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School Vouchers in Minnesota: Confronting the Walls Separating Church and State

Eric Nasstrom

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# SCHOOL VOUCHERS IN MINNESOTA: CONFRONTING THE WALLS SEPARATING CHURCH AND STATE

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I. INTRODUCTION

School choice is one of the most popular and controversial proposals being considered by education policy makers. Simply put, school choice theorists seek to enhance parents' ability to select schools most appropriate for their children. The device favored for reaching this result is the school voucher. In a typical voucher plan, the state would first deliver vouchers to parents. Parents then could submit the voucher to whichever school they wished their child to attend. In turn, schools would be reimbursed by the state for the value of the vouchers each school accumulated. Advocates believe that school choice,
facilitated through school voucher legislation, can revitalize America’s schools.

Two separate but interdependent themes stir school reform advocates’ interest in school vouchers. First, advocates believe parents, not politicians and public administrators, should select schools for their children. According to voucher advocates, parents are best able to determine the educational needs of their children. The second theme flows from the freedom granted to parents in choosing which schools their children will attend: competition among schools increases teaching effectiveness and financial efficiency. School voucher supporters assert that public schools have an unfair price advantage when compared to private schools. Implementing school voucher programs would level the educational playing field by requiring both public and private schools to subsist exclusively on school vouchers. Once on equal footing, competition among public and private schools would unleash market forces that would rid the country of inferior schools while sparing only those schools fit to attract funding through

4. See Kirkpatrick, supra note 1, at 48. Opponents of school choice argue that parents might be swindled by certain schools and make poor decisions about which schools their children should attend. Kirkpatrick argues that this line of reasoning is elitist. He suggests that the ultimate question is who is more incompetent at choosing schools: parents or the government. Doubtless, some parents will choose the wrong schools for their children. Id. at 49. But one parent’s mistake has a limited effect and remains anonymous. By contrast, public officials’ mistakes potentially affect many children; also, public officials’ mistakes will be publicized, which has the effect of dampening public officials’ desire to be innovative. Furthermore, public officials do not have the attached interest in children that parents do. Id. at 49.

5. See Kirkpatrick, supra note 1, at 49. For example, parents can choose whether their children should undergo life-threatening medical procedures. Therefore, Kirkpatrick argues, it makes little sense to remove parental choice from determining which types of education their children should receive. Id.

6. See Underwood, supra note 1, at 600. School choice is attractive to reformers because the cost of sending a child to a private school would become comparable to sending a child to a public school. Furthermore, parents would be able to avoid sending their children to schools they deem incapable of meeting their children’s educational needs. To many, according to Underwood, “Choice represents the ultimate school reform, a quick and easy solution to the problems of public education.” Id.

7. Public schools, as they exist now, face no cost competitive adversaries. The costs parents incur to send their children to private schools are not defrayed by their share of taxes that support public schools. Under a school voucher plan, public schools would have no incipient advantage because their funding would not be guaranteed. Instead, public school funding would rely on the number of vouchers received. See Milton Friedman & Rose Friedman, Free To Choose 161 (1980) [hereinafter FREE]; Milton Friedman, Capitalism and Freedom 91 (1962) [hereinafter CAPITALISM]; see also David Futterman, School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Parochial Schools, 81 Geo. L.J. 711, 713 (1992-93).
After market forces are infused into education, voucher advocates believe more effective schools, and ultimately a better educated populace, would follow.

Minnesota Governor Arne Carlson concurs with voucher theorists' assertions that school choice can cure the ills plaguing America's education system. In fact, Carlson's faith in vouchers is so strong that he declared that passing voucher legislation was his top priority in 1996. Carlson vowed that he would "go to the wall" to ensure voucher legislation's enactment. Less than one month after opening the 1996 legislative session, the Senate Education Committee drew the curtains on Carlson's proposal. Nevertheless, because vouchers receive strong support from many constituencies, attempts to enact voucher legislation will continue in future legislative sessions.

The voucher legislation Carlson favored would have allowed parochial schools to participate. If passed in this form, the legislation would have inevitably faced constitutional challenges. The First Amendment's Establishment Clause, according to Thomas Jefferson,

8. See Futterman, supra note 7, at 713 (citing U.S. DEP'T OF EDUCATION, AMERICA 2000: AN EDUCATION STRATEGY 5-7 (1991) (noting that the concept of vouchers is to ensure schools are "accountable" by exposing them to free market competition). This argument implies that parents, acting as educational consumers for their children, would be able to influence how schools spend money because schools as merchants would have to satisfy parents as customers. Id.; see also CAPITALISM, supra note 7, at 94-95 (suggesting the voucher system "permits each to satisfy his own taste").


10. See Jack B. Coffman, Vouchers Will Alter Political Terrain, ST. PAUL PIONEER PRESS, Jan. 16, 1996, at 1A. In seeking enactment of voucher legislation, "[l]egislative leaders say they have been told the governor's staff will spend 80 percent of its time on the proposal." Id.

11. Id. Carlson threatened to veto education aid bills failing to include a pilot voucher program. He stated, "We will go to the wall on that one." Id.

12. Debra O'Connor, Senate Panel Turns Down Voucher Plan Governor Hopes His School Proposal Will Get Another Hearing This Session, ST. PAUL PIONEER PRESS, Feb. 3, 1996, at 1A. Because the Senate Education Committee turned down vouchers, it is expected that the House Education Committee will not even vote on voucher bills. Id.

13. See Coffman, supra note 10, at 1A. Supporting vouchers are business leaders, Roman Catholic bishops, Christian conservatives, the Republican party and private schools. Vouchers' lack of success in the 1996 legislative session probably had more to do with the Republicans' reluctance to support vouchers in an election year than with a decline of their popularity. Id.; see also O'Connor, supra note 9, at 1A (indicating school vouchers were unlikely to succeed in an election year).

14. O'Connor, supra note 9, at 1A (discussing Carlson's desire to include religious schools in a school voucher program to expand school choices).

15. U.S. CONST., AMEND I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Id.
erected “a wall of separation between church and state.”16 This wall is joined by walls separating church and state constructed by Minnesota’s constitution.17 Voucher opponents would assert that these walls are pierced when school voucher legislation permits parochial schools to participate. Whether voucher legislation collides with these walls turns on the U.S. and Minnesota Supreme Courts’ interpretations of federal and state constitutional establishment clauses.

Because Governor Carlson’s attempts to enact voucher legislation failed, the issue of whether voucher legislation in Minnesota can constitutionally include religious schools never ripened. Yet school vouchers’ popularity insures that bills will be proposed in following legislative sessions. Therefore, determining whether parochial schools can constitutionally participate in school voucher programs remains an important concern for Minnesota’s policy makers. This Article examines this issue.

Part II of this Article explores the theoretical underpinnings of school vouchers. Additionally, the ascension of vouchers will be tracked at the federal and state levels, specifically including a discussion of school vouchers in Minnesota. Part III examines whether school voucher legislation including religious schools is permissible under the U.S. Supreme Court’s analytical frameworks for determining when governmental actions violate the Establishment Clause. Part IV examines whether school voucher legislation can withstand scrutiny under Minnesota’s constitutional counterparts to the Establishment Clause. Part V concludes with a summation of school voucher legislation’s fate when scrutinized under federal and Minnesota establishment clauses.

16. Reynolds v. United States, 98 U.S. 145, 164 (1879) (citing Jefferson’s reply to an address to him by a committee of the Danbury Baptist Association). Chief Justice William Rehnquist blasted the notion that Jefferson’s statement should be the foundation for Establishment Clause analysis. Wallace v. Jaffree, 472 U.S. 38, 91-92 (1985) (Rehnquist, J., dissenting) (noting that Thomas Jefferson was not even in the country when the Establishment Clause was debated, and that James Madison was the driving force behind the Amendment). Id. at 92. Madison thought the Amendment was “designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects.” Id. at 98. Madison did not see it as requiring neutrality on the part of government between government and religion. Id.

17. MINN. CONST. art. I, § 16. “Nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious ecclesiastical ministry, against his consent.” Id. Also, article XIII, section 2 of Minnesota’s Constitution states that “[i]n no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.” MINN. CONST. art. XIII, § 2.
II. HISTORY OF SCHOOL VOUCHERS

A. Vouchers: A Theory for School Improvement

1. Competition and Parental Choice: Enduring Approaches for School Improvement

The belief that competition in education leads to improved learning among students dates over two centuries. Adam Smith suggested in *An Inquiry Into the Wealth of Nations* that allowing students to choose their own teachers would compel teachers to deliver a quality education. Students would choose the best teachers available; ineffective teachers would attract no students, and thus, no income. The belief that parents should have power over selecting where their child attends school is not novel either. In *The Rights of Man*, Thomas Paine supported granting lower income parents funds derived from taxes that would allow parents to choose schools for their children. Similar to Smith’s view, John Stuart Mill in the 19th century asserted that teachers’ salaries that were unreflective of ability provided no incentive for teachers to sharpen their educating skills. Hence, he proposed tying teachers’ salaries to their teaching ability to elicit better teaching. Smith, Paine, and Mill’s ideas concerning choice and competition in education correspond with contemporary views supporting school voucher programs. Being noted for political and economic philosophy, rather than education philosophy, their ideas initially drew little attention.

In contemporary times, Milton Friedman stands as the father of school choice. Friedman’s theories echo those of Smith, Paine, and
Mill. He proposes that allowing parents to choose which schools their child attends compels schools to more efficiently and effectively educate America's youth. Public schools, according to Friedman, are essentially indolent monopolies. Forcing schools to compete for a limited supply of school vouchers would theoretically eradicate this monopoly. Market forces, not political forces, would foster improvements in public education. As an example of how a school voucher program would function, Friedman pointed to the Servicemen's Readjustment Act of 1944, or "G.I. Bill." Veterans were able to

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24. See Free, supra note 7, at 154. Allowing governments to provide education reflected "the early emergence among intellectuals of a distrust of the market and of voluntary exchange." America's school system became an "island of socialism in a free market sea." Id.; see also Kirkpatrick, supra note 1, at 52. According to Kirkpatrick, "No other western democracy has so adamantly stood face to face with its principals of liberty and refused" to recognize that parents should have the right to send their children to the school of their choice. Id. (quoting Virgil Blum, Freedom in Education, 150 (1958)).

25. Capitalism, supra note 7, at 94-95. Friedman suggests that subsidizing institutions, such as public schools, inefficiently allocates resources because all of the institutions' activities are supported, and not merely those activities that institutions do well. Id. at 94.

26. Public schools act as monopolies because parents have no plausible choice when it comes to selecting a school for their children. Henig, supra note 1, at 59 (citing Capitalism, supra note 7). Either parents pay tuition to send their children to private schools while already paying taxes to finance public schools, or parents must move so their children can attend school in another district. Because consumers (i.e., parents) have no real alternatives, public schools have no incentive to provide either an inexpensive or quality education because funding remains constant. At least under private monopolization consumers can theoretically quit consuming the monopolized product. In contrast, consumers cannot opt out of public monopolies. They must continue paying taxes. Id.

27. Daniel, supra note 2, at 25 (citing Peter Drucker, Management 131-33 (1974)). Those in business realize that satisfying the customer is the "only way to guarantee continued existence and growth of the company." Because the public schools receive no real competition, they have no compelling need to satisfy the customer (i.e., parents). Id.

28. Chubb & Moe, supra note 1, at 217. Democratic forces, though revered, impede school performance because political control requires that bureaucracies ensure schools are complying with public demands. Chubb and Moe argue that schools driven by market forces would not require this control and thus would be more efficient. Additionally, Chubb and Moe conclude that school organization is an important factor in the productivity of schools. Their studies suggest that schools that are restrained by inflexible rules are not as effective as more autonomous schools. Political forces and administrators create and implement burdening rules. By contrast, under a school voucher program, market forces often determine which rules would be needed. Thus, schools would have to be well organized and attuned to parents' needs as customers. Id.

29. Friedman & Friedman, supra note 7, at 161 ("The voucher plan embodies exactly the same principals as the G.I. bills that provide for educational benefits to military veterans."). Veterans received vouchers for educational expenses and were free
attend any school, public or private, while the federal government paid for tuition. Friedman suggested that the popular and successful G.I. Bill provided a model for school vouchers to follow. Absent from Friedman's writings is proof that the G.I. Bill improved colleges and universities; consequently, analogies between the G.I. Bill and voucher legislation are perhaps useful only for showing that voucher legislation can be adequately administered.

2. School Choice Support: Beyond Free Market Advocates

Most school voucher supporters who concur with the market force theory for improving schools tend to be conservatives. Not surprisingly, those opposing school vouchers typically fall in the middle or left end of the political spectrum. Vouchers, however, also draw support from various groups critical of traditional public schools who are unconcerned with the effects of market forces. For example, some have suggested school choice facilitates cultural diversity because parents will be able to send their children to schools emphasizing children's cultural heritage. In the future, voucher legislation may...
attract support from parties on both ends of the political spectrum. Carlson's voucher proposal did not, but future voucher legislative attempts may tap enough support from traditionally Democratic-leaning groups to secure passage.

B. History of School Vouchers in the Federal Government

Initially, Milton Friedman's theories stirred little interest in school vouchers. By the late 1960s and early 1970s, however, vouchers began receiving attention from academics, conservative think tanks, and parochial school advocates. For the first time federal public officials took a formal interest in school vouchers. The U.S. Office of Economic Opportunity sought school districts willing to implement a demonstration voucher program using government funding. Only one school district, Alum Rock in California, accepted the OEC's offer. Studies of Alum Rock's voucher program found that participating parents viewed the program favorably and took more interest in their children's education once the program commenced. Nevertheless, the experiment, begun in 1972, ended five years later when federal funding was withdrawn. Analysts note that only public schools participated in the program and no teachers were permitted to be terminated because of vouchers' effects; thus, advocates suggest the true powers of vouchers were suppressed. Therefore, many education policy experts consider the Alum Rock project an unreliable

roots political movements. Fourth is the contingent alliance, who support school choice merely because it means change, and not for any ideological reasons. Id. at 6. Attention to school choice was "episodic" until it was "grafted" onto the privatization movement. In fact, into the 1980s the trend was toward more government involvement in education. Id. at 64. Conservatives were attracted by the laissez-faire theory to educational improvements. Also, academics were interested in voucher's "intellectual power." Parochial school supporters felt vouchers would funnel more students to parochial schools. Id.

