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ABSTRACT

A LEGAL ANALYSIS OF SCHOOL VOUCHERS AND THE SOCIAL JUSTICE IMPACT

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Northern Illinois University, 2015

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While our nation's best students can generally be found in predominately white, suburban, and middle to upper-middle class school districts, our weakest students can generally be found in predominately inner-city school districts with high minority populations. To address the disparities between schools a variety of reforms, initiatives, and programs have been created and implemented – with seemingly little if any long-lasting positive effects. It is this researcher's contention that the one reform movement that is different from the other measures is school choice. It is different because it is the only reform measure that leaves the decision on what is best for a student up to the parent. While the topic of school choice is expansive, this paper focuses exclusively on school vouchers as a possible option for low-income families who reside in a large urban school district.

Framing this study is Professor Derrick Bell's theories on social change. Professor Bell postulated that four conditions must be present in order for social change, such as access for blacks and minorities to quality schools, to be cemented. This study examines political and legal events to judge whether or not Bell's theories can be employed at times when state legislation or important court decisions supported or prevented low-income families from attending the school of their choice.

NORTHERN ILLINOIS UNIVERSITY
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A LEGAL ANALYSIS OF SCHOOL VOUCHERS AND
THE SOCIAL JUSTICE IMPACT

BY

MICHAEL PATRICK RYAN

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A DISSERTATION SUBMITTED TO THE GRADUATE SCHOOL
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
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DEPARTMENT OF LEADERSHIP, EDUCATIONAL PSYCHOLOGY,
AND FOUNDATIONS

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Rosita Lopez

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DEDICATION

This work is dedicated to my wife Ellie and our children Meghan, Catherine, Patrick, Claire, Moira, and Bridget. Thank you for your love, understanding, and unwavering support. In addition, I would like to dedicate this project to my parents Martin and Judy Ryan, who both passed away before this work was completed.

TABLE OF CONTENTS

Chapter	Page
1. INTRODUCTION	1
Background	1
Background on School Vouchers.....	4
Framework for the Study	6
Origins of School Vouchers.....	9
Pro School Voucher Studies	10
Counterarguments to School Vouchers	11
Statement of the Problem	14
Significance of the Study	17
Research Questions	17
Summary	18
2. REVIEW OF LITERATURE	19
Introduction.....	19
First Amendment Historical Perspective	21
Purpose of the Constitution’s Religion Clauses.....	21
Blaine Amendments.....	22
The Continual Debate on the Meaning and Impact of Blaine Amendments	24

Chapter	Page
Development of Establishment Clause Tests.....	27
<i>Everson</i> Opens a Door	27
The <i>Lemon</i> Test.....	28
<i>Agostini</i> Gives <i>Lemon</i> a Twist	29
<i>Mitchell</i> – Two Parts <i>Lemon</i> and One Part <i>Agostini</i>	30
Establishment Clause and Its Relationship with Public Schools	32
Disagreement on How the 1 st Amendment is Applied to Schools: Infusion of Religion into Public Schools	32
Release Time from Public Schools for Religious Instruction.....	33
Prayer in Public Schools	35
Religious Groups Using Public School Property.....	36
Religious Schools’ Right to Exist – 1925 and Parent’s Rights Determining Their Child’s Education – 1972.....	38
<i>Pierce v. Society of Sisters</i> (1925)	38
<i>Wisconsin v. Yoder</i> (1972).....	39
Pre- <i>Zelman</i> : Relevant Judicial Precedent Determining the Constitutionality of School Voucher Programs	40
1947 – 1968: Tax Dollars and Private Schools – The Door Opens for School Vouchers	40
Introduction.....	40
<i>Everson v. Board of Education</i> , 330 U.S. 1(1947).....	40
<i>Board of Education v. Allen</i> (1968)	43
1973 – 1985 Successes and Roadblocks: State Legislatures Continue to Test the Waters with Public Money Going to Private Schools.....	47

Chapter	Page
Introduction.....	47
<i>Levitt v. Committee for Public Education</i> (1973).....	48
<i>Committee for Public Education v. Nyquist</i> (1973).....	50
<i>Meek v. Pittenger</i> (1975).....	54
<i>Wolman v. Walter</i> (1977).....	59
<i>Mueller v. Allen</i> (1983).....	64
<i>Grand Rapids v. Ball</i> (1985).....	69
1986 – 2000: A Perceivable Shift in U.S. Supreme Court Rulings – School Vouchers Gain More Momentum	75
Introduction.....	75
<i>Witters v. Washington</i> (1985)	75
<i>Zobrest v. Catalina Foothills School District</i> (1993)	78
<i>Agostini v. Felton</i> (1997)	84
<i>Mitchell v. Helms</i> (2000).....	95
2002: The <i>Zelman</i> Decision <i>Zelman v. Simmons-Harris</i> (2002)	103
Facts and History	103
Public School Option.....	104
Private School Option	105
Tutoring Program.....	106
The Decision	107
Private Choice.....	108

Chapter	Page
Neutral to Religion	110
Justice O'Connor's Concurrence	112
Consistent with Other Programs	112
Consistent with Prior Decisions.....	114
Justice Thomas' Concurrence	115
The Dissent	116
Problem with Neutrality.....	116
Problem with Choice.....	117
2002 – 2011: Post-Zelman: Do We Have a Mandate?.....	119
Introduction.....	119
<i>Locke v. Davey</i> (2004)	123
<i>Eulitt v. State of Maine</i> (2004).....	125
<i>American Jewish Congress v. Corporation for National and Community Service</i> (2005)	127
<i>Anderson v. Town of Durham</i> (2006)	129
<i>Arizona Christian School Tuition Organization v. Winn</i> (2009).....	132
School Voucher Programs	135
Parental Choice Program – Milwaukee	135
Scholarship and Tutoring Program – Cleveland.....	136
Opportunity Scholarship Program – Washington D.C.	137
Choice Scholarships – Indiana.....	138

Chapter	Page
Lack of Judicial and Voter Support – School Voucher Failures in Florida and Utah	139
Privately Funded School Vouchers.....	140
Public Support – Polls and Surveys.....	141
Issues Facing Chicago Public Schools.....	142
The Debate Continues.....	145
Attempts in Illinois to Create School Voucher Programs.....	148
Summary	149
3. METHODOLOGY	151
4. ANALYSIS.....	153
Professor Derrick Bell’s theory on Social Change	154
Bell’s First Condition.....	156
Bell’s Second Condition.....	164
Bell’s Third Condition	166
Bell’s Fourth Condition	171
Challenges to the Application of Bell’s Theory	178
5. CONCLUSIONS AND SUMMARIES	181
Introduction.....	181
Part 1 Summary of the Study	182
School Vouchers as a Possible Solution to the Plight of Our Public Schools.....	183
A Social Justice Framework	184

Chapter	Page
Historical and Legal Aspects of School Vouchers	186
Vouchers: Status and Public Opinion	192
The Plight of the City of Chicago Public School System.....	193
The Voucher Debate Continues	195
School Voucher Attempts in Illinois.....	198
A Re-Statement of the Problem	199
Research Questions Re-visited	200
Part 2 Findings	202
Political Will	211
Part 3 Conclusions	213
Part 4 Implications	225
Part 5 Future Research	226
Part 6 Complete Summary	227
SELECTED BIBLIOGRAPHY	231
LEGISLATION AND COURT DECISIONS CITED	240

CHAPTER ONE

INTRODUCTION

Background

It has been thirty years since the 1983 report “A Nation at Risk,”¹ a report which brought to light the serious state of our elementary and secondary education across the country, and in that time not much has changed for inner-city, low-income, minority students. The report’s ominous warnings of a “rising tide of mediocrity”² have been debated by both public school supporters and their detractors. However, the thirty year debate has generated few tangible solutions on ways to improve the public education for low-income minority students living in our big cities. While our nation’s best students can generally be found in predominately white, suburban, and middle to upper-middle class school districts, our weakest students can generally be found in predominately inner-city school districts with high minority populations.³

After the “A Nation at Risk” was published, the response mechanisms went into overdrive.⁴ According to John W. Hunt, university professor and past Illinois public school superintendent, the report “A Nation at Risk” had “struck a chord” with the American public in

¹ National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform* (Washington, D.C.: U.S. Department of Education, 1983). http://datacenter.spps.org/uploads/sotw_a_nation_at_risk-1983.pdf.

² *Id.* at 9.

³ Gary Orfield, *Reviving a Goal of an Integrated Society: a 21st Century Challenge*, January 2009 (arguing that school segregation has increased dramatically across the country and that minority students are more likely to attend poor performing schools than their white counterparts) <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf>.

⁴ John W. Hunt, *A Nation at Risk and No Child Left Behind: Deja Vu for Administrators?* Phi Delta Kappan, Vol. 89, No. 8, April 2008.

such a way that it dramatically changed the lives of school administrators.⁵ He cites three major areas or movements that were the result of the federal report. The first was the *excellence movement*⁶ which set policies to increase standards for students, teachers, and administrators. During the *excellence movement* more attention was paid to graduation rates. In addition, administrators were not immune and were encouraged to adopt business models in operating and managing people and resources. The next movement, the *restructuring movement*⁷ contained what Hunt called the “golden age of site-based management” where district administration was encouraged to hand over more responsibility to the schools.⁸ The conventional wisdom of site-based management was that the people closest to the problem had a better chance of coming up with the most viable solutions. The third movement was the *standards movement*.⁹ The *standards movement* moved attention away from teacher behavior and teacher activities and shined a spotlight on student achievement. Specifically, new learning standards were created to increase student achievement. Hunt cites the *Principles and Standards for School Mathematics*, produced by the National Council of Teachers of Mathematics as one apparatus created as a result of the “Nation at Risk.”¹⁰ As we will see in the next section, these mechanisms spilled over into the next couple of decades and as the new millennium approached a new federal initiative would be created to address student achievement.

Over the past thirty years a variety of reforms, initiatives, and programs were created and implemented – with seemingly little if any long-lasting positive effects. A myriad of instructional

⁵ *Id* at 580.

⁶ *Id* at 581.

⁷ *Id* at 582.

⁸ *Id* at 582.

⁹ *Id* at 583.

¹⁰ *Id* at 583.

reforms were implemented and they included: an emphasis on improved and varied teaching methods; longer school days and school years; after-school tutoring programs; smaller class sizes; and most recently the No Child Left Behind¹¹ initiatives. An improvement in teacher quality is another area that received a lot of attention and discussion. Programs that addressed the teacher quality issue included: improved training; increased credential standards; higher pay to attract more qualified applicants; performance incentives or merit pay; and an emphasis on teacher evaluation to weed out low-performing teachers. Other reform topics seeking improvements have included: increased access and use of technology in schools; tracking and reducing absenteeism and drop-out rates; and mainstreaming special education students. Lastly, another reform movement that was created in response to the poor performance of public schools was school choice. School choice options include magnet schools, charter schools, and school vouchers.

Several of the school reforms mentioned above can be broken down into two main categories: improving the schools (e.g. smaller class sizes, longer days, more technology, etc.) and improving the way we prepare teachers (e.g. more rigorous training, higher standards for evaluations, merit pay, etc.). It is this researcher's contention that the one reform movement that is different from the other measures is school choice. It is different because it is the only reform measure that leaves the decision on what is best for a student up to the parent. While the topic of school choice is expansive, this paper will focus exclusively on school vouchers as a possible option for low-income families who reside in a large urban school district.

¹¹ Enacted on January 8, 2002 No Child Left Behind is the common name used to describe Public Law 107-110. (Quoting from its introduction the Federal Law concerning public education addressed "closing the achievement gap with accountability, flexibility, and choice, so that no child is left behind.") For the complete bill see <http://www.gpo.gov/fdsys/pkg/PLAW-107publ110/html/PLAW-107publ110.htm>.

Background on School Vouchers

First, what is a school voucher? There are two general, but separate, definitions for the term school voucher. One definition of school voucher is when parents receive a tax credit from their state for private school expenses.¹² Another more customary definition for school voucher involves the government (in most cases state governments) awarding money directly to parents who then spend it, in most instances,¹³ on the private school of their choice.¹⁴ For the purposes of this paper, the latter definition of school vouchers will be used.¹⁵

When one mentions the words school voucher as an option for parents whose children attend underperforming public schools, two distinct opposing opinions – each with its own assertions – are often raised. Pundits on both sides of the discussion present compelling reasons for and against school vouchers.

