unlike the original Milwaukee program, families in Cleveland can use their scholarships at sectarian private schools.[15] By the summer of 1996, over 50 private schools had registered to participate, most of them sectarian.[16] No adjacent school district had done so.

During 1996-97, the program awarded nearly 2,000 scholarships to a maximum of $2,500 each to recipients chosen by lottery from over 6,000 applications.[17] Students who receive a scholarship can renew it through the eighth grade.[18] If a child attends a private school, the scholarship check is payable to the parent but transmitted directly to the school where the parent then endorses it over

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10. For example, Holy Cross School charges tuition of $1,475 while its actual cost of education is $2,446 per student. Emmanus Lutheran School charges $1,080 tuition to church members and $1,350 to nonmembers, while its annual educational expenditure per student exceeds $2,000. Mother of the Good Counsel School reported that its tuition covered just half the per student education costs. *Jackson*, No. 95 CV 1982 at 13-14. Because the amended parental choice program pays schools the actual cost of educating a student not to exceed $4,400 of state aid allocated per student in the Milwaukee public school system, the program relieves the churches that sponsor the schools of having to seek the portion of the difference between tuition and the actual cost of education. *Id.* at 14.

11. Davis v. Grover, 480 N.W.2d 460 (Wis.), *reconsideration denied*, 490 N.W.2d 26 (Wis. 1992). The court upheld the program against charges that it violated the judicially developed public purpose doctrine, was enacted as a private bill in violation of Article IV, Section 18 of the Wisconsin Constitution, and did not satisfy the uniform school provision of art. X, §3. *Id.* The uniformity provision states that "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable . . ." WIS. CONST. art. X, § 3. Because the private schools are not district schools and because children participating in the choice program can always return to the public schools, the court determined that the program met this constitutional requirement. *Davis*, 480 N.W.2d at 476.

12. State of Wisconsin v. Warner Jackson, 546 N.W.2d 140 (Wis. 1996) (per curiam) (lifting stay of proceedings in Dane County Circuit Court).

13. George V. Voinovich, *Choice Puts Kids First*, USA TODAY JAN. 16, 1996, at 12A.

14. Ohio Rev. Code Ann. § 3313.974-3313.98 (West Supp. 1998).

15. *Id.* at § 3313.96.

16. Mark Walsh, *Battle Over Vouchers in Cleveland*, EDUC. WK., Feb. 19, 1997, at 1.

17. Kimberly J. McLarin, *Ohio Paying Some Tuition for Religious School Students*, N.Y. TIMES, Aug. 28, 1996, at B9.

18. Ohio Rev. Code Ann. § 3313.975(C)(1) (West Supp. 1998).

to the school.[19] If the child attends an out-of-district public school, the money goes directly to the school.[20] A companion program provides tutorial assistance grants up to $500 for parents whose children attend the Cleveland school system—an amount much less than the scholarship program.[21]

C. *The Decisions*

Inclusion of sectarian private schools in the amended Milwaukee Parental Choice Program sparked a resumption of litigation that focused on Article I, Section 18 of the Wisconsin Constitution.[22] The provision states in part:

> nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall . . . any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.[23]

In 1997 Dane County Circuit Judge Paul Higginbotham ruled that the expansion of the program violated this provision.[24] Judge Higginbotham pointed out that the Wisconsin Supreme Court previously had ruled that Article I, Section 18 imposes greater restrictions on state authority to aid private religious schools than the Establishment Clause of the First Amendment to the U.S. Constitution, which together with the Fourteenth Amendment, prevents states from making laws "respecting an establishment of religion."[25] While recognizing that the Wisconsin high court later opted to follow the U.S. Supreme Court's Establishment Clause precedents with regard to interpreting Article I, Section 18, Judge Higginbotham maintained that the Wisconsin high court never explicitly rejected its early pronouncement that the Wisconsin constitutional provision is more restrictive than the First Amendment Establishment Clause.[26]

Following a strict interpretation of Article I, Section 18, the judge then proceeded to apply it to the amended MPCP. He noted that the primary beneficiaries would be sectarian private schools since eighty-nine of the 122 eligible private schools in Milwaukee are sectarian.[27] Further, he observed that religion is pervasively intertwined with the instructional program at these schools,

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19. *See id.* § 3313.979.
20. *See id.*
21. *See id.* § 313.978(B).
22. *Jackson*, No. 95 CV 1982 (Wis. Cir. Ct. 1997).
23. WISC. CONST. art. I, § 18.
24. *Jackson*, No. 95 CV 1982 at 2-3.
25. *Id.* at 20 (citing Reynolds v. Nusbaum, 115 N.W.2d 761 (Wis. 1962) and State *ex rel.* Warren v. Reuter, 170 N.W.2d 790 (Wis. 1969)).
26. *Id.* at 23-25.
27. *Id.* at 10, 29.

citing the mission statements at a number of them.[28] The judge noted no restrictions on how the private schools could use the funds, and he argued that because the schools receive more than they charge in tuition, "[e]very dollar paid by the government exceeding the actual tuition provides a direct and substantial benefit to the religious schools."[29] Judge Higginbotham was particularly offended by what he considered religious coercion of taxpayers: "Perhaps the most offensive part of the amended MPCP is it compels Wisconsin citizens of varying religious faiths to support schools with their tax dollars that proselytize students and attempt to inculcate them with beliefs contrary to their own."[30] The judge also ruled that the amended MPCP constituted a private bill in violation of Article IV, Section 18 of the Wisconsin Constitution and violated the judicially developed public purpose doctrine that legislation must serve the public interest.[31] Rather than serve the public interest, Judge Higginbotham found that the program served the interests of the sectarian private schools.[32]

In Ohio, litigation began in the Court of Common Pleas of Ohio, Franklin County. Judge Lisa L. Sadler handed down a decision in July 1996 upholding the program.[33] In addressing the state constitutional claims, she noted that Article I, Section 7 and Article VI, Section 2 of the state constitution are no more restrictive than the First Amendment.[34] Article I, Section 7 provides in part that "No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society . . . ."[35] Article VI, Section 2, requires an adequately financed public school system and provides that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state."[36] Since the Cleveland program awards scholarships to parents without regard to the public or nonpublic nature of the schools they choose, Judge Sadler noted that any benefit to sectarian private schools was indirect.[37] For this reason, there was no violation of either the First Amendment Establishment Clause or the anti-establishment provisions of the Ohio Constitution.[38] The judge also ruled the program meets the requirement of the state constitution's uniformity clause and its thorough and efficient clause.[39] The latter requires the General Assembly to "secure a thorough and efficient system of common schools

28. *Id.*
29. *Id.* at 29.
30. *Id.* at 30.
31. *Id.* at 37, 45-46.
32. *Id.* at 43, 45-46.
33. Gatton v. Goff, Nos. 96CVH-01-191, 96CVH-01-721, 1996 WL 466499 (Ohio Com. Pl., July 31, 1996), *rev'd sub nom.*, Simmons-Harris v. Goff, No. 96APE08-982, 96APE08-991, 1997 WL 217583 (Ohio App. [10 Dist.] May 1, 1997).
34. *Id.* at 15.
35. OHIO CONST. art. I, § 7.
36. OHIO CONST. art. VI, § 2.
37. *Gatton*, 1996 WL 466499 at *14.
38. *Id.* at *15.
39. *Id.* at *17-*19.

throughout the state . . . ."[40] Plaintiffs argued that the program would impair the education of students in the Cleveland City School District by funneling high achieving students and economic resources to private schools.[41] But they did not convince Judge Sadler who indicated that "regardless of the merits of these arguments it is clear that any effect on those students remaining in the public school system is purely speculative."[42]

III. Analysis of the Choice Decisions

A. Classical View

Note that despite virtually the same anti-establishment constitutional provisions the judges reach opposite conclusions. Differences in the design of the two choice programs played some role in the decisions, but more important to the outcomes are differences between the judges in the way they interpret their respective constitutional provisions. Long ago the legal community rejected the classical legal view that the law is a simply a system of neutral rules that judges apply to reach one legally correct result. Judges cannot simply lay the article of the Constitution which is invoked beside the challenged statute and decide whether the latter squares with the former.[43] Such simplicity is impossible because many constitutional provisions are open-ended and/or ambiguous. Thus, for example, how should the prohibition against "unreasonable" searches and seizures in the Fourth Amendment to the U.S. Constitution be interpreted? What is "due process of law" in the Fifth and Fourteenth Amendments? What does the First Amendment's prohibition on "no law respecting an establishment of religion" mean? State constitutional provisions raise similar concerns.

B. Legal Realism

In contrast to the classical view, legal realists maintain that since law is socially constructed, it is often indeterminate and subject to judicial idiosyncracy. Research on court decisions shows clearly that the political orientation, background, and values of judges are important factors in judicial decision making. Since the 1970s, many scholars have argued that all legal decision-making is

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40. OHIO CONST. art. VI, § 2.
41. *Gatton*, 1996 WL 466499 at *18.
42. *Id.* at *19.
43. United States Supreme Court Justice Owen Roberts is often cited for this so-called "T-square" rule of mechanical judicial decision making. *See* U.S. v. Butler, 297 U.S. 1, 62 (1936).

simply politics disguised to legitimate configurations of power.[44] Viewed from this perspective "[L]awyers, judges, and scholars make highly controversial political choices, but use the ideology of legal reasoning to make our institutions appear neutral and our rules appear neutral."[45] U.S. Supreme Court Justice Abe Fortas is said to have written draft opinions without citations and then advised his law clerks to go out and find some supportive law.[46] According to one of his biographers, "That did not mean that Fortas knew the supporting law was there. It meant that he considered law indeterminate and did not care about it much at all."[47]

Judges Higginbotham and Sadler clearly have different perspectives on the proper relationship between state establishment of religion and individual free exercise of religion. Despite a line of decisions by the Wisconsin Supreme Court suggesting otherwise, Judge Higginbotham maintained that the state constitution is more restrictive of aid to religious institutions than the federal constitution.[48] He bluntly acknowledged his disagreement with members of the U.S. Supreme Court about what constitutes a direct benefit to sectarian institutions.[49] Addressing the procedure of having the state superintendent send a check directly to the school upon request by the parent, Judge Higginbotham wrote:

> It can hardly be said that this does not constitute direct aid to the sectarian schools. Although the U.S. Supreme Court has chosen to turn its head and ignore the real impact of such aid, this court refused to accept that myth. Millions of dollars would be directed to religious institutions that are pervasively sectarian with a clear mission to indoctrinate Wisconsin students with their religious beliefs. Whether sent directly to the schools or sent directly to the schools with a mandate of restrictive endorsement by the parents, is irrelevant.... [T]he state cannot do indirectly what it cannot do directly. And that

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44. *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 82-93 (1996). Kalman's book explores in great detail the paradigmatic shifts in approaches to constitutional decision-making during the past fifty years from the perspective of liberal legal scholars. These scholars embrace the rights-oriented decision-making evident in the decisions of the Warren Court beginning with the momentous 1954 *Brown v. Board of Education* decision striking down *de jure* school segregation. During the late 1970s, a group known as the critical legal scholars mounted a frontal assault on traditional ways of looking at legal decision-making, asserting that, in the words of Professor Mark Tushnet, "law is politics, all the way down." Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1526 (1991). In *Critical Legal Studies*, Tushnet describes how he and others sympathetic to the views of radical student protesters in the 1960s came together to form the leftist critical legal scholarship movement. *Id.*

45. Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 5-6 (1984)

46. KALMAN, *supra* note 44, at 46.

47. *Id.* Kalman adds, "As one of Fortas's biographers, I found his cavalier attitude toward the rule of law surprising. Since I usually liked the results he reached and since historians explain more that they diagnose, however, his approach and the Warren Court's activism posed no political or professional problems for me."

48. *Jackson*, No. 95 CV 1982 at 25.

49. *Id.* at 28.

> is provide money from the state treasury to pervasively sectarian religious schools for the purpose of educating Wisconsin students.[50]

In contrast to Judge Higginbotham's doctrinal differences with the U.S. Supreme Court, Ohio Circuit Judge Sadler quoted with approval from a U.S. Supreme Court decision upholding the provision of aid to a blind student to study religion at a sectarian college.[51] Judge Sadler observed that "the nonpublic sectarian schools participating in the scholarship program are benefited only indirectly, and purely as a result of the 'genuinely independent and private choices of aid recipients.'"[52] Given philosophical differences about where to strike the proper balance between the state and religion and the absence of precedent in many states, the same divergence of opinion will occur elsewhere as state judges confront constitutional challenges to voucher programs.

Clearly, judges' backgrounds and values affect their judicial perspective. At the time of the decision, Judge Higginbotham was the only African-American on the Dane County bench. A liberal, Judge Higginbotham previously served as minority affairs coordinator for Dane County and had been a member of the NAACP executive committee.[53] One of the plaintiffs in the litigation was the NAACP. Governor Tommy Thompson sought to remove Judge Higginbotham from the case by transferring it to another court but was unsuccessful.[54] Thompson accused Judge Higginbotham of being biased against the program.[55] Judge Sadler, a Republican, served as deputy legal counsel to Governor Voinovich. Voinovich appointed Judge Sadler to the Common Pleas Court in March 1996 when a vacancy occurred.[56] Four months later, Judge Sadler upheld the voucher plan.[57]

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50. *Id.*

51. *Gatton* 1996 WL 466499 at *13 (quoting *Witters v. Washington Dept. of Servs.*, 474 U.S. 481 (1986)).

52. *Id.* at *14.

53. Joe Beck, *Newcomers Vie for First-Time Seat*, WISCONSIN STATE JOURNAL, Apr. 3, 1994, at 1C.

54. *Judge Denies Governor's Bid in Schools* [*sic*] *Case*, WISCONSIN STATE JOURNAL, May 29, 1996, at 3B.