37. The U.S. Office of Economic Opportunity was an important department for Lyndon Johnson's "War on Poverty." Id. at 65. The voucher plan it proposed sought equality of opportunity for minorities and was not advocated for its market force effects. Id. at 67.

38. Id. at 66-68 and accompanying text.

39. HENIG, supra note 1, at 132 (noting that satisfaction of the Alum Rock project, as well as Milwaukee's current voucher program, waned in following years when parents found the promises made by voucher proponents were not being realized); infra notes 66-68 and accompanying text.

40. HENIG, supra note 1, at 67 (noting that the Alum Rock school district did not have the finances to maintain the program without federal assistance).

41. Id. at 120; cf. KIRKPATRICK, supra note 1, at 95 (suggesting the Alum Rock's example was not followed by other school districts because information about it was not dispersed).
forecast of the effects an unfettered school voucher program would foment.42

As time passed, the perceived failings of America's public schools created a political climate favorable for spawning school reform proposals.43 Critics insisted that America's public schools were producing children unable to attain their foreign peers’ education levels.44 In 1981, a prominent national report stated that America's public schools were falling into a "rising tide of mediocrity that threatened the very survival of America."45 Policy makers searched for ways to curb the perceived failings of America's schools. Many believed school vouchers were the answer.

Throughout two presidential terms, President Reagan urged Congress to pass voucher legislation.46 These attempts failed, but interest in school vouchers had been piqued.47 In 1991, the Bush Administration developed legislation promoting school choice.48 A major portion of President Bush’s “America 2000,”49 was dedicated to

42. CHUBB & MOE, supra note 1, at 308-09 n.50 (noting that the Alum Rock project was "ill fated" because of poor design and implementation and therefore, the project “cannot meaningfully be a test of anything”); see also HENIG, supra note 1, at 120 (noting that voucher proponents give little weight to the Alum Rock project’s results).

43. See Underwood, supra note 1, at 599 (noting the popularity of vouchers has recently “caught fire” when confidence in public schools declined).

44. CHUBB & MOE, supra note 1, at 1. America's schools have been subject to “savage” criticism for not meeting the needs of children. Id. Schools have been failing to provide an adequate education in core courses, drop out rates have increased, and mean SAT scores of high school seniors dropped throughout the 1970s. Id.; see, e.g., DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 127 (1995). The mean SAT scores of college bound seniors in Mathematics and Verbal testing declined from 1966 to 1980. However, the statistics show a leveling off of this trend and slight increases in SAT scores since 1980. Id.

45. Daniel, supra note 2, at 6 (citing NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, U.S. DEPARTMENT OF EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATION REFORM, A REPORT TO THE NATION AND THE SECRETARY OF EDUCATION 5 (1983)); cf. HENIG, supra note 1, at 26 (citing Paul E. Peterson, Background Paper, in Twentieth-Century Fund, Making the Grade, at 30). Nearly every decade an educational crisis is said to be looming. Peterson, supra at 30. Crises have been alleged in the 1920s (inefficiency), 1930s (fiscal problems resulting from the Great Depression), 1950s (the Soviet Union’s challenge of the United States’ technological supremacy), and 1960s (racial integration and excessive bureaucratization). Id. As a result of these continual “crises,” Peterson suggests “caution be exercised” so policy makers will not overreact. Id.

46. HENIG, supra note 1, at 72 (noting efforts were made by the Reagan Administration in 1983, 1985, and 1986 to enact voucher programs).

47. Id. at 73 (noting a READERS’ GUIDE TO PERIODICAL LITERATURE survey showing the number of newspaper articles concerning school vouchers rose in the 1980s).


establishing a federally-funded school voucher program.\textsuperscript{50} Pursuing a "G.I. Bill for Children" President Bush continued pressing for school choice legislation in 1992.\textsuperscript{51} President Bush's defeat in 1992 at least temporarily dampened the chance that school voucher legislation would be enacted at the federal level.\textsuperscript{52} Nevertheless, a steady stream of school choice proposals, often implemented through vouchers, continue to be introduced in Congress.\textsuperscript{53}

C. History of School Vouchers in State Governments

State legislature have made sporadic attempts to enact voucher-type programs. For example, Virginia's General Assembly created legislation granting tuition vouchers to children of veterans killed or disabled in World War II.\textsuperscript{54} In the early 1970s, legislators in Massachusetts and

\textsuperscript{50} Title V was devoted to promoting school choice in an effort to strengthen academic performance of America's students. H.R. 2460, 102nd Cong., 1st Sess., Title V (1991). The bill proclaimed that "choice in education creates market-based accountability, encourages school diversity and competition and provides parents with a sense of investment in their schools." Id. § 501. Furthermore, the bill stated that economically-disadvantaged children deserved the same access to schools as other, more economically-advantaged children. Id. In 1992, then-President George Bush proposed "G.I. Bills for Children," which would create scholarships for low income students, allowing them to attend public, private, and religious schools. \textit{HENIG}, supra note 1, at 92-93.

\textsuperscript{51} S. 3010, 102d Cong., 2d Sess. (1992) (referred to as the "Federal Grants for State and Local 'G.I. Bills' for Children Act"). This bill would have granted scholarships to lower-income students to attend private and parochial schools. Id. § 2; \textit{see also} S. 2, 102d Cong., 2d Sess. § 202(d)(1) (1992) (suggesting implementation of a federally-funded school choice program).

\textsuperscript{52} \textit{See HENIG}, supra note 1, at 200. In the 1992 presidential campaign, Bush supported voucher programs that would include private and religious schools. \textit{Id.} Clinton, however, argued for school choice only among public schools, a far less contentious proposition. The National Education Association, an extremely influential teachers' union, would feel less threatened by a school choice program that did not include private schools. \textit{Id.}


Washington favored implementing school choice programs similar to current school voucher proposals.55 These programs intended to reimburse parents for tuition expenses incurred by sending children to sectarian and non-sectarian private schools.56 Perhaps as a precursor to current voucher legislation attempts, Virginia's and Washington's Supreme Courts determined their states' respective programs would unconstitutionally aid religion, while Massachusetts' constitution forbade even private schools from receiving public funds.57

Doubts about the ability of public schools to prepare children for future employment were felt by state legislators too. In response, state policy makers set out to cure public schools' ills. Sweeping reforms were enacted, including more stringent graduation requirements, longer school years, and higher academic performances of future teachers.58 Some states initiated school choice programs.59 Various municipalities created "magnet" schools that permitted parents to send their children to specialized schools.60 The increased attention schools received was reflected by the fact that per pupil expenditures

56. Weiss, 509 P.2d at 976. The legislation struck unconstitutional made grants available to low income students for use in schools of their choice. Id. The proposal reviewed by Massachusetts Supreme Court would have granted $100 to school children that could be used at any school, including parochial schools. Opinion of the Justices, 259 N.E.2d at 566.
57. Virginia's Supreme Court held the tuition grants unconstitutional because they would have permitted state funds to support religion. Almond, 89 S.E.2d at 858 (applying VIRG. CONST. § 58, which states "no man shall be compelled to . . . support any religious worship, place or ministry whatever" and VIRG. CONST. § 67 prohibiting the General Assembly from "mak[ing] any appropriation of public funds . . . to any church . . . society, [or] association . . . controlled by" religious institutions). Washington's Supreme Court held that tuition grants resulting in "indirect" and "incidental" aid supporting parochial schools violated the state's constitution. Weiss, 509 P.2d at 978. Similarly, the Massachusetts Supreme Court held that tuition grants could not support private schools, whether parochial or not. Opinion of the Justices, 259 N.E.2d at 566.
58. CHUBB & MOE, supra note 1, at 10. States' attempts to reform their public schools were "frenetic." Reforms included more stringent teacher qualifications, stricter graduation requirements, and harsher disciplinary policies. Also, teacher merit pay, longer school years, and longer school days were touted as cures to America's public school problems. Id.
59. Id. at 10. A large number of states introduced stricter graduation requirements, increased teacher certification standards and salaries, created longer school days, and introduced "magnet schools." Id.; see, e.g., MINN. STAT. § 120.062 (1994) (allowing students to attend any public school in or out of that child's school district); OHIO REV. CODE. ANN. § 3313.97 (Baldwin 1995) (creating an open enrollment program in Ohio).
60. HENIG, supra note 1, at 112.
on education increased nearly fifty percent during the 1980s. Nevertheless, America's confidence in public schools was unaffected by these reforms.

Interest in school vouchers exploded at the state level in the late 1980s and early 1990s. Numerous bills were introduced to state legislatures that would create school voucher programs. In California, a tuition voucher proposal was submitted to a referendum vote. The proposal was soundly defeated, but the referendum vote brought increased focus on vouchers. Currently, a number of private voucher programs are being operated. The only publicly-funded school voucher plan exists in Wisconsin. However, Ohio enacted voucher legislation that will take effect in the 1996-1997 school year. These pilot voucher programs focus on providing school choice to inner-city school children whose parents have low incomes.

61. See Department of Education, National Center for Education, Office of Education Research and Improvements, Digest of Education, at 49 (1995). In 1980, per-pupil spending in average daily attendance was slightly over $4,000 in constant 1987 dollars. By 1990, expenditures had increased to nearly $6,000 per pupil in constant 1987 dollars. Id.

62. Egle, supra note 23, at 461 (citing National Center for Education Office of Evaluation on Research and Improvements Digest of Education, which indicated that in 1981 the public rated public schools 2.20 on a scale of 4, while in 1990 the nation rated schools as a 1.98).


65. Weishaar, supra note 1, at 543 (citing Dan Morain & Sandy Banks, State Voters Reject School Vouchers 2-1, L.A. Times, Nov. 3 1993, at 1). The voucher proposal, coined Proposition 174, would have permitted children to attend public, private, and parochial schools using state funded tuition vouchers. Id.


69. Wis. Stat. Ann. § 119.23, subd. 2(a)(1) (West 1991). Families with an income below 175% of the federal poverty level are eligible. Id.; Thomas Suddes, Budget Accord Has Few Surprises Highlights Are Tax Cut And Voucher Pilot, THE PLAIN DEALER (Cleveland),...
D. School Vouchers in Minnesota

A number of laws designed to curb eroding student performance in public schools have been enacted in Minnesota.70 The Legislature passed the Post Secondary Enrollment Option Act, which allows high school students to attend college classes while receiving credits that could satisfy curriculum requirements at either secondary or post-secondary schools.71 The Legislature also passed “magnet” school legislation to encourage school districts to expand opportunities for disadvantaged children.72 Additionally, the state enacted a school choice program that allows students to attend any public school desired.73 Minnesota’s school reforms have been considered the most sweeping in the country.74 Little evidence suggests that these reforms have increased student performance, however.75 Consequently,

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June 25, 1995, at 1A (declaring Cleveland’s voucher program would be available to low-income families).

70. KIRKPATRICK, supra note 1, at 154-55 (citing TIM MAZZONI & BARRY SULLIVAN, STATE GOVERNMENT AND EDUCATIONAL REFORM IN MINNESOTA, THE FISCAL, LEGAL AND POLITICAL ASPECTS OF STATE REFORM OF ELEMENTARY AND SECONDARY EDUCATION 189, 190 (Van Mueller & Mary McKeown eds., 1986)). The Minnesota Citizens League called for deregulating and decentralizing education through parental choice. Id. at 155. Then Governor Rudy Perpich called for state-wide educational choice legislation, which was passed in 1988. Id.

71. MINN. STAT. § 123.3514, subd. 1-5 (1994).

72. MINN. STAT. § 124C.498, subd. 1 (1994). This legislation establishes a metropolitan magnet school program. The law makes funds available for school districts to create magnet schools that can meet disadvantaged children’s needs. Id. The Legislature also passed a law allowing school boards to sponsor licensed teachers’ efforts to establish outcome-based schools. MINN. STAT. § 120.064, subd. 1-5 (1994).

73. MINN. STAT. § 120.062 (1994). Two limitations prevent unfettered open enrollment among public schools. First, school districts may opt to deny students from entering its schools. MINN. STAT. § 120.062, subd. 3 (1994). Additionally, students may be prevented from crossing district boundaries if their resident district is under a desegregation plan. MINN. STAT. § 120.062, subd. 5. (1994); see also HENIG, supra note 1, at 123 (noting that 88% of white open enrollment applicants in Minneapolis were denied transfer). These restrictions, coupled with the fact that only public schools can participate, render Minnesota’s open enrollment plan unsatisfying to many school choice advocates. Id.

74. CHUBB & MOE, supra note 1, at 210. Those who have been affected by Minnesota’s reforms are satisfied with the changes and reportedly believe they are benefitting from the programs. However, the results of the reforms are preliminary. Id.