Arguments representing the pro-voucher side include: *the values assertion*¹⁶ – vouchers allow all parents the right to send their children to schools which reflect their values; *the civil rights assertion*¹⁷ – vouchers provide poor children the same opportunity to a quality education

¹² Currently thirteen states (Alabama, Arizona, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Minnesota, North Carolina, Pennsylvania, Rhode Island, and Virginia) provide their residents with income tax credits when they send their children to private schools. <http://www.edchoice.org/School-Choice/School-Choice-In-Your-State.aspx>.

¹³ In 1995 the State of Ohio enacted the Cleveland Scholarship and Tutoring Program. Part of that program allotted funds for public school parents to use a voucher at a public school that bordered their own public school or at State approved private school. More details on this program will be provided in subsequent chapters.

¹⁴ Three states (Indiana, Ohio, and Wisconsin) and the District of Columbia (through funding from the federal government) are currently the only ones offering this type of school voucher.

¹⁵ Definition of voucher: for the purpose of this study voucher shall mean: a coupon issued by the government to a parent or guardian to be used to fund a child's education in either a public or private school. <http://www.merriam-webster.com/dictionary/voucher>.

¹⁶ David M. Powers, *The Political Intersection of School Choice, Race, and Values* 60 Ala. L. Rev. 1051, 1063-1064 (2009).

¹⁷ *Id.* and Terry M. Moe, *Schools, Vouchers, and the American Public*. Washington, D.C.: Brookings Institution, (2001).

as children who come from wealthy families; *the free market assertions*¹⁸ – vouchers create needed competition between private and public schools and this competition makes both schools better; and vouchers eliminate the monopoly public schools have, and as a result it affords parents the option to choose the best environment for their children.

On the anti-voucher side typical opinions include: *the funding assertion*¹⁹ – vouchers take money away from already cash-strapped public schools and further damage the meager conditions for poor urban students; *the extra scrutiny assertion*²⁰ – if the government provides money to private schools, then more intrusive government oversight of those schools will follow; *the religious assertions*²¹ – vouchers for private sectarian schools promote religion and violate the Establishment Clause of the U.S. Constitution; and vouchers have the potential to cause increased religious conflict in our country.²² The feelings on either side are strong and the arguments are contentious.²³

¹⁸ Milton Freidman, The Role of Government in Education, *Economics and the Public Interest*, 123-44, (1955). and Milton Freidman, *Capitalism and Freedom*, (1962).

¹⁹ Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 Am. U.L. Rev. 1461, 1474-1475 (2003) (warning that school vouchers will only worsen public schools by taking away needed funds).

²⁰ Peter A. Swift, *Mitchell v. Helms: Does Government Aid to Religious Schools Violate the First Amendment? An Extensive Analysis of the Decision and Its Repercussions*, 41 Catholic Law 169, 183-184 (2001) (raising the concern that with more government funds comes the potential for more government interference) and Paul Finkelman, *School Vouchers, Thomas Jefferson, Roger Williams, and Protecting the Faithful: Warnings from the Eighteenth Century and the Seventeenth Century on the Danger of Establishments to Religious Communities*, 2008 B.Y.U.L. Rev. 525, 542 (2008) (claiming that vouchers “would naturally lead to greater state supervision of, and interference with, religious schools and religious institutions”).

²¹ Erwin Chemerinsky, *Why Church and State Should Be Separate*, 49 Wm. & Mary L. Rev. 2193, 2207 (2008) (advocating that tax dollars should never be used to promote any religion).

²² *Zelman v. Simmons-Harris* 536 U.S. 639, 686, 729 (2002) (Steven, J., dissenting) (citing potential for vouchers to cause “religious strife”); (Breyer, J., dissenting) (fearing that vouchers can cause “religiously based conflict” in society); *Everson v. Board of Education*, 330 U.S. 1, 53-54 (1947) (Rutledge, J., dissenting).

²³ The National Education Association (NEA) adamantly opposes any type of school voucher. For more information on their opposition to school vouchers see <http://www.nea.org/home/16970.htm>. On the other hand, arguments in support for vouchers can be found at the Center for Education Reform, see <http://www.edreform.com/issues/choice-charter-schools/> and at the Friedman Foundation, see <http://www.edchoice.org/>.

Framework for the Study

This study assumes that access to quality public schools is both a legal and a moral right. Further, scholars maintain that our system of public education is predicated on social justice.²⁴ One group of educational scholars referred to social justice as “...the quality of fairness that exists within communities or societies. The extent to which fairness and equity exist in a school community is, in part, the responsibility of its leaders.”²⁵ Thus, it is fair to further assume that access to quality public schools would be a right for all students, regardless of race, family income, or the location of their home. It would be unfair and unjust for any society to deprive any student equal access to a quality education. In 1954, the U.S. Supreme Court ruled that separate educational opportunities for whites and blacks were unconstitutional.

The landmark case *Brown v. Board of Education*²⁶ found that separate public schools was detrimental to black students. *Brown* was really five cases rolled into one. Though the facts of each case were different, the central idea to each was the constitutionality of state-sponsored segregation in public schools. Future U. S. Supreme Court Justice Thurgood Marshall and the NAACP Legal Defense and Education Fund handled these cases.²⁷ Even though Marshall highlighted a wide range of legal issues on appeal, the most common one was that separate public schools for blacks and whites were essentially unequal, and consequently violated the

²⁴ For a more detailed view on Horace Mann and John Dewey’s opinions on social justice as foundation for the American public school system see Brick, Blanche, *Changing Concepts of Equal Educational Opportunity: A Comparison of the Views of Thomas Jefferson, Horace Mann and John Dewey*, American Educational History Journal v32 n2 p166-174 (2005).

²⁵ Susan Toft Everson and Leslie Hazle, *Educational Leadership for Social Justice: Enhancing the Ethical Dimension of Educational Leadership*, Catholic Education: A Journal of Inquiry and Practice, v11 n2 p176-187 Dec (2007).

²⁶ *Brown v. Board of Education*, 347 U.S. 483 (1954).

²⁷ Federal Judicial Center. History of the Federal Judiciary. http://www.fjc.gov/history/home.nsf/page/tu_bush_bio_naacp.html.

“equal protection clause” of the Fourteenth Amendment to the U.S. Constitution.²⁸ In addition, Marshall relied on the testimony of social scientist Kenneth Clark, who performed sociological tests on school children.²⁹ In his arguments to the Court, Marshall used the results of these tests to maintain that segregated schools had a propensity to make black children feel inferior to white children, and therefore this arrangement was unconstitutional.³⁰

The Court ruled in *Brown* that segregating black students in so-called equal but separate public schools was unconstitutional. While *Brown* addressed the rights of all students to attend quality public schools, this study goes one step further from *Brown* and asks: how fair is the environment in which poor performing public schools are the only option for blacks and other minorities? Is it inherently unequal when some families get to choose a better school, be it private or public, merely based on the location of the house they reside in or the income the family has? More precisely – sixty years after *Brown* do we still have *de facto* segregation in our schools? *Brown* guaranteed all students equal access to quality *public* schools, but what if those public schools do not offer the “quality” parents are looking for? If inequalities still exist, then another question should be asked: what options do black and other minority parents have if they are not satisfied with the public schools?

In order to fully develop this process of thought and answer the pertinent questions, Professor Derrick Bell’s theories on social change will be employed. Professor Bell theorized that four conditions must be present in order for social change, such as access for blacks and

²⁸ *Brown v. Board of Education*, 347 U.S. 483, 487-492 (1954).

²⁹ Gordon Beggs. *Novel Expert Evidence in Federal Civil Rights Litigation*. The American University Law Review, 45, p 9-16 (1995).

³⁰ *Id.*

minorities to quality schools, to be cemented. The following are complete presentation of Professor Bell's conditions:

1. "Initially or over time, the issue gains acceptance from a broad segment of the populace,
2. The issue protects vested property in all its forms through sanctions against generally recognized wrongdoers,
3. The issue encourages investments, confidence, and security through a general upholding of the status quo, and
4. While recognizing severe injustices, the issue does not disrupt the reasonable expectations of society."³¹

For the purposes of this study, conditions 1, 3, and 4 are of primary relevance and, therefore, will be considered. This study examines political and legal events to judge whether or not Bell's theory can be employed at times when state legislation or important court decisions supported or prevented low-income families from attending the school of their choice.

To what degree can Professor Bell's concepts be applied to the political and legal issues facing legislatures and courts when they consider opportunities for low-income families? This examination is especially relevant when framed within the current context where lawmakers and judges are asked to consider the circumstance around providing those same families access to alternatives to poor performing public schools.

³¹ Derrick Bell, *Colloquium: Relearning Brown: Applying the Lessons of Brown to the Challenges of the Twenty-First Century*, 29 N.Y.U. Rev. L. & Soc. Change 633, 635 (2004).

This question creates the environment in which the 1st, 3rd, and 4th conditions are of primary academic significance. For Bell's first condition, were there political and legal issues facing the legislatures and the courts during the 1870s (a time of increased immigration to the U.S.) which prompted Representative James Blaine from Maine to author an amendment to the U.S. Constitution that would make it illegal for the government to provide any funds to religious schools?³² For Bell's third condition, by defining the school voucher movement as an opportunity to exercise a choice in the free market, have voucher proponents encouraged investments, confidence, and security through a general upholding of the status quo for public education? For Bell's fourth condition, are the political and legal issues surrounding the disenfranchisement of the black and minority citizenry so complete, visible, and compelling that legislators and justices felt compelled to rectify the past wrongs and provide blacks and minorities alternatives to poor performing public schools?

Origins of School Vouchers

The idea for school vouchers was first disseminated by economist Milton Friedman. Professor Friedman was a libertarian who promoted free markets and capitalism. His resume included holding a prominent spot on the faculty at the University of Chicago from 1944 until 1977. Later, as an advisor to President Ronald Reagan, Friedman was considered a leading economic scholar. His views on economics influenced the government from the late 1950s

³² Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551(Spring, 2003). (providing an examination of the origins, history, current status of State Blaine Amendments).

through the 1980s.³³ Friedman first mentioned school vouchers in a 1955 journal article, but not until 1962, when he dedicated an entire chapter to the topic in his book *Capitalism and Freedom*, did the idea of school vouchers become part of the public debate. Friedman passed away in 2006, but his foundation continues to fight for school vouchers. The foundation maintains a website for the sole purpose of advocating for school choice for parents.³⁴

While Friedman was supporting the idea of vouchers in his publications, the federal government tried instituting a school voucher program in California. The first opportunity for school vouchers to reach parents came in the Alum Rock school district in California in the early 1970s. The Office of Economic Opportunity assisted in funding a voucher program, but it was met with resistance from a teachers' union and folded after three years. However, the subject of school vouchers would continue to receive attention from researchers and educators.

Pro School Voucher Studies

While Alum Rock was not a success, two major studies, one in 1982 and the other in 1990, kept the debate alive. The 1982 study, conducted by a research team lead by James S. Coleman, reported that students in Catholic schools did better academically than their public school counterparts. Coleman, a sociologist and professor at the University of Chicago at the time of the study, interpreted the findings and concluded that students learned more in an

³³ For and in depth study of Milton Friedman and his life see e.g., Alan O. Ebenstein, *Milton Friedman: A Biography*. New York, NY: Palgrave Macmillan, (2007).

³⁴ Friedman Foundation for Educational Choice at <http://www.edchoice.org/>.

environment where there were strong bonds between parents, teachers, and religious leaders.³⁵ In 1990, a reanalysis of Coleman's findings was completed by John E. Chubb and Terry M. Moe. Chubb and Moe's conclusion was that private schools had more autonomy and therefore, were more inclined to be better organized and be run with more efficiency than public schools. Echoing Milton Friedman's assertion that parents should be given a choice when it comes to the education of their children, Chubb and Moe deemed parents – not the government – as the best judges for selecting the appropriate school for their children. As an alternative to the inherent deficiencies they saw in public schools, Chubb and Moe supported the idea of school vouchers as an option.³⁶

Counterarguments to School Vouchers

Two groups that counter the findings by Coleman, Chubb, and Moe are the Center on Education Policy (CEP) and the National Education Association (NEA). The CEP cites their own research stating it is difficult to decipher results from school voucher studies and the NEA contends that vouchers do not improve conditions for public school students.

In 2011, the CEP came out with a report on school vouchers.³⁷ The report, titled *Keeping Informed about School Vouchers*, synthesized findings on school vouchers and found it was difficult to draw any conclusions about their effectiveness and the positive impact that some

³⁵ James S. Coleman, J. S., *Achievement and Segregation in Secondary Schools: A Further Look at Public and Private School Differences*. Sociology of Education. 55, 162-82. (1982).

³⁶ Chubb, J. and Moe, T., *Politics, Markets, and America's Schools* Washington, D.C.: Brookings Institution, 1990.