55. *Id.* Governor Thompson could take heart in two developments regarding the Wisconsin Supreme Court. First, in 1996, conservative Pat Crooks was elected to the court, replacing Justice Rollie Day, who had voted against expansion of the Milwaukee choice program to include sectarian private schools in the tie vote resulting in return of the case to trial court. *Id. See also, State of Wisconsin v. Warner Jackson*, 546 N.W.2d 140 (Wis. 1996) (*per curiam*). Campaign literature for Crooks indicated his support for the amended program. Cary Segall, *New Justice May Be Swing Vote in Milwaukee Church School Case*, WISCONSIN STATE JOURNAL, Mar. 1, 1998, at 6C. Then in 1997, Justice Jon Wilcox, who had been appointed to the high court by Governor Thompson in 1992, was elected to the position. Wilcox had voted for the expanded voucher program in 1996. Cary Segall, *Court Candidates Differ on Role of Politics in Justice*, WISCONSIN STATE JOURNAL, Feb. 23, 1997, at 1B.

56. Bruce Cadwallader, *Candidates for Common Pleas Judgeship Part of Youthful Push; Candidate Profiles*, COLUMBUS DISPATCH, Oct. 28, 1996, at 3D.

57. Gatton v. Goff, Nos. 96 CVH-1-198, 96 CVH-01-721, 1996 WL 466499 (Ohio Com. Pl., Franklin Cnty. July 31, 1996), *rev'd sub nom.*, Simmons-Harris v. Goff, No. 96APE08-982, 96APE08-991, 1997 WL 217583 (Ohio App. 10 Dist. May 1, 1997).

IV. Approaches to Constitutional Interpretation

Although judges' attitudes and values strongly influence their decisions, judicial rulings are not devoid of guiding principles. The quest for a transcendant value to guide constitutional interpretation in the interest of principled decision-making has been a perennial concern of the legal community. Because there is no consensus, paradigmatic differences contribute to inconsistency. Here major contenders in this continuing intellectual debate are identified, and the impact of their thinking is illustrated in disparate federal and state decisions regarding government assistance to sectarian private schools.

A. Property Right Protectionism

Early in the twentieth century, arch-conservatives dominated the U.S. Supreme Court. These justices elevated property rights to a preferred position among constitutional guarantees and repeatedly struck down social legislation that diminished them. The famous 1905 *Lochner v. New York* decision is a case-in-point.[58] There the high court announced that the New York maximum hours law interfered with a constitutional right to make a contract and declared it unconstitutional.[59] The decision touched off a furor among judges and legal scholars that led to the eventual retreat on protecting private property rights from reasonable government social and economic regulations.[60] The same property rights protectionism was evident in the seminal 1925 *Pierce v. Society of Sisters* decision where a unanimous Supreme Court ruled that an Oregon statute requiring all children to attend public school was unconstitutional because it deprived private school operators of their property rights under the Fourteenth Amendment.[61] *Pierce* is equally important in the context of school choice because the Court recognized that parents have a fundamental right to control the education of their children by enrolling them in a private school.[62]

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58. 198 U.S. 45 (1905).

59. *Id.* at 64.

60. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (1988) at 574-86.

61. 268 U.S. 510, 535-36 (1925). In holding the right of private schools to coexist with public schools, Supreme Court Justice James Clark McReynolds wrote:

> No question is raised concerning the power of the State reasonably to regulate all schools to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Id. at 534. States have relied on this passage to set standards for private schools encompassing such matters as compliance with health and safety regulations, length of the school year, and enrollment reporting. Less frequently, states have included state certification of teachers and curricular regulations. For a discussion of state regulation of private schools and how a state funded voucher program encompassing sectarian private schools might affect it, *see* Frank R. Kemerer, et al., *Vouchers and Private School Autonomy*, 21 J.L. & EDUC., Fall 1992, at 601.

62. *Id.* at 534-35.

B. Individual Rights Protectionism

The Supreme Court retreated from its high-profile property right protectionism in the 1930s under pressure from many quarters, not the least of which was President Franklin Roosevelt's court packing plan.[63] While the Court retreated from intervention on behalf of economic rights, Justice Harlan Stone wrote a well-known footnote in a 1938 decision that sought to distinguish intervention on other grounds.[64] Stone noted that judicial intervention might be appropriate when legislation interferes with one of the enumerated constitutional rights, restricts access to the political process, or penalizes minorities.[65] Stone's footnote foreshadowed the Warren Court's preoccupation in the 1950s and 1960s with expanding individual rights and increasing access to the political system.[66] Warren Court apologists have attempted to differentiate this form of interventionism from that of more economically-oriented justices by using as transcendant values the protecting of minority rights from abuses by the majority and the making of government more broadly representative.[67]

We can see elements of the rights-protecting approach to constitutional interpretation in the views of some state supreme court judges regarding aid for sectarian private schooling. In 1979 the Rhode Island Supreme Court upheld a

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63. Economic rights protectionism appears once again evident among neoconservative Supreme Court justices in recent decisions involving property rights and the takings clause. See M. McUsic, *The Ghost of J. Lochner: Modern Takings Doctrine and Its Impact on Economics Legislation*, 76 B.U. L. REV. 605 (1996).

64. United States v. Carolene Products Co., 304 U.S. 144, 152, n.4 (1938).

65. *Id.*

66. KALMAN, *supra* note 44, at 42-44.

67. See generally, KALMAN, *supra* note 44, ch. 2. In turning to other disciplines, scholars enamored with Warren Court decision making have embraced political philosphers like John Rawls. Rawls proposed a rights-oriented constitutionalism anchored in moral philosophy in his 1971 work *A Theory of Justice*. There he argued that a hypothetical person behind a "veil of ignorance" would choose "pure procedural justice" that accords maximum individual equality. Inequality is just only if it results in compensating benefits, especially for the least advantaged members of society. KALMAN, *supra* note 44, at 63. Some legal liberals, however, were skeptical about relying on moral underpinnings. John Hart Ely, a former Warren clerk, wrote:

> One might be tempted to suppose that there will be no systematic bias in the judges' rendition of 'correct moral reasoning' aside from whatever derives from the philosophical axioms from which they begin. ('We like Rawls, you like Nozick. We win, 6-3. Statute invalidated.') That would certainly be bad enough, but the actual situation is likely to be somewhat worse. Experience suggests that there will be a systematic bias in judicial choice of fundamental values, unsurprisingly in favor of the values of the upper-middle, professional class, from which most lawyers and judges, and for that matter most moral philosophers, are drawn.

John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) (as quoted in KALMAN, *supra* note 44, at 89).

Kalman also notes how Ely tried to limit unbridled judicial discretion by linking activist judicial intervention to the value of making the political process more democratic, thus differentiating the Warren Court's Brown v. Board of Education, 347 U.S. 483 (1954), school desegregation and Baker v. Carr, 369 U.S. 186 (1962), one man-one vote decisions from the discredited Lochner v. New York, 198 U.S. 45 (1905). KALMAN, *supra* note 44, at 90-91. But critics were not impressed, noting that no such delimitation was expressed by liberal members of the Warren Court. *Id.*

student bus transportation program against a challenge under Article XII, Section 1 of the state constitution requiring the general assembly to promote public schools and "to adopt all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education."[68] Citing the U.S. Supreme Court's *Pierce v. Society of Sisters* ruling in support of the right of parents to send their children to private schools, the high court noted, "We would . . . be fostering an anomaly if we held that the state is only obligated under article XII to assist those parents who choose public over private schools . . . ."[69] Dissenting from a decision by the Puerto Rico Supreme Court rejecting a commonwealth-funded school voucher program in 1994, Justice García wrote, "The essence of the constitutional right to an education, as a precondition to liberty, is the right to choose within a pluralistic system of possibilities. By forcing poor students to public schools, we are saying that private education is only for the well-off; we deprive them of the possibility to educate their children."[70] Dissenting from a decision by the Washington State Supreme Court in 1989 striking down the provision of rehabilitation services for a blind student pursuing studies at a Christian college, Justice Dolliver argued that the decision sacrificed religious rights to an absolutist interpretation of the state constitution's restriction on use of public funds for sectarian purposes: "To require [the student] to abandon his religious vocation in order to retain his funding as a handicapped person—to require him to make such a choice—is to deprive him of the full benefits of citizenship. It is just such a diminishing of citizenship that the free exercise clause

68. Jamestown Sch. Comm. v. Schmidt, 405 A.2d 16, 19 (R.I. 1979).

69. *Id.* at 21. The court also rejected a claim that the bus transportation program was barred as a violation of § 2 of Article XII restricting the use of permanent school funds for support of public schooling. The justices noted that the legislature could use other public monies for this purpose. *Id.* at 22.

70. Asociación de Maestros de Puerto Rico v. Torres, Dkt. No. KAC-93-1268 (1003) (P.R. Feb. 7, 1994).

was meant to prevent."[71] Dolliver cited liberal Harvard constitutional law scholar Laurence Tribe in support of his assertion that religious autonomy should take precedence over anti-establishment concerns. "[I]t seems doubtful," Tribe maintains, "that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers — or to a coherent vision of religious autonomy in the affirmative state."[72]

C. *Strict Constructionism*

Competing with the rights-based approach to constitutional interpretation is strict constructionism, which gained ground during the Nixon administration in response to an outpouring of criticism about the activism of the Warren Court.[73]

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71. Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1136 (Wash.) (en banc), *cert. denied*, 493 U.S. 580 (1989). Dolliver found that the state did not have a compelling purpose to interfere with the student's religious freedom, a test Congress sought to require when it enacted the Religious Freedom Restoration Act (RFRA) in 1993. *Id.* That law, which was struck down by the U.S. Supreme Court by an 8-1 margin in 1997 in the context of state governmental action, provided in part that government could not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability. City of Boerne v. Flores, 117 S. Ct. 2157 (1997) (striking down RFRA 42 U.S.C.§ 2000bb, *et seq*). If government does substantially burden a person's exercise of religion, it may do so only if it demonstates that the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." *Id.* at 2162. RFRA could have been used by voucher proponents to require that any voucher program had to include sectarian private schools. Whether a state court's assertion that compliance with the state constitution's anti-establishment of religion provision justified the exclusion and thus served the compelling-least restrictive provisions of the federal statute never came to a test. The majority in *City of Boerne* considered congressional efforts to moot its ruling in Employment Div. Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), by enacting RFRA, an intrusion on the authority of the judiciary. In *Smith* the Court ruled that religious freedom does not justify an exemption from a statute of general applicability. *Id.* at 885. At issue was whether a state could deny unemployment benefits to Native American workers who were terminated for using peyote in a religious ceremony contrary to an Oregon statute that criminalized drug use. The majority in the six to three ruling held that the Free Exercise Clause was not intended to create an anomaly in the law by giving religion an exemption denied others. *Id.* at 888-89.

72. TRIBE, *supra* note 60, at 1204.

73. Like all transcendant values, strict constructionism is subject to interpretation. During the 1968 presidential campaign when Nixon promised to appoint judges who employ strict constructionism, Justice William O. Douglas is reported to have turned to his liberal colleague Hugo Black and said, "He must be talking about judges like us." Smiling, Black replied, "I don't think so." If strict constructionism is interpreted to mean a literal reading of constitutional terminology, then Justice Black would be a foremost exemplar. Writing in A CONSTITUTIONAL FAITH, Black set forth his view on the First Amendment:

> My view is, without deviation, without exception, without any ifs, buts, or whereases, that freedom of speech means that government shall do nothing to people, or, in the words of the Magna Carta, move against people, either for the views they have or the views they express or the words they speak or write. . . . As I have said innumerable times before I simply believe that 'Congress shall make no law' means Congress shall make no law.

HUGO L. BLACK, A CONSTITUTIONAL FAITH 45 (1968). Adhering to a literal reading of the First Amendment, Black could find no justification for government curtailment of expression: "Just as with obscenity laws, I believe the First Amendment compels the striking down of all libel laws." *Id.* at 48. Clearly, Nixon had something else in mind.

According to this view, the intent of the framers ought to guide constitutional decision making. Three unlikely assumptions underlie this approach: The framers intended constitutional provisions to be immutable, they agreed on constitutional meaning, and there is a reliable historical record. A foremost proponent of strict constructionism was Harvard law professor Raoul Berger. In his 1977 book *Government by Judiciary*, Berger asserted that "the Justices' value choices may not displace those of the Framers; or, as Chief Justice Marshall stated, the words of the Constitution are not to be 'extended to objects not . . . contemplated by its framers'—let alone to those which unmistakably were excluded."[74] Writing with reference to the Fourteenth Amendment, Berger asserted that the Warren Court had reached decisions contrary to the intent of the framers.[75] Included among them was *Brown v. Board of Education.* Wrote Berger of *Brown*, "When Chief Justice Warren asserted that 'we cannot turn back the clock to 1868,' he in fact rejected the framers' intention as irrelevant. On that premise the entire Constitution merely has such relevance as the Court chooses to give it, and the Court is truly a 'continuing constitutional convention,' constantly engaged in revising the Constitution, a role clearly withheld from the Court."[76] Justice William Brennan, the architect of many of the Warren Court's seminal decisions, has labeled strict constructionism as "little more than arrogance cloaked as humility."[77] Shortly before his death in 1997, Brennan wrote,

> I approached my responsibility to interpret the Constitution in the only way I could — as a twentieth-century American concerned about what the Constitution and the Bill of Rights mean to us in our time. The genius of the Constitution rests not in any static meaning it may have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.[78]

Strict construction is evident in a number of state court decisions interpreting the religion provisions of their constitutions. For example, the Hawaiian Supreme Court took such an approach in 1969 in interpreting Article X, Section 1 of the Hawaiian Constitution prohibiting expenditure of public funds "for the support or benefit of any sectarian or private educational institution."[79] In rejecting use of public funds to provide bus transportation to parochial students, the court noted that "if the words used in a constitutional provision, such as article [X], section 1, are

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74. RAOUL BERGER, GOVERNMENT BY JUDICIARY 285-86 (1977) (footnotes omitted).
75. *See generally, id.*
76. *Id.* at 408.
77. William J. Brennan, Jr., *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 4-5 (1985).
78. William J. Brennan, Jr., *My Life on the Court*, *in* REASON AND PASSION, 17, 18 (Rosencrantz, et al. eds., 1997).
79. HAW. CONST. art. X, § 1.

clear and unambiguous, they are to be construed as they are written."[80] The court observed that the framers of the Hawaiian Constitution rejected the pupil benefit theory by adopting the "support or benefit" terminology.[81] The pupil benefit theory stems from U.S. Supreme Court rulings distinguishing impermissible government aid to sectarian private schools from permissible assistance to students that only indirectly benefits the schools.[82] The proper way for the legislature to do what the constitution prohibits, the Hawaiian court noted, is to "return to the people to ask them to decide whether their State Constitution should be amended to grant the Legislature the power that it seeks, in this case, the power to provide 'support or benefit' to nonpublic schools."[83] Judge Higginbotham in the Milwaukee voucher case applied a similar analysis to determine the meaning of Article I, Section 18 of the Wisconsin Constitution. As described *infra*, states with similar restrictive constitutional language and with judges who adhere to a strict constructionist viewpoint are likely to need a constitutional amendment to permit a voucher program encompassing sectarian private schools.