75. E.g., MINNESOTA DEPARTMENT OF EDUCATION, MINNESOTA EDUCATION OVERVIEW, DATA MANAGEMENT, table 5.5 at 31. Minnesota’s high school dropout rate has been increasing steadily through the 1980s and 1990s. Id; cf. MINNESOTA DEPARTMENT OF EDUCATION, DEPARTMENT OF CHILDREN, FAMILY & LEARNING, REPORT TO THE GOVERNOR AND 1995 LEGISLATURE (1995). Minnesota students’ ACT scores are higher than the national average, but since 1980 they have dropped slightly relative to
Minnesota's education reforms have not placated school voucher advocates. 76

According to voucher advocates, schools will not see measurable improvements until the state implements school voucher legislation. 77 Minnesota Governor Arne Carlson's interest in school vouchers reflects this belief. 78 The voucher bill he supported was intended to grant families in Minneapolis, St. Paul, Brooklyn Center, and at least one rural school district tuition vouchers redeemable at any school, whether it's public, private, or sectarian. 79 If passed, this legislation would have been a small but crucial step toward realizing many voucher advocates' goal of making vouchers available to all Minnesota parents with school-aged children. 80

Heading into Minnesota's 1996 legislative session, vouchers carried strong public support. 81 One poll showed that fifty-seven percent of those responding supported a voucher program in Minnesota. 82
Though school voucher bills have been introduced in other sessions, the Governor's support, along with the public's, fueled speculation that some form of voucher legislation would be enacted in 1996. After vouchers' rejection by the Senate Education Committee, school voucher advocates must now pin their hopes on future legislative sessions. Yet support for school vouchers will continue until perceptions of public schools improve.

Because parochial schools constitute over seventy percent of the private schools state-wide, measurable increases in competition among schools will not take place without parochial school participation in a voucher program. For this reason, many voucher advocates will insist voucher proposals include parochial schools. If so enacted, school voucher legislation would be unable to avoid a confrontation with the walls separating church and state.


84. See O'Connor, supra note 9, at 1A (suggesting vouchers would receive strong support with the Governor's support); Coffinan, supra note 10, at 1A (noting Steve Sviggum, a Republican legislator, felt that with the governor's influence, almost all bills they support end up enacted).

85. See, e.g., Thomas Collins, St. Paul Board Expected To Oppose Vouchers For Tuition, ST. PAUL PIONEER PRESS, Feb. 27, 1996, at 2B. Governor Carlson tried reviving school vouchers for the 1996 legislative session by offering a $12 million incentive to the St. Paul City School Board. The money was turned down. In an attempt to sway city voters, Carlson circulated information indicating that in 40 of 47 elementary schools, eight of nine middle schools, and four of five high schools over half the students fell below the national average on achievement tests. Id.; see also Richard Chin, Half of Minnesota Parents Would Reject Public Schools, Poll Says, ST. PAUL PIONEER PRESS, Feb. 16, 1994, at 1A. Chin cited a study that found over half of Minnesota parents would send their children to private schools if financially feasible. Moreover, 61% of Minnesotan's favored voucher legislation that would allow private and parochial schools to participate. Id.

86. See MINNESOTA DEPARTMENT OF EDUCATION, MINNESOTA DEPARTMENT OF CHILDREN, FAMILIES AND LEARNING DATA MANAGEMENT, INFORMATION ON MINNESOTA NON PUBLIC SCHOOLS, at 6, 1994-95. Ninety-one percent of Minnesota students attending private schools do so at parochial schools. Id. at 6, fig. 2. Seventy-one percent of the private schools in Minnesota are sectarian. Id. at table 7.

87. See Minnesota Fed'n of Teachers v. Mammenga, 485 N.W.2d 305 (Minn. Ct. App.) rev. denied, (Minn. 1992). The Minnesota Federation of Teachers challenged the Post Secondary Enrollment Option Plan, which allows students to attend colleges, including religiously-affiliated colleges for credit, on the ground that it allowed state tax dollars to support sectarian interests. Id. The Minnesota Court of Appeals did not accept this argument. Id.; Sharon Theimer, Former Education Chiefs Support Religious Options in School Choice, ST. PAUL PIONEER PRESS, Sept. 6, 1995, at 3C. The Milwaukee Parental Choice Program was this summer amended to allow vouchers to be submitted at parochial schools; the Wisconsin Supreme Court issued an injunction against the use of vouchers in religiously affiliated schools pending its determination of whether the amendment is prohibited by church-state intermingling. Id.
III. SCHOOL VOUCHERS AND THE U.S. CONSTITUTION

The U.S. Constitution prohibits laws respecting an establishment of religion. Nearly all constitutional historians agree that the framers intended to prevent the federal government from creating a state-instituted religion. Beyond this axiom, opinions diverge. Many argue the wall of separation is breached whenever any governmental support flows to sectarian interests. Others believe that as long as government aid does not favor religion, there will be no Establishment Clause violation. The U.S. Supreme Court has positioned the Establishment Clause somewhere between these views.

The Establishment Clause has proven difficult for the Court to interpret and apply. This has been especially true when applying the Establishment Clause to programs providing public assistance to parochial schools and parents of children who attend parochial schools. In these circumstances, the "[Court] can only dimly perceive the lines of demarcation." The next section of this Article determines where the U.S. Supreme Court places this line, and which side of the line school vouchers legislation that includes parochial schools falls.

A. The Lemon Test

In Lemon v. Kurtzman, the U.S. Supreme Court developed a three-pronged test to determine when public funds can flow to sectarian interests without offending the Establishment Clause. Under Lemon, a statute first must have a secular purpose. Second, the primary effect of the legislation must neither advance nor inhibit religion.

90. Weishaar, supra note 1, at 545. At the extremes of Establishment Clause interpretations are two schools of thought. First are the "non-preferential accommodationists," who believe the government can support religion provided no particular religion is singled out for support. At the other extreme are the "strict separationists," who say no form of government aid reaching sectarian interests is allowable. Id.
91. Id.
92. Stick, supra note 64, at 445-46.
94. Id. at 393.
95. Id. (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).
96. 403 U.S. 602 (1971).
97. Id. at 612-13.
98. Id. at 612.
99. Id.
Third, the statute must not foster "excessive government entanglement with religion." Failing any one of the three prongs renders a statute unconstitutional.

The first two prongs of Lemon originated in Abington School District v. Schempp.101 In Schempp, the Court found that a Pennsylvania statute requiring teachers to read Bible verses at the start of each school day violated the Establishment Clause.102 The test applied examined whether the statute had the purpose or effect of either advancing or inhibiting religion.103 If the statute did either, it violated the Establishment Clause. The purpose of these two prongs is to ensure that governments maintain a neutral posture toward religion.104

In Walz v. Tax Commission of New York,105 the Court determined whether New York could grant property tax exemptions for religious organizations.106 Benefits received by the religious organizations required no "sustained and detailed administrative relationships" to ensure compliance with the statute.107 The nature of this type of aid contrasts with direct grants to religious organizations that result in administrative relationships requiring monitoring to prevent public aid from being used for sectarian purposes.108 Hence, the third prong emerged to prevent entwining relationships between government and religion.

Various Supreme Court justices have expressed discontent with the Lemon test.109 Their frustration perhaps lies with the effects prong, which requires distinguishing between government actions having the primary effect of advancing religion, and those that do so only residually.110 Still, the Court continues to use the Lemon test.111

100. Id. (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
102. Id. at 205, 223.
103. Id. at 222.
104. The need for neutrality stems from history's lessons that strong sects could fuse their power with the government's. Id.
106. Id. at 666-67.
107. Id. at 676.
108. Id.
109. See, e.g., Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring) (stating "I do not wish to be seen as advocating, let alone adopting [Lemon] as our primary guide."); Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting). In a general attack on the U.S. Supreme Court's misunderstanding of the meaning of the Establishment Clause, Justice Rehnquist stated that the "Lemon test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests." Id.
110. See Laurence H. Tribe, American Constitutional Law, § 14-10, at 1215 (2d ed. 1988) (stating that the Court bases its analysis of the effects prong on a "metaphysical distinction between direct and immediate effects on the one hand and effects
Therefore, the *Lemon* test, or a test relying on cases applying it, would likely serve as the test under which school vouchers will be scrutinized. For this reason, an analysis of the Court's applications of the *Lemon* test is needed to determine how school voucher legislation including parochial schools would fare under Establishment Clause scrutiny.

1. **The First Prong: Secular or Sectarian Interest**

School aid cases do not often result in disputes over whether legislation has a secular purpose. A very secular motive, improving education, predominantly drives school funding increases. Moreover, the Court is reluctant to ascribe an unconstitutional motive to legislation. For this reason, only in egregious situations where the statute's alleged secular purpose is a "sham" will the Court strike it down as unconstitutional for having the purpose of promoting religion. As a result, the Court devotes little time to analyzing this prong.

2. **The Second Prong: Primary Effects**

*Lemon*'s second prong seeks to ensure governmental programs deemed indirect and incidental on the other.


112. See id.; *Heise*, supra note 66, at 143 (stating that *Zobrest* showed the Court had not abandoned *Lemon* for examining the constitutionality of school aid cases).

113. School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 383 (1985) (stating that "a[s] has often between true in school aid cases, there is no dispute as to the first test."); see *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (stating that "[u]nder our prior decisions, governmental assistance programs have consistently survived this inquiry even when they have run afool of other aspects of the *Lemon* framework.").

114. See *Mueller*, 463 U.S. at 395 (noting the many important reasons for spending public money on education).

115. Id. at 394-95 (stating that the U.S. Supreme Court is reluctant to attribute "unconstitutional motives to the States," especially when a viable secular purpose for the state's legislation can be gleaned from the face of the statute).


117. See, e.g., *Zobrest*, 113 S. Ct. at 2465 n.4 (Respondents conceded statute providing interpreters for hearing impaired persons had a secular purpose); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 485 (1986) (holding that a statute granting aid to visually impaired persons had a secular purpose). *See generally* Futterman, supra note 7, at 726 (stating that "no law providing public aid to religious schools has been invalidated on the secular prong of *Lemon.*").
remain neutral with respect to religion. Federal and state governments are not permitted to allocate funds in a manner that will result in a "direct subsidy" to sectarian schools. Even funds that do not flow directly to religious schools may have the effect of a direct subsidy despite being distributed to students or parents. Conversely, the Establishment Clause is not violated each time funds initially held by the state find their way into the hands of religious institutions. For example, no violation occurs when a state employee donates part or all of her paycheck to a church.

The effects prong is the most important element of the *Lemon* test. It is also the most difficult to analyze. Therefore, a survey of the Court's prior cases involving school aid sheds light on how the Court would apply the second prong of *Lemon* to school voucher programs including parochial schools.

\hspace{1cm}a. Committee for Public Education v. Nyquist

In *Nyquist*, the Court determined whether amendments to New York's tax laws designed to help children in nonpublic schools violated the Establishment Clause. The first tax provision provided direct money grants to private schools for the purposes of maintaining and repairing school facilities and equipment. The second program allowed parents with low incomes to receive reimbursements for private school tuition. The third program allowed parents not entitled to tuition reimbursements to deduct amounts spent on their children's private school tuition from their taxable income. Each of these programs was found to have the effect of promoting religion and therefore were found unconstitutional.

After examining the first program, the Court concluded that there was no way to ensure the direct money grants to the predominantly

\hspace{1cm}118. *Zobrest*, 113 S. Ct. at 2466; see also *Grand Rapids Sch. Dist.*, 473 U.S. at 382 (finding government aid may not have the "effect of promoting a singular religion, or religion generally"); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 788 (1973) (stating that governments should refrain from advancing or inhibiting religion and instead be neutral toward religion).

\hspace{1cm}119. *Witters*, 474 U.S. at 487.

\hspace{1cm}120. Id.

\hspace{1cm}121. Id. at 486.

\hspace{1cm}122. Id. at 487.

\hspace{1cm}123. 413 U.S. 756 (1973).

\hspace{1cm}124. *Nyquist*, 413 U.S. at 759.

\hspace{1cm}125. The grants were directed at qualifying nonpublic, nonprofit schools serving low-income students. Id. at 762-63.

\hspace{1cm}126. Id. at 764.

\hspace{1cm}127. Id.
Roman Catholic schools went to secular purposes. Without restrictions on the uses of the funding and some way to ensure the restrictions were complied with, the aid effectively directly subsidized religion. The Court applied the same reasoning when striking down the tuition reimbursement and tax deduction programs. The state argued that the tax programs removed the state's ability to direct funds to private schools because it was parents' decisions to send their children to parochial schools that allowed those schools to receive public funds. Thus, contended the state, the tax statutes were constitutional because the states' actions did not determine whether sectarian schools received state funds. The Court, however, indicated that intervening parental choice was just one of many factors necessary to determine whether funds have the effect of promoting religion. In cases where the Court permitted public aid to flow to parents with parochial school children, there was no threat that public funds could be used for sectarian purposes; that threat could not be suppressed in Nyquist. Furthermore, the statutes' benefits were available only to parents with children attending private schools, whereas constitutionally-permissible statutes allowed all parents to avail state benefits.

b. Mueller v. Allen

A decade after Nyquist, the Court confronted a similar tax scheme in Mueller v. Allen. At issue were Minnesota laws allowing state

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128. *Id.* at 775.
129. "Nothing in the statute . . . bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel." *Id.* Thus, the Court stated that it could not be denied that the statute has the primary effect of advancing religion. *Id.*
130. *Id.* at 780-89.
131. *Id.* at 791.
132. *Id.* at 781.
133. *Id.*
134. *Id.*
135. *Id.;* Everson v. Board of Educ., 330 U.S. 1 (1946). In *Everson*, the Court upheld a New Jersey statute permitting parents of school children attending parochial schools to use buses funded by the state. The Court found that the state contributed no money to the parochial schools and did not support them. *Id.* at 18. It merely enabled children to reach their schools safely, regardless of their religion. *Id.; see also* Board of Educ. v. Allen, 392 U.S. 236 (1968). In *Allen*, the Court did not find the second prong of *Lemon* violated when the state of New York lent secular textbooks to children attending public or private schools. *Id.* The government benefits conferred in *Allen* and *Everson* had no sectarian characteristics and could not be put to secular uses.
136. *Nyquist*, 413 U.S. at 782 n.38. In *Allen* and *Everson*, tax exemptions were provided to all parents, not just those with students attending private schools. *Id.*
taxpayers to deduct from their taxable income expenses for their children’s tuition, textbooks, and transportation. 138 Those deductions were available to parents with children attending parochial schools. Initially, the Court explained that Minnesota’s tax scheme included many deductions and therefore warranted the Court’s deference. 139 The Court’s decision, however, turned on two other considerations. First, and most significantly, the exemptions were available to all parents. 140 In Nyquist, the only beneficiaries of the tax statutes were parents whose children attended private schools. 141 Conversely, Minnesota’s statute permitted parents to take deductions whether their children attended public or private schools. 142 Also important to the Court was the fact that “numerous private choices” of parents directed the funds to parochial schools. 143 Only after parents decided to send their children to parochial schools did public funds reach religion. 144 Therefore, the tax deduction created a constitutionally-permissible “attenuated benefit” to parochial schools. 145 Thus, it passed the effects prong of Lemon. 146