³⁷ The CEP calls itself “a national, independent advocate for public education” and seeks ways to inform Americans on issues facing public education. For more information on the CEP see <http://www.cep-dc.org/>.

studies claim.³⁸ After reviewing twenty-seven different studies, the CEP found the majority of those studies were funded or otherwise supported by pro-voucher organizations.³⁹ According to the CEP, when school voucher studies are supported by organizations sympathetic to vouchers – then it is possible that an unfair bias played a role in the positive conclusions drawn about vouchers.⁴⁰ The CEP recommended that an “independent advisory committee” be established to certify that school voucher studies be conducted in a fair and evenhanded manner.⁴¹

The NEA, the largest union in the United States, has vehemently fought against any voucher program.⁴² The NEA lists several reasons why vouchers are unsuccessful and impractical. According to the NEA, vouchers actually deny access to a large majority of students. Where vouchers exist, the NEA claims lotteries inherently exclude a majority of students from receiving a voucher. In addition, limited space is available in private schools for public school students wishing to transfer to a private school. NEA also contends that student achievement is not significantly increased with vouchers. Using the results of studies done on voucher programs in Milwaukee and Cleveland, which found no significant academic growth for voucher recipients, the NEA argues that vouchers have failed to improve student test scores. The lack of accountability with state oversight of private schools and the cost to the taxpayer for sending students to private schools are other arguments set forth by the NEA in opposition to vouchers.⁴³

³⁸ The CEP report is downloadable at: <http://www.cep-dc.org/displayDocument.cfm?DocumentID=369>.

³⁹ *Id.* at 47.

⁴⁰ *Id.* at 47.

⁴¹ *Id.* at 47.

⁴² The NEA details their arguments against vouchers on their website. See, <http://www.nea.org/home/16378.htm>.

⁴³ To read more on NEA anti-voucher position, see <http://www.nea.org/home/19133.htm>.

While the school voucher debate heated up among academics, over the last few decades state legislatures have enacted laws that would funnel public tax dollars to private schools. Some of those laws have remained while others have been overturned by the courts. Over the course of seventy years a myriad of court cases, both state and federal, have addressed public funds reaching private schools, but not until 2002 did the U.S. Supreme Court take up the school voucher issue. In the 2002 case, *Zelman v. Simmons-Harris*,⁴⁴ the U.S. Supreme Court ruled that school vouchers were permissible, under certain circumstances, thus flaring a debate that is still controversial today.⁴⁵ Legislators, judges, parents, teachers, and school administrators have argued about school vouchers and continue to do so. This study explores the assumption that access to a quality public school is both a legal and moral right. If our system of public education is built on social justice, is it fair to assume that access to quality public schools is a right for all students, regardless of race, income, or the location of their home? This study examines the question of social justice and the importance of quality public schools being accessible for all students, regardless of race, family income, or the location of their home. Moreover, this study will address the inequality that may exist in our public school system that may deprive any student equal access to a quality education. This study also uses the history surrounding the Supreme Court decision in *Zelman* and reviews the legal issues surrounding the debate over the implementation of vouchers in Illinois. Ultimately, this paper suggests possible ways the State of Illinois could implement a limited school voucher system in the City of Chicago.

⁴⁴ *Zelman*, *supra* note 22.

⁴⁵ Evidence of continual debate of issue – see: <http://www.csmonitor.com/2007/0322/p13s02-legn.html> (discussing ongoing voucher controversies in Cleveland, Milwaukee, Colorado, Florida, and Utah).). *See also*, ongoing debate in *Chicago Tribune* http://blogs.chicagotribune.com/news_columnists_ezorn/2010/02/voucherrhubarb.html.

Statement of the Problem

Social justice concerns itself with equal economic, political and social rights and opportunities. Social justice in education advocates for our society to make available the best possible education to all students.⁴⁶

Here in Illinois reforming a system as large and complex as the CPS is, indeed, challenging. While the attempts in 2012 to create ten so-called “turnaround” schools may have had an impact on a few thousand students, more than 400,000 students, of which eighty-six percent are minorities, were not afforded an opportunity to go to a better school.⁴⁷ If our society is to hope for significant growth, we may need to prepare for systemic change.

Adding to the complexities of the situation is the problem with continued segregation in public schools. In his 2009 study on public school segregation, scholar Gary Orfield reported that “Fifty-five years after the *Brown* decision, blacks and Latinos in American schools are more segregated than they have been in more than four decades.”⁴⁸ According to Orfield, millions of non-white students are forced to attend high schools that he called “dropout factories,” where large percentages do not graduate, have bleak futures in a tough economy, and are not properly prepared for college.⁴⁹

Public education in America is faced with many distinctive challenges as educators attempt to provide equal educational opportunities to an ever-growing diverse group of students.

⁴⁶ See, Michael Rebell, *Equal Opportunity and the Courts*, Phi Delta Kappan v89 n6 p432-439 (Feb 2008).

⁴⁷ The CPS district report card detailing enrollment figures can be found at: <http://iirc.niu.edu/District.aspx-?districtID=15016299025>.

⁴⁸ Orfield, *supra* note 3.

⁴⁹ *Id.* at 3.

Among those struggles is the changing composition of the student population. Over the past few decades public school demographics have seen an increase in: student minority representation, students with lower English language proficiency, and students coming from homes with higher poverty levels.⁵⁰ In August of 2014 the U.S. Department of Education released their projections on the demographics of public schools.⁵¹ In 2012, white students made up 51 percent of public school enrollment and that will dip to 49.7 in 2014 – marking the first time white students will no longer be in the majority.⁵² In 1997, white enrollment was 63.4 percent. It is projected that in 2022, minority students will make up 54.7 percent of the public schools and whites, 45.3 percent.⁵³

Do these statistics suggest that one would find more minority students in any randomly selected public school? On the contrary, while minority student populations have increased, our public schools have become even more segregated.⁵⁴ In 2012, the Civil Rights Project at UCLA found a preponderance of evidence that segregation has “increased dramatically” for both black and Latino students.⁵⁵

While the report found numerous amounts of proof suggesting student segregation had increased, a few statistics bear mentioning here. First, the typical black or Latino student attends a school with almost double the amount of low-income students in their schools than the typical

⁵⁰ For more details and statistics see, *Minorities in Public Schools: Social context of education*. Education Digest, 0013127X, Feb98, Vol. 63, Issue 6 (reporting that between 2000-2020 the increase in minority student population will outpace whites students two to one. Increases in the number of English Language Learners and students coming from impoverished homes will also increase at similar rates.).

⁵¹ Hussar, W.J., and Bailey, T.M. (2013). *Projections of Education Statistics to 2022* (NCES 2014-051). U.S. Department of Education, National Center for Education Statistics. Washington, DC: U.S. Government Printing Office.

⁵² *Id* at 5.

⁵³ *Id* at 5.

⁵⁴ Gary Orfield, John Kucsera & Genevieve Siegel-Hawley, *E Pluribus...Separation: Deepening Double Segregation for More Students*, September 2012. Civil Rights Project at UCLA.

⁵⁵ *Id* at 7

white or Asian student.⁵⁶ Second, 15% of black students, and 14% of Latino students, attend “apartheid schools,” where whites make up 0 to 1% of the enrollment.⁵⁷ As for Chicago, the researchers found that half of the city’s black students attends these so-called “apartheid schools.”⁵⁸ Finally, the 2012 report stated that whites make up just over half of the nation’s enrollment and the typical white student attends a school where three-quarters of their peers are white.⁵⁹ Coupled with the segregation, minority students are more likely to attend high-poverty schools.⁶⁰ It follows, then that this study concerns itself with these disparities and the social justice in our educational system. The point is – how can we offer every child a quality education when there are differences in schooling environments across low and high-poverty schools?

Almost a hundred years ago educational scholar John Dewey, in his book *Democracy and Education*, delineated a thoughtful dichotomy as a means to developing a populace able to contribute to the American Ideal. According to Dewey, a school system must provide students with both a rigorous curriculum that emphasized the acquisition of content knowledge and with the knowledge on how to live productive lives.⁶¹ While both elements of this school are an important part of developing a society, it is the later that finds its focus, clearly, in the realm of social justice. If a society is to hope for a school system that does place students in a position to possess the myriad of skills, conceptual understandings, and personal abilities needed to be a fully formed, productive adult, that society may need to address the negative results that manifest

⁵⁶ *Id* at 9

⁵⁷ *Id* at 9

⁵⁸ *Id* at 9.

⁵⁹ *Id* at 10.

⁶⁰ Minorities in Public School, *supra* note 50.

⁶¹ John Dewey, *Democracy and Education*. The Macmillan Company, (1916).

when large parts of specific populations are not afforded the opportunity to participate in an educational culture and setting that facilitates such development.

Significance of the Study

Since the voucher question is not going away, Illinois legislators need to make a decision: embrace the idea of vouchers wholeheartedly and institute an Indiana-like program, incorporate some components of a voucher program, or reject the idea entirely. The possible implications for public education in the state could be far-reaching. Implement vouchers, and we risk violating the U.S. Constitution. Ignore them, and we could prolong the debate on the solution to our state education crisis indefinitely, thus subjecting children, many of whom are already struggling, to sub-standard educational opportunities.

Research Questions

This study investigated the following research questions:

1. What is the legal history of school vouchers?
2. To what extent do the legal and political frames (social justice) meet Bell's conditions for social reform?
3. What affect do school vouchers have on assuring that low-income minority students have access to an equitable quality education?

Summary

Beginning with the 1983 federal report “A Nation at Risk” up to the 2002 No Child Left Behind legislation, the United States has sought ways to improve public school education – with special attention placed on making improvements for the most disadvantaged students. Despite the best efforts of legislatures, governors, presidents, commissions, and pundits, few positive and sustainable effects have been realized. Reform after reform has been created, implemented, re-cycled, and shelved – most with minimal success. Regardless of the intentions of the reformers, our nation’s reality is that there still exists a chasm between the more affluent high performing public schools and the low-income public schools of our nation’s inner cities.

This study will analyze school vouchers as a possible solution for those parents whose children are stuck in poor performing public schools. Of course, there are strong opinions on both sides of the voucher aisle. Chapter Two will begin to frame this discussion by employing an historical perspective on the legality of school vouchers. In addition to this historical analysis, Professor Bell’s theories on social change will provide a framework for examining the viability of a school voucher program.

CHAPTER TWO

REVIEW OF LITERATURE

Introduction

In the United States laws are created by our federal and state legislatures.⁶² The U.S. Constitution leaves most of the responsibility of educating the citizens to the states. As a result, state legislatures create educational laws.⁶³ The individual state constitutions place boundaries on the laws created by the legislatures.⁶⁴ Additionally, state legislatures are obligated to follow the U.S. Constitution.⁶⁵ Laws enacted by state legislatures that run afoul of either the U.S. Constitution or its own constitution are considered unconstitutional and unenforceable.⁶⁶ Over the years state governments, and sometimes the federal government, have created educational laws that have been challenged in the courts. This study will examine the legality of school vouchers and the social contexts in which they may be suitable.

Chapter Two provides a summary of the legal issues involved with these challenges to school voucher legislation. It begins with an historical perspective of the First Amendment and a review of the purpose of the Constitution's Religion Clauses and an examination of the court cases that helped define the Establishment Clause Tests. What follows is an investigation of the

⁶² Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, BYU Educ. & L. J. 1, (Spring 1997).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

Establishment Clause and its relationship with public schools. Through a detailed examination of relevant court cases, I discuss the difficulty our legislatures have with how, when, and where it is permissible to allow religion into our public schools. Religious schools right to exist, as decided by the U.S. Supreme Court, will also be examined.

After addressing the Establishment Clause and its relationship with public schools, I turn back to the relevant judicial precedent determining the constitutionality of school vouchers. In this section the cases are divided into three groups. The first group of cases contains an analysis of legal decisions from 1947 to 2000 which opened the door or set up roadblocks for school vouchers. The second part of my analysis concentrates solely on the U.S. Supreme Court's decision in *Zelman v. Simmons-Harris* (2002).⁶⁷ Many thought that this was the seminal case for school vouchers.⁶⁸ After a review of *Zelman*, my examination turns to the third group of cases that followed the *Zelman* decision. Covering the years 2002 to the present, I analyze five court cases, both federal and state, where the support for *Zelman* vacillates between solid to suspect.

The final part of Chapter Two examines the school voucher programs in Milwaukee, Cleveland, Washington, D.C., and Indiana. Attention will also be given to failed programs in Florida and Utah. Publicly funded vouchers and public opinion polls on the subject are also

⁶⁷ *Zelman*, *supra* note 22.