By way of contrast, the Arizona Supreme Court in 1967 chose not to view the state constitution as a static document with regard to a state plan to reimburse sectarian third parties for providing services to destitute families. The Arizona high court rejected the argument that the program violated Article 2, Section 12 of the state constitution prohibiting use of public money "to the support of any religious establishment" and Article 9, Section 10 prohibiting any tax or appropriation "made in aid of any church, or private or sectarian school, or any public service corporation."[84] Adhering to a view of the state constitution similar to Justice Brennan's view of the federal constitution, the Arizona justices wrote that in order to fulfill the original purpose of the document, "the word 'aid' like the word 'separation' must be viewed in the light of contemporary society, and not strictly held to the meaning and context of the past."[85] Applying what it called the "True Beneficiary Theory," the high court noted that the true beneficiaries were the individuals and families who received emergency aid, not religious institutions: "The 'aid' prohibited in the constitution of this state is, in our opinion, assistance in any form whatsoever which would encourage or tend to encourage preference of one religion over another, or religion per se over no religion."[86] The court was not troubled by the fact that pictures of Jesus Christ and signs concerning chapel service were posted at a center operated by the Salvation Army.[87] Based on this

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80. Spears v. Honda, 449 P.2d 130, 134 (Haw. 1969). The article originally referred to in the opinion was renumbered to Article X by the Constitutional Convention of 1978 and the subsequent election of November 7, 1978.

81. *Id.*

82. The first and leading pupil benefit case is *Everson v. Board of Education*, 330 U.S. 1 (1947) (state transportation reimbursement plan for children attending parochial school benefits the children in getting safely to and from school and is not a violation of the Establishment Clause).

83. *Spears*, 449 P.2d at 139.

84. Community Council v. Jordan, 432 P.2d 460 (Ariz. 1967).

85. *Id.* at 466.

86. *Id.*

87. *Id.* at 468.

precedent, a state voucher program that gives parents a broad choice of public or private schools likely would receive a favorable reception in Arizona.

D. Originalism

Originalism is a richer, broader version of strict constructionism in that it expands constitutional interpretation beyond the views of the framers to include those involved in the ratification process.[88] But as Stanford history professor Jack Rakove demonstrates in his 1996 Pulitzer Prize winning book on the adoption of the U.S. Constitution, the task is daunting: "Both the framing of the Constitution in 1787 and its ratification by the states involved processes of collective decision-making whose outcomes necessarily reflected a bewildering array of intentions and expectations, hopes and fears, genuine compromises and agreements to disagree."[89] Furthermore, as Rakove illustrates with regard to James Madison's attempt to use originalism to justify opposition to implementation of the Jay Treaty in 1796, originalism cannot be separated from its political context.[90] Not surprisingly, originalism has been used by both conservative and liberal jurists to justify their respective positions.[91] It likely will be used in the future as a basis for judicial interpretation of constitutional provisions in the context of school vouchers.

In sum, different approaches to constitutional interpretation coupled with ambiguous constitutional provisions involving government aid to religion and protection of religious freedom suggest that the Higginbotham-Sadler dichotomy could be repeated many times with regard to school voucher programs.

V. The Significance of Federalism: the Division of Governmental Authority

A. Federal Authority

Another important factor in litigation over the constitutionality of school

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88. KALMAN, *supra* note 44, at 109, 132-39.

89. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 6 (1996).

90. *Id.* at ch. XI, *particularly* pp. 355-65. Madison's speech on April 6, 1796, noted the difficulty of relying on the intent of the framers of the Constitution to ascertain the meaning of its provisions:

> As the instrument came from them, it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions. If we were to look therefore, for the meaning of the instrument, beyond the face of the instrument, we must look for it not in the general convention, which proposed, but in the state conventions, which accepted and ratified the constitution.

Id. at 362. Having said that, Madison then employed a selective reading of the latter including unadopted proposals emanating from the state conventions to justify his position that the House of Representatives had a constitutional role to play in treaty making. The episode demonstrates, Rakove observes, "that neutrality could rarely be attained when the Constitution was so highly politicized, or when politics was so highly constitutionalized." *Id.* at 365.

91. *See generally*, KALMAN, *supra* note 44, pt. 2.

vouchers is federalism—the division of governmental authority between a central government and fifty separate state governments. A *federally funded* voucher program could trump the application of state constitutional anti-establishment provisions in state court under the Federal Supremacy Clause. The Supremacy Clause provides that the federal constitution and federal statutes take precedence over conflicting state constitutional provisions and laws.[92] This is the teaching of the U.S. Court of Appeals for the Ninth Circuit in *Garnett v. Renton School District* in an extensively litigated conflict over the federal Equal Access Act and an anti-establishment provision in the Washington State Constitution.[93] The Ninth Circuit ruled that notwithstanding the state constitution, the federal Equal Access Act guarantees access of student religious clubs to public school property.[94] The appeals court noted that while state constitutions can be more protective of individual rights than the federal constitution, they cannot abridge rights granted by federal law.[95] In a concurring opinion, Circuit Judge Farris agreed that Congress intended to preempt state law but acknowledged that "[t]he result is no minor intrusion on state sovereignty."[96] With regard to a federally funded voucher program, much will depend, of course, on the form of the legislation and on the intent of Congress in enacting it.

A ruling by a federal court that exclusion of sectarian private schools from a state voucher program violates the Free Exercise Clause and/or the Equal Protection Clause[97] of the federal constitution would have the same effect. Such a ruling would reverse a trend by the present U.S. Supreme Court to give greater deference to state authority.[98] Proponents of state-funded voucher programs encompassing sectarian schools argue that such a strong assertion of federal

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92. Article VI, § 2 of the U.S. Constitution states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

93. Garnett v. Renton Sch. Dist. No. 403, 987 F.2d 641 (9th Cir. 1993).

94. *Id.* The Ninth Circuit ruled that the Equal Access Act, 20 U.S.C. § 4071, preempts Article I, § 11 of the Washington State Constitution with regard to use of public school property for the meetings of student religious clubs. Article I, § 11 provides that "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment." The Washington State Supreme Court had ruled that this provision prohibited access of student religious clubs to public school campuses despite the Equal Access Act. *Garnett v. Renton Sch. Dist. No. 403*, 675 F. Supp. 1268 (W.D. Wash. 1987), *aff'd*, 865 F.2d 608 (9th Cir. 1989), *cert. granted and vacated*, 496 U.S. 914 (1990), *opinion after remand*, 772 F. Supp. 531 (W.D. Wash. 1991), *rev'd*, 987 F.2d 641 (9th Cir.), *cert. denied*, 510 U.S. 819 (1993).

95. *Garnett*, 987 F.2d at 646-47.

96. *Id.* at 647.

97. The Free Exercise clause states "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*...." U.S. CONST., amend. I (emphasis added). The Equal Protection Clause of the Fourteenth Amendment reads, "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S.CONST., amend. XIV, § 1.

98. For a comprehensive discussion of issues of federalism, see *Symposium: Constructing a New Federalism*, 14 YALE L. & POL'Y REV (1996).

authority is necessary to accord parents their full First Amendment rights, especially free exercise of religion.[99] Opponents counter that such a ruling would emasculate the long established wall of separation between church and state inherent in the Establishment Clause.[100]

To date, the U.S. Supreme Court has recognized that the Establishment Clause of the First Amendment does not trump more restrictive state constitutional provisions.[101] While the Court ruled unanimously in *Witters v. Washington Department of Services for the Blind* that the Establishment Clause does not prevent the provision of vocational rehabilitation services to aid a blind student to pursue studies at a Christian college to become a minister,[102] the justices noted that the Court was considering only the First Amendment issue and that, on remand, the Washington State Supreme Court was free to consider the "'far stricter' dictates of the Washington state constitution."[103] As discussed *infra*, the Washington high court did so and struck down the aid plan as a violation of the state constitution's anti-establishment clause.[104] Further, there often are other provisions in state constitutions that may affect the outcome of litigation over state funded voucher programs. These include provisions restricting expenditures of public monies to public schools only or requiring that public appropriations serve a public purpose.

B. Blaine Amendment

Still, the influence of the federal government is great. An ill-fated constitutional amendment introduced into Congress by Rep. James Blaine of Maine in 1875 to halt public funding of Catholic education is a case-in-point.[105] The amendment was a political effort by the Republican congressman to gain support for his presidential bid by appealing to anti-Catholic sentiment then being stirred

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99. *See, e.g.*, Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113 (1996).

100. *See e.g.*, Cynthia Bright, *The Establishment Clause and School Vouchers: Private Choice and Proposition 174*, 31 CAL. W. L. REV. 193 (1995).

101. *See, e.g.*, Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, *reh'g denied*, 475 U.S. 1091 (1986).

102. *Id.* at 489.

103. *Id.* Justice Blackmun made the same point in his dissent in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (The Establishment Clause does not bar a school district from providing a sign-language interpreter under the Individuals with Disabilities Education Act to a deaf student attending classes at a Roman Catholic high school). Blackmun noted that the majority's decision did not preclude further litigation at the state level. *Id.* at 15-16. Indeed, he cited an Arizona Attorney General opinion to the effect that under Article II, § 12 of the state constitution, interpreter services could not be furnished to petitioner. *Id.* at 16, n.1. That provision provides that "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." *Id.* No litigation, however, commenced at the state level following the U.S. Supreme Court's decision.

104. *Witters*, 771 P.2d at 1121.

105. *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM.J. OF LEGAL HIST. 38, 47 (1992).

up by the Republican Party.[106] The issue arose when Catholics began challenging Protestant overtones in public education and seeking public monies and tax exemptions for their own schooling system.[107] As originally proposed, the amendment would have added this language to the Constitution:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State, for the support of the public schools or derived from any public fund therefor, shall ever be under the control of any religious sect, nor shall any money so raised ever be divided between religious sects or denominations.[108]

Blaine introduced his amendment after President Ulysses S. Grant delivered a speech in 1875 to advance his own fading political fortunes in which he urged the nation to "[e]ncourage free schools, and resolve that not one dollar, appropriated for their support, shall ever be appropriated to the support of any sectarian schools."[109] The Blaine Amendment failed by four votes in the Senate after passing by a large margin in the House.[110] The political character of the entire matter is revealed in the fact that Blaine, having lost out to Rutherford B. Hayes for the Republican presidential nomination and having just been appointed a U.S. Senator, failed to show up for the final vote.[111] Had he done so, the amendment may have passed the Senate. Further, Blaine made no mention of the amendment in his autobiography.[112] As one commentator notes, "The Blaine Amendment was the direct result of Republican attempts to gain political mileage from a growing public concern over Catholic and immigrant inroads into American culture. The Democrats were no less culpable through their use of the amendment to garner Catholic support."[113]

C. Influence on States

While the Blaine Amendment failed, it sparked similar efforts at the state level as alarm grew over efforts by religious interests to secure state funding for their schools. By 1890, twenty-nine states had constitutional provisions limiting the transfer of public funds for sectarian purposes.[114] In 1899, Congress passed legislation dividing the Dakota Territory into two states and requiring them, along

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106. *Id.* at 54. (Ironically, the Republican Party today has made vouchers that channel money indirectly to sectarian private schools a key legislative goal.)

107. *Id.* at 41-49.

108. H.R. Res. 1, 44th Cong., 1st Sess. (1875).

109. *See* Green, *supra* note 105, at 47.

110. *Id.* at 38.

111. *Id.* at 67-68.

112. James L. Blaine, *Twenty Years of Congress 1861-1881*, at 570 (1884); *see also* Green, *supra* note 105, at 69.

113. Green, *supra* note 105, at 69.

114. Viteritti, *supra* note 99, at 146-47.

with Montana and Washington, to include language in their new state constitutions similar to that of the Blaine Amendment.[115] As discussed *infra*, one-third of the states have anti-establishment constitutional provisions that are more strictly worded than the Establishment Clause of the First Amendment and consequently make the constitutionality of a voucher system encompassing sectarian private schools highly problematic, unless, of course, the U.S. Supreme Court were to rule that the Free Exercise Clause and the Equal Protection Clause moot these provisions.

At the same time, some state supreme courts have taken the position that their constitutional provisions pertaining to religion mean the same as the Establishment Clause of the First Amendment.[116] This is true even though state constitutional provisions often are worded considerably different. For example, Illinois has a seemingly strict anti-establishment provision that prohibits the General Assembly and all political subdivisions from ever making any appropriation or paying from any public fund whatever, "anything in aid of any church or sectarian purpose, or to help or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever. . . ."[117] However, the Supreme Court of Illinois ruled in 1973 that the restrictions of this clause are identical to those of

115. *Id.* at 146.