The Nyquist Court did not decide whether tax deductions could be taken by parents with children in parochial schools; thus, the distinctions drawn by the Mueller Court between the statutes in Nyquist and Mueller rested on valid structural differences. 147 The actual effects of

138. Id. at 396 (discussing MINN. STAT. § 290.09, subd. 10 (1983) (repealed 1987), which permitted deductions for medical expenses, and MINN. STAT. § 290.21, subd. 3 (1933) (repealed 1987), which allowed deductions for charitable contributions).
139. Id. The many available deductions were, according to the Court, an “essential feature” of Minnesota’s tax scheme. Id. Moreover, legislatures’ creation of tax classifications are traditionally treated with deference. See Regan v. Taxation with Representation of Wash., 461 U.S. 540, 547 (1983); Madden v. Kentucky, 309 U.S. 83, 88 (1940) (acknowledging legislators’ ability to “achieve an equitable distribution of the tax burden” because they have “familiarity with local conditions”). Considering the size of the legislation when analyzing whether it aids religion illogically implies that the larger the tax legislation, the less important concerns over provisions in the legislation that advance religion become. See Weishaar, supra note 1, at 552 n.79. If the court’s logic were followed, Legislatures could “bury” religious funding provisions in massive tax bills without being concerned about Establishment Clause implications.
140. Mueller, 463 U.S. at 397.
141. Id.; see supra note 135 and accompanying text.
143. Id. at 399.
144. Id.
145. Id. at 400.
146. “Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no ‘imprimatur of state approval’ can be deemed to have been conferred on any particular religion, or on religion generally.” Id. at 399 (citations omitted).
147. In Nyquist, the Court found the statute in question not to be a genuine tax deduction. Nyquist, 418 U.S. at 790 n.49. Therefore, the Court did not rule if tax
the statutes, however, were virtually identical.\textsuperscript{148} Though \textit{Mueller} purportedly allowed all parents to take deductions,\textsuperscript{149} only those with children in private schools could reap the statute’s benefits.\textsuperscript{150} In contrast, Minnesota’s public schools are free.\textsuperscript{151} Therefore, parents with children in public schools could make no textbook, tuition, or transportation deductions. Consequently, the statutes did not benefit them. Along a concomitant vein, parochial schools benefitted disproportionately from the deductions. They become less expensive for parents and thus draw more demand.\textsuperscript{152} Conversely, this tax scheme relieved public schools of no expenses. Thus, the benefits conferred by Minnesota’s tax deductions were limited to parents and the private schools their children attend.\textsuperscript{153} The Court’s distinction between \textit{Mueller} and \textit{Nyquist} rested in form, not substance.\textsuperscript{154} 

\textit{Mueller} signaled a significant shifting of the Court’s analysis of \textit{Lemon}’s effects prong in school aid cases. The effects of the statutes in \textit{Mueller} and \textit{Nyquist} were indistinguishable, yet the Court’s interpretatio-
tion yielded opposing decisions. The following opinions demonstrate that the Court's relaxed application of Lemon allows statutes to provide substantial aid to religion provided they indirectly benefit classes purportedly undefined by sectarian interests.

c. Witters v. Washington Department of Services for the Blind

In Witters, the Court determined whether a visually-impaired person's reception of state aid precluded the student's attendance at a religious school. The statute first delivered aid to the visually-impaired student; in turn, the student chose to attend a bible college. Like Mueller, students could avail the statute's benefits regardless of whether they attended public, private, or parochial schools. Thus, according to the Court, students had no incentive to enroll in sectarian schools. Moreover, the available aid flowed to religious institutions only after aid recipients made "independent" and "private choices" to attend religiously-affiliated schools. Consequently, following the Mueller Court's reasoning, the "effects" prong was not breached when the student used the funds at religious schools.

155. Compare the Court's composition in Nyquist with its composition in Mueller. The ideological leanings of the Justices likely influenced the differing results. When the Mueller decision was handed down, Justice Stewart, who voted with the Nyquist majority, was no longer on the bench. By 1983, moderately conservative Justice O'Connor had joined the bench and voted with the Mueller majority. Justice Powell, who wrote the majority opinion in Nyquist, also voted with the majority in Mueller. Justices Marshall, Burger, Brennan, Rehnquist, and White sat on the bench when both decisions were handed down. Their votes in Mueller were consistent with their positions in Nyquist.

156. 474 U.S. 481 (1986).

157. Id. at 483 (citing WASH. REV. CODE § 74.16.181 (1981), which authorized a state commission to "[p]rovide for special education and/or training in the professions, business or trades," thereby enabling visually impaired persons to become self sufficient).

158. Id. at 487.

159. Though the opinion did not explicitly rely on Mueller, it applied Mueller's analytical framework. See id. at 490 (Powell, J., concurring).

160. Id. at 488.

161. Id. at 487.

162. In one sense, the statutes in Mueller and Witters functioned differently. Under the statute in Witters, government benefits are available to the student no matter where he or she attends school. Id. By contrast, government aid in Mueller was not triggered until the student attended a private school. See supra notes 145-50 and accompanying text.

163. Witters, 474 U.S. at 489.
d. Zobrest v. Catalina Foothills School District

Zobrest164 represents the most recent case in which the Court has analyzed whether public funds unconstitutionally reached religious institutions. The Zobrest Court ascertained whether a student could be denied use of a state-provided hearing interpreter because he attended classes at a Roman Catholic High School.165 Again, the Court followed Mueller’s path.166 In overruling the Arizona Supreme Court’s determination that this resulted in an Establishment Clause violation, the Court first emphasized that the statute conferred benefits to a class of persons undefined by religious beliefs.167 Furthermore, intervening choices guided the funds to sectarian schools.168 As a result, the decision to aid parochial schools could not be linked to the state.169 Consequently, the effects prong of Lemon was not derogated: in the Court’s eyes, children, not religion, were the primary beneficiaries of governmental funds.170

3. The Third Prong: Excessive Entanglement

The “excessive entanglement” prong poses two considerations for the Court. First, a statute must not result in administrative entanglements between church and state. Administrative entanglement exists when the statute would require “comprehensive, discriminating, and continuing state surveillance.”171 Second, the statute must not promote political divisiveness.172 Political divisiveness occurs when the government’s involvement in religion is so pervasive that it risks stirring “strife” and “strain” among religious sects.173 The Court has provided little insight into when the excessive entanglement prong has been violated,174 conceding that its examination requires an “elusive

164. 113 S. Ct. 2462 (1993).
165. Id. at 2464. The statutes at issue were the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400(c) (1988), and ARIZ. REV. STAT. ANN. § 15-761 (1991 & Supp. 1992).
166. Zobrest, 113 S. Ct. at 2463.
167. Id. at 2467 (noting that the IDEA allows any qualifying “handicapped” child to receive benefits).
168. Id. at 2467-68.
169. Id.
170. Id. at 2469.
171. Lemon, 403 U.S. at 619.
172. Id. at 622.
173. Nyquist, 413 U.S. at 755; see also id. at 755 n.54 (quoting Freund, Comment, Public Aid to Parochial Schools, 82 HARV. L. REV. 1680, 1692 (1969): “[p]olitical division along religious lines is one of the principal evils that the First Amendment sought to forestall”).
174. Weishaar, supra note 1, at 568.
Recent Court decisions have omitted altogether any discussion of excessive entanglement. Therefore, it is unclear if analysis of the "excessive entanglement" prong continues serving as an important component of Lemon. Though its omission from recent Court decisions may have diminished its importance, the excessive entanglement prong is well grounded in Court precedent. Thus, the Lemon test should be examined when exploring the constitutionality of school voucher legislation.

a. Administrative Entanglement

The Lemon Court examined statutes permitting Pennsylvania and Rhode Island to provide reimbursement to parochial schools for teachers' salaries, textbooks, and other materials used for secular educational purposes. Finding the entanglement prong violated, the Court indicated that ensuring the funds were used for secular purposes required an impermissible level of governmental intrusiveness. Distinguishing benefits along secular and sectarian lines would necessitate a level of state inspection "fraught with the sort of entanglement that the Constitution forbids."

By contrast, the Mueller Court found no entanglement where parents of children in parochial schools took tax deductions for secular textbooks, tuition, and transportation costs. Determining whether books were secular or not had been allowed in previous cases. But, Justice Marshall's dissent countered that there was no way to ensure the aid conferred from tuition reimbursements went exclusively to secular interests. In his view, Minnesota's tax statutes were nothing more than taxpayer financing of parochial education. Mueller illustrates that the Court will require no effort to separate funds along secular and sectarian uses when the aid received by parochial

175. Mueller, 463 U.S. at 403 n.11.
176. See, e.g., Zobrest, 113 S. Ct. 2462 (containing no discussion of the excessive entanglement prong in the majority's opinion); Witters, 474 U.S. at 487 n.5.
177. See, e.g., Mueller, 463 U.S. at 403; Nyquist, 413 U.S. at 794; Lemon, 403 U.S. at 620.
178. Lemon, 403 U.S. at 607, 609.
179. Id. at 620.
180. Id.
181. Mueller, 463 U.S. at 403 (discussing MINN. STAT. § 290.09, subd. 22 (1982) (repealed 1987)).
182. Id. (citing Board of Educ. v. Allen, 392 U.S. 236 (1968); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975)).
183. Id. at 407 (Marshall, J., dissenting). Financial assistance for tuition payments, even though indirect, is impermissible because there is no way to be sure the aid does not benefit religion. Id. (citing Lemon, 403 U.S. at 613).
184. Id. Because taxpayers end up financing parochial education, the tax deduction creates an incentive for parents to send their children to religious schools.
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b. Political Divisiveness

In Nyquist, the Court found that statutes providing parochial schools with maintenance and tuition grants, along with tax deductions were likely to cause political divisiveness. The Court reasoned that the programs would require continual re-examination and funding increases each year. Once this occurs, political constituents distinguished by religion would grow and become more aggressive in pursuing further governmental aid, thereby increasing the potential for political strife caused by allegations of religious favoritism toward particular sects. To prevent this, the Court must carefully scrutinize aid programs benefitting parochial schools. Although given strong consideration, political divisiveness standing alone will not convince the Court to hold laws unconstitutional. Furthermore, the political divisiveness prong’s application is limited to programs conferring direct aid to parochial schools or parochial school teachers. Thus, the Court would probably forgo a political divisiveness inquiry in cases where neutrally-offered statutes confer indirect aid to parochial schools.

4. The Current Status of Lemon

The Court’s analysis of statutes conferring aid to parochial schools pivots on the effects prong. First, however, the Court gives a cursory analysis to the act’s purpose. Moving to the second prong, the Court determines whether the government’s actions are neutrally offered to groups undefined by religious beliefs. Then it looks to see if intervening choices are responsible for government aid reaching religion. If these examinations are answered affirmatively, the second prong of Lemon is passed. From here, the Court can subject the statute to an entanglement prong inquiry. As the Court’s recent holdings suggest, this examination is unlikely to occur where a statute is neutral toward

185. See Futterman, supra note 7, at 724 (suggesting Rehnquist’s opinion in Mueller abandoned the entanglement prong).
186. Nyquist, 413 U.S. at 796.
187. Id. at 796-97 (citing Lemon, 403 U.S. at 623).
188. Id. at 796.
189. Id. at 798.
190. Id. at 798-99.
191. Mueller, at 403 n.11 (stating that cases regarding political divisiveness must be “confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.”).
religion and confers benefits to religion indirectly. The following analysis illustrates how school vouchers including parochial schools would fare under U.S. Supreme Court scrutiny.

B. Applying Lemon to School Vouchers

Analysis shows that the U.S. Supreme Court's current construction and application of Lemon to voucher legislation permitting parochial schools' participation would not result in an Establishment Clause violation.