⁶⁸ See, e.g., Colleen Carlton Smith, *Zelman's Evolving Legacy: Selective Funding of Secular Private Schools in State School Choice Programs*, 89 Va. L. Rev. 1953 (2003) (Ms. Smith stated, "Advocates immediately characterized the Court's declaration as a grant of broad authority for both states and localities to enact voucher programs and many state legislatures almost immediately began to consider doing exactly that."); Joshua Edelstein, *Zelman, Davey, and the Case for Mandatory Government Funding for Religious Education*, 46 Ariz. L. Rev. 151, (Spring 2004) (stating that "In the wake of *Zelman*, the door is open for the proliferation of school voucher programs." and "*Zelman's* twin requirements of neutrality and private choice will not prove to be a high hurdle for future voucher programs to pass."), and Mary Leonard, *Proponents of Vouchers See Opening Planning Suits in Six States, Including Mass.*, Boston_Globe, Nov. 18, 2002, at A1 (claiming that voucher proponents have targeted Massachusetts, Maine, and Vermont, and other states).

considered. Finally, Chapter Two concludes with outlining the issues facing the Chicago Public Schools System as well as recent attempts in Illinois to create a voucher program.

First Amendment Historical Perspective

Purpose of the Constitution's Religion Clauses

The First Amendment to the U.S. Constitution states, “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.”⁶⁹ The first section of the First Amendment is designed to prevent two things: one, the establishment of a national religion, often referred to as the Establishment Clause and two, the preference of one religion over another, often referred to as the Free Exercise Clause.⁷⁰ However basic and straightforward these clauses may seem, the issues of establishment and free exercise have been debated in State Courts and the United States Supreme Court on numerous occasions. One area where agreement on the intent of the First Amendment usually ends involves the Establishment and Free Exercise Clauses and their relationships with religious schools.⁷¹ Whereas some are convinced that there should never be a

⁶⁹ U.S. Const. amend. I.

⁷⁰ See e.g., Michael W. McConnell, John H. Garvey, and Thomas C. Berg, *Religion and the Constitution* (2006) (elucidating about the first two clauses of the First Amendment and how they relate to government regulation especially concerning tax dollars reaching religious institutions and the place religion holds in government institutions like schools, as well as focusing on the correlation between the first two clauses of the First Amendment).

⁷¹ Orrin G. Hatch, *The Tension between the Free Exercise Clause and the Establishment Clause of the First Amendment* 47 Ohio St. L.J. 291, (Spring, 1986) (recognizing a “certain tension” between the establishment clause and the free exercise clause that sometimes includes treating them as separate and distinct entities) and Thomas

connection between government and religion, others maintain that such a relationship is inevitable.⁷² When this debate reaches the courts, contradiction and confusion are inherent in the discussion.⁷³ During the past sixty years, both sides of the argument have been well-represented in our court systems as the result of lawsuits challenging the interpretation of these clauses.

Blaine Amendments

Before a deeper discussion on the history of school vouchers can begin, it is important to look back at what is referred to as the Blaine Amendment⁷⁴ and its influence on state constitutions.

In 1875, Representative James Blaine of Maine proposed an amendment to the

Curry, *Interpreting The First Amendment: Has Ideology Triumphed Over History*, 53 DePaul L. Rev. 1 (2003) (describing the religion section of the First Amendment as being “divided” into two clauses by the Supreme Court, “each with its separate functions and purposes” and asking “How can government determine the free exercise of religion or avoid an establishment of religion if it cannot describe or define those terms?”).

⁷² See e.g., Nicole M. Weber, *First Amendment - Establishment Clause - School District Policy Permitting Student-Initiated Prayer At High School Football Games Violates The Establishment Clause - Santa Fe Independent School District v. Doe*, 120 S. Ct. 2266 (2000), 11 Seton Hall Const. L.J. 627, (Spring 2001) (discussing the continuing struggle for the Supreme Court in terms of the balance between the establishment and free exercise clauses); Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 Duq. L. Rev. 181, (2002) (arguing that the original definition of religion, as defined by the “Ratifiers” of the First Amendment, should be the only definition employed by the Supreme Court); and Michael Kavey, *Private Voucher Schools and the First Amendment Right To Discriminate*, 113 Yale L.J. 743, (2003) (inquiring after the *Zelman* decision if the Constitution protected religious schools right to discriminate based on race, gender, sexuality, etc.).

⁷³ *Wallace v. Jaffree*, 472 U.S. 38, 111 (1985) (In his dissenting opinion Justice Rehnquist illustrated the conflicting constitutional environment that exists for religious schools. He stated, “For example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them non-reusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip.”).

⁷⁴ DeForrest, *supra* note 32.

U.S. Constitution that would forbid federal funds going to private organizations. The Blaine Amendment came about at a time when there were strong nativist feelings about immigration. The 1850s had seen an increase in European immigration to the United States. Many of these new immigrants were Catholic and their assimilation into a predominantly Protestant culture proved to be difficult – especially in the area of education. Some have accused James Blaine of actively discriminating against Catholics by creating an amendment that would deny them funds to support their schools.⁷⁵ Blaine’s amendment to the U.S. Constitution passed in the House, but it fell short by four votes in the Senate.⁷⁶

After the defeat of the Blaine Amendment at the federal level, new states that were added to the Union began including Blaine Amendment language in their constitutions. Even though the Blaine Amendment failed at the federal level, it still resonates in thirty-seven state constitutions today.⁷⁷ While the specific language in the state constitutions varies from state to state, the purpose of any of the states’ Blaine amendments is to stop public money from reaching sectarian institutions – particularly private schools. For example, Illinois’ Blaine Amendment reads:

“Public Funds for Sectarian Purposes Forbidden – Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be

⁷⁵ See e.g. Brandi Richardson, *Eradicating Blaine's Legacy of Hate: Removing the Barrier to State Funding of Religious Education*, 52 Cath. U.L. Rev. 1041 (2003) (quoting from Arizona Supreme Court ruling in *Kotterman v. Killian* 972 P.2d 606 (Ariz. 1999) where the court stated “the Blaine Amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing ‘Catholic menace.’ Its supporters were neither shy nor secretive about their motives.” At note 115).

⁷⁶ Blaine Amendments. <http://www.blaineamendments.org/Intro/whatis.html>

⁷⁷ *Id.* (currently there are 37 states with Blaine Amendment language in their constitutions.).

made by the State, or any such public corporation, to any church, or for any sectarian purpose.”⁷⁸

Those that oppose vouchers often cite a state’s Blaine Amendment in their arguments against school voucher enactment, while those that support vouchers often cite the unconstitutionality of Blaine Amendments.⁷⁹

The Continual Debate on the Meaning and Impact of Blaine Amendments

There continues to be a debate on the intent and the influence of the Blaine Amendment. One example is from 2007, when the U.S. Commission on Civil Rights (CCR) took up the issue and summoned a conference in Washington D. C. on the status and effect of Blaine Amendments.⁸⁰ The CCR heard from two different groups – those in support of state Blaine Amendments and those opposed. The backdrop for this investigation included how Blaine Amendments place constitutional restrictions on school vouchers.

In their written report to the CCR, the Anti-Defamation League (ADL)⁸¹ appropriated a pro-Blaine stance. The ADL reported that Blaine Amendments “further the interest of religious

⁷⁸ Ill. Const. art. X, § 3.

⁷⁹ 2007 U.S. Commission on Civil Rights report *School Choice: The Blaine Amendments and Anti-Catholicism*, <http://www.usccr.gov/pubs/BlaineReport.pdf>) (The Commission conducted a briefing in Washington, D.C. on the status and effect of Blaine Amendments had on state constitutions and legislation. They heard testimony from four separate legal experts on the legitimacy and the unconstitutionality of Blaine Amendments.). See also, e.g., Steven K. Green, “*Blaming Blaine: Understanding the Blaine Amendment and the ‘No Funding’ Principle*,” 2 First Amendment L. Rev. (Winter 2003). (advocating a pro-Blaine Amendment argument that no public tax dollars should ever reach private schools). And See, e.g., Kyle Duncan, *Secularism’s Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. Pol. 493, at 528 (December, 2003). (suggesting that state Blaine amendments have superseded the church and state separation mandated by the Establishment Clause).

⁸⁰ *Id.*

⁸¹ The Anti-Defamation League (ADL) began in 1913 as an association dedicated to stopping the defamation of Jewish people. Since then the group has grown into what it calls itself the “nation’s premier civil rights/human

liberty in America because they ensure that government does not provide financial support to religious institutions.”⁸² The ADL went on to state that Blaine Amendments prohibit states from using tax dollars for sectarian purposes. While the ADL admitted that anti-Catholicism may have been at the root of the Blaine Amendments in the 1870’s, the ADL’s contention was that present-day Blaine Amendments are no longer filled with any bias against Catholics. The ADL listed several reasons why they believed school vouchers are not advantageous. They argued that school vouchers are “bad public policy” because they threaten the constitutional principle of separation of church and state.⁸³

Without government control, the ADL feared that vouchers would support schools that discriminate against minorities and would promote the creation of private schools that may not be as inclusive as our current public school system.⁸⁴ The ADL’s final concern about vouchers was that they do not help the poorest of the poor. They argued that most vouchers do not cover the entire cost of attending a private school. This leaves the poorest families with bills they cannot hope to pay. As a result, the ADL reasoned that vouchers only served a select few who can supplement the costs of private school tuition.⁸⁵

The ADL contended that because of our diverse population we need a public school system that unites and ties us all together. School vouchers take needed funds away from the poorest parts of that diverse population and the neediest children suffer the consequences. In the

relations agency”. The ADL offers opinions on why vouchers are ineffective and not in the best interest of public education. For more details on their views see, <http://www.adl.org/>.

⁸² CCR Blaine Report, *supra* note 79, at 47.

⁸³ *Id.* at 50.

⁸⁴ *Id.* at 51.

⁸⁵ *Id.* at 51.

opinion of the ADL, Blaine Amendments help prevent this from happening. The ADL concluded that the introduction of school vouchers undermines our American system of public education.

One argument countering the ADL's position was posited by the Institute for Justice (IJ),⁸⁶ represented by, Richard D. Komer, Senior Litigation Attorney for the IJ. Calling the American public school system a "hideously expensive failure", Komer argued that the education monopoly held by the government was disproportionality affecting minority students.⁸⁷ Using civil rights as the foundation for his argument, Komer argued against the Blaine Amendments and the negative impact it had on minority students and their lack of opportunities.

Komer disparaged our K through 12 public school system. According to Komer, public schools were not meeting the needs of a large portion of the student population – namely low-income students who are primarily members of minority groups. Komer argued that low-income minority students "deserve[d]" an education equal to the education more affluent students receive.⁸⁸

According to Komer, school choice would level the playing field for disadvantaged students. However, Komer contended the Blaine Amendments inhibit the opportunity for minority groups to have a choice. To break free from the poor conditions of many public schools, school vouchers were a necessity, but Komer argued that Blaine Amendments must first be stricken from state constitutions. Komer believed that once this was accomplished school vouchers would become more readily available to low-income students, and as a result provide

⁸⁶ The Institute for Justice is a civil liberties law firm specializing in private property, economic liberty, free speech and school choice. For more information on their mission see <http://ij.org/>.

⁸⁷ *Id.*

⁸⁸ *Id.*

them equal opportunities to a quality education that their more affluent counter parts already enjoyed.

Development of Establishment Clause Tests

The first amendment's religion clauses have confounded judges and justices since their inception.⁸⁹ However, for the purposes of this study I will be concentrating on the Supreme Court rulings after World War II that set up the various Establishment Clause tests. The Court's rulings in four cases, *Everson v. Board of Education* (1947),⁹⁰ *Lemon v. Kurtzman* (1971),⁹¹ *Agostini v. Felton* (1997),⁹² and *Mitchell v. Helms* (2000),⁹³ have evolved over time and have defined Establishment Clause test language for future courts.⁹⁴ Later in this Chapter I devote more attention to these cases as they apply to school vouchers, but here my concentration is exclusively on how these cases relate to the Establishment Clause.

Everson Opens a Door

The *Everson* case concerned a New Jersey law that allowed public tax dollars to be funneled back to private school parents to pay for the cost of transporting their children to private religious schools. Examining the New Jersey Law as an effort to assist parents in transporting

⁸⁹ See e.g., Phillip E. Johnson, *The Religious Clauses: Concepts and Compromise in First Amendment Religious Doctrine*, 72 Calif. L. Rev. 817, (1984).

⁹⁰ *Everson*, *supra* note 22.

⁹¹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁹² *Agostini v. Felton*, 521 U.S. 203 (1997).