116. Among those states in which the state supreme court has explicitly indicated that the anti-establishment clause in the state constitution is coextensive with the religion clauses of the First Amendment are the following: Alabama (Alabama Educ. Ass'n v. James, 373 So.2d 1076 (Ala. 1979)); Illinois (People *ex rel* Klinger v. Howlett, 305 N.E.2d 129 (Ill. 1980)); Maine (Squires v. Inhabitants of City of Augusta, 153 A.2d 80 (Me. 1959)); North Carolina (Heritaga Village Church & Missionary Fellowship, Inc. v. State, 263 S.E.2d 726 (N.C. 1980)), New Jersey (Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353 (N.J. 1992)); Ohio (see the cases listed in Simmons-Harris v. Goff, Nos 96APEO8-982, 96APEO8-991, 1997 WL 217583 at *11 (Ohio App. 10 Dist. May 1, 1997)); and Pennsylvania (Springfield Sch. Dist. v. Dep't of Educ., 397 A.2d 1154). In a few states, the state supreme court has suggested, but not ruled, that the state constitution's religious provisions are equivalent to their First Amendment counterparts. For example, in upholding a grant program for students attending all but pervasively sectarian private colleges, the Colorado Supreme Court noted that state constitutional provisions address interests "not dissimilar" to the First Amendment Free Exercise and Establishment Clauses and, although "not necessarily determinative of state constitutional claims, First Amendment jurisprudence cannot be totally divorced from the resolution of these claims." Americans United for Separation of Church & State Fund, Inc. v. State, 648 P.2d 1072, 1078 (Colo. 1982). In a 1976 ruling, the Iowa Supreme Court observed that "To the extent our provision differs from the First Amendment to the United States Constitution we think our framers were merely addressing the evils incident to the state church . . . forced taxation to support the same, and the payment of ministers from taxation." Rudd v. Ray, 248 N.W.2d 125, 132 (Iowa 1976) (neither federal nor state constitutions constitute a bar to providing salaried chaplains and religious facilities at the state penitentiary.)

117. ILL CONST. art. 10, § 3.

the First Amendment.[118] Thus, how the U.S. Supreme Court decides the voucher question with regard to the federal constitution will have great bearing on the meaning of constitutional provisions in Illinois and other states that have tied the meaning of their anti-establishment constitutional provision to the First Amendment.

VI. Vouchers and the Federal Constitution

Without question, the opponents of a state-funded voucher program enabling parents to choose among public and sectarian and nonsectarian private schools for their children will challenge the program as a violation of the Establishment Clause of the First Amendment. Recently, there has been considerable commentary in the legal community about the outcome.[119] In a long line of decisions, the U.S. Supreme Court has construed the clause to prevent government from establishing a state church and from directly aiding any one religion—the Jeffersonian principle

118. People *ex rel.* Klinger v. Howlett, 305 N.E.2d 129 (Ill. 1973). Much earlier precedents also addressed the aid issue. In Cook County v. Chicago Indus. Sch. for Girls, 18 N.E. 183 (Ill. 1888) the high court held that tuition reimbursement paid by Cook County to Catholic organizations functioning as the Chicago Industrial School for Girls violated the state constitution's mandate against use of public monies to support any sectarian institution. But several decades later the same court ruled that reimbursement of less than actual cost was not a constitutional violation. Dunn v. Chicago Indus. Sch. for Girls, 117 N.E. 735 (Ill. 1917).

119. *See, e.g.*, David Futterman, *School Choice and the Religion Clauses*, 81 GEO. L.J. 711 (1993); Comment, Peter J. Weishaar, *School Choice Vouchers and the Establishment Clauses: The Law and Politics of Public Aid to Private Parochial Schools*, 58 ALB. L. J. 543 (1994); Michael J. Stick, *Educational Vouchers: A Constitutional Analysis*, 28 COLUM. L.J. & SOC. PROBS. 423 (1995); Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243 (1996); Case Comment, *The Cleveland Scholarship and Tutoring Program: Why Voucher Programs Do Not Violate the Establishment Clause*, 58 OHIO ST. L.J. 1103 (1997).

of separation of church and state.[120] Yet, if designed to avoid direct aid to religion, the majority of Justices are likely to declare voucher programs constitutional. These points are developed in detail below.

A. Channeling Money To Sectarian Private Schools

A voucher system designed essentially to channel public funds to sectarian private schools will not pass muster in federal court. This is clear from the Supreme Court's decision in *Committee for Public Education v. Nyquist* invalidating six to three a New York statute that provided financial assistance to private schools and to low-income parents.[121] In addition to maintenance and repair grants paid directly to private schools, the New York plan encompassed a tuition grant program for low-income families and a tax deduction program that varied by income level for other families so that they could attend private schools.[122] The Court ruled that both tuition aid programs violated the Establishment Clause.[123] Writing for the majority, Justice Powell noted that "if the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same."[124]

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120. *See, e.g., Everson*, 330 U.S. 1 (discussing meaning of Establishment Clause in upholding bus transportation reimbursement for parochial school children as public welfare legislation); McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (struck down release time program involving use of public school classroom by sectarian groups); Zorach v. Clauson, 343 U.S. 306 (1952) (upheld release time program where students leave the public school premises); Engel v. Vitale, 370 U.S. 421 (1962) (struck down the reading of a non-denominational school prayer prepared by state officials); School Dist. of Abington v. Schempp, 347 U.S. 203 (1963) (struck down laws requiring reading of Biblical passages in public schools); Epperson v. State of Arkansas, 393 U.S. 97 (1968) (struck down statute prohibiting teaching of evolution in public schools); Lemon v. Kurtzman, 403 U.S. 602 (1971) (struck down reimbursement to nonpublic schools for teachers' salaries, texts, and instructional materials); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (struck down reimbursement for maintenance and repairs of nonpublic schools and indirect use of tuition grants and tax benefits to parents); Meek v. Pittenger, 421 U.S. 349 (1974) (upheld textbook loan program but struck down loans of instructional equipment to nonpublic schools and auxiliary services by public school personnel in nonpublic schools); Wolman v. Walter, 433 U.S. 229 (1977) (upheld textbook loan program, standardized testing, diagnostic service, and counseling program for nonpublic schools but struck down instructional equipment loan program to parents and field trip transportation program); Wallace v. Jaffree, 472 U.S. 38 (1985) (stuck down state statute authorizing public schools to set aside time for silent meditation or prayer); Stone v. Graham, 499 U.S. 399 (1980) (struck down classroom posting of Ten Commandments in public schools); Lee v. Weisman, 504 U.S. 577 (1992) (struck down school sponsored invocation and benediction at school graduation ceremonies); Agostini v. Felton, 117 S. Ct. 1997 (1997) (overturned earlier rulings disallowing public school teachers to deliver compensatory education on sectarian private school grounds as unnecessarily strict interpretation of Establishment Clause).

121. Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

122. *Id.* at 764-65.

123. *Id.* at 798.

124. *Id.* at 786.

While the majority in *Nyquist* found inconsequential the fact that the money first went to parents rather than directly to schools, they included a telling footnote:

> Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficaries might differentiate the present case from a case involving some form of public assistance (e.g., scholarships) made available *without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.*"[125]

In other words, if tuition vouchers could be redeemable at either public or private schools, the constitutional outcome would be different. For this reason, the Court observed that its decision did not compel a conclusion that the GI Bill impermissibly advances religion.[126] This commentary foreshadowed the Court's seminal ruling in *Mueller v. Allen* a decade later.

Other courts have followed the Court's *Nyquist* precedent in ruling on vouchers. For example, in 1995 a U.S. District Court in Wisconsin relied on the *Nyquist* decision to reject a suit brought by five Milwaukee parents who contended that the original Milwaukee publicly-funded voucher program denied them religious freedom and equal protection of the laws by not allowing them to select sectarian private schools.[127] Since tuition payments went directly to participating private schools, Judge John Reynolds noted that including religious schools would violate the Establishment Clause: "No case has overruled Nyquist's prohibition on tuition grants and unrestricted direct subsidies to religious schools."[128] Reynolds also pointed out that the Milwaukee program encompassed only private schools.[129] Parents cannot choose out-of-district public schools.[130] The plaintiffs argued that the "present state of Establishment Clause jurisprudence is in flux" and that the current Supreme Court might uphold such a direct tuition reimbursement scheme to private sectarian schools, but the judge refused to speculate on the future of constitutional law.[131]

B. Channeling Money To Parents and Students

In *Mueller v. Allen* the Supreme Court upheld five to four a Minnesota law

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125. *Id.* at 782, n.38 (emphasis added).

126. *Id.*

127. Miller v. Benson, 878 F. Supp. 1209 (E.D. Wis. 1995). The decision was later vacated and the case declared moot by the U.S. Court of Appeals for the Seventh Circuit in light of legislation extending the program to sectarian private schools and in light of litigation begun in state court. The appeals court noted that the plaintiffs in the case ought not to "play off one court system against the other. The state legislature gave plaintiffs what they sought, and this case is therefore moot." 68 F.3d 163, 165 (7th Cir. 1995). Litgation continues in state court on the amended program.

128. *Miller*, 878 F. Supp. at 1215.

129. *Id.*

130. *Id.* at 1210.

131. *Id.* at 1216.

that allows parents an income tax deduction for expenses incurred in providing tuition, textbooks, and transportation for children in public or private schools.[132] In a key passage anchored in originalist jurisprudence, Justice Rehnquist observed in his majority opinion that "[t]he historic purposes of the [Establishment] [C]lause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case."[133] It did not trouble the majority that most of the benefits flow to parents of children in parochial schools. The dissenters viewed the indirect character of the aid plan as immaterial to its constitutionality. Writing for the four, Justice Marshall argued that "[t]he statute is little more than a subsidy of tuition [at religious schools] masquerading as a subsidy of general educational expenses."[134]

Four recent cases have built on the *Mueller* reasoning. In 1986, the Court unanimously held that the Establishment Clause does not prevent the provision of vocational rehabiliation services to aid a blind student to pursue studies at a Christian college to become a minister.[135] In *Witters v. Washington Department of Services*, the Court emphasized that aid is given to the student who then transmits it to the public or private educational institution of the student's choice.[136] Thus the money is not in the form of impermissible direct state subsidy of religion. The Court was not troubled by the fact that the religious institution might use the assistance provided through the student for any purpose. The Court noted that there was no incentive for the student to use the money at religious institutions and that no significant part of the money would end up flowing there.[137] Thus, the program does not "confer any message of state endorsement of religion."[138] It is uncertain whether the fact that this case involved higher education undercuts its significance for elementary and secondary education. In the past, the Court has distinguished between these sectors of education in Establishment Clause cases.[139] Significantly, the Court noted in *Witters* that it was considering only the First Amendment issue and that, on remand, the Washington State Supreme Court was

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132. Mueller v. Allen, 463 U.S. 388 (1983).

133. *Id.* at 400.

134. *Id.* at 408-09.

135. *Witters*, 474 U.S. 481.

136. *Id.* at 488.

137. *Id.*

138. *Id.* at 489.

139. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981). In *Widmar* the Court concluded by an eight to one margin that public colleges and universities cannot refuse use of their campus facilities by student organizations for religious discussion and worship. The majority noted in a footnote that "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Id.* at 274, n.14. In upholding construction grants to religiously affiliated colleges and universities for nonsectarian purposes in *Titson v. Richardson*, 403 U.S. 672 (1971), the Court observed that "There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools . . . .There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination." *Id.* at 685.

free to consider the "'far stricter'" dictates of the Washington state constitution.[140] As noted *infra*, the Washington high court did so and denied the aid.

In *Zobrest v. Catalina Foothills School District*, the Court addressed whether the Establishment Clause bars a school district from providing a sign-language interpreter under the federal Individuals with Disabilities Education Act (IDEA) to a deaf student attending classes at a Catholic high school.[141] The majority in the five to four ruling noted that "[w]hen the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is no way skewed towards religion'. . . it follows that under our previous decisions the provision of that service does not offend the Establishment Clause."[142] Handicapped children, not sectarian schools, are the primary beneficiaries of the sign-language interpreter. The majority observed that "respondent readily admits, as it must, that there would be no problem under the Establishment Clause if the IDEA funds instead went directly to James' parents, who, in turn, hired the intrepreter themselves."[143] In dissent, Justices Blackmun and Souter sought to distinguish between the type of aid upheld in *Mueller* and the provision of the sign-language interpreter, which they believed offends the Establishment Clause because a government employee is serving as a conduit for religious messages conveyed to the student.[144] They acknowledged, however, that "When government dispenses public funds to individuals who employ them to finance private choices, it is difficult to argue that government is actually endorsing religion."[145]

In 1995 the Court ruled five to four in *Rosenberger v. Rector & Visitors of the University of Virginia* that a public university violates the Free Speech Clause of the First Amendment when it refuses to allow student activity fees to be paid to third party printers of a student religious newspaper.[146] While much of the focus of the majority's attention was on viewpoint discrimination, the justices also noted that providing such assistance does not violate the Establishment Clause because the institution remains neutral toward religion.[147] Drawing upon its earlier precedents including *Mueller, Witters,* and *Zobrest*, the Court majority observed, "[w]e have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[148]

In its 1997 *Agostini v. Felton* decision, the Court relied on *Witters* and *Zobrest* to overturn earlier rulings disallowing public school teachers to deliver

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140. *Witters*, 474 U.S. at 489 (quoting Witters v. Comm'n for the Blind, 689 P.2d. at 55).

141. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

142. *Id.* at 10 (quoting Witters, 474 U.S. at 488).

143. *Id.* at 13, n.11.

144. *Id.* at 22.

145. *Id.* at 22-23.

146. Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819 (1995). *See also* Note, Richard S. Albright, *Educational Voucher Statutes: Does the Rosenberger Analysis Provide a Modern Constitutional Foundation for Legitimacy?* 74 U. DET. MERCY L. REV. 525 (1997).