1. School Vouchers Under the First Prong

Finding a secular purpose in a school voucher program that allows sectarian schools to participate would pose no difficulties for the Court.\footnote{192. Stick, supra note 64, at 434.} The theories underlying school vouchers do not include proselytizing school children.\footnote{193. See supra notes 18-31 and accompanying text (discussing the theoretical underpinnings of school vouchers, which included granting parents the freedom to select schools for their children and increasing competition among schools).} Universally, school voucher legislation envisions improving education through parental choice and increased competition among schools.\footnote{194. See supra notes 23-31 and accompanying text.} The legislation introduced into Minnesota's Legislature reflects these goals.\footnote{195. H.R. 2651, 79th Leg., 1st Sess., § 7, subd. 2, Minn. (1996) (discussing the purposes of school voucher legislation).} Therefore, little evidence suggests the majority of voucher proponents seek voucher legislation for its proclivities to forward sectarian purposes. Had Governor Carlson's proposal succeeded, U.S. Supreme Court analysis would almost certainly find the first prong of Lemon not violated.\footnote{196. See Weishaar, supra note 1, at 581 (suggesting that school voucher legislation's constitutionality would not turn on the Court's analysis of the Lemon test's first prong).} The legislation introduced into Minnesota's Legislature reflects these goals.\footnote{195. H.R. 2651, 79th Leg., 1st Sess., § 7, subd. 2, Minn. (1996) (discussing the purposes of school voucher legislation).} Therefore, little evidence suggests the majority of voucher proponents seek voucher legislation for its proclivities to forward sectarian purposes. Had Governor Carlson's proposal succeeded, U.S. Supreme Court analysis would almost certainly find the first prong of Lemon not violated.\footnote{196. See Weishaar, supra note 1, at 581 (suggesting that school voucher legislation's constitutionality would not turn on the Court's analysis of the Lemon test's first prong).}

2. School Vouchers Under the Second Prong

The constitutionality of school voucher legislation permitting parochial schools' participation hinges on the Court's application of the effects prong.\footnote{194. See supra notes 23-31 and accompanying text.} \textit{Mueller} and following cases establish that two factors of the effects prong will be pivotal if the Court examines school vouchers. First, voucher legislation will have to be neutrally provided. Then, private choices, and not the government's, must direct the aid to religion.
a. The Neutrality of Voucher Legislation

To deem school voucher legislation neutrally offered, it must be available to a class of beneficiaries undefined by religious persuasions.\textsuperscript{197} Initially, Governor Carlson's proposal would have granted vouchers to lower or middle income parents.\textsuperscript{198} As a result, the benefactors of vouchers would be parents who qualified because they met the requisite income criteria. Absent from the legislation's criteria were requirements of religious adherence. Following \textit{Mueller}'s trail, this classification would meet no constitutional resistance from the U.S. Supreme Court. The Court consistently states that when neutrally offered, a statute which permits aid to eventually fall into the hands of religious institutions suggests no governmental establishment of religion.\textsuperscript{199} This response would unlikely vary if the Court were confronted with voucher legislation including parochial schools.

As in \textit{Mueller}, however, persuasive arguments could be made that the statute is not in fact neutral. Public schools are available to all students. And in Minnesota, parents have the option of sending their child to any public school in or out of their residence's school district.\textsuperscript{200} Thus, vouchers offer few benefits to parents wishing to send their children to public schools.\textsuperscript{201} By contrast, parents sending their children to private schools, which are predominately sectarian, benefit significantly from vouchers. Parents are free to spend more of their income on tuition. Consequently, religious schools benefit because their relative cost decreases.\textsuperscript{202} From this perspective, only those attending parochial schools, and the parochial schools themselves, benefit from voucher legislation. Moreover, unlike the aid given to disabled students in \textit{Witters} and \textit{Zobrest}, only when parents send their children to private schools do vouchers trigger benefits to parents. In Minnesota's case, this almost always means sending children to parochial schools.\textsuperscript{203} Thus, the statutes' benefits would be conferred almost exclusively on parochial schools and their students' parents.

Arguing vouchers are not neutrally offered would not likely succeed. In theory, vouchers benefit a class distinguished on income, not

\textsuperscript{197} See \textit{Witters}, 474 U.S. at 488-89.
\textsuperscript{198} "The student's income must not be more than 275 percent of the federal poverty level." H.R. 2651, 79th Leg., 1st Sess., § 7 subd. 4, Minn. (1996).
\textsuperscript{199} \textit{Zobrest}, 113 S. Ct. at 2466; \textit{Mueller}, 463 U.S. at 400.
\textsuperscript{200} See \textit{MINN. STAT.} § 123.76 (1994).
\textsuperscript{201} This argument can be made, but parents at least receive the choice of having private tuition reduced. Futterman, supra note 7, at 728-29.
\textsuperscript{202} See id. at 728. Vouchers clearly make parochial schools more affordable. Thus, parochial schools would be far more competitive with public schools under a voucher program. \textit{Id}.
\textsuperscript{203} See supra note 86 (discussing the number of religiously affiliated schools).
religious beliefs. In this respect, the class of beneficiaries mirrors the class that the Court found acceptable in Mueller. As with Mueller, the only true beneficiaries of school vouchers are parents who send their children to private schools, which are almost always parochial. Because this fact was unpersuasive to the Mueller Court, it would also be unavailing should the Court examine school vouchers. Therefore, the Court would find voucher legislation including parochial schools to be neutrally offered.

b. Incidental and Indirect Benefits of School Vouchers

For vouchers to confer incidental and indirect benefits to religion, independent choices must direct the vouchers to parochial institutions. Stated differently, it must be shown that, but for personal and independent choices of private persons, no aid would flow to religious institutions. Most voucher plans envision granting parents vouchers that can be delivered to any school parents deem worthy. Parochial schools, therefore, will receive vouchers, and thus public funds, only when parental choice permits. Recent Court analysis indicates this type of financial transfer facilitated by school vouchers would be permissible under the Establishment Clause. In a footnote stirring much attention, the Zobrest Court stated that it was undeniable that when public funds went directly to parents whose private choices directed it toward religion no Establishment Clause violation resulted. Commentators speculate that this statement indicates the Court's willingness to find school voucher legislation including parochial schools constitutionally acceptable.

Vouchers, though provided initially to parents, have an economic impact on private schools no different than a direct subsidy. Conceding this is true with tax deductions for parents with children in private

204. See Futterman, supra note 7, at 729. Voucher legislation would be "at least nominally available to all students" even though parents sending their children to public schools gain nothing from vouchers. Id.

205. See Weishaar, supra note 1, at 568 (participating in a voucher program would in reality be possible only if the parents sent their children to private schools).


207. Id. at 400.

208. Zobrest, 113 S. Ct. at 2467; Witters, 474 U.S. at 487.

209. See Zobrest, 113 S. Ct. at 2467; Witters, 474 U.S. at 487.

210. See Zobrest, 113 S. Ct. at 2469 n.11 ("The 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 interpreter themselves.").

211. See Heise, supra note 66, at 142 (stating that Zobrest, 113 S. Ct. at 2469 n.11 stood for the proposition "that a well-crafted school voucher program would not conflict with the First Amendment"). See also Kemerer, supra note 53, at 22.
schools, the *Mueller* Court stated that "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children."212 With vouchers it can be argued that parents are "mere conduits" of the state for the purposes of funding religion.213 Thus, the state is doing indirectly what it cannot do directly.214

*Mueller* and its progeny suggest this argument would fail. As the Court found in *Zobrest* and *Witters*, when children, not sectarian schools, are the primary beneficiaries of public aid, the state is not impermissibly funding religion.215 This analysis would easily extend to a voucher program. School vouchers aid children by providing them with more educational opportunities. If the aid eventually falls into religious institutions' hands, it does so residually.216 This form of state aid would not be found unconstitutional: indirect and attenuated aid to religion facilitated by parental choice.217

3. **School Vouchers Under the Third Prong**

Whether the U.S. Supreme Court would even find an entanglement prong analysis appropriate in analyzing school voucher legislation including parochial schools is unclear.218 If it did, the Court would conclude that the dangers of entanglement would not warrant finding voucher legislation unconstitutional.

a. **Administrative Entanglement**

Theoretically, school voucher legislation including parochial schools would be hard pressed to overcome the administrative entanglement prong.219 Because primary and secondary religious schools' overriding mission is instilling religious values in children, separating

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212. *Mueller*, 463 U.S. at 399; *Witters*, 474 U.S. at 487 (stating that although a state may not give direct aid to religion, "[a]id may have that effect even though it takes the form of aid to students or parents").

213. *See Bruno*, supra note 192, at 17 (quoting *Nyquist*, 413 U.S. at 786).


216. *Cf. Witters*, 474 U.S. at 488. In *Witters*, the Court stated that "unrestricted aid, if properly attributable to the state" violates the Establishment Clause. *Id.* at 481. The aid to parochial schools under a voucher plan would be unrestricted. Once received, there would likely be no limitations on how it is spent. However, the aid would not be "properly attributable to the state." As with tax deductions, the Court would likely attribute the aid received by parochial schools to parents making independent choices. *Id.* at 489.


218. *See supra* note 176 and accompanying text.

219. *See Egle*, supra note 23, at 485 (finding that the third prong of *Lemon* will be the most difficult to overcome for school vouchers).
vouchers' benefits along secular and sectarian lines would be nearly impossible. After Mueller, this problem would be avoided, however. The Court upheld Minnesota's tuition tax deduction statute without requiring mechanisms that ensured the financial benefits received were used for nonsectarian purposes.221 Seeing this, state legislatures quit erecting monitoring systems to ensure public funds are used for only secular purposes.222 Financial aid conferred by tuition deductions has a nearly identical effect to the benefits conferred by school vouchers. As in Mueller, then, the Court would probably require no safeguards to ensure the aid was spent exclusively on secular purposes. Moreover, the Court's omissions of entanglement prong analyses in Zobrest and Witters suggest that school vouchers may altogether avoid subjection to an administrative entanglement prong analysis. Consequently, whether applied or not, administrative entanglement concerns would not prevent parochial schools from receiving state funded vouchers.223

Approaching the entanglement prong from a different direction could present Free Exercise issues.224 As Zobrest and Witters indicated, incidental and indirect government aid received by parochial schools is attributed to the aid's recipients.225 If aid is attributed to private persons under effects prong analysis, it would be inconsistent to supervise the aid as if it were the government's own under an entanglement prong analysis. The Constitution cannot mandate supervision of the legitimacy of the use of religious funds flowing from private individuals. A similar analysis could be applied to school vouchers. If parochial schools receive public aid from vouchers as a result of private and independent choices, the aid would be attributed to parents. The Court could not order supervision of the parochial schools because the aid vouchers offered in effect came from parents, not the government. The entanglement prong evaporates once the effects prong is surmounted.

b. Political Divisiveness

The Court has stated that the principal purpose of the Religious

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220. See Bruno, supra note 192, at 20.
222. Futterman, supra note 7, at 730.
223. See id. (suggesting that the Mueller decision indicates that government programs aiding religion need not be supervised to ensure the benefits go exclusively to secular interests).
224. "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. CONST. amend. I.
225. See supra part III.A.2.c-d and accompanying text (discussing the nature of the aid received by parochial schools).
Clauses is to prevent "political division along religious lines."\(^{226}\) Without question, school voucher legislation produces politically-charged discourse. It could therefore be asserted that school vouchers' contentiousness would result in a level of political divisiveness violative of the Establishment Clause.\(^{227}\) However, the Court has stated that political divisiveness inquiry is required only when public aid is directly transmitted to parochial schools.\(^{228}\) In all likelihood, the Court would find that school vouchers benefit parochial schools only incidentally and indirectly. As a result, no matter how heated debates over vouchers become, striking school vouchers unconstitutional for fomenting political divisiveness would require the Court take a very dramatic turn in its analysis of the *Lemon* test.\(^{229}\)

4. **School Vouchers: Passing the Lemon Test**

Applying recent applications of *Lemon* to school voucher legislation would result in vouchers being held constitutional.\(^{230}\) School vouchers have a secular purpose. Additionally, the Court would probably find voucher legislation neutrally offered and conferring only indirect benefits to parochial schools. Finally, school vouchers would not cause excessive entanglement. Thus, the *Lemon* test would be passed by school voucher legislation including parochial schools.\(^{231}\) It is possible, however, that school vouchers would be scrutinized under an alternative test. Consequently, school voucher legislation should be analyzed under these tests to determine if these tests would render vouchers unconstitutional.

C. **Beyond Lemon: Alternative Tests**

1. **The Endorsement Test**

The endorsement test was enunciated in Justice O'Connor's...
O'Connor first suggests that establishment clause analysis should focus on whether the governmental actions convey a message of favor or approval toward religion. Even if laws have the primary effect of advancing or inhibiting religion, they can pass constitutional muster if no message of endorsement or disapproval is expressed by the government. Consequently, analysis of the effects prong shifts toward examining the message government communicates about religion, not the effects its actions have on religion. O'Connor's endorsement test also considers entanglements between government and religion to be the other principal threat to the Establishment Clause. If governmental involvement with religion limits religious institutions' autonomy, or grants religious institutions access to government that is unavailable to non-practitioners, entanglement exists. Under the endorsement test, political divisiveness would remain non-dispositive when examining the constitutionality of statutes benefitting religion. Therefore, the significance of O'Connor's endorsement test lies more in its proposed alteration of Lemon's effects prong than its views on entanglement.

Application of the endorsement test was illustrated in *Grand Rapids School District v. Ball*. In *Ball*, the Grand Rapids School District offered two programs allowing public school employees to teach

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233. *Id.* at 688 (O'Connor, J., concurring) ("Endorsement sends a message to nonadherence that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.").
234. For example, O'Connor suggested that in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (allowing tax exemptions for religious institutions), the statute questioned had an effect of advancing religion, yet, the Establishment Clause was not violated. *Lynch*, 465 U.S. at 691-92 (O'Connor, J., concurring).
235. *Id.* at 688 (O'Connor, J., concurring).
236. *Id.* at 689 (O'Connor, J., concurring).
237. *Id.* at 689-88 (O'Connor, J., concurring).
238. *Id.* at 690 (O'Connor, J., concurring). Political divisiveness may indicate excessive entanglement, but ultimately, the Court should examine why the government actions result in divisiveness, not the extent of divisiveness itself. *Id.*
240. *Id.* at 375-76. The Shared Time program permitted public school employees to teach classes at non-public schools. Only students attending private schools could attend the classes. The Community Education Program operated similarly, offering classes to children as well as adults. Unlike the Shared Time program, however, it was taught primarily by parochial school teachers. *Id.*
supplemental classes at predominantly sectarian private schools. Because the vast majority of the students attended parochial schools, they would not be able to discern that the programs were government offered and non-sectarian. Governmental actions should not suggest a close identity between church and state, according to the Court. Invoking endorsement test analysis, the Court stated that when this type of relation "conveys a message of endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated." Finding this to be true with the school district's programs, the Court invalidated both as unconstitutional.