⁹³ *Mitchell v. Helms*, 530 U.S. 793 (2000).

⁹⁴ Edelstein, *supra* note 68.

their children to sanctioned, albeit private religious schools, the Court ruled that the State was not indirectly or otherwise subsidizing religious schools and that the wall between church and state had not been broken.

Everson sent mixed signals, making it challenging for lower courts to distinguish the fundamental boundaries enacted by the Establishment Clause. On the one hand the Court went to great length to explain the conditions imposed by the Clause, but on the other hand the Court ultimately upheld the New Jersey law as constitutional. Lower courts would have to wait for future decisions from the U.S. Supreme Court to elucidate the limits imposed by the Establishment Clause. The justice system would have to wait until 1971 and the decision in *Lemon* for a clearer picture on applications to the Establishment Clause.

The *Lemon* Test

If covering the cost of transporting private school students did not crack the wall of separation of church and state, as decided in *Everson*, what would? The 1971 case *Lemon v. Kurtzman* concerned a Pennsylvania statute that provided tax dollars to pay religious school teachers' salaries for teaching secular subjects (math, modern and foreign language, physical education, and physical science) in their religious schools. The question before the Court was whether the Pennsylvania statute violated the First Amendment's Establishment Clause. For several years the Court used a three-pronged test, described in *Lemon*, when answering this question. First, any government aid to a religious institution must have a secular purpose.⁹⁵

⁹⁵ *Lemon*, *supra* note 91, at 612-13.

Second, the aid may neither advance nor inhibit religion.⁹⁶ Finally, the aid must not create “an excessive government entanglement with religion.”⁹⁷ Using this three-part test, the *Lemon* Court struck down two laws that funded religious schools through funded teachers’ salaries, textbooks, and instructional aids.⁹⁸

Agostini Gives Lemon a Twist

In 1997, the Court made a ruling in *Agostini v. Felton* that reshaped the *Lemon* Test and upheld a New York program that sent public school teachers to religious schools.⁹⁹ Specifically, the *Agostini* case involved public school teachers providing remedial education to at risk private school students.¹⁰⁰ The Court presented three new requirements when analyzing government action and whether it established or advanced religion. First, the government action could not result in governmental indoctrination.¹⁰¹ Second, it could not define aid recipients by reference to religion or discriminate against religion.¹⁰² Third, it could not create an excessive entanglement that advanced or inhibited religion.¹⁰³ The important takeaway from *Agostini* was the Court determining that the New York program was “neutral” toward religion.¹⁰⁴ For the Court “neutral” toward religion meant that the aid was available to a broad group of people (religious

⁹⁶ *Id.* at 612-13.

⁹⁷ *Id.* at 613.

⁹⁸ *Id.* at 606-07.

⁹⁹ *Agostini v. Felton* 521, U.S. 203 (1997).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 234.

¹⁰² *Id.* at 235.

¹⁰³ *Id.* at 235.

¹⁰⁴ *Id.* at 210.

or non-religious) and the aid did not prohibit or advance religion.¹⁰⁵ Because the New York program provided assistance to all qualified private and public students, the program was neutral and did not advance religion.¹⁰⁶

Mitchell – Two Parts *Lemon* and One Part *Agostini*

In the *Mitchell* decision, the Court applied and defined the new *Agostini* test. In 2000, the Court held that a Louisiana law that provided educational materials and equipment to both public and private schools did not violate the Establishment Clause.¹⁰⁷ Using *Lemon*'s first and second prongs and the latest ruling in *Agostini*, the Court rendered its decision. The Court reasoned that the Louisiana statute did not violate the Establishment Clause because the law met *Lemon*'s first condition of having a secular purpose and it met *Lemon*'s second condition of not inhibiting or advancing a religious purpose. The Court replaced *Lemon*'s third prong (whether a government action resulted in an excessive entanglement between government and religion) with its decision in *Agostini*.¹⁰⁸ Using *Agostini*, the Court replaced the excessive entanglement component with a primary effect component. In other words, the Court determined whether the legislation had an immediate and direct effect of advancing religion. The Court in *Mitchell* deemed the program did not advance religion.

¹⁰⁵ *Id.* at 210.

¹⁰⁶ *Agostini v. Felton* 521, U.S. 203, 234 (1997).

¹⁰⁷ *Mitchell*, *supra* note 93.

¹⁰⁸ *Id.* at 809.

The majority summed up their decision by focusing on the ideas of “neutrality” and “private choice”, as they pertained to public funds reaching private schools.¹⁰⁹ In other words, a program was neutral towards religion if a government action neither favored nor disfavored religion.¹¹⁰ True private choice occurred when parents made their own decisions where to apply government aid. The concepts of neutrality and private choice would become the foundation for the decision in *Zelman*.¹¹¹

Before attempting to lay out the arguments concerning school vouchers and the use of government funds to support religious education, background should be provided on Supreme Court cases that have involved the Establishment and Free Exercise Clauses of the First Amendment. As an illustration, some past cases involving the First Amendment and legislative encouragement of religion in public schools have dealt with the infusion of religion into the educational program,¹¹² the approval of release time for religious education,¹¹³ the implementation of state-sanctioned prayer,¹¹⁴ and the use of public school facilities by religious groups.¹¹⁵ These cases illustrate the difficulty faced by the judicial branch in interpreting the Establishment and Free Exercise Clauses.

¹⁰⁹ *Id.* at 829.

¹¹⁰ *Id.* at 829.

¹¹¹ *Id.* at 829.

¹¹² *Epperson v. Arkansas*, 393 U.S. 97 (1968) and *Edwards v. Aguillard*, 483 U.S. 578 (1987).

¹¹³ *McCullum v. Board of Education*, 333 U.S. 203 (1948) and *Zorach v. Clauson*, 343 U.S. 306 (1952).

¹¹⁴ *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington Township v. Schempp*, 374 U.S. 203 (1963).

¹¹⁵ *Widmar v. Vincent*, 454 U.S. 263 (1981) and *Westside Community Board of Education v. Mergens*, 496 U.S. 226 (1990).

Establishment Clause and Its Relationship with Public Schools

A basic search on the relationship between the Establishment Clause and public schools will generate myriad opinions on the topic. The novice researcher would more than likely walk away confused by the inconsistency of these opinions. Consider the following examples. Illinois public schools are mandated to have all students recite the Pledge of Allegiance.¹¹⁶ Every day thousands of Illinois public school students declare out loud the following words “one Nation under God.” Conversely, attempts to promote a religious message in schools or other government buildings by displaying a copy of the Ten Commandments has been ruled unconstitutional. In addition, teachers and students are forbidden from saying prayers at school sponsored activities. However, public schools are required to provide meeting space for students and religious organizations who wish to conduct sectarian meetings on school property. To the uninitiated, American jurisprudence on this topic can be puzzling and perhaps uneven. The following cases elaborate some more on this topic.

Disagreement on How the 1st Amendment Is Applied To Schools:

Infusion of Religion into Public Schools

After the U.S. Supreme Court’s decision in *Everson*, but before their decision in *Lemon*, other cases involving the educational program had come before the Court in response to legislation that conflicted with the First Amendment. For example, in the 1968 *Epperson v.*

¹¹⁶ Quoting from 105 ILCS 5/27-3 of the Illinois School Code: “The Pledge of Allegiance shall be recited each school day by pupils in elementary and secondary educational institutions supported or maintained in whole or in part by public funds.” <http://www.ilga.gov/legislation/ilcs/ilcs4.asp?ActID=1005&ChapterID=17&Seq-Start=157-200000&SeqEnd=164000000..>

*Arkansas*¹¹⁷ decision the Court struck down a state law which made it unlawful for any public school teacher to teach the theory of evolution. While the Court believed that control of the curriculum was the responsibility of the school officials, it reasoned that in this particular case the law was meant to force teachers to teach creationism, which in the Court's opinion came from a literal reading of the Bible. While *Epperson* predates *Lemon*, the Court found this law to be in conflict with the Establishment Clause of the First Amendment.¹¹⁸

Almost twenty years later, the Court invalidated a Louisiana law authorizing public school teachers to balance the teaching of "creation-science" and "evolution-science". The Court ruled in *Edwards v. Aguillard*¹¹⁹ that the State statute was designed to "advance the religious viewpoint that a supernatural being created mankind."¹²⁰ The Court found that *Lemon*'s first prong was not met and struck down the law because it supported a religious viewpoint and thus violated the Establishment Clause of the First Amendment.

Release Time from Public Schools for Religious Instruction

Earlier in 1948 and again in 1952, the Court had to consider the Establishment and Free Exercise Clauses in two cases involving release time for public school students to receive religious education. Both cases involved establishing a period of time when students in public schools were, upon parental request, to receive religious instruction. In the first case, *McCollum*

¹¹⁷ *Epperson*, *supra* note 112.

¹¹⁸ *Epperson*, *supra* note 112, at 110.

¹¹⁹ *Edwards v. Aguillard*, 483 U.S. 578 (1987).

¹²⁰ *Id.* at 591.

v. Board of Education,¹²¹ religious classes were conducted during the regular school day in the public school building by outside teachers representing the Protestant, Roman Catholic, and Jewish faiths. Parents gave written permission for their children to attend religious instruction during the school day. Attendance for this religious instruction was taken and reported to the school principal in the same way other classes took attendance. Students not attending the religious instruction followed their normal schedule. The Court found this to be an improper relationship between the public school and religious groups. Even though this case was decided before *Lemon*, the Court ruled that because the public school played a part in supporting religious instruction it violated the Establishment Clause of the First Amendment.

Four years later in 1952, in another case predating *Lemon*, the Court upheld a different release time program in *Zorach v. Clauson*.¹²² In this case, parents gave written permission for their children to leave during school hours to receive religious instruction at their respective churches. While those students who remained behind followed their normal schedule, attendance was taken by the churches and reported back to the public school. The Court ruled that allowing release time for religious instruction did not violate the First Amendment. The Court differentiated their ruling in *McCorm* and in *Zorach* because, unlike *McCorm* where the public school hosted the religious instruction, religious instruction in *Zorach* took place outside public school grounds, which the Court deemed permissible.

¹²¹ *McCorm*, *supra* note 113.

¹²² *Zorach v. Clauson*, 343 U.S. 306 (1952).

Prayer in Public Schools

Another issue involving the entanglement of religion in public schools concerns state-sanctioned prayer. In the case of *Engel v. Vitale*¹²³ the Court found in 1962 that a New York school could not require each class to begin with a recitation of the following prayer: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers, and our country.”¹²⁴ The Court ruled that the invocation violated the Establishment Clause of the First Amendment because it appeared that the State of New York was sanctioning religious prayer. The Court was not influenced by the fact that the prayer seemed to be nondenominational and students were not forced to recite it.

Following the *Engle* case the Court ruled on two cases in which parents disputed the requirement that each school day begin with readings from the Bible. In its 1963 opinion in *Abington Township v. Schempp*,¹²⁵ the Court ruled that Bible readings were an endorsement of religion and a violation of the Establishment Clause, despite the State’s contention that the Bible readings promoted moral values, endorsed tradition, and encouraged reading. Twenty-two years later in 1985 the Court held in *Wallace v. Jaffree*¹²⁶ invalid an Alabama statute authorizing a one-minute period of silence in all public schools “for meditation or prayer.”¹²⁷ The Court ruled that the first part of the *Lemon* Test had been violated because the statute’s purpose was religious in nature. The key component for the Court was that the statute authorized a period of silence for “meditation or voluntary prayer” in public schools was a law in conflict with the Establishment

¹²³ *Engel*, *supra* note 114.

¹²⁴ *Id.* at 421.

¹²⁵ *Abington Township v. Schempp*, 374 U.S. 203 (1963).

¹²⁶ *Supra* note 73 Wallace.

¹²⁷ *Id.* at 90.

Clause, which ran contrary to the First Amendment, since the only articulated reason for the statute was to provide an opportunity to voluntarily pray in schools.

Religious Groups Using Public School Property

In addition to the cases involving the educational program, release time, and state-sanctioned prayer in public schools, the courts have had to render decisions regarding religious groups using public school property. In *Widmar v. Vincent*¹²⁸ the Court ruled that in 1981 the University of Missouri could not prevent a student-led religious group from meeting on public school property. The Court decided that this kind of entanglement between the religious group and the school did not run afoul of the Establishment Clause because the University had allowed different outside groups to use their facilities. The Court also stated that allowing religious groups to use University property would not violate any of the three prongs of the *Lemon* Test.