147. *Rosenberger*, 515 U.S. at 846.

148. *Id.* at 839.

compensatory education on sectarian private school campuses under a congressionally mandated program.[149] Writing for the five-person majority, Justice O'Connor noted that since its original decision twelve years before, "we have departed from the rule relied on in *Ball* [one of the two earlier companion cases] that all government aid that directly aids the educational function of religious schools is invalid."[150] Citing *Witters*, the majority noted that a neutral government program that provides benefits without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited does not violate the Establishment Clause.

Based on these decisions, it appears quite possible that a slim majority of the present justices on the U.S. Supreme Court will uphold against an Establishment Clause challenge a publicly-funded voucher program that channels money to parents and gives them a wide variety of public and private schools, including those that are sectarian, from which to choose.[151] At the same time, most of the justices are supportive of federalism and are likely as they did unanimously in *Witters* to allow state courts to apply their own state constitutional provisions to the question.

VII. Vouchers and State Constitutions[152]

Based on a review of the constitutions and interpretive case law of all fifty states, each of the fifty states was placed into one of three categories—restrictive, permissive, uncertain—with regard to its likely orientation toward the constitutionality of state-funded school vouchers encompassing sectarian private schools (see Table 1). Because of the complexity of this task and the subjectivity inherent in making these determinations, the classifications made here should be

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149. Agostini v. Felton, 117 S. Ct. 1997, 2010-14 (1997) (overruling School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) and Aguilar v. Felton, 473 U.S. 402 (1985)).

150. *Id.* at 2011.

151. While headcounting justices is risky since it ignores factual and subtle interpretive differences that play a significant role in judicial decision making, it does suggest where judicial predispositions lie. With regard to recent Establishment Clause jurisprudence, the judicial lineup is instructive. Justices still on the Court who voted with the majority in *Mueller* include Chief Justice Rehnquist and Justice O'Connor. The Court was unanimous in the *Witters* decision. Those still on the Court who participated in that case include Chief Justice Rehnquist and Justices O'Connor and Stevens. Justices still on the Court who voted with the majority in the *Zobrest* decision include Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. Justices O'Connor and Stevens dissented on procedural grounds in that case. Justice Souter joined Justice Blackmun's dissent, but, as noted *infra*, both acknowledged that when government funding flows to individuals who then use it to finance private choices, "it is difficult to argue that government is actually endorsing religion." Justice Breyer, who replaced retiring Justice Blackmun, and Justice Ginsburg, who replaced retiring Justice White, did not participate in any of these decisions. Blackmun dissented in *Mueller* and *Zobrest*; White was in the majority in both of these rulings. Chief Justice Rehnquist and Justices Scalia, Thomas, O'Connor, and Kennedy were in the majority in both *Rosenberger* and *Agostini*. It would appear, then, that these five justices and perhaps Justice Souter, based on his dissent in *Zobrest*, have expressed some degree of support for government funding programs that meet the specified design features for a publicly-funded voucher program.

152. For a detailed version of this section, see Frank. R. Kemerer, *State Constitutions and School Vouchers*, 120 ED. LAW REP. 1 (1997).

viewed as approximations. It will be useful to review Table 1 periodically in reading the following discussion. The constitutional provisions reviewed for each state are listed in Table 2.

A. Restrictive States

1. Prohibition on Vouchers

The most restrictive constitutional provision, of course, would specifically proscribe a publicly funded voucher program involving any sectarian or nonsectarian private school. Only the Michigan Constitution falls into this category. Article 8, Section 2 of that document prohibits the use of public monies by the state or its political subdivisions for the support of denominational or other nonpublic school, adding that:

> No payment, credit, tax benefit, exemption or deductions, *tuition voucher*, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students.[153]

The only exception in that section is transportation of students to and from any school.[154]

Known as "The Parochiaid Proposal," Section 2 was added to Article 8 by referendum in November 1970.[155] A year later the Michigan Supreme Court ruled that the portion of Section 2 restricting payments "at any location or institution where instruction is offered in whole or part to such nonpublic school students" was unconstitutional because the provision denied private school students the opportunity to receive shared time and auxiliary services at public schools and thus violated the equal protection of the laws and constituted only incidental aid to private schools.[156] It also penalized them for attending a sectarian private school and thus intruded on their free exercise of religion.[157] As noted *supra*, the issue of religious discrimination is an important countervailing principle to the separation of church and state. The court seemed to accept that Section 2 bars voucher-like payments to parents of children attending private school.[158] The justices cited with approval a statement from Professor Paul G. Kauper at the University of Michigan

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153. MICH. CONST. art. 8, § 2 (emphasis added)

154. *Id.*

155. *See In re Proposal C.*, 185 N.W.2d 9, 14-17 (Mich. 1971), for a historical discussion surrounding the adoption of this amendment.

156. *Id.* at 27-29.

157. *Id.* at 27.

158. *Id.* at 26.

Law School to the effect that any system whereby parents are given vouchers payable out of public funds to subsidize education of their children at a private school of their choice would be unconstitutional.[159] Kauper observed that the constitutional prohibition against "credit, tax benefit, exemption or deduction" extends to any form of special tax benefits as well.[160] Thus, vouchers are not likely to be deemed permissible in Michigan absent amending the state constitution.[161]

2. No Direct or Indirect Aid to Sectarian Private Schools

Other than the specific prohibition on tuition vouchers in the Michigan Constitution, the most restrictive state constitutional provision prohibits both direct and indirect aid to sectarian private schools. States in this category include Florida,[162] Georgia,[163] Montana, [164]New York, [165]and Oklahoma. [166]As already noted, the Michigan Constitution also has a prohibition on direct and indirect aid.[167] A variation of this wording can be found in state constitutions that prohibit expenditure of public monies that "support or benefit," "support or sustain," "support or assist," or "are used by or in aid of" any sectarian private school. For example, Article IX, Section 5 of the Idaho Constitution restricts the state legislature and any county, city, town, township, school district, or other public corporation from making any payment of public monies "to help support or sustain any school, academy, seminary, college, university, controlled by any church, sectarian or religious denomination whatsoever."[168] Note that these provisions go beyond simply restricting direct aid to sectarian private schools. By including assistance that supports, benefits, or aids them, these provisions appear to have the same character as the prohibition on "indirect" aid in other state constitutions, an interpretation reflected in some of the case law. States with constitutional provisions like these include California,[169] Colorado,[170] Delaware,[171] Idaho,[172]

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159. *Id.*

160. *Id.* In a memorandum on the proposal that the court included in its opinion, Kauper wrote in part, "the 'tuition voucher' reference is clear. Under the amendment any system whereby parents are given vouchers payable out of public funds to subsidize education of their children at a school of their choice would be unconstitutional, at least to the extent that such voucher could be used to purchase education at nonpublic schools. I think it is fairly clear too that the phrase 'credit, for benefit, exemptions or deductions; has reference to various devices whereby special tax benefits are awarded parents who send their children to private schools . . . .'

161. *Id.*

162. FLA. CONST. art. I, § 3.

163. GA. CONST. art. I, § 2, para. VII.

164. MONT. CONST. art. X, § 6.

165. N.Y. CONST. art XI, § 3.

166. OKLA. CONST. art. II, § 5.

167. MICH. CONST. art. 8, § 2.

168. IDAHO CONST. art. IX, § 5.

169. CAL. CONST. art. XVI, § 5.

170. COLO. CONST. art. IX, § 7.

171. DEL. CONST. art. X, § 3.

172. IDAHO CONST. art. IX, § 5.

Illinois,[173] Minnesota,[174] Missouri,[175] North Dakota,[176] South Dakota,[177] and Wyoming.[178] Hawaii[179] and Kansas[180] have constitutional provisions that restrict expenditure of public monies for the support or benefit of *any* private educational institution. Thus, if taken literally, these provisions would restrict aid benefiting nonsectarian private schools as well as to those which are religiously affiliated.

In other states, constitutional provisions are restrictive regarding sectarian private schools but are silent with regard to those that are nonsectarian. As noted below, other constitutional provisions restricting use of public monies only for public schools appear to undercut the significance of the exclusion. Virginia is unique in specifically *allowing* assistance to nonsectarian private schools.[181] Until the mid-1950s the Virginia Constitution restricted appropriations to schools owned or exclusively controlled by the state or its political subdivisions.[182] Following a Virginia Supreme Court decision declaring tuition reimbursement to parents of children attending sectarian schools unconstitutional,[183] the constitution was amended to allow such assistance.[184]

3. What Is "Indirect Aid"?

Despite the apparent strict separationist character of direct/indirect and support/benefit constitutional language, considerable room remains for judicial interpretation, and a sampling of the case law illustrates a divergence of opinion. One of the first and most often cited definitions of "indirect aid" comes from the 1938 ruling of *Judd v. Board of Education.*[185] The Court of Appeals of New York, the state's highest court, struck down school busing for parochial students by a four to three vote because it was a form of indirect aid prohibited by Article IX, Section 4 of the state constitution.[186] That provision, which directly stemmed from the Blaine Amendment, states in part,

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173. ILL. CONST. art. X, § 3.
174. MINN. CONST. art. 1, § 16; MINN. CONST. art. XIII, § 2.
175. MO. CONST. art. IX, § 8.
176. N.D. CONST. art. VIII, § 5.
177. S.D. CONST. art. VI, § 3.
178. WYO. CONST. art. VII, § 8.
179. HAW. CONST. art. X, § 1.
180. KAN. CONST., B of R., § 7.
181. VA. CONST. art. 8, § 10.
182. *Id.*
183. Almond v. Day, 89 S.E.2d 851 (Va. 1955). In *Almond* the court ruled that tuition payments to parents of children attending sectarian private schools pursuant to vouchers approved by the Superintendent of Public Instruction violated Article 8, § 10 of the state constitution requiring no expenditure of public funds to any school not owned or exclusively controlled by the state or its political subdivisions.
184. Following a 1956 amendment to this section authorizing assistance to students attending nonsectarian private institutions, the Virginia Supreme Court distinguished the *Almond* ruling in *Miller v. Ayres*, 191 S.E.2d 261 (Va. 1972), regarding assistance to students in nonsectarian schools.
185. Judd v. Bd. of Educ., N.E.2d 576, *reh'g denied*, 17 N.E.2d 134 (N.Y. 1938).
186. *Id.*

> Neither the State nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught . . . .[187]

In deciding the case, the majority differentiated "direct" from "indirect" assistance:

> Aid furnished 'directly' would be that furnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked, and without circumlocution or ambiguity. Aid furnished 'indirectly' clearly embraces any contribution, to whomsoever made, circuitously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interests and purposes.[188]

School busing assistance, the court ruled, fell into the latter category. By implication, so would school vouchers.

In 1967 the Court of Appeals of New York had a change of view. By another four to three ruling, the court upheld the state's textbook loan program in *Board of Education of Central School District No. 1 v. Allen*, a decision later affirmed by the U.S. Supreme Court by a six to three margin.[189] Writing for the majority on the New York court, Judge Scileppi said of *Judd*:

> We cannot agree with the reasoning of the majority in the *Judd* case and accordingly hold that it should not be followed . . . . The architecture reflected in *Judd* would impede every form of legislation, the benefits of which, in some remote way, might inure to parochial schools. It is our view that the words 'direct' and 'indirect' relate solely to the means of attaining the prohibited end of aiding religion as such.[190]

Subsequently, Article XI was amended to allow the legislature to "provide for the transportation of children to and from any school or institution of learning."[191] The reasoning expressed by the Court of Appeals of New York in *Allen* suggests that a state voucher program whose primary purpose is aiding the education of children

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187. N.Y. CONST. art. XI, § 3.

188. *Judd*, 15 N.E.2d at 582.

189. Board of Educ. of Central Sch. Dist. No. 1 v. Allen 228 N.E.2d 791 (N.Y. 1967), *aff'd*, 392 U.S. 236 (1968).

190. *Id.* at 794.

191. N.Y. CONST. art. XI, § 3.

and which only indirectly benefits sectarian private schools has a good chance of being upheld in that state. While the *Judd* decision has been discredited by its own judiciary, it has been cited elsewhere with approval by judges who adhere to a strict separationist viewpoint.[192]

The interpretive power of the state judiciary is well illustrated by the South Carolina Supreme Court decision in 1972 when it simply ignored the prohibition on indirect aid to church-controlled educational institutions in Article XI, Section 9 of the state's constitution in upholding a tuition assistance program for students attending private colleges in the state.[193] The court noted in *Durham v. McLeod* that the student could choose any public or private institution in or out of the state.[194] Distinguishing its ruling the year before striking down funds made available for financial aid to students attending private colleges only,[195] the court observed,

> In this case, the emphasis is on aid to the student rather than to any institution or class of institutions. All which provide higher education, whether public or private, sectarian or secular, are eligible. The loan is to the student, and all eligible institutions are as free to compete for his attendance as though it had been made by a commercial bank.[196]

The court noted that if sectarian schools had been excluded from the grant program, they would have been materially disadvantaged.[197] In 1973, Article XI, Section 9 was replaced by Article XI, Section 4. The latter restricts only aid constituting a "direct benefit of any religious or other private educational institution."[198] Thus, the constitution now conforms more closely to the South Carolina Supreme Court's ruling in *Durham*. With these developments, South Carolina is placed in the permissive column of Table 1.

The South Carolina Supreme Court decision is important for two additional reasons. First, the channeling of funding to the family or to the student who then has a wide selection of public and private institutions from which to choose is an important design feature in school voucher programs because it tends to attenuate the relationship between the state and sectarian private schools. Second, the exclusion of sectarian private schools from a general voucher program raises

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192. A good example is the Hawaii Supreme Court, which cited *Judd* with approval in its 1969 ruling rejecting use of public funds to provide bus transportation to parochial students. *Spears v. Honda*, 449 P.2d 130 (Haw. 1969). The decision is discussed *supra* p. 13.