2. The Coercion Test

The coercion test prevents the government from coercing citizens to either support or reject religion. Justice Kennedy first announced the coercion test in his dissent in *Allegheny County v. Greater Pittsburgh ACLU*. Three years later, writing for the majority in *Lee v. Weisman*, Kennedy declared that holding an invocation and convocation at high school ceremonies effectively compelled students to support religion. Because graduation ceremonies are so significant for students and their families, the students had no choice but to endure religious exposure. The school district argued that the students had the option of not attending, but the Court disposed of this argument, saying it merely presented a "formalistic," unviable option. According to Kennedy, the school district's actions

241. Forty of the forty-one schools the programs operated at were religiously affiliated. *Id.* at 379.
242. *Id.* at 388-89.
243. *Id.* at 389.
244. *Id.* at 398-99 (O'Connor, J., concurring in part, dissenting in part). Justice O'Connor distinguished the Shared Time Program from the Community Education Program. Because the Shared Time Program was taught by public school teachers, she found no threat of proselytization, and thus no constitutional problems with it. She concurred with respect to the Community Education Program, which was taught by parochial school teachers. *Id.* Allowing parochial school teachers to teach secular subjects at parochial schools, "has the perceived and actual effect of advancing the religious aims of the church-related schools." *Id.* at 400.
245. *Id.* at 398 (O'Connor, J., concurring in part, dissenting in part).
246. 492 U.S. 573, 659 (1989) (Kennedy, J., dissenting) (stating "government may not coerce anyone to support or participate in any religion or its exercise").
248. *Id.* at 592-93.
249. *Id.* at 593.
250. *Id.* After going to school for many years, students should have an opportunity to share there achievements. More fundamentally, when a citizen's rights are violated, it is the state's duty to refrain from acting. It is not the duty of the citizen to accommodate unconstitutional state activity. *Id.*
coerced students into participating in religious activity and were therefore unconstitutional. 251

3. Status of the Endorsement and Coercion Tests

The Court adopted Justice O'Connor's endorsement test in Allegheny County, 252 where Justice Blackmun opined that the test was useful for evaluating whether religious symbols, such as nativity scenes, promoted religion. 253 Yet the majority opinion did not indicate whether the endorsement test should be used in school aid cases. 254 Moreover, asking what the government endorses may be unanswerable when the government's acts are noncommunicative, which is often the case with school aid programs. 255 The coercion test may be even less applicable to school funding cases. Justice Kennedy, who first enunciated the test, appears to be its only supporter. 256 Thus, it is unlikely that the endorsement or coercion tests would be applied to school voucher legislation. Nevertheless, it is worthwhile to provide a brief analysis of how these two tests would measure school voucher legislation permitting parochial schools to participate.

D. Applying the Endorsement and Coercion Tests to School Vouchers

1. The Endorsement Test and School Vouchers

To pass the endorsement test, school vouchers would have to avoid sending either a message of governmental endorsement or condemnation of religion. This would be particularly true with children benefitting under school voucher legislation. The Court recognizes that young children may be influenced by a "symbolic union" between church and state. 257 Therefore, state actions that might lead children to believe the state supports religion undergo taxing scrutiny. 258 The

251. Id.
252. 492 U.S. 573.
253. Id. at 595.
254. Daniel, supra note 2, at 65 n.426.
256. See Stick, supra note 64, at 454. It has been criticized as merely a restatement of the principles set forth in the Free Exercise Clause, which states "Congress shall make no law . . . prohibiting the free exercise" of religion, because the Free Exercise Clause prohibits the government from coercing citizens to believe or disbelieve in religion. Id. at 455.
257. Ball, 473 U.S. at 389, 390.
258. See, e.g., Ball, 473 U.S. at 390 (noting children are more easily influenced by governmental actions aiding the state); see also Tilton v. Richardson, 403 U.S. 672, 685-
Court's desire to shield children from appearances of church and state collaboration raises an interesting problem concerning school vouchers. A child of parents with a modest income who once attended public school might be curious as to why she can now attend a parochial school. Upon learning that the government's school voucher program enables this, would she infer that the state prefers children attend parochial schools? Should the Court consider this, it might find that in a child's mind, vouchers are supportive of religion. To a lesser extent, parents and society may reach the same conclusion from school voucher legislation including parochial schools. Nevertheless, the non-communicative nature of school voucher legislation renders the possibility of this result remote. 299

Analysis of school vouchers' propensity to promote entanglement under the endorsement test parallels an analysis under Lemon. 260 O'Connor voted with the Mueller's majority, which found no administrative entanglement concerns with tax deductions. 261 This suggests O'Connor would treat school vouchers similarly when applying the entanglement portion of the endorsement test. Corresponding to the political divisiveness component of Lemon, it could be argued that certain faiths, such as Catholicism, would reap greater benefits from voucher legislation than other religious groups. 262 O'Connor's endorsement test, however, is not passed or failed according to the political divisiveness stirred by government actions. 263 Consequently, school vouchers' failure to pass the endorsement test would require a supplemental finding that voucher legislation sends a message that the government supports religion. As this Article suggests, the Court would not make such a finding. Therefore, the endorsement test's entanglement concerns, as well as its communicative concerns, would not result in an invalidation of school voucher legislation including parochial schools. 264

86 (1971) (discussing the different effects that public aid flowing to religion has on college age students and those of younger years).

259. See supra notes 252-55 and accompanying text (discussing whether the endorsement test can and would be applied to school voucher legislation).

260. For an analysis of the entanglement prong of Lemon, see supra notes 218-29 and accompanying text.


262. Nyquist, 413 U.S. at 796-98; see also Bruno, supra note 192, at 24 (indicating that certain sects benefit more from voucher legislation than others).


264. See, e.g., Witters, 474 U.S. at 493 (O'Connor, J., concurring). Applying her endorsement test, Justice O'Connor found that the program granting state funds to the visually impaired would have passed the endorsement test because no reasonable person would infer that the state endorsed religion. Id.
2. The Coercion Test and School Vouchers

School vouchers are intended to promote school choice; consequently, arguing vouchers coerce religious adherence requires making a paradoxical assertion. An argument has been made that school voucher legislation including parochial schools would be coercive because parents would feel pressured into sending their children to parochial schools. For this argument to succeed, religious schools' superiority would have to be conclusively established. If this can be proven, then it can be argued with equal force that better educational opportunities would be the factor coercing parents, not sectarian curricula. School vouchers are intended to coerce parents into seeking schools better equipped to educate their children. If the better schools happen to be parochial, then religion becomes incidental to the vouchers' ultimate aim. To the extent school vouchers possess coercive powers, the coerciveness would be deemed secular. Therefore, the coercion test would not derail school voucher legislation allowing parochial schools to participate.

3. School Voucher Legislation: Neither Endorsement Nor Coercion

The endorsement and coercion tests have not served as the test for determining whether legislation unconstitutionally allows public funds to reach religious institutions. If either is applied, school voucher legislation would most likely be found constitutional. The indirect nature of the aid conferred by school vouchers suggests the Supreme Court could not find such legislation to be an endorsement of religion. Voucher legislation, designed to expand school choices, cannot be seen as coercing citizens to support religion. Thus, the alternatives to Lemon fail to strike down school voucher legislation which permits religious schools to participate.

IV. School Vouchers and the Minnesota Constitution

A. Introduction

The U.S. Supreme Court, applying any existing test, would find school voucher legislation including sectarian schools permissible under the Establishment Clause. Yet this does not mean school vouchers will not establish religion. Before religious schools can participate in a voucher program in Minnesota, they must not run

265. Weishaar, supra note 1, at 571 (noting that "choice" and "coercion" are antonyms).
266. Daniel, supra note 2, at 68.
267. Stick, supra note 64, at 454.
afoul of the Minnesota Constitution.268

B. Religion and the States

The notion that church and state should not be intertwined originated before the U.S. Constitution was ratified.269 A number of colonies had established religions;270 however, many followed Virginia’s lead in dismantling state-instituted churches.271 Still, it was not until 1833 that Massachusetts disestablished the Congregationalist Church as the official state religion.272 In fact, the Establishment Clause was not applied to state actions until 1947. Prior to being incorporated by the Fourteenth Amendment, the religion clauses only extended to the federal government’s intrusion into religion.273 Thus, if a citizen claimed excessive governmental involvement in religion, he or she had to look to state constitutional provisions for protection.274 Often, states’ establishment clauses are more prohibitive than their federal counterpart.275 Coupled with state courts’ ability to interpret constitutional claims relying on independent state constitutional grounds, states’ constitutions can be read to impose

268. See generally Witters, 474 U.S. at 481. After reversing the Washington Supreme Court’s determination that the U.S. Constitution’s Establishment Clause did not permit a visually-impaired person attending a religious school to receive state aid, the Court said the Washington court was permitted to apply its more stringent constitution on remand. Id. at 489. The Washington Supreme Court did so and again found it unconstitutional for the student receiving public aid to attend a bible school. Witters v. Washington Comm’n for the Blind, 771 P.2d 1119, 1121 (Wash. 1989) (en banc).

269. James Madison’s Memorial and Remonstrance Against Religious Assessment and Thomas Jefferson’s Bill for Establishing Religious Freedom were bulwarks for those arguing that the colonies, and later the states, should not establish religion. ROBERT L. CORD, SEPARATION OF CHURCH AND STATE 4-5 (1982).

270. See generally LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE, 1-16 (1986). Anglicanism was the state-established religion in Virginia and other southern states. Id. at 1. In New England, many of the colonies established Congregationalism as the official religion. Roman Catholics, Jews, Baptists and other sects were often prohibited from practicing their religion. Id.

271. CORD, supra note 269, at 4. By the time the Constitutional Convention had convened, the Anglican Church of Virginia had been disestablished. Id.

272. Id.

273. See Everson v. Board of Educ., 330 U.S. 1 (1947). In Everson, the Establishment Clause was first applied to state actions. Id. at 15; see also Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (stating that the religious clauses were incorporated by the 14th amendment).


more restrictive standards on state actions than the federal constitution. 276

C. The Establishment Clauses of the Minnesota Constitution

Traditionally, Minnesota courts have rarely extended the state’s bill of rights beyond the limits of protection provided by the federal Bill of Rights. 277 Minnesota’s state constitutional counterpart to the Establishment Clause has not been excepted from the Minnesota Supreme Court’s general practice of relying on the U.S. Constitution. 278 The Minnesota Supreme Court acknowledges it can interpret article I, section 16 of the Minnesota Constitution more expansively than the U.S. Supreme Court interprets the Establishment Clause, 279 yet it has not done so. 280 Straying from the U.S. Supreme Court’s influence, the Minnesota Supreme Court has recently been inclined to interpret Minnesota’s Constitution as conferring more protection than the U.S. Constitution. 281 The Minnesota Supreme Court has found

276. Id. at 625. Because states can impose tighter restrictions on government activities benefiting religion, state constitutions often pose more of a threat to legislation than does the federal constitution. Id.; see also Fleming & Nordby, supra note 274, at 57-59 (discussing state courts’ ability to grant citizens greater protections under the Minnesota Constitution than offered under the U.S. Constitution); cf. William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489, 491 (1977) (indicating that state courts have a duty to apply state constitutions to protect their citizens).

277. Fleming & Nordby, supra note 274, at 53-54. Although the Minnesota Supreme Court often announces its ability to interpret the state bill of rights differently than the Federal counterpart, it has yet to provide greater protection than the U.S. Constitution offers. Id. (note: Fleming and Nordby wrote this article in 1984).

278. See id. at 66-67.

279. Americans United Inc. as Protestants United for Separation of Church and State v. Independent Sch. Dist. No. 622, 288 Minn. 196, 201, 179 N.W.2d 146, 149 (1970) (stating that the U.S. Supreme Court’s analysis of the First Amendment in Everson provides “persuasive and distinguished precedent,” but it is not binding authority on how the Minnesota Constitution should be interpreted).

280. See Fleming & Nordby, supra note 274, at 58. The decisions of the Minnesota court do not often rest exclusively on the Minnesota Bill of Rights. Id. Never has the Minnesota court interpreted the Minnesota Bill of Rights in a manner that would contradict U.S. Supreme Court findings. Id.

281. See, e.g., Ascher v. Commissioner of Pub. Safety, 519 N.W.2d 183, 185 (Minn. 1994); Gray v. Commissioner of Pub. Safety, 519 N.W.2d 187 (Minn. 1994). In Ascher and Gray, the Minnesota Supreme Court held that random sobriety checkpoints were unconstitutional. Id. The U.S. Supreme Court, in Michigan Dep’t of State Police v. Sitz, 496 U.S. 444 (1990), had held that the federal constitution permitted such searches. Even though article I, section 10 of the Minnesota Constitution is worded identically to the Fourth Amendment in the U.S. Constitution, the Minnesota Supreme Court exercised its ability to expand the protections of the state constitution beyond the protections offered by the U.S. Constitution. Id.; see also State v. Russell, 477 N.W.2d 886, 888 (Minn. 1991) (applying a stricter rational basis test for equal protection.
that Minnesota’s Free Exercise Clause is more prohibitive than its federal counterpart. This suggests that Minnesota’s Supreme Court may be willing to do the same with Minnesota’s establishment clauses. For the purposes of school voucher analysis, article XIII, section 2 of the Minnesota Constitution, which prohibits the use of public money or property for the support of parochial schools, is the more pertinent establishment amendment.

D. The Minnesota Supreme Court and Public Aid to Parochial Schools

The Minnesota Supreme Court’s willingness to extend state constitutional protections beyond the point where the U.S. Supreme Court interprets the U.S. Constitution threatens voucher legislation including parochial schools. Even if the U.S. Supreme Court finds state-funded school voucher programs constitutional, the Minnesota Supreme Court could hold otherwise under Minnesota’s Constitution. Examining Minnesota’s Supreme Court’s scrutiny of state legislation conferring aid to parochial schools casts light on whether the school vouchers can avoid colliding with Minnesota’s constitutional barriers.

purposes than the U.S. Supreme Court applies).