Nine years later in *Education v. Mergens*¹²⁹ the Court, relying on the *Lemon* Test, ruled that a student-led religious group could use the public high school for its meetings. As a result of its decision the Court upheld the Equal Access Act,¹³⁰ maintaining that public schools could not use the Establishment Clause to prevent after-hours use of public school property by religious groups.

¹²⁸ *Widmar*, *supra* note 115.

¹²⁹ *Westside Community Board of Education v. Mergens*, 496 U.S. 226 (1990).

¹³⁰ Pub. L. 98-377, title VIII, 98 Stat. 1302 (1984); 20 U.S.C. Sec. Sec. 4071-74. (Created in 1984, the act is a federal law that ensures that any public high school receiving federal aid must ensure equal access to their building for after school meetings for the school's extracurricular clubs. The Act reads in part, a school may not "discriminate against any students who wish to conduct a meeting...on the basis of the religious, political, philosophical, or other content of the speech at such meetings.") <http://www.justice.gov/crt/cor/byagency/ed407-1.php>).

This study assumes that access to quality public schools is both a legal and a moral right. The issues that this study will raise will primarily focus on the term “quality.” There is little disagreement that education affords one the best chance of bettering themselves and improving their ability to actualize the American Dream. There is, however, disparity amongst those in the field regarding the means of achieving an educational system that allows for this. The case summaries above offered background for the legal aspects of the research and examined the Establishment and Free Exercise Clauses of the First Amendment as they pertain to the funding of private schools through government-supported vouchers.

What the prior cases do not address is the issue of tax money going directly to parents of private school children -- a highly controversial topic. The U. S. Supreme Court has authored several decisions that specifically influenced how government funds could or could not benefit private school parents. The first two decisions to address this constitutional debate were *Everson v. Board of Education*¹³¹ and *Board of Education v. Allen*.¹³² In *Everson* the question before the Court was whether a New Jersey law to provide public funds to parents for transporting their children to private schools violated the Establishment Clause of the First Amendment. The constitutional question in *Allen* was whether a New York law that compelled public school boards to furnish textbooks to private school students free of charge violated the Establishment and Free Exercise Clauses. In both cases the issue of providing state funds directly, in the form of reimbursement for the cost of taking a bus to school, or indirectly, in the form of free secular textbooks, to parents whose children attended private schools was brought to light.

¹³¹ *Everson*, *supra* note 22.

¹³² *Board of Education v. Allen*, 392 U.S. 236 (1968).

Religious Schools' Right to Exist – 1925
and
Parents' Rights Determining Their Child's Education – 1972

Pierce v. Society of Sisters (1925)¹³³

In 1925 the U.S. Supreme Court first established the fundamental right for parents to decide what was in the best interests of their children's education when it struck down an Oregon statute that made it mandatory for children to attend a public school. The statute's requirement was ruled unconstitutional because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."¹³⁴ Basically, the *Pierce* decision confirmed the fundamental right of parents to be able to choose a private school instead of a public school. However, the subject of government funding of religious schools was never addressed in *Pierce*, but voucher advocates look upon this case as support for parental choice.¹³⁵

¹³³ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

¹³⁴ *Id.* at 534-535.

¹³⁵ See e.g., Gia Fonte, *Zelman v. Simmons-Harris: Authorizing School Vouchers, Education's Winning Lottery Ticket*, 34 Loy. U. Chi. L.J. 479, 498-500 (2003).

Wisconsin v. Yoder (1972)¹³⁶

In 1972 the Court again addressed the question of parents' rights in *Wisconsin v. Yoder*. An Amish parent in Wisconsin sued the State for compelling their child's education past the eighth grade. In *Yoder* the Court wrote that it is of vital importance for parents "to guide the religious future and education of their children."¹³⁷ In its unanimous decision the Court found in favor of the Amish parent and wrote, "This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."¹³⁸ According to the Court, parents had a fundamental right, guaranteed by the religious clause of the First Amendment, to be able to use their religious beliefs in determining the best educational environment for their children. In terms of educating their children, the Court basically held that the parents' religious rights superseded the interests of the State. Pro-voucher advocates believe the decisions in *Pierce* and *Yoder* begin to lay the foundation for their view that parents have a right to choose between private and public schools.¹³⁹ However, the decisions in *Pierce* and *Yoder* did not address the funding of private schools.

¹³⁶ *Wisconsin v. Yoder*, 406 U.S. 205, (1972).

¹³⁷ *Id.* at 232.

¹³⁸ *Id.* at 232.

¹³⁹ Powers, *supra* note 16, at 1059-1060..

Pre-Zelman: Relevant Judicial Precedent

Determining the Constitutionality of School Voucher Programs

1947 – 1968 Tax Dollars and Private Schools – The Door Opens for School Vouchers

Introduction

The decisions in *Everson* and *Allen* begin to address the matter of state legislatures providing assistance to religious schools, or their students and parents, without establishing or endorsing religion.¹⁴⁰ The U.S. Supreme Court decisions in these two cases are a first glimpse at the idea that as long as public aid went to students or their parents, and not directly to the private schools, then the government aid would not contradict the First Amendment.

Everson v. Board of Education, 330 U.S. 1 (1947)

In 1947 the *Everson* case reached the United States Supreme Court on an appeal from the Court of Errors and Appeals of the State of New Jersey, which at the time was New Jersey's highest state court.¹⁴¹ The Court ruled on the constitutionality of a New Jersey statute¹⁴² that authorized public school districts to provide transportation for students to and from school. The statute stipulated that if a public school district provided transportation for public school children, it then had to supply the same resources to those children who attended a school other

¹⁴⁰ Johnson, *supra* note at 89.

¹⁴¹ From 1844 to 1947 the highest state court in New Jersey was the Court of Errors and Appeals. The New Jersey Constitution of 1947 replaced the Court of Errors and Appeals and created the New Jersey Supreme Court. See 1844 Constitution of New Jersey at <http://njlegallib.rutgers.edu/statutes/1895/gsnj.xxv.pdf> and the 1947 Constitution of New Jersey at <http://www.njleg.state.nj.us/lawsconstitution/consearch.asp>).

¹⁴² *Everson*, *supra* note 22. (See note 1 on New Jersey Laws 1941, c. 191, p. 581, N.J.Rev.Stat. 18:14-8, N.J.S.A.).

than a public school. Parents who sent their children to public and Catholic schools were reimbursed if their children used their city's bus system.

In carrying out the statute, the Ewing Township Board of Education authorized transportation reimbursements to all parents whose children used the city's public transportation system to go to and from school. All parents were to receive reimbursements no matter what type of school – private or public – their children attended. Because some of the reimbursements went to parents who had children attending Catholic schools, taxpayers filed suit in a State court arguing that the Board of Education of Ewing Township violated both the State and U. S. Constitutions concerning the establishment of religion. The State court found that the statute was in conflict with the New Jersey State Constitution, thus preventing the Board of Education from providing transportation reimbursement to private school parents. The Board of Education appealed to the Court of Errors and Appeals of the State of New Jersey which reversed the lower court's decision and stated that the statute did not violate the State Constitution or the U. S. Constitution. The taxpayers appealed to the U.S. Supreme Court on the grounds that the statute violated the First and Fourteenth Amendments.

Writing for the majority, Justice Black examined the issues before the U. S. Supreme Court through two questions. First, did the statute violate the Due Process Clause of the Fourteenth Amendment because public taxes were used by a select group for its own personal benefit? Second, did the statute violate the Establishment Clause of the First Amendment by providing public funds to help support religious schools?¹⁴³

¹⁴³ *Id.* at 5.

In a 5-4 vote the majority held the New Jersey statute as constitutional. The majority contended that reimbursement for the busing of private school children was akin to the police and fire protection provided to churches and other private entities.¹⁴⁴ The majority stated that the First Amendment “does not require the state to be their [religious believers] adversary. State power is no more to be used so as to handicap religions than it is to favor them.”¹⁴⁵ As for the first claim that taxes were being used for a special group against the wishes of some taxpayers, the majority believed that a public good was served when tax dollars provided transportation for students to attend either public or private school.¹⁴⁶

As for the second claim that public funds were being used to support religious schools, the majority found that parents were free to pick between public and private schools and that transportation reimbursement for parents who opted for private education for their children did not mean that the government was supporting religion.¹⁴⁷ As an illustration, the Court referred to its ruling in *Pierce v. Society of Sisters*¹⁴⁸ that parochial schools could coexist with the public school system as long as parochial schools met the state’s educational requirements. Parents’ right to choose a suitable school for their child was supported by the decision in *Pierce*. Consequently, if parents were free to choose a school free from government entanglement, per

¹⁴⁴ *Id.* at 17 (stating that, “...state-paid policemen, detailed to protect children going to and from church school...would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation” for children attending any type of school. Similarly, the Court reasoned that parents would not want to send their children to private schools where the “state had cut off general government services [such as] police and fire protection, connection for sewage disposal, public highways and sidewalks”).

¹⁴⁵ *Id.* at 18.

¹⁴⁶ *Id.* at 18.

¹⁴⁷ *Id.* at 18.

¹⁴⁸ *Pierce*, *supra* note 133.

the Court's reasoning in *Everson*, there would be no more interference if it provided reimbursement to parents for transportation to a parochial school.¹⁴⁹

In conclusion, the majority notably stated in *Everson* that “the First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.”¹⁵⁰ The Court ruled that the New Jersey statute did not “breach”¹⁵¹ that wall. However, the decision in *Everson* was a “mixed” bag.¹⁵² While the Court emphasized the importance the Establishment Clause, the 5-4 majority approved a statute that provided funds for parents to send their students to religious schools.¹⁵³ Though the Court's ruling found in favor of travel reimbursement for parents to send their children to religious schools, the decision in *Everson* was not the last case defining how state funds could reach religious schools.¹⁵⁴

Board of Education v. Allen (1968)¹⁵⁵

Twenty-one years later the Court heard a case similar to *Everson*. The Supreme Court would hear in *Board of Education v. Allen* about legislation that provided free textbooks to

¹⁴⁹ *Everson*, *supra* note 22.

¹⁵⁰ *Id.* at 18.

¹⁵¹ *Id.* at 18.

¹⁵² Mark Strasser, *Religion in the Schools: On Prayer, Neutrality, and Sectarian Perspectives*, 42 Akron L. Rev. 185, 190 (2009) (blaming the *Everson* Court for conditions that made it difficult for future courts to “discern the prevailing limitations imposed by the Establishment Clause”).

¹⁵³ *Everson*, *supra* note 22, at 11-28 (See Justice Black's majority opinion and Justice Rutledge's dissenting opinion both featuring James Madison and Thomas Jefferson's writings warning against any union of government and religion.).

¹⁵⁴ Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. Pa. J. Const. L. 585, 588 (2006).

¹⁵⁵ *Allen*, *supra* note 132.

private school children. In 1965 the State of New York amended a law¹⁵⁶ stipulating that public school districts were responsible for supplying textbooks free of charge to all students, including private school students. The amendment stated:

...boards of education...shall have the power and duty to purchase and to loan upon individual request, to all children...who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, textbooks. Textbooks loaned to children enrolled in...private schools shall be textbooks which are designated for use in any public [school] of the state or are approved by any boards of education. Such textbooks are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities.¹⁵⁷

The Board of Education of Central School District No. 1 in Rensselaer and Columbia Counties brought suit¹⁵⁸ against James Allen, Commissioner of Education for the State of New York,¹⁵⁹ claiming that the law violated the First Amendment of the U.S. Constitution.

The trial court agreed with the School Board that the law violated the First Amendment.¹⁶⁰ Reversing the trial court's decision, the New York Court of Appeals found that the School Board had not made their case in contesting the statute.¹⁶¹ Stating that the law assisted all students, the Court of Appeals found that the statute did not violate the U.S. Constitution because books were approved by public school officials, making the type of school irrelevant.

¹⁵⁶ New York Sess. Laws 1965, c. 320, § 1. (Prior to 1965, New York Sess. Laws 1950, c. 239, § 701 of the Education Law of New York mandated that public school boards of education were responsible for supplying their public school children with books. In 1965 the law was changed to include all students, regardless of the type of school they attended.).

¹⁵⁷ New York Sess. Laws 1950, c. 239, § 701.

¹⁵⁸ 51 Misc. 2d 297, 273 N.Y.S.2d 239, (1966).

¹⁵⁹ The Commissioner of Education for the State of New York is in charge of the State's education department.

¹⁶⁰ 27 A.D.2d 69; 276 N.Y.S.2d 234; (1966) (After the trial court's decision, Mr. Allen appealed to the Appellant Division of the Supreme Court of New York. Irrelevant to the issue in this paper the Appellant Division ruled that the Board of Education of Central School District No. 1 in Rensselaer and Columbia Counties had no legal standing in questioning the validity of a state law. After the Appellant Division's decision the case was appealed to the New York Court of Appeals.).