193. Durham v. McLeod, 192 S.E.2d 202 (S.C. 1972) (per curiam), *appeal dismissed*, 413 U.S. 902 (1973).

194. *Id.* at 203.

195. *Id.* (citing Hartness v. Patterson, 197 S.E.2d 907 (S.C. 1971) (state financial aid for students attending private colleges violates the direct/indirect prohibitions of Article IX, § 9 of the South Carolina Constitution)).

196. *Id.*

197. *Id.* at 204.

198. S.C. CONST. art. XI, § 4.

questions of religious discrimination and denial of free exercise rights under both federal and state constitutions.

As the majority of the New York judges recognized in *Board of Education v. Allen*, if taken literally, the *Judd* approach would make any state assistance that indirectly aids a sectarian school unconstitutional. In *Sheldon Jackson College v. State*, a 1979 decision, the Alaska Supreme Court noted that the Alaska Constitutional Convention rejected inclusion of the "direct or indirect" terminology because it did not want "to prevent the state from providing for the health and welfare of private school students, or from focusing on the special needs of individual residents."[199] Article VII, Section 1 of the Alaska Constitution only restricts the expenditure of public funds "for the direct benefit of any religious or other private educational institution."[200] The court noted that Article VII, Section 1 "was designed to commit Alaska to the pursuit of public, not private education, without requiring absolute governmental indifference to any student choosing to be educated outside the public school system."[201] Having said that, however, the Alaska Supreme Court unanimously struck down a state program providing grants to students in private colleges. The court noted that

> merely channeling the funds through an intermediary will not save an otherwise improper expenditure of public monies . . . . Simply interposing an intermediary 'does not have a cleansing effect and somehow cause the funds to lose their identity as public funds. While the ingenuity of man is apparently limitless, the Court has held with unvarying regularity that one may not do by indirection what is forbidden directly.'[202]

The justices observed in a telling sentence, "The courts have expressly noted that the *superficial form* of a benefit will not suffice to define its *substantive character*."[203] Thus, despite the absence of an "indirect" component in the Alaska Constitution, the Alaska Supreme Court has come to the same conclusion as the *Judd* court with respect to educational benefits conferred indirectly on private educational institutions. For this reason, Alaska is listed in the restrictive column of Table 1.

In summary, the presence of restrictive language in a state constitution is not definitive as to whether a state voucher program would be upheld. State judges often take an independent mind to interpreting state constitutional provisions, and what appears to be restrictive may turn out to be permissive (New York) and what appears to be permissive may turn out to be restrictive (Alaska).

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199. Sheldon Jackson College v. State, 599 P.2d 127, 129 (Alaska 1979).
200. ALASKA CONST. art. VII, § 1.
201. *Sheldon Jackson College*, 599 P.2d at 129.
202. *Id.* at 130, 132 (quoting Wolman v. Essex, 342 F. Supp. 399, 415 (S.D. Ohio 1972).
203. *Id.* at 130 (emphasis added).

4. Funding for Public Schools Only

Several states have constitutional provisions restricting the expenditure of all public money to public schools, thus preventing the flow of public money to private schools. The Massachusetts Constitution is typical in providing that

> No grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any . . . primary or secondary school . . . which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the commonwealth or federal authority or both . . . .[204]

In 1970 the Supreme Judicial Court of Massachusetts unanimously issued an advisory opinion that channeling money to students to help defray part of the cost of education at a private school would violate this provision.[205] In 1987 the court unanimously advised the state senate that a tax deduction bill for private school expenses would violate the same provision. The court noted that the form of payment is immaterial for "[i]f aid has been channeled to the student rather than to the private school, the focus still is on the effect of the aid, not on the recipient."[206] Other states with similar provisions include California,[207] Colorado,[208] Nebraska,[209] New Mexico,[210] Virginia,[211] and Wyoming.[212] The states of Alabama[213] and Pennsylvania[214] have such a provision as well, but it can be overriden by a vote of two-thirds of the members elected to each house. In part for this reason, these two states are listed in Table 1 as permissive toward a state voucher program. In some states such as Connecticut,[215] Delaware,[216] and Texas,[217] constitutional provisions restricting funding to public school purposes are limited to certain sources of funding (e.g., the public school fund). This leaves open the possibility of using other sources of funding for a state voucher program.

The wording of constitutional provisions can have a major impact on how

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204. MASS. CONST. art. XVIII, § 2.

205. *Opinion of the Justices to the House of Representatives*, 259 N.E.2d 564 (Mass. 1970).

206. *Opinion of the Justices to the Senate*, 514 N.E.2d 353 (Mass. 1987). In a footnote the court noted that the "language of our anti-aid amendment is 'much more specific' than the First Amendment to the U.S. Constitution." *Id.* at 354, n.4.

207. CAL. CONST. art. 9, § 8.

208. COLO. CONST. art. 5, § 34.

209. NEB. CONST. art. VII, § 11.

210. N.M. CONST. art. 4, § 31.

211. VA. CONST. art. 8, § 10.

212. WYO. CONST. art. 3, § 36; WYO. CONST. art. 7, § § 4, 7.

213. ALA. CONST. art. IV, § 73.

214. PA. CONST. art. III, § 30.

215. CONN CONST. art. 8, § 4.

216. DEL. CONST. art. 10, § 4.

217. TEX. CONST. art. VII, § 5.

they are interpreted. For example, prior to changing the restriction in the Nebraska Constitution from appropriately public funds "in aid of" to "to" any school or institution not exclusively controlled by the state or its political subdivisions,[218] the Nebraska Supreme Court ruled that a textbook loan program was unconstitutional as being "in aid of" institutions not publicly controlled.[219] The court noted that it made no difference that the textbooks were loaned to students: "the fact that the benefit of the secular textbooks goes originally to the student rather than directly to the school is a mere conduit and does not have the cleansing effect of removing the identity of the ultlimate benefit to the school as being public funds."[220] But with the change in constitutional wording, the court in 1981 upheld a scholarship program enabling eligible Nebraska undergraduate students to attend postsecondary institutions including sectarian colleges provided the student is not pursuing a sectarian course of study.[221] The court noted that the money was not going to the institution, but rather to the student.[222] Employing the same reasoning, the court a year later upheld a statute providing bus transportation to private school students[223] and in 1989 upheld a statute authorizing public schools to loan textbooks to private school students.[224] Given the change, Nebraska is listed in the permissive category in Table 1.

5. Public Purpose Doctrine

Most states have a constitutional provision providing that public monies must be spent for a public purpose. Typical is Kentucky constitutional provision § 171 stipulating that "Taxes shall be levied and collected for public purposes only . . . ."[225] By and large, courts defer to legislative judgment regarding what serves a public purpose. The prevailing view was well expressed by the Nebraska Supreme Court, which stated that "[i]t is for the legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts."[226]

However, on rare occasion, a public purpose constitutional provision could prove fatal to a state voucher program. A case-in-point is the Kentucky Supreme Court decision striking down a textbook loan program for students in private schools.[227] Employing a form of strict constructionism, the court concluded that the public purpose envisioned in § 171 of the state constitution was not being served, because "[n]onpublic schools are open to selected people in the state, as

218. NEB. CONST. art. VII, § 11.
219. Gaffney v. State Dep't of Educ., 220 N.W.2d 550, 557 (Neb. 1974).
220. *Id.*
221. Lenstrom v. Thone, 311 N.W.2d 884 (Neb. 1981). The amendment to Article VII, § 11 was adopted by the voters in 1972. *Id.* at 886-87.
222. *Id.* at 889.
223. State ex rel. Bouc v. Sch. Dist., 320 N.W.2d 472 (Neb. 1982)
224. Cunningham v. Lutjeharms, 437 N.W.2d 806 (Neb. 1989).
225. KY. CONST. § 171.
226. *Lenstrom*, 311 N.W.2d at 888.
227. Fannin v. Williams, 655 S.W.2d 480 (Ky. 1983).

contrasted with public schools which are open to 'all people in the state.'"[228] The court held that the programs also violated § 189 prohibiting expenditures for sectarian schooling.[229] Money spent on education must be spent exclusively in the public school system "except where the question of taxation for an educational purpose has been submitted to voters and the majority of the votes cast at the election on the question shall be in favor of such taxation" under § 184 of the Kentucky Constitution.[230] The court ruled such use of tax monies to be unconstitutional: "We cannot sell the people of Kentucky a mule and call it a horse even if we believe the public needs a mule."[231]

6. Judicial Precedent

Even if state constitutional anti-establishment restrictions are relatively weak or ambiguous, a state supreme court may interpret them otherwise. Perhaps the best example is the state of Washington. In 1973, the Washington State Supreme Court unanimously struck down a state voucher program providing individual grants to needy and disadvantaged students seeking to attend the public or private school of their choice.[232] In unusally trenchant language, the court ruled that the program violated Article IX, Section 4 of the Washington State Constitution.[233] That provision provides that "[a]ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."[234] Noting that the provision is more stringent than the Establishment Clause of the First Amendment, the court stated that there is "no such thing as a 'de minimis' violation of article IX, section 4 . . . the prohibition is absolute."[235] The court was not persuaded that the free exercise rights of students were violated, that channeling money through parents attenuates state benefit to private schools, or that allowing students to attend either out-of-district public schools or private schools makes a difference.[236]

In 1989, the Washington high court had a second opportunity to revisit the question when the U.S. Supreme Court remanded the *Witters* case involving state aid to a blind student studying religion at a sectarian private college.[237] But this time the court was not of one mind. The justices struck down the aid program by a five to four margin, this time as a violation of Article I, Section 11 of the state constitution.[238] That provision states in part, "No public money or property shall

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228. *Id.* at 482.
229. *Id.* at 483.
230. *Id.* at 482.
231. *Id.* at 484.
232. Weiss v. Bruno, 509 P.2d 973 (Wash. 1973), *modified*, 523 P.2d 915 (Wash. 1974) (allowance of attorney fees).
233. *Id.* at 977.
234. WASH. CONST. art. IX, § 4.
235. *Weiss*, 509 P.2d at 978.
236. *Id.* at 978, n.2, 979-80.
237. *Witters*, 474 U.S. at 481.
238. *Witters*, 771 P.2d 1119, 1122 (Wash. 1989).

be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."[239] As before, the majority found no violation of the student's free exercise rights and no violation of equal protection of the laws. The Court stated

> We hold that when a person '*is getting a religious education* (italics ours), to use the words of his attorney, that person comes squarely within the express prohibition contained in the Constitution of the State of Washington that '*no public money . . . shall be appropriated for or applied to any religious . . . instruction.*[240]

The dissenters focused on the flow of money to the individual not the institution, arguing that it was in error to interpret the state constitutional provision as constraining individual decisions.[241] Since the *Witters* ruling is relatively recent, the five to four split may well signal a repositioning of the court on the issue of indirect aid to religion and the proper balance between anti-establishment provisions and free exercise rights. In particular, the views of the dissenters may be indicative of future trends on the Washington court—and elsewhere. Until that happens, however, the state is listed in the restrictive column of Table 1.

In sum, there are seventeen states where strict anti-establishment provisions in state constitutions and/or the disinclination of state supreme court judges to allow state funds to flow directly or indirectly to sectarian educational institutions create an unfavorable legal climate for state voucher programs that encompass sectarian private schools. Of the seventeen, nine are concentrated in the western section of the country where public schooling has been the norm since statehood. In many of these states, a constitutional amendment may be the only way for proponents of such programs to be successful.

B. Permissive States

1. No Anti-Establishment Provision

At the opposite end of the spectrum from the anti-voucher stance of the Michigan Constitution are state constitutions that have no specific anti-establishment provisions. Maine, Maryland, Rhode Island, and Vermont fall into this category. The state supreme court in each of these states has not found the state constitution to be an impediment to educational programs encompassing sectarian private schools. For example, the Vermont Supreme Court observed that so long as the general public benefit is the dominant interest served by state educational aid programs, the constitution is not offended when private institutions

239. WASH. CONST. art. I, § 11.
240. *Witters*, 771 P.2d at 1119-20 (citing WASH. CONST. art. I, § 11) (emphasis in original).
241. *Id.* at 1124-25.

are recipients of the assistance.[242] In upholding a tuition reimbursement program in 1992 for a parent who sent his son to an out-of-state sectarian school, the Vermont high court noted that the federal constitution is more restrictive of government assistance to sectarian institutions than the state constitution.[243] The court went on to conclude that the tuition reimbursement program did not offend the First Amendment.[244] In 1996, litigation on this issue surfaced over a similar tuition reimbursement plan instituted by the Chittenden School Board.[245] In June 1997, the Rutland Superior Court struck down the program as a violation of the Establishment Clause.[246] The Chittenden School Board voted to appeal the decision to the Vermont Supreme Court, which heard oral arguments in March 1998.[247]

2. Supportive Legal Climate

There are ten other states where some combination of weak anti-establishment constitutional provisions, strong free exercise provisions, the presence of a constitutional override provision on restricting appropriations for public education only, or supportive state supreme court precedent suggests a permissive climate for state vouchers. The ten states are: Alabama, Arizona, Mississippi, Nebraska, New Jersey, New York, Pennsylvania, South Carolina, Utah, and West Virginia (see Table 1). The constitutional provisions and case law of Nebraska, New York, and South Carolina already have been discussed, *infra*.[248] With regard to the other states, none has a strict anti-establishment provision that prohibits indirect assistance to sectarian private schools. Most either prohibit direct assistance or restrict taxation and appropriations for sectarian purposes. The supreme courts of these states do not view prohibitions on direct aid as barring any assistance to sectarian private schools. For example, in upholding a textbook loan

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242. Vermont Educ. Buildings Fin. Agency v. Mann, 247 A.2d 68 (Vt.), *appeal dismissed*, 396 U.S. 801 (1969).