282. Hill-Murray Fed’n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992) (maintaining a more stringent test for determining when the state infringes upon a person’s free exercise rights than the U.S. Supreme Court utilized); see also State v. Hershberger, 444 N.W.2d 282 (Minn. 1989), vacated and remanded, 495 U.S. 901, aff’d on remand, 462 N.W.2d 393 (1990) (en banc). In Hershberger, an Amish person contested Minnesota Statutes section 169.552 as violating Minnesota’s Free Exercise Clause by compelling bright, reflective signs be put on slow moving vehicles. Id. at 397. This requirement violated a tenet of the Amish religion. Deciding that the Amish person’s constitutional rights had been violated, the court noted that Minnesota’s Free Exercise Clause was “distinctly stronger” than its federal counterpart. Id.; see also State v. French, 460 N.W.2d 2, 11 (Minn. 1990) (holding that a landlord’s free exercise rights under Minnesota’s constitution were violated when the Minnesota Human Rights Department filed a complaint against the landlord for refusing to rent to an unmarried couple). For a detailed discussion of Hershberger and French, see generally, Rita Coyle De Meulos, Minnesota’s Variable Approach To State Constitutional Claims, 17 WM. MITCHELL L. REV. 163 (1991).


284. See, e.g., Americans United, Inc. as Protestants and Other Amer. United for Separation of Church and State v. Independent Sch. Dist. No. 622, 288 Minn. 196, 201, 179 N.W.2d 146, 149 (1970) (applying article VIII, section 2 (now article XIII, section 2) to a statute allowing students attending parochial schools to ride publicly-funded buses).

285. See Michigan v. Long, 463 U.S. 1032 (1983) (holding that when a state court rules on “separate” and “independent” state constitutional grounds the Supreme Court cannot attain jurisdiction over the case).
1. **Americans United, Inc. v. Independent School District No. 622**

In *Americans United*, the court upheld a state statute permitting school children to ride publicly-funded buses to sectarian schools. The court's opinion mirrored the U.S. Supreme Court's holding in *Everson v. Board of Education*, which found that the Establishment Clause was not violated when parochial school students were transported to schools on public school buses. Importantly, the court conceded that it took less governmental activity to "support" religion than to "establish" religion thus acknowledging the independent significance of Minnesota's establishment clauses. Despite providing parochial schools with some benefit, the court found that the benefits received by the parochial schools were merely "incidental" and "indirect." Parents and children, according to the court, were the "primary beneficiaries" of the busing services. Consequently, religion was not deemed supported when parochial school students rode publicly-funded buses. Ending with a caveat, the court indicated that its holding stood at the outer limits of constitutional-

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286. 288 Minn. 196, 179 N.W.2d 146 (1970).
287. *Id.* at 217, 179 N.W.2d at 157. Minnesota Statutes section 123.76 allows "school children attending any schools, complying with [Minnesota Statutes §] 120.10 [setting forth compulsory attendance requirements, school year length, and other minimum requirements set for all schools, public and private in Minnesota] to the same rights and privileges relating to transportation." *Id.*; see also *Everson v. Board of Educ.*, 330 U.S. 1, 67 (1947) (finding the U.S. Constitution permitted New Jersey to allow children attending sectarian schools to ride buses funded by the state).
288. *Everson*, 330 U.S. at 17. In *Everson*, the U.S. Supreme Court upheld a New Jersey statute that permitted parochial school children to ride publicly-funded buses. *Id.* The Court also found that the statute did not "support" parochial schools when it allowed parochial school children to ride public school buses. *Id.* at 18.
289. See *Americans United*, 288 Minn. at 201, 179 N.W.2d at 149. In making this statement, the court conceded that Minnesota's establishment clauses, which both prohibit support of religion, are more prohibitive than the U.S. Constitution, which merely prevents the government from establishing religion. *Id.* For this reason, "a more effective argument can be made" under Minnesota's Constitution. *Id.* Compare MINN. CONST. art. I, § 16 and MINN. CONST. art. XIII, § 2 with U.S. CONST. amend I.
290. The court stated that *Everson* is "simply distinguished precedent" and that its holding was "diluted" because of the different texts of the U.S. and Minnesota Constitution. *Americans United*, 288 Minn. at 201, 179 N.W.2d at 149.
291. See *id.* at 210, 179 N.W.2d at 155.
292. *Id.* at 205, 179 N.W.2d at 151.
293. See *id.* The court described a number of state courts finding parochial school children could constitutionally ride publicly-funded school buses because the aid received by the schools was incidental and indirect. *See id.*
294. *Id.* at 210, 179 N.W.2d at 154.
SCHOOL VOUCHERS

2. Minnesota Higher Education Facilities Authority v. Hawk

In Hawk, the Minnesota Supreme Court decided whether a state agency could issue tax exempt revenue bonds to religiously-affiliated colleges. The statute required that the schools using the bonds be nonsectarian, and it would not permit the bonds to be used for financing sectarian investments in teaching or building construction. First, the court found that because the state agency issuing the bonds was funded entirely by fees from the schools receiving the bonds, there was no state support of religion. Thus, article XIII, section 2 was inapplicable because it only applies when public funds support religious schools. Second, the Hawk court found the schools receiving the funds were secular in nature. The statute was upheld, but in dicta the court emphasized that allowing public aid to reach religiously-affiliated post-secondary schools was far different than permitting public aid to go to primary and secondary schools.

295. The court declared that its decision went to the brink of constitutionality. Id. Further, the Court opined that legislation allowing aid to flow to sectarian schools is "today a trickling stream but may all too soon become a raging torrent." Id. (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963)).

296. 305 Minn. 97, 232 N.W.2d 106 (1975).

297. Id. at 100, 232 N.W.2d at 108. The colleges involved were St. Theresa’s (now defunct), St. Mary’s, and Bethel College. Id.

298. Id. at 98, 232 N.W.2d at 107; see also MINN. STAT. § 136A.28(b) (1974) (stating that the projects "shall not include any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination.").

299. Id. at 98, 232 N.W.2d at 107; see also supra note 257.

300. Hawk, 305 Minn. at 104-07, 232 N.W.2d at 110-12. The Minnesota Higher Education Authority merely issued the bonds. The state was not responsible for their payment; this duty fell on the schools. Id. at 106, 232 N.W.2d at 111.

301. Id. at 107-08, 179 N.W.2d at 112; see also MINN. CONST. art. XIII, § 2 ("In no case shall any public money be appropriated or used . . . for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular" religion are promoted).

302. Hawk, 305 Minn. at 109-10, 232 N.W.2d at 113 (citing Tilton v. Richardson, 403 U.S. 672, 685 (1971)). College students are "less impressionable and less susceptible to religious indoctrination." Also, "church-related" colleges permit and encourage academic freedom and critical thought. For these reasons, the colleges are therefore "secular in nature." Id. at 110, 232 N.W.2d at 115.

303. Id. at 110, 232 N.W.2d at 114 (stating "higher education is an entirely different matter than aid to primary and secondary schools").
3. The Mammenga Cases

In the *Mammenga* cases, the Minnesota Court of Appeals examined the constitutionality of Minnesota's Post Secondary Enrollment Option Act (PSEOA). The statute permits students in eleventh or twelfth grade to take college courses; a portion of tuition is then reimbursed by the state. The statute was argued to be in violation of Minnesota's establishment clauses because many of students participating took courses at religiously-affiliated colleges. The courts used a two-pronged test to ascertain the statute's effect on religion. First, benefits received by schools promoting religious doctrines must be "incidental" and "indirect." Second, the court must determine whether the school is "pervasively sectarian." However, if the first prong is answered affirmatively, aid to the schools does not impermissibly establish religion. This is true even if the college is pervasively sectarian. The appellate court found that the colleges received the aid as an "incidental and indirect result of the individual choices of the beneficiaries." Additionally, despite the colleges' religious affiliations, they were deemed nonsectarian. As a result, religiously-affiliated colleges' participation in the PSEOA was upheld.

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308. See *Mammenga* II, 500 N.W.2d. at 138.

309. *Id.* (citing *Mammenga* I, 485 N.W.2d at 310).

310. *Id.*

311. *Id.*

312. *Id.* The appellate court listed a number of reasons why the first prong had not been violated: 1) The PSEOA benefits high school students, not the schools they attend; 2) students may attend either public or private universities; 3) the tuition reimbursement applies only to secular classes; 4) only a portion of the tuition expenses are paid to the colleges by the state; and 5) PSEOA funds are separated from other funds to ensure they are only used for secular purposes. *Id.*

313. *Mammenga* II, 500 N.W.2d at 138-39; *Mammenga* I, 485 N.W.2d at 308.

314. *Mammenga* I, 485 N.W.2d at 309 (citing *Hawk*, 305 Minn. 97, 98, 232 N.W.2d 106, 107 (1975)).

315. *Mammenga* II, 500 N.W.2d at 199; *Mammenga* I, 485 N.W.2d at 309.
E. The Minnesota Supreme Court and School Vouchers

The Minnesota Court of Appeals' pronouncement of a two part test in *Mammenga* provides a framework under which school vouchers can be analyzed. Though only an intermediate appellate court decision, the *Mammenga* court's test was deduced from the Minnesota Supreme Court's holdings in *Americans United* and *Hawk*. Therefore, its underpinnings provide a solid framework for analyzing the constitutionality of school vouchers.

1. Incidental and Indirect Aid

The court's holding in *Americans United* offers strong precedent supporting school voucher advocates' position. Finding that the real beneficiaries of the statute questioned were parents and children establishes a strong foundation for school voucher advocates because the same analysis can be applied to school vouchers. For parochial schools to receive public funds through a school voucher program, parents first must decide to send their children to a parochial school. Only when this occurs do parochial schools accrue public funds. Thus, school vouchers confer benefits on parochial schools indirectly and incidentally.

Yet, in *Americans United* the court cautioned that its decision brought it to the "brink of unconstitutionality." Allowing parochial school children to ride publicly-funded buses does not approach conferring the level of benefits that school vouchers would. Under a voucher program, a whole stratum of children once unable to attend private schools could now do so. Moreover, parochial schools' tuition costs would be significantly defrayed by state funded vouchers. Consequently, though indirect and incidental, the benefits school vouchers would deliver to parochial schools may be so significant that school voucher

316. See *Mammenga II*, 500 N.W.2d at 138.

317. While analyzing the incidental nature of the benefits conferred to religious colleges in *Mammenga*, the court also noted that the PSEA was neutrally offered. *Mammenga II*, 500 N.W.2d at 139; *Mammenga I*, 485 N.W.2d at 308. Coupled with each other, considerations of the statutes' neutral classifications and tendencies toward providing merely incidental and indirect benefits bears strong resemblance to the U.S. Supreme Court's framework for analyzing school aid legislation permitting parochial schools to receive state support.

318. See supra notes 1-4 and accompanying text. Under typical voucher plans, the parents receive the voucher. *Id*. Thus, when parents choose to send their child to a parochial school they are determining who receives financing, not the state. *Id*. But see Bruno, supra note 192, at 13 (stating that the voucher "is nothing of value to the parent except as a means of designating a state grant to a particular school.").

319. *Americans United*, 288 Minn. at 210, 179 N.W.2d at 154.
legislation would go beyond Minnesota’s constitutional brink.\footnote{320}

The \textit{Mammenga} decisions may encourage voucher advocates more than \textit{American United}. The Post Secondary Enrollment Option Program upheld by the Minnesota Court of Appeals operates in a manner identical to how a voucher program would function. After matriculating high school students, colleges and universities are reimbursed for tuition by the state.\footnote{321} The secondary education students attended religiously-affiliated schools, but the benefits realized by the religiously-affiliated colleges were incidental and indirect.\footnote{322}

Still, the \textit{Mammenga} decisions were only rendered by the Minnesota Court of Appeals. More importantly, the students availing themselves of the statute’s benefits could only be reimbursed for nonsectarian coursework.\footnote{323} Distinguishing between sectarian and nonsectarian coursework in parochial schools would be impossible because inculcating religious beliefs is an indelible part of the schools’ mission.\footnote{324} Therefore, even if aid flowing to religious schools is incidental and indirect in the PSEOA, the court may be reluctant to apply this reasoning to school voucher programs. The aid school vouchers confer to primary and secondary parochial schools cannot be separated along secular and sectarian uses because these schools’ primary mission is to inculcate religious adherence in children.

2. Pervasively Sectarian

According to \textit{Mammenga}, if public aid flows to religion incidentally and indirectly, the statute questioned is still constitutional even if the school receiving the aid is pervasively sectarian. Yet \textit{Mammenga} dealt exclusively with religiously-affiliated post-secondary schools. School vouchers, on the other hand, emphasize aiding primary and secondary schools. The Minnesota Supreme Court sees little possibility

\footnote{320. In addressing concerns that upholding laws allowing parochial school children to ride public school buses, the court in dicta took pains to limit its interpretation of Minnesota’s Constitution to the particular facts. \textit{See Americans United}, 288 Minn. at 211-13, 179 N.W.2d at 154-55. The court stated that direct aid to students in parochial students may be unconstitutional and declared that it may be unable to draw a distinction between direct and indirect aid. \textit{Id.} at 213, 179 N.W.2d at 155.}

\footnote{321. In the PSEOA, the state reimburses colleges and universities for a percentage of the tuition expenses participating students incur. \textit{MINN. STAT.} § 123.3514, subd. 6 (1994).}

\footnote{322. \textit{Mammenga II}, 500 N.W.2d at 139.}

\footnote{323. \textit{MINN. STAT.} § 123.3514, subd. 2 (1994) (stating the program allows secondary students to “enroll full time or part time in nonsectarian courses or programs”).}

\footnote{324. Students at colleges and universities are old enough to think critically and independently. \textit{See Minnesota Higher Educ. Facilities Auth. v. Hawk}, 305 Minn. 97, 110, 232 N.W.2d 106, 118 (1975) (citing \textit{Tilton v. Richardson}, 403 U.S. 672, 685 (1971)). Funding higher education, however, “is in an entirely different category than aid to primary and secondary schools.” \textit{Id.} at 110, 232 N.W.2d at 114.}
of religious inculcation occurring in post-secondary education. By contrast, the court is much more skeptical when public aid flows to primary and secondary schools. Their primary mission is to "assure future adherents to a particular faith by having control of the total education at an early age." For this reason, parochial schools are likely to be deemed predominantly sectarian. Nevertheless, this factor alone would not render school vouchers unconstitutional if the benefits accorded to parochial schools are incidental and indirect.  