¹⁶¹ 20 N.Y.2d 109; 228 N.E.2d 791; 281 N.Y.S.2d 799; (1967).

There was no evidence that religious books were ever loaned by the public school boards to any private school students. Important to the Court of Appeals was the fact that private school parents and students received this benefit and not the private schools. The Board of Education's appeal before the U.S. Supreme Court questioned whether the State of New York had violated the Establishment Clause of the First Amendment because it required public schools to furnish textbooks to private schools free of charge.¹⁶²

In a 6-3 decision the U. S. Supreme Court voted to uphold the New York law. Prior to 1965, the New York law¹⁶³ stated that a community could initiate a special tax to pay for public school books. In 1965 the law was amended and starting with the 1966-1967 school year, school boards were obligated to provide books and lend them free of charge to both public and private school students in grades seven to twelve. The only books that could be loaned had to be approved by the State Board of Education or ones already in use in any public school.¹⁶⁴

The majority saw a direct connection between *Allen* and *Everson*.¹⁶⁵ Writing for the majority, Justice White stated that the reimbursement for transportation in the *Everson* case was equal to providing secular books to students attending private schools.¹⁶⁶ As in *Everson*, the majority did not see support for religion in *Allen*. They contended that the travel reimbursement in *Everson* and the loaning of textbooks in *Allen* benefitted the parents and students, not the private schools.¹⁶⁷ The books loaned to private school students were secular books that were

¹⁶² *Allen*, *supra* note 132, at 238.

¹⁶³ New York Sess. Laws 1950, c. 239, 1. New York Education Law 703, New York Sess. Laws 1950, c. 239, 3.

¹⁶⁴ *Allen*, *supra* note 132, at 240.

¹⁶⁵ *Id.* at 242.

¹⁶⁶ *Id.* at 244.

¹⁶⁷ *Id.* at 245.

similar, if not the same, as the books used in public schools.¹⁶⁸ Relying again on the decision in *Pierce v. Society of Sisters*,¹⁶⁹ the majority asserted that if the State mandated compulsory education, then it was also responsible for ensuring that all students, both those who attended public schools and those who attended private schools, had the proper tools to complete their education.¹⁷⁰

By supplying secular textbooks to private school students, the Court's ruling in *Allen* appeared to expand on the decision in *Everson*. The decision in *Allen* recognized that private schools were operating in two worlds, that is, they provided secular and religious education to their students. The majority in *Allen* saw this as two distinct and separate functions. Along with *Everson*, the *Allen* decision would be used by the Court in a number of future cases involving public funding and private schools.

The Court's decisions in *Everson* and *Allen* followed this premise: as long as public funds went to students and their parents, and not directly to the private schools, then the benefits received would not be in conflict with the First Amendment. Accordingly, state legislatures began to enact laws that followed this line of thinking. However, opponents to any kind of private school funding continued to file suit. Subsequently, six cases that reached the U. S. Supreme Court helped to put the Court's interpretation of this issue more into focus. In *Levitt v. Committee for Public Education*,¹⁷¹ *Committee for Public Education v. Nyquist*,¹⁷² *Meek v.*

¹⁶⁸ *Id.* at 245.

¹⁶⁹ *Pierce*, *supra* note 133.

¹⁷⁰ *Allen*, *supra* note 132, at 246.

¹⁷¹ *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973).

¹⁷² *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).

Pittenger,¹⁷³ *Wolman v. Walter*,¹⁷⁴ *Mueller v. Allen*,¹⁷⁵ and *Grand Rapids v. Ball*¹⁷⁶ the Court began to define its parameters as to how public funds could be used to support private school families and private school education.

1973 – 1985 Successes and Roadblocks:

State Legislatures Continue to Test the Waters with Public Money Going to Private Schools

Introduction

In this section several cases are examined. Beginning with the *Levitt* decision (where the U.S. Supreme Court struck down a New York law because it provided funding to private schools for the cost of state-authorized testing) and concluding with an analysis on the *Ball* decision (where the U.S. Supreme Court found a Michigan law unconstitutional because it required public school teachers to deliver special instructional programs to private school students in their private schools). Mixed in between are a number of other U.S. Supreme Court decisions that involve tax credits and tuition reimbursements for parents who send their children to private schools. In addition, other cases presented in this section explore the constitutionality of public funds being spent on books, instructional materials, and diagnostic services for the benefit of private school children. For a school voucher supporter there are some hits and misses with these decisions – but mostly misses.

¹⁷³ *Meek v. Pittenger*, 421 U.S. 349 (1975).

¹⁷⁴ *Wolman v. Walter*, 433 U.S. 229 (1977).

¹⁷⁵ *Mueller v. Allen*, 463 U.S. 388 (1983).

¹⁷⁶ *Grand Rapids v. Ball*, 473 U.S. 373 (1985).

Levitt v. Committee for Public Education (1973)

Following the decisions in *Everson* and *Allen*, the Supreme Court would hear in *Levitt* about a different kind of tax dollar support for private education. In 1970, the State of New York enacted a law that allowed reimbursement to private schools for the cost of state-authorized testing and record keeping.¹⁷⁷ New York taxpayers sued in District Court on grounds that this statute violated the Establishment Clause of the First Amendment. Rejecting the argument that reimbursements were only for non-religious activities, the District Court found the statute unconstitutional. The District Court contended that testing students was an essential part of a teacher's role and paying for religious school teachers to administer tests created an improper relationship between church and state. Therefore, the District Court ruled that the New York law violated the Establishment Clause and religious schools could not be compensated for the cost of state authorized testing. The State of New York appealed the lower court's decision to the U.S. Supreme Court.

In an 8-1 vote the Supreme Court affirmed the lower court's decision, ruling that compensating private schools for the cost of state-mandated testing was unconstitutional because it violated the Establishment Clause of the First Amendment. Writing for the majority, Justice Burger wrote there was a "substantial risk" when the state subsidized private education through "state-supported examinations, prepared by teachers under the authority of religious institutions."¹⁷⁸ The majority emphasized these examinations would be "drafted with an eye...to

¹⁷⁷ New York Laws 1970, c. 138, 4.

¹⁷⁸ *Levitt*, *supra* note 171, at 480.

inculcate students in the religious” teachings of the church.¹⁷⁹ The majority claimed that “the potential for conflict” required that the state avoid any action that would seem to support “religious indoctrination.”¹⁸⁰

The State of New York argued that decisions in *Everson* (transportation costs reimbursed to private school parents) and *Allen* (secular books lent to private school students) demonstrated that in some cases it was permissible for the state to provide funds to private school parents. The State’s assertion that this applied to private schools as well was contradicted by the majority’s claim that the “state-supported activities [are] a substantially different character from bus rides or state-provided textbooks.”¹⁸¹ The majority maintained that “routine teacher-prepared tests” are fundamental to the teaching of students.¹⁸² In making this comment, the majority argued that characteristics of religion would inevitably find their way into the private school teacher’s exams and therefore create an unwarranted link between church and state.

Ultimately the question before the Court, according to the majority, was whether the statute had a “primary purpose or effect of advancing religion or religious education or whether it leads to excessive entanglement by the State in the affairs of the religious institution.”¹⁸³ While the majority agreed there were some legitimate areas where the State and private schools would intertwine, for the majority it did not mean that the Establishment Clause should allow a “State to pay for whatever it requires a private school to do.”¹⁸⁴ The majority concluded that the statute violated the Establishment Clause because the money given to the private schools could find its

¹⁷⁹ *Id.* at 480.

¹⁸⁰ *Id.* at 480.

¹⁸¹ *Id.* at 481.

¹⁸² *Id.* at 481.

¹⁸³ *Id.* at 482.

¹⁸⁴ *Id.* at 482.

way to supporting religious views. As an illustration, the Court reasoned that a teacher in a religious school could construct tests which would be inherently religious.

While decisions in *Everson* and *Allen* seemed to open a door for state aid to find its way to religious education, that door was closed slightly in the *Levitt* decision. In *Levitt* the Court saw a significant difference between bus rides or state-provided textbooks and teacher-prepared tests. Likewise, future cases would further illustrate what the U.S. Supreme Court deemed permissible involving state aid and private schools.

Committee for Public Education v. Nyquist (1973)

In *Committee for Public Education v. Nyquist*¹⁸⁵ the Supreme Court would make a similar decision to their ruling in *Levitt*. The case concerned a New York statute providing tax credits to the parents of children enrolled in private schools, including religious schools, for the purpose of reimbursing parents for tuition. The Court found the statute violated the Establishment Clause because the statute supported religious schools and because parents with children in public schools were unable to participate.

In 1972 the State of New York amended their education laws and created “three financial aid programs for nonpublic elementary and secondary schools.”¹⁸⁶ The first part of the program gave money to private schools in poor urban areas for “maintenance and repair” and for the

¹⁸⁵ Nyquist, *supra* note 172.

¹⁸⁶ *Id.* at 414, § 1, amending N. Y. Educ. Law, Art. 12, §§ 549-553 (Supp. 1972-1973). <http://public.leginfo.state.ny.us/lawsseaf.cgi?querytype=laws+&querydata=@lledn+&list=law+&browser=browser+&token=42094100+&target=view>.

“health, welfare, and safety” of the students.¹⁸⁷ The second part gave money directly to parents for “tuition reimbursement” whose children attended nonpublic schools.¹⁸⁸ The third part gave “state income tax relief” to those parents who sent their children to nonpublic schools.¹⁸⁹ An unincorporated association, known as the Committee for Public Education and Religious Liberty and several New York taxpayers filed suit in District Court in the Southern District of New York claiming the amended laws violated the Establishment Clause of the First Amendment. New York State Education Commissioner Ewald B. Nyquist was named as the defendant. The District Court struck down sections one and two as violating the Establishment Clause, but ruled that section three did not violate the Establishment Clause. The Committee for Public Education and Religious Liberty and New York taxpayers appealed to the U. S. Supreme Court on grounds that the lower court’s decision with respect to the third portion of the law was not valid.¹⁹⁰

The question before the U. S. Supreme Court was whether or not the New York law “has a primary effect that advances religion, or which fosters excessive entanglements between Church and State.”¹⁹¹ The Court affirmed the District Court’s ruling with regards to sections one and two, but the Court reversed the decision as it applied to section three and found it to be unconstitutional as well.

Section one of the New York law dealt with “maintenance and repair.”¹⁹² The majority wrote that the “maintenance and repair” provision in section one violated the Establishment

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 774.

¹⁹² *Id.* at 762-763. (Section one provided “for direct money grants from the State” to “qualifying nonpublic schools to be used for the maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.” Schools that qualified for funds were “any non-public, nonprofit elementary or secondary school which in the prior year served “a high concentration of pupils from low-income families” defined by “Title

Clause because it made direct payments to nonpublic schools. The vast majority of these schools were Roman Catholic schools in low-income areas.¹⁹³ This fact “had a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian” schools.¹⁹⁴

Section two of the New York law dealt with tuition reimbursement.¹⁹⁵ The majority stated that the tuition reimbursement plan also violated the Establishment Clause. The grant money went directly to sectarian schools that, as a result, benefitted from the aid.¹⁹⁶ By reimbursing parents for a portion of the tuition bill, the State relieved the financial burden on parents. This in turn allowed parents to continue to choose private schools and the result was that government funds played an improper role in supporting parents’ decisions to enroll their children in private schools. The effect of the aid was to support private schools. This violated the Establishment Clause.¹⁹⁷ Irrelevant to the Court was the fact that parents had free choice to spend the money on any private school. The mere offer of money was incentive enough to parents to choose a private school over a public school. The Establishment Clause was violated when the money was offered, regardless of where the money was spent.¹⁹⁸

IV of the Federal Higher Education Act of 1965 (20 U. S. C. A. § 425).” “Maintenance and repair” was defined by the statute to include “the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils.”). *See also* note 10.

¹⁹³ *Id.* at 768. (*See* note 23. “In the fall of 1968, there were 2,038 nonpublic schools in New York State; 1,415 Roman Catholic; 164 Jewish; 59 Lutheran; 49 Episcopal; 37 Seventh Day Adventist; 18 other church affiliated; 296 without religious affiliation. N. Y. State Educ. Dept., Financial Support—Nonpublic Schools 3 (1969).”).

¹⁹⁴ *Id.* at 762.

¹⁹⁵ *Id.* at 764. (In order to receive the tuition reimbursement a parent must earn less than \$5,000 of taxable income a year. The amount of reimbursement was capped at \$50 for each grade school student and \$100 for each high school student.).