243. *Id.* at 73.

244. Campbell v. Manchester Board of Sch. Dirs., 641 A.2d 352 (Vt. 1994). In upholding the program, the court noted several delimiting factors including (1) the reimbursement goes to the parent and not the school, (2) the Manchester school board pays tuition for all high school students because it does not have its own high school, (3) sectarian reasons did not motivate the town's decision not to have a high school, (4) no substantial numbers of students are sent to sectarian schools, (5) the extent of state regulation of private schools is minimal, and (6) the subsidy program does not promote sectarian education. *Id.* at 359-60. In 1961, the same court struck down the practice as a violation of the First Amendment Establishment Clause. Swart v. South Burlington Town Sch. Dist., 167 A.2d 514, *cert. denied*, 366 U.S. 925 (1961). This was prior to the U.S. Supreme Court's rulings in *Mueller* and *Witters*, which the Vermont Supreme Court cited in support of its decision in *Campbell*.

245. *See* Libby Johnson, *Vermont Parents Ask State to Pay Catholic School Tuition*, N.Y. TIMES, Oct. 30, 1996, at B9.

246. Chittenden Sch. Dist. v. Dep't of Educ., Dkt. No. 50478-96 (Rutland Superior Ct. June 27, 1997); see also L. Sternberg, *History Sheds Light on Bars to School Choice*, WASHINGTON TIMES, July 28, 1997, at 28.

247. Mark Walsh, *Vouchers Face Key Legal Test in Wisconsin*, EDUC. WK., Mar. 11, 1998, at 1.

248. See *infra* Section VII.A.3.

program against a challenge under a provision prohibiting public funding "toward the support of any sectarian schools," the Mississippi Supreme Court noted that "[i]f the pupil may fulfill its duty to the State by attending a parochial school it is difficult to see why the state may not fulfill its duty to the pupil of encouraging it 'by all suitable means.'"[249] To deny pupils textbooks when they transfer to parochial schools, the justices observed, "would constitute a denial of equal privileges on sectarian grounds . . . ."[250]

In summary, the legal climate in thirteen states appears supportive of publicly funded voucher programs. Of the thirteen, seven are in the northeast where the roots of private schooling are deep and state parochial aid efforts frequent (see Table 1). Whether a voucher program encompassing sectarian private schools will pass constitutional muster in these and other states depends in large measure upon how the program is designed.

C. *Uncertain States*

There is insufficient information for as many as nineteen states to warrant placing them in either the restrictive or permissive columns of Table 1. They have been listed in the uncertain column because of ambiguous constitutional terminology, the absence of authoritative case law, or pending litigation.

1. Ambiguous Constitutional Terminology

Many states have provisions that restrict the direct advancement or support of religion but are silent on indirect advancement. In the absence of interpretive caselaw, the significance of these provisions for a state voucher program is not clear. For example, Article 12, Section 3 of New Mexico's constitution specifies that "no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied, or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college, or university."[251] While direct support seems ruled out, the constitution does not address educational appropriations that may indirectly benefit denominational or private educational institutions.[252] A 1976 attorney general opinion recognized this fact in noting that a voucher system would aid children, not schools. The attorney general opined that support of private schools, if any, would be only an indirect consequence, and therefore a voucher system for exceptional children would not be in violation of this section of the state constitution.[253] The attorney general noted that the issue of advancement of religion could be addressed by limiting a voucher program to nonsectarian

249. Chance v. Mississippi State Textbook Rating and Purchasing Bd., 200 So. 706, 710 (Miss. 1941).

250. *Id.* at 713.

251. N.M. CONST. art. XII, § 3.

252. *Id.*

253. *Op. Atty Gen.* No. 76-6 (1976).

schools.[254]

A number of state supreme courts have ruled that the anti-establishment provisions in their state constitutions carry the same meaning as the First Amendment Establishment Clause despite often considerable variation in wording between the two.[255] Thus, as noted *supra*, how the U.S. Supreme Court rules on the constitutionality of a voucher program encompassing sectarian private schools has great significance for litigation in these states.

Minnesota is one of the pioneering states in promoting school choice within the public sector, and by the mid-1990s, voucher proposals encompassing sectarian private schools were surfacing in the legislature under pressure from Republican Governor Arne Carlson.[256] The Minnesota Supreme Court, however, has issued ambiguous decisions involving the religion clauses in the state constitution. In 1970, the court held that the limitations on state involvement with religion contained in the Minnesota Constitution are "substantially more restrictive" than the First Amendment to the U.S. Constitution.[257] But in 1990 the court noted that "Minnesotans are afforded greater protection for religious liberties against governmental action under the state constitution than under the first amendment of the federal constitution."[258] Indicative of possible shifting sands on the establishment versus free exercise issue in recent years in Minnesota is a 1993 intermediate appellate court decision involving the state's postsecondary choice program that enables high school students to attend college and obtain dual credit toward high school graduation and a college degree.[259] At issue was whether students could choose to attend a sectarian private college.[260] The court answered in the affirmative, noting that the program is designed to benefit high school students, not the sectarian private college.[261] The court observed that participating

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254. *Id.*

255. See *supra* note 116, and accompanying text.

256. *Public Private Schools? Time to Confront the Constitution*, STAR TRIBUNE (Minneapolis-St. Paul), July 3, 1997, at 28A.

257. Americans United, Inc. v. Indep. Sch. Dist. No. 622, 179 N.W. 2d. 146 (Minn. 1970), *appeal dismissed*, 403 U.S. 945 (1971) (program providing for transportation of children to sectarian private schools does not violate the Minnesota Constitution). Article I, § 16 provides that no money "be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries." Article XIII, § 2 restricts expenditures of public money "for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught." In 1974 the Minnesota Supreme Court struck down a state tax credit plan for parents who send their children to nonpublic schools. The decision was based solely on the First Amendment Establishment Clause; no consideration was given to the provisions of the Minnesota Constitution. Minnesota Civil Liberties Union v. State, 224 N.W.2d 344 (Minn. 1974), *cert. denied*, 421 U.S. 988 (1975). As noted *supra*, Section VI.B., the U.S. Supreme Court reached the opposite conclusion nearly ten years later in Mueller v. Allen, 463 U.S. 388 (1963).

258. State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990) (state requirement that slow-moving vehicles display a triangular reflective symbol violates the free exercise rights of the Amish under Article I, § 16 since the state failed to demonstrate that its objective for public safety could not be achieved through the use of white reflective tape and a red lantern).

259. Minnesota Fed. of Teachers v. Mammanga, 500 N.W.2d 136 (Minn. App. 1993).

260. *Id.* at 138.

261. *Id.* at 138-39.

colleges could be either public or private and that the state reimbursement is only forty-two percent of the actual costs for tuition, materials, and fees.[262] Even if the college were pervasively sectarian, the appellate court noted, the constitutional provisions are not violated so long as the benefits are indirect and incidental.[263]

2. Absence of Authoritative Case Law

In some states the absence of any relevant case law precludes a determination of how state constitutional provisions might apply to a state voucher program. A case-in-point is Texas, where Article I, Section 7 of the state constitution precludes appropriations "for the benefit of any sect, or religious society, theological, or religious seminary"[264] and Article VII, Section 5 prohibits use of the permanent and available school fund "for the support of any sectarian school."[265] How these provisions would apply to a state voucher program that provides funding to parents who then select schools for their children is not known.

In Louisiana, the state supreme court issued a well reasoned decision in 1970 striking down a state program to pay private school teachers to teach secular subjects as a violation of provisions of the state constitution prohibiting appropriations directly or indirectly in aid of any religious institution.[266] The court distinguished teacher salaries from lending of books, which it approved in 1930 in the celebrated case of *Cochran v. Louisiana State Board of Education*.[267] However, the 1970 precedent is no longer valid, since a new state constitution was adopted in 1974 and the restriction on direct and indirect aid was eliminated.[268]

In a few states, the case law is so dated that its relevancy to modern times is questionable. For example, the Iowa Supreme Court ruled in 1918[269] that direct payment of public monies to religious colleges would violate Article I, Section 3 of the state constitution prohibiting enactment of any law "respecting an establishment of religion" and any law requiring persons to "pay tithes, taxes, or

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262. *Id.* at 139.

263. *Id.*

264. TEX. CONST. art. I, § 7.

265. TEX. CONST. art. VII, § 5.

266. Seegers v. Parker, 241 So.2d 214 (La. 1970), *cert. denied*, Williams v. Seegers, 403 U.S. 955 (1971).

267. Cochran v. Lousiana State Bd. of Educ., 123 So. 664 (La. 1929), *aff'd*, 281 U.S. 370 (1930).

268. The present anti-establishment provision in the Louisiana Constitution provides, "No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof." LA. CONST. art. I, § 8. Article VIII, § 1 provides, "The Legislature shall provide for the education of the people of the state and shall establish and maintain a public education system." LA. CONST. art. VIII, § 1. One commentator and voucher advocate who was present at the 1973 Constitutional Convention maintains that the conjunctive "and" in this section "was intended by the delegates to authorize constitutionally permissible state aid to nonpublic schools, including [those that are] sectarian." *Id.* While voucher plans have been introduced into the legislature in recent years, none has moved out of committee. Letter from David A. Hamilton, attorney and counselor at law, to the author (Nov. 17, 1997) (on file with the author).

269. Knowlton v. Baumhover, 166 N.W. 202 (Iowa 1918).

other rates for building or repairing places of worship, or the maintenance of any minister, or ministry."[270] Over fifty years later, the attorney general relied on this precedent to advise that the provision of tuition grants to Iowa students to attend accredited sectarian private colleges in the state would violate the state constitution since the students would merely be conduits through whom the grants would flow to the colleges.[271] However, if only nonsectarian colleges were involved, there would be no violation of the provision.[272]

3. Pending Litigation

Litigation continues in Wisconsin, Ohio, and Vermont over state voucher programs encompassing sectarian private schools. Judge Higginbotham's decision striking down the expansion of the Milwaukee voucher program to encompass sectarian private schools was immediately appealed.[273] In August 1997, the Wisconsin Court of Appeals upheld the decision in a two to one ruling.[274] The majority noted that in an 1890 decision, the Wisconsin Supreme Court stated that

> Wisconsin, as one of the later states admitted into the Union, having before it the experience of others, and probably in view of its heterogeneous population . . . has, in her organic law, probably furnished a more complete bar to any preference for, or discrimination against, any religious sect, organization or society than any other state in the Union.[275]

In a lengthy analysis, the dissenting judge relied chiefly on the U.S. Supreme Court precedent cited in Section VI, *supra*, to uphold the program as aiding students, not sectarian institutions. The case is pending at this writing before the Wisconsin Supreme Court.[276]

Judge Sadler's decision upholding the Cleveland scholarship program was

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270. IOWA CONST. art. I, § 3. In Rudd v. Ray, the Iowa Supreme Court suggested that Article I, § 3, which prohibits enactment of any law "respecting an establishment of religion" and any law requiring persons to "pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry" is similar to the First Amendment of the U.S. Constitution, noting that "to the extent our provision differs from the First Amendment to the United States Constitution we think our framers were merely addressing the evils incident to the state church." 248 N.W.2d. 125, 132 (Iowa 1976). In going on to uphold a provision of salaried chaplains and religious facilities at the state penitentiary, the court noted that it was striking a balance between anti-establishment and free exercise interests. The decisions seems to undercut the strict anti-establishment character of *Knowlton*.

271. *Op. Atty. Gen.* (Hill) April 25, 1969.

272. *Id.*

273. *Jackson*, 570 N.W.2d 407 (Wis. App. 1997).

274. *Id.*

275. *Id.* at 417, (quoting from concurring opinion of Cassoday, J., "to whom the court's opinion delegated the task of addressing Article I, § 18" of the state constitution in State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. Eight of Edgerton, 44 N.W. 967, 977 (Wis. 1890)).

276. Jackson v. Benson, 570 N.W. 2d 407, 446 (Wis. App. 1997).

appealed to the Tenth District Court of Appeals of Ohio, which reversed her decision in May 1997.[277] Applying the same First Amendment Establishment Clause analysis that Sadler used, the court found the scholarship program constituted an impermissible advancement of religion in large part because no public school district chose to participate in the program.[278] This being so, the only choice available to parents was either the troubled Cleveland City School system or a sectarian private school.[279] "Such a choice steers aid to sectarian schools, resulting in what amounts to a direct government subsidy," the judges wrote.[280] The court recognized that the state could have mitigated this effect by requiring public schools to participate so that parents have a broad range of choices.[281] The court also observed that a companion program to provide tutorial assistance grants up to $500 for parents whose children attend the Cleveland public schools did not render the scholarship program neutral with regard to aiding religion.[282] The dollar value of the tutorial grant was much less than the scholarship.[283] Further, the limitation of the tutorial grant to the troubled Cleveland system restricted its educational value.[284] Thus, the scholarship program "creates an impermissible incentive for parents to send their children to sectarian schools."[285]

Litigation in Ohio demonstrates the points discussed earlier about differences among judges in constitutional interpretation. While the Ohio appellate court judges recognized that in earlier decisions the Ohio Supreme Court rendered the state's religion clauses co-extensive with the First Amendment Establishment Clause, they were not happy about it: "[W]e wish to point out that construing [these clauses] to be coextensive with the Establishment Clause, creates a pointless redundancy."[286] Such redundancy, they asserted, was being untrue to the intention of the state constitution's framers.[287] How the Ohio Supreme Court will rule on the matter is uncertain.