3. School Vouchers and the Mammenga Test

The few cases interpreting Minnesota's establishment amendments offer a glimpse of where school voucher legislation falls under Mammenga's test. Supporting voucher passage is the similarity of the Mammenga test to the current effects prong of Lemon. Both permit incidental and indirect aid to flow to religion. Two factors weaken the predictive value of Minnesota case law interpreting Minnesota's establishment clauses: 1) The Minnesota Supreme Court cases are dated and few in number; and 2) The court's decisions permitting aid to flow to parochial schools considered statutes that would provide far less aid than school vouchers. Relying on the analytical framework gleaned from the Minnesota cases leaves much room for speculation regarding the constitutionality of school vouchers.

F. Minnesota Constitutional Text: Snaring Vouchers?

Article XIII, section 2 of Minnesota's Constitution states that "In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught." Article I, section 16 states that no person can "be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent." Without question, the language of Minnesota's establishment clauses, in particular article XIII, section 2, is stronger than the federal constitution, which requires "Congress make no law respecting an

325. Id. at 110, 292 N.W.2d 106, 113 (1975) (quoting Tilton v. Richardson, 403 U.S. 672, 685 (1971)).

326. Mammenga II, 500 N.W.2d at 138; see Americans United, 288 Minn. at 214-15, 179 N.W.2d at 156 (allowing children to attend sectarian schools to ride publicly-funded buses because the benefits received by parochial schools was incidental and indirect).

327. See Mammenga II, 500 N.W.2d at 138.

328. See Mammenga I, 485 N.W.2d at 507. The court noted that "twice during the 1970's" had the Minnesota Supreme Court interpreted Minnesota's establishment clauses. The court relied on Americans United and Hawk exclusively for analysis of Minnesota's establishment clause. Id. at 308-09.
establishment of religion. It has been suggested that article XIII, section 2 prevents even indirect aid from reaching parochial schools. Minnesota's Supreme Court has recognized that showing a statute supports religion is less burdensome than showing the statute establishes religion. Consequently, if literally interpreted, Minnesota's establishment clauses would likely render school vouchers including parochial schools unconstitutional.

Buttressing this assertion are other state courts' analyses of similar constitutional provisions. Initially snaring vouchers' implementation were state constitutions finding that parochial schools could not receive public support in the form of vouchers or tuition reductions. More recently, the Puerto Rico Supreme Court held that school voucher legislation including private schools would unconstitutionally "support" schools not operated by the state. In 1992, the New Hampshire Supreme Court found that a school voucher program allowing religious schools to participate would be unconstitutional. Like Minnesota's constitution, the New Hampshire Constitution prohibits public funds from supporting sectarian schools. Similar-

829. U.S. CONST. amend. I.
830. Bruno, supra note 192, at 27. As one commentator notes, no "qualifier" precedes the word "support" in the amendment. Bruno argues that this indicates the Minnesota Constitution permits no support to parochial schools in any form. Id.
831. Americans United, 288 Minn. at 213, 179 N.W.2d at 155 ("We simply inject a caveat that the limitations contained in the Minnesota Constitution are substantially more restrictive than those imposed" by the Establishment Clause.).
832. See, e.g., John Paul Jones, Pennsylvania's Choice: "School Choice" And Pennsylvania's Constitution, 66 TEMP. L.Q. 1289, 1312 (1993) (examining whether sectarian schools could receive publicly-funded school vouchers without running afoul of Pennsylvania's establishment clause in article I, section 3, which states "no man can of right be compelled to attend, erect or support any place of worship.") As Jones states, there is no textual basis for reading Pennsylvania's Constitution and the federal constitution in identical fashion. Id.
833. See supra notes 54-56 and accompanying text (describing Washington, Virginia and Massachusetts' incipient school voucher programs that were found to impermissibly aid religion). Interestingly, the Minnesota Supreme Court in its discussion of Minnesota's stringent establishment clauses cited to the Opinion of the Justices of Massachusetts case, which held a voucher like bill unconstitutional. See Americans United, Inc., 288 Minn. at 212 n.5, 179 N.W.2d at 155 n.5.
834. Kemerer, supra note 53, at 31. In Puerto Rico, a publicly-funded voucher plan allowing parochial schools to participate was enacted. After interpreting article II, section 5 of Puerto Rico's Constitution, which states "[N]o public property or public funds shall be used for the support of schools or education institutions other than those of the state," the voucher legislation was found unconstitutional. This amendment was found to prohibit any benefits or support from reaching religious schools. Id.
836. Id. The New Hampshire Supreme Court opined that a parental choice program that permitted parochial schools to participate was unconstitutional. Id. It based its ruling on an amendment very similar to article XIII, section 2 of the Minnesota-
ly, the Massachusetts Supreme Court advised the Massachusetts Legislature that a tax deduction modeled after *Mueller v. Allen* would not pass state constitutional muster because the language of the Massachusetts constitution was much more "specific" than the First Amendment of the U.S. Constitution. Another example of state constitutions' prohibitive nature is article I, section 11 of Washington's constitution, which declares "no public money or property shall be . . . applied to . . . the support of any religious establishment." Applying this amendment, Washington's Supreme Court affirmed its decision in *Witters* on remand by the U.S. Supreme Court. These cases show that textual differences in state constitutions, and the stricter applications that logically follow, suggest school vouchers would possibly meet a similar fate under Minnesota constitutional analysis.

Minnesota's Supreme Court has applied Minnesota's free exercise clause in a manner that reflects the amendment's strong text. This suggests the court may give similar treatment to Minnesota's establishment clause. In *State v. Hershberger*, the court declared that article I, section 16 was "distinctly stronger" than its federal counterpart. The *Mammenga* court contended that this statement merely ta Constitution. Compare *MINN. CONST.* art. XIII, § 2 with *N.H. CONST.* pt. I, art. 6 (stating that "no person shall ever be compelled to pay towards the support of the schools of any sect or denomination.").

337. Opinion of the Justices to the Senate, 514 N.E.2d 353, 354 n.4 (Mass. 1987) (referring to article 46, section 2 of the Massachusetts Constitution, which prohibits a "grant, appropriation or use of public money . . . for founding, maintaining or aiding" religious schools). The court stated that despite who receives the aid first, "the focus still is on the effect of the aid, not on the recipient." *Id.* at 356.


339. Witters v. State Comm'n For The Blind, 771 P.2d 1119, 1121 (Wash. 1989). "Here, the applicant is asking for the State to pay for a religious course of study at a religious school, with a religious career as his goal. This falls precisely within the clear language of the state constitution again prohibition against applying public moneys to any religious instruction." *Id.*

340. See *Kemerer*, supra note 53, at 24. Many states' establishment clauses are stronger than the federal establishment clause and pose a more significant threat to school voucher programs that include parochial schools. *Id.* at 24 n.29; Jonathan B. Cleveland, *School Choice: American Elementary and Secondary Education Enter the "Adapt or Die" Environment of a Competitive Marketplace*, 29 J. MARSHALL L. REV. 75, 139 (1995) (stating state constitutions may demand a strict separation of church and state).

341. See supra note 282 (discussing the Minnesota Supreme Court's application of the Minnesota Constitution's free exercise clause in *State v. Hershberger*, *State v. French*, and *Hill-Murray Fed'n v. Hill Murray High Sch.*). Minnesota's Free Exercise clause states that "[t]he right of every man to worship God according to the dictates of his own conscience shall never be infringed; . . . nor shall any control of or interference with the rights of conscience be permitted." *MINN. CONST.* art. I., § 16.

342. *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990); accord *State v. French*, 460 N.W.2d 2, 11 (1990) (acknowledging the comparative strength of Minnesota's free
reflects the Minnesota Supreme Court's disposition toward Minnesota's free exercise clause, and not Minnesota's establishment clause. Yet the Minnesota Supreme Court did not explicitly, or even implicitly, suggest the statement exclusively referred to the free exercise clause of article I, section 16. If both are textually far stronger than their federal counterparts, then both establishment and free exercise clauses should be applied in a manner recognizing their more prohibitive nature. Adhering to the literal requirements of some constitutional amendments while ignoring other amendments' mandates would be logically inconsistent. Doing so would have the dual effect of rendering Minnesota's constitutional text unreliable and fostering appearances that the Minnesota Supreme Court capriciously interprets constitutional amendments.

If Minnesota's establishment clauses are interpreted in a consistent fashion, school voucher legislation that includes parochial schools faces an imposing obstacle to being upheld by the Minnesota Supreme Court. Commentators acknowledge that the strength of states' establishment clauses may require amendment to ensure school

343. Mammenga II, 500 N.W.2d at 139 ("The Hershberger court was not referring to the specific clause at issue in this case. It was instead discussing the general free exercise and establishment components of the Minnesota Constitution.").

344. See id.; cf. Americans United, 288 Minn. at 213, 179 N.W.2d at 155. In Americans United, the court squarely dealt with article VIII., section 2 (now article XIII, section 2), which is one of Minnesota's two establishment clauses. It said that the "limitations of the Minnesota Constitution are substantially more restrictive" than the U.S. Constitution. Id. at 213, 179 N.W.2d at 155. This precedent contradicts the Mammenga court's implication that the Minnesota Supreme Court has not expressed that Article XIII, Section 2 is more prohibitive than the Establishment Clause of the U.S. Constitution.

345. See Jones, supra note 332, at 1317 ("It should not be assumed that courts will employ disingenuous reasoning to circumvent the constitutional mandates" of more prohibitive state constitutional provisions.). Perhaps offering a glimpse of the Minnesota Supreme Court's view of article XIII, section 2 is Justice Coyne's dissent in Women v. Gomez, 542 N.W.2d 17, 38-39 (Minn. 1995) (Coyne, J., dissenting). Justice Coyne suggested that article I, section 16, though expanding free exercise protections beyond the U.S. Constitution's reach, had not been expanded beyond Lemon v. Kurtzman, 403 U.S. 602 (1971) because of article XIII, section 2's existence. Justice Coyne suggested this article "comports with the decision of Lemon." The Lemon Court found that statutes supplementing private school teachers' salaries, as well as providing reimbursements for text books and instruction materials were unconstitutional. Lemon, 403 U.S. at 625. The states' statutes could not separate benefits along secular and sectarian lines without excessive government entanglement into religion. Id. at 616, 619, 621. If Justice Coyne is suggesting this is the Minnesota Supreme Court's stance toward aid to religious schools, then school voucher legislation would face the impossible task of separating benefits conferred to religious primary and secondary schools to maintain constitutionality.
vouchers' constitutionality when parochial schools participate. 346 Although school vouchers do not establish religion literally, they undoubtedly support religious institutions. 347 Therefore, they would very likely run afoul of both of Minnesota's establishment clauses.

V. CONCLUSION

Though school vouchers floundered in Minnesota's Legislature this year, they will return. If ever able to muster enough support to be enacted, school vouchers would face establishment clause challenges. The most recent cases analyzing statutes conferring benefits to religious schools demonstrate that the U.S. Supreme Court would find a school voucher plan constitutional under any existing analytical frameworks. Federally-funded school voucher programs, or comparable state-funded voucher programs challenged under the federal constitution's establishment clause would probably avoid collision with the walls separating church and state.

If funded from Minnesota's coffers, school voucher legislation including parochial schools must resist Minnesota's walls separating church and state. These walls would prove more difficult to resist for school voucher legislation. Nonetheless, Governor Arne Carlson expressed confidence that school vouchers could steer clear of Minnesota's constitutional barriers. 348 This position draws limited support from Minnesota courts' analyses of statutes challenged under the state's establishment clauses. Nevertheless, Minnesota's constitution, at least in word, separates church and state with walls far higher than does the federal constitution. This fact, coupled with the Minnesota Supreme Court's willingness to apply amendments commensurably with their textual strength, endanger state-supported school voucher legislation including parochial schools. For this reason, if state-funded school vouchers crash into a wall separating church and state

346. Cleveland, supra note 340, at 139 (noting that state constitutions may need amending before parochial schools could participate in a school voucher program); Jones, supra note 352, at 1317 (noting Pennsylvania citizens can amend the state's constitution so school voucher legislation can include religious schools); see also Coffman, supra note 10, at 1A. Roger Moe, the Minnesota Senate's majority leader, suggests putting article XIII, section 2 up for a referendum vote. This would allow voters to amend the amendment so parochial schools can participate in a school voucher program. Id.

347. Voucher legislation receives strong support from private schools, Christian conservatives, and Roman Catholic Bishops. Coffman, supra note 10, at 1A. All of these groups surely want America's children to be better educated, but their enthusiasm over school vouchers is at least partially motivated by the fact that publicly-funded school vouchers would go toward supporting religion.

348. O'Connor, supra note 9, at 1A.
state, it will be into Minnesota’s constitutional walls, not the federal constitution’s.

Eric Nasstrom