The same is true for the private school tuition reimbursement tuition plan instituted by the Chittenden School Board that is pending before the Vermont Supreme Court.[288] In an earlier decision, the Vermont high court ruled that a similar program did not violate the First Amendment to the United States Constitution, noting that the federal constitution is more restrictive than the state constitution.[289]

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277. Simmons-Harris v. Goff, No. 96APE08-982, 96APE08-991, 1997 WL 217583 (Ohio App. 10 Dist. May 1, 1997).
278. *Id.* at *6-*7.
279. *Id.* at *8.
280. *Id.* at *9.
281. *Id.* at *7.
282. *Id.* at *8.
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.* at *11.
287. *Id.*
288. *Chittenden Sch. Dist.*, Dkt. No. 97-275.
289. *Campbell v. Manchester Bd. of Sch. Dirs.*, 641 A.2d 352 (Vt. 1994).

VIII. Implications for Voucher Program Design

A voucher program is most likely to withstand constitutional challenge at the federal level and in all but the restrictive states if it is modeled after the original Milwaukee Parental Choice Program and excludes sectarian private schools. This sidesteps the religious issue altogether. If future developments in religious discrimination law or political factors preclude this, then a voucher program encompassing sectarian private schools has the best chance of surviving constitutional challenge on anti-establishment grounds if it meets certain design features.

To have the best chance of surviving a constitutional challenge in federal court based on the U.S. Supreme Court's prior precedents, a publicly-funded voucher program should provide payments in the form of scholarships to parents of school-age children, should allow parents to choose among a wide variety of public and private nonsectarian and sectarian schools, and should give no preference to sectarian schools. Programs that do not meet these specifications will be vulnerable to an Establishment Clause challenge.

Given the fact that a state voucher program could be challenged on more than just anti-establishment grounds in most states, legislators must pay greater attention to design issues. First, the voucher must flow to parents and not to institutions. Most states have a constitutional provision that prohibits direct expenditure of public money for sectarian purposes. The simplest way to accomplish this is to provide parents with certificates redeemable for educational services at approved schools and have the schools return the certificates to the state for payment. To avoid the problems experienced in litigation in Wisconsin and Ohio, the legislature should tailor the amount of the voucher to the cost of instruction. This avoids the appearance of giving sectarian private schools a windfall which then can be diverted for sectarian purposes. Second, the legislature must give parents a wide choice of public and private schools. As already described, expansion of the Milwaukee voucher program to include sectarian private schools but not public schools floundered on this point in litigation at the trial court level in 1997.[290]

Third, the legislature must state clearly the public purpose of the state voucher program. This will help it survive a challenge under the public purpose provision that is common in state constitutions. The most convincing purpose is to enfranchise middle and low income families with the means to seek improved educational opportunities for their children so that the legislature clearly advances the state's interest in an educated citizenry. From an equity perspective, the present educational system fails to accord all but the wealthy the opportunity to control their children's education through choice of residency or payment of private school tuition. Legislatures can effectively demonstrate such a public purpose by varying the amount of the voucher with income level: the lower the income, the greater the voucher.

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290. *See supra* Section II.B.

Fourth, legislators must include sufficient accountability measures to demonstrate that the voucher program will achieve the public purpose.[291] These are most likely to take the form of prohibition on discrimination in admissions, prohibition on teaching such subjects as hatred and racism and restriction on tuition charges over and above the voucher. Fifth, to demonstrate that favoritism is not being extended to sectarian private schools, the legislature should establish some degree of regulatory parity between public and private schools.

Even with design features like these, there is no assurance that a court would uphold voucher program encompassing sectarian private schools. Much will depend upon the wording of state constitutional provisions and upon the views of judges as to the proper relationship between church and state.

IX. Summary

This discussion of the constitutionality of school voucher programs demonstrates the complexity of the issue. Not only are two different judiciaries involved—federal and state—but also fifty-one constitutions. As noted, past decisions suggest that the U.S. Supreme Court may allow states to apply their own constitutional provisions to challenged voucher programs in the interest of federalism. Assuming this to be the case, differences in state constitutions and the absence of relevant case law in many states make the outcome difficult to predict. It would appear that vouchers will have an uphill battle in about one-third of the states. The going should be easier in another third, with the outcome in the remaining states uncertain.

Differences among judges about the principles to be used to guide constitutional interpretation coupled with uncertainty about the proper role of religion in public life tend to elevate the role of personal beliefs and political considerations. For this reason, a decision by the U.S. Supreme Court on the constitutionality of a voucher program encompassing sectarian private schools will have significant influence on state judges struggling with the same issue. The influence will be greatest in states where the state supreme court has interpreted the religion clauses in the state constitution to be the equivalent of the First Amendment religion clauses and in states where there is little interpretive case law. To a lesser extent, the decisions reached by the Wisconsin, Ohio, and Vermont supreme courts regarding the voucher programs pending before them also will be influential as cases of first impression. Finally, the fact that judges in three-fourths of the states are elected cannot be ignored, since political fervor can be a powerful influence on the elected judiciary.

The voucher design features advanced in this article are based on decisions already reached by the U.S. Supreme Court and by state supreme courts regarding forms of assistance to sectarian organizations. While these features are essential

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291. *See* Frank R. Kemerer, Ph.D., *School Choice Accountability* (unpublished manuscript presented at School Choice, Law, and Public Policy Symposium at University of California, Berkeley School of Law, Apr. 18, 1998) (on file with author).

to give voucher programs encompassing sectarian private schools the best chance for passing constitutional muster, they do not constitute the only features necessary for voucher programs to serve the public interest. Legislators and policy makers must go beyond concerns about complying with state constitutional provisions to consider how market-oriented school choice systems can best serve the interests of parents and of the state without intruding unnecessarily on institutional autonomy.[292]

292. *Id.*

Table I:
State Constitutional Orientation Towards School Vouchers[1]

State	Restrictive			Permissive			Uncertain
	Const. Lang.	Case Law	AG Opns.	Const. Lang.	Case Law	AG Opns.	
AL				x	x		
AK		x					
AZ					x		
AR							x
CA	x	x	x				
CO							x
CT							x
DE	x	x					
FL	x						
GA							x
HI	x	x					
ID		x					
IL							x
IN							x
IA							x
KS	x		x				
KY	x	x					
LA							x
ME				x			
MD				x	x		
MA	x	x					
MI	x						
MN							x
MS					x		
MO	x	x					

1. For purposes of this table, it is assumed that a state voucher program would encompass sectarian private schools.

State	Restrictive			Permissive			Uncertain
	Const. Lang.	Case Law	AG Opns.	Const. Lang.	Case Law	AG Opns.	
MT							x
NE				x	x		
NV							x
NH							x
NJ							x
NM							x
NY					x		
NC							x
ND	x						
OH							x[2]
OK	x	x	x				
OR							x
PA				x	x		
RI				x	x		
SC					x	x	
SD		x					
TN							x
TX							x
UT					x		
VT							x[2]
VA	x	x					
WA		x					
WV					x		
WI							x[2]
WY	x						

2. Litigation pending.

Table II:
State Constitutional Provisions Relevant to School Vouchers[1]

STATE	RELIGIOUS FREEDOM	PUBLIC SUPPORT & PRIVATE SCHOOLS	APPLICATION OF INCOME OR PROPERTY TO EDUCATIONAL	APPROPRIATIONS FOR PUBLIC PURPOSE	GENERAL APPROPRIATION OF FUNDS	GOVERNMENT INVOLVEMENT WITH PRIVATE ORGANIZATIONS
AL	Art. 1, §3	Art. 14, §263	Amd. 111 of Art 14, §256	Art. 4, §73	Art. 4, §71	Art. 4, §93 Art. 4, §94
AK	Art 1,§4	Art. 7, §1		Art. 9, §6		
AZ	Art. 2, §12	Art. 9, §10		Art. 9, §7		
AR	Art. 2, §24	Art. 14, §2	Art. 14, §3 Amd. 53		Art. 5, §31	Art. 16, §1 Art. 12, §5
CA	Art. 1, §4	Art. 9, §8 Art. 16, §5	Art. 16, §8(a)	Art. 16, §5	Art. 16, §3	Art. 16, §6
CO	Art. 2, §4	Art. 9, §7		Art. 5, §34		Art. 11, §1 Art. 11, §2
CT	Art. 7		Art. 8, §4			
DE	Art. 1, §1	Art. 10, §3 Art. 10, §5	Art. 10, §2 Art. 10, §4	Art. 8, §4		Art. 8, §8
FL	Art. 1, §3		Art. 9, §6			Art. 7, §10
GA	Art. 1, §1, ¶4	Art. 8, §7, ¶4	Art. 8, §7, ¶1	Art. 1, §2, ¶7	Art. 3, §9, ¶3	Art. 7, §4, ¶8 Art. 9, §2, ¶8
HI	Art. 1, §4	Art. 10, §1		Art. 7, §4		Art. 9, §3
ID	Art. 1, §4	Art. 9, §5		Art. 7, §10		Art. 8, §2 Art. 8, §4
IL	Art. 1, §3	Art. 10, §3		Art. 8, §1		
IN	Art. 1, §2 Art. 1, §4	Art. 8, §3		Art. 1, §6	Art. 1, §3	
IA	Art. 1, §3					Art. 7, §1
KA	B. of R., §7	Art. 6, §6	Art. 1, §5	Art. 11, §5		
KY	B. of R., §5	§186 §189	§184	§171		§177
LA	Art. 1, §8	Art. 8, §4				
ME	Art. 1, §3	Art. 8, Pt. 1, §1	Art. 8, Pt. 1, §2			

1. To facilitate readability, all roman numerals have been converted to numbers.

STATE	RELIGIOUS FREEDOM	PUBLIC SUPPORT & PRIVATE SCHOOLS	APPLICATION OF INCOME OR PROPERTY TO EDUCATION	APPROPRIATIONS FOR PUBLIC PURPOSE	GENERAL APPROPRIATION OF FUNDS	GOVERNMENT INVOLVEMENT WITH PRIVATE ORGANIZATIONS
MD	Dec. of Rts., Art. 36	Art. 8, §3		Dec. of Rts., Art. 43	Art. 3, §52(6)	Art. 3, §34
MA	Pt. 1, Art 2 Pt. 1, Art. 3	Amd., Art. 18				Amd., Art. 62, §1
MI	Art. 1, §4	Art. 8, §2	Art. 9, §11		Art. 3, §18	
MN	Art. 1, §16	Art. 13, §2				Art. 11, §2
MS	Art. 3, §18	Art. 8, §208				Art. 14, §258
MO	Art. 1, §5 Art. 1, §6 Art. 1, §7	Art. 9, §8	Art. 9, §3(a) Art. 9, §5			
MT	Art. 2, §5	Art. 10, §6				Art. 5, §11
NE	Art. 1, §4	Art. 7, §11				Art. 13, §3
NV	Art. 1, §4	Art. 11, §10	Art. 11, §9			Art. 8, §9 Art. 8, §10
NH	Pt. 1, [Arts.] 5th, 6th	Pt. 2, [Arts.] 5, 12, 83 [Art.] 12 [Art.] 5				
NJ	Art. 1, §3 Art. 1, §4			Art. 8, §2, ¶1	Art. 8, §2, ¶2 Art. 8, §4, ¶1 Art. 8, §4, ¶2 Art. 8, §4, ¶3	Art. 8, §3, ¶2
NM	Art. 2, §11	Art. 21, §4	Art. 12, §3	Art. 4, §31		Art. 9, §14
NY	Art. 1, §3	Art. 11, §3	Art. 11, §1			Art. 7, §8
NC	Art. 1, §13 Art. 1, §19	Art. 9, §1	Art. 9, §6	Art. 2, §23		
ND	Art. 1, §3	Art. 8, §5 Art. 9, §2	Art. 8, §1			Art. 10, §18
OH	Art. 8, §3 Art. 1, §7	Art. 6, §2	Art. 6, §6		Art. 2, §26	Art. 8, §4

STATE	RELIGIOUS FREEDOM	PUBLIC SUPPORT & PRIVATE SCHOOLS	APPLICATION OF INCOME OR PROPERTY TO EDUCATION	APPROPRIATIONS FOR PUBLIC PURPOSE	GENERAL APPROPRIATION OF FUNDS	GOVERNMENT INVOLVEMENT WITH PRIVATE ORGANIZATIONS
OK	Art. 1, §2	Art. 1, §5	Art. 2, §5			Art. 10. §15 Art. 10, §17
OR	Art. 1, §2 Art. 1, §3	Art. 1, §5				Art. 11, §7 Art. 11, §9
PA	Art. 1, §3	Art. 3, §15		Art. 3, §30	Art. 3, §29	Art. 8, §8 Art. 9, §9
RI	Art. 1, §3	Art. 12, §4	Art. 12, §2	Art. 12, §1		
SC	Art. 1, §2	Art. 11, §4	Art. 11, §3			Art. 10, §11
SD	Art. 6, §3 Art. 26, §18, ¶1	Art. 8, §16 Art. 26, §18, ¶4	Art. 8, §20		Art. 26, §18	
TN	Art. 1, §3		Art. 11, §12		Art. 11, §8	Art. 2, §29
TX	Art. 1, §6	Art. 7, §5		Art. 3, §52	Art. 1, §7	Art. 3, §51 Art. 11, §3
UT	Art. 1, §4	Art. 10, §9 Art. 3	Art. 10, §1			Art. 14, §6
VT	Ch.1, Art. 3rd Ch.2, §68			Ct.1, Art. 9th		
VA	Art. 1, §16 Art. 4, §16	Art. 8, §10	Art. 8, §3 Art. 8, §11			Art. 10, §10
WA	Art. 1, §11	Art. 9, §4				Art. 8, §5 Art. 8, §7 Art. 12, §9
WV	Art. 3, §15	Art. 12,§11 WV Const. Amd. The Irreducible School Fund Amd.	Art. 12, §5			Art. 10, §6
WI	Art. 1, §18	Art. 10, §6			Art. 10, §3	Art. 8, §3
WY	Art. 1, §18	Art. 7, §7 Art. 7, §8 Art. 7, §12	Art. 21, §28 Art. 7, §7 Art. 7, §16	Art. 1, §19 Art. 7, §4 Art. 3, §36		Art. 16, §6