¹⁹⁶ *Id.* at 764.

¹⁹⁷ *Id.* at 764.

¹⁹⁸ *Id.* at 764.

Section three of the New York law dealt with tax relief for private school parents.¹⁹⁹ The Court ruled that the tax credit for parents who sent their children to private schools violated the Establishment Clause. The Court saw little difference between the tax credit in section three and tuition reimbursement in section two. In both situations the parent received special consideration in the form of encouragement and reward for sending their children to private schools.²⁰⁰

The State of New York argued that a) tax relief went directly to parents and not to schools and b) religious organizations enjoyed tax exemptions and in turn parents should receive the same consideration.²⁰¹ The majority countered that parents were getting a financial break because of their own personal choice to send their children to private schools. In affect this amounted to a tuition waiver. Adding to their argument, the majority stated that history pointed to many instances of tax relief for religious organizations, but there was no such history of tax benefits for parents whose children attended private schools. They reasoned that recent financial burdens experienced by private schools may have been the impetus for such legislation.²⁰² The majority maintained while the benefits aided parents who sent their children to private schools, the aid had the effect of advancing religion. The granting of aid would tend to increase rather than limit the involvement between church and state.²⁰³

¹⁹⁹ *Id.* at 765. (According to the Court, section three of the statute was “designed to provide a form of tax relief to those who fail to qualify for tuition reimbursement.” The Court highlighted the following examples of how a family could qualify for the tax relief. Parents could “subtract from their adjusted gross income for state income tax purposes a designated amount for each dependent for whom they have paid at least \$50 in nonpublic school tuition. If the taxpayer’s adjusted gross income is less than \$9,000 he may subtract \$1,000 for each of as many as three dependents. As the taxpayer’s income rises, the amount he may subtract diminishes. Thus, if a taxpayer has adjusted gross income of \$15,000, he may subtract only \$400 per dependent, and if his adjusted gross income is \$25,000 or more, no deduction is allowed.”) *See also* note 18.

²⁰⁰ *Id.* at 764.

²⁰¹ *Id.* at 764.

²⁰² *Id.* at 765.

²⁰³ *Id.* at 765.

Relying on the *Lemon* Test, the majority concluded the New York law violated the Establishment Clause because it had a “primary effect of advancing religion” and it infringed on the constitutional provision of “respecting an establishment of religion.”²⁰⁴ Justices Rehnquist and White both dissented on the Court’s ruling concerning the third part of the program that allowed tuition reimbursement and tax relief for private school parents. Their dissents would be a prelude for future arguments concerning public money reaching private schools.²⁰⁵

Meek v. Pittenger (1975)

Decisions in *Levitt* and *Nyquist* struck down state statutes that provided funds directly to private schools and aid that went to private school parents. One case that approved some assistance to private school students but denied other assistance was *Meek v. Pittenger*.²⁰⁶ In July 1972 the Pennsylvania legislature enacted Acts 194 and 195,²⁰⁷ which provided supplementary services to all children enrolled in private elementary and secondary schools.²⁰⁸ In Act 194 these

²⁰⁴ *Id.* at 773.

²⁰⁵ *Id.* at 807-813. (Justice Rehnquist contended that tax deductions and exemptions granted to private citizens were different from aid sent directly to religious institutions and he saw no connection between tax exemption and the establishment of religion. According to Justice Rehnquist tax exemptions did not directly aid religion. Justice Rehnquist saw a difference between “a complete forgiveness of taxes” and “merely a reduction in taxes.” On one hand the benefit went directly to the religious entity and on the other hand the benefit “rebounds only to a religiously sponsored school.” He was sympathetic to the State’s concern that “those at the lower end of the income brackets are less able to exercise” the freedom to choose a private school and therefore they are more due the relief provided by the statute. Justice Rehnquist relied on the Court’s decisions in *Allen* (books) and *Everson* (buses) in his support for the New York law. In *Allen* and *Everson* no money was directly given to the private school. Likewise the aid in *Nyquist* went directly to the parent and not to the private school. By sending their children to nonpublic schools, Justice Rehnquist maintained that private school parents helped decrease the cost of “an already overburdened public school system.” Justice Rehnquist supported the idea of granting aid to parents, who then make private decisions on how to spend the money.)

²⁰⁶ *Meek*, *supra* note 173.

²⁰⁷ Pennsylvania General Assembly in 1972 added Acts 194 and 195, July 12, 1972, Pa. Stat. Ann., Tit. 24, 9-972, to the Pennsylvania Public School Code of 1949, Pa. Stat. Ann., Tit. 24, 1-101 to 27-2702.

²⁰⁸ *Meek*, *supra* note 173.

supplementary services included counseling, hearing and speech therapy, psychological services, and testing.²⁰⁹ Basically the supplementary services were to be provided to private school students in much the same way as they were provided to the public school students.²¹⁰

Act 195 also provided for the loan of free textbooks to private school students and instructional materials and equipment to private schools. Instructional materials included periodicals, maps, charts, sound recordings, and films. Instructional equipment included projectors, record and cassette equipment, and laboratory equipment. The items loaned to the private schools were to be similar to the items provided to the public schools.²¹¹

In 1975 taxpayers sought a review in District Court for the Eastern District of Pennsylvania. The District Court found all segments, except one,²¹² of Act 194 and 195 to be constitutional. The taxpayers appealed to the U.S. Supreme Court on grounds that the laws violated the Establishment Clause of the First Amendment.

In a 6-3 vote the U.S. Supreme Court ruled that the loan of books was constitutional because the books were loaned to private school students and not loaned to the private schools.²¹³ The books were secular in nature and therefore they could not be used to advance a religious message.²¹⁴ The Court ruled unconstitutional the loaning of other materials and services because these items went directly to the private schools.²¹⁵

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Meek, *supra* note 207.

²¹² Meek v. Pittenger, 374 F.Supp. 639 (1974) (The only component the court struck down was Act 195's provision authorizing spending tax money for the purchase of instructional equipment which would be loaned to private schools and only if the equipment would not be used for religious purposes at 662.).

²¹³ Meek, *supra* note 173.

²¹⁴ *Id.*

²¹⁵ *Id.*

Justice Stewart delivered the opinion of the Court. The loaning of instructional materials and equipment to private schools was unconstitutional because it had the “primary effect of establishing religion.”²¹⁶ The majority asserted that while the aid was superficially limited to secular instructional materials it had the direct impact of advancing religion.²¹⁷ The majority also pointed out that Act 194 also provided for “auxiliary services”²¹⁸ on private school property, thus running afoul of the Establishment Clause.²¹⁹

Act 195 set up a system for nonpublic school children, both elementary and high school, to receive “textbooks without charge...that meet the Commonwealth’s” guidelines.²²⁰ The lent books would be the same as the books used in the Commonwealth’s public schools.²²¹ The other part of Act 195 allowed nonpublic schools to secure “instructional materials and equipment, useful to the education”²²² of nonpublic school children.²²³

Comparing *Meek* to *Allen*’s textbook loan program, the majority asserted that Act 195 makes “textbooks [available] to the students...and not to the nonpublic school itself.”²²⁴ The majority’s argument was *Meek* and *Allen* were similar because in both programs parents and

²¹⁶ *Id.* at 363.

²¹⁷ *Id.*

²¹⁸ *Id.* at 352-354. (auxiliary services included counseling, testing, and psychological services, speech and hearing therapy, teaching and related services for exceptional children, for remedial students, and for the educationally disadvantaged, “and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.”).

²¹⁹ *Id.* at 352-353.

²²⁰ *Id.* at 354.

²²¹ Pa. Stat., *supra* 207.

²²² *Id.* (defined instructional materials as “periodicals, photographs, maps, charts, sound recordings, films, or any other printed and published materials of a similar nature” and instructional equipment included “projection equipment, recording equipment, and laboratory equipment”).

²²³ *Meek*, *supra* note 173, at 355.

²²⁴ *Id.* at 361.

students benefitted from the loaning of textbooks. They did not see the benefit directly helping the private school.²²⁵

However, issues were quite different for the majority when instructional materials and equipment were to be provided to the same nonpublic schools.²²⁶ Agreeing with the lower court, the majority ruled “that the direct loan of instructional material and equipment has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from Act 195.”²²⁷ Calling this assistance “massive aid”, the majority argued it “is neither indirect nor incidental.”²²⁸ While the majority agreed that the nature of the instructional materials and equipment being loaned was “wholly neutral” and “secular”, the end result was “the direct and substantial advancement of religious activity...and thus constitutes an impermissible establishment of religion.”²²⁹

According to the majority opinion, Act 194 violated the Establishment Clause because of the “auxiliary services” provided to the nonpublic schools.²³⁰ While Act 195 centered its provisions on books, instructional materials and equipment, Act 194 supplied “professional staff, as well as supportive materials, equipment, and personnel” to nonpublic school children.²³¹ These services were provided only at the private schools.²³² Believing that placing public employees on private school property would create an environment where religious teaching

²²⁵ *Id.* at 361.

²²⁶ *Id.* at 363.

²²⁷ *Id.*

²²⁸ *Id.* at 365.

²²⁹ *Id.* at 366.

²³⁰ *Id.* at 367.

²³¹ *Id.*

²³² *Id.*

could creep into the secular instruction, the majority found this untenable with the Establishment Clause.²³³

Another issue for the Court concerned “political fragmentation and division along religious lines.”²³⁴ The Court pointed to the likely confrontation between those in favor of the auxiliary service program and those opposed to it.²³⁵ This created a “serious potential for divisive conflict over the issue of aid to religion.”²³⁶ The majority concluded there was enough “potential” for an improper association between church and state that would cause a violation of the Establishment Clause.²³⁷

Justice Brennan dissented in part.²³⁸ He agreed with the majority on all issues except that of the loaning of books to nonpublic students.²³⁹ He criticized the book deal and pointed to a “political-divisiveness factor” born from the textbook loan program outlined in Act 194.²⁴⁰ Justice Brennan delineated the incongruity with the majority’s argument that permitted textbooks to be loaned, but disallowed the loaning of instructional materials. For Justice Brennan there was no difference between the two.²⁴¹

²³³ *Id.* at 370.

²³⁴ *Id.* at 372.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 373.

²³⁹ *Id.*

²⁴⁰ *Id.* at 377.

²⁴¹ *Id.* at 378-387. (Justice Brennan outlined two reasons why he believed the loan of textbooks to nonpublic students in Act 195 was just as unconstitutional as the offer of instructional materials and equipment to nonpublic schools. Justice Brennan’s first point was “...it is pure fantasy to treat the textbook program as a loan to students.” He pointed out that the “nonpublic school, not its pupils, is the motivating force behind the textbook loan, and that virtually the entire loan transaction is...conducted between officials of the nonpublic school...and the officers of the State.” He argued that the exchange of books involved the private school and State officials and left the students and their parents out of the mix. Books are ordered by nonpublic school officials, delivered to the nonpublic school and distributed by those same officials to nonpublic students. Justice Brennan’s second point that the loan of books goes

Wolman v. Walter (1977)

In 1977 a similar case to *Meek* would be heard by the U. S. Supreme Court. In *Wolman v. Walter*²⁴² the issues concerned a State of Ohio law²⁴³ that granted state aid to private religious schools.²⁴⁴ Taxpayers sued the state on grounds that the aid violated the Establishment Clause.²⁴⁵ The U.S. District Court for the Southern District of Ohio sustained the State's program.²⁴⁶ The taxpayers appealed and sought review by the U.S. Supreme Court.²⁴⁷ In a 5-4 decision the U.S. Supreme Court supported some but not all of the lower court's decision.²⁴⁸ They ruled that the program, which provided textbooks, standardized tests, and services such as speech, hearing, psychological and therapeutic services, was constitutional and did not violate the Establishment

to the school or to the students was "wholly irrelevant". What trumped the particulars of the exchange of books is the "divisive political potential" that was born from the aid programs. He believed "Act 195 was intended solely as a financial aid program to relieve the desperate financial plight of nonpublic, primarily parochial, schools." Justice Brennan asserted that strong "emotions" about the separation of church and State may trigger severe divisive political outcomes. In response to Justice Brennan's assertions, Justice Burger responded and questioned the potential "political divisiveness" issue. He saw no proof that it had existed in the past. Justice Burger stated that there was no historical evidence that supported the idea that any political danger would occur simply because the State provided "...the remedial assistance necessary for *all* its children" and he doubted that "divisive political confrontation" would be a result. Justice Burger continued his own criticism of the Court's decision when he stated, "...to deny those benefits to other children only because they attend a Lutheran, Catholic, or other church-sponsored school does not simply tilt the Constitution against religion; it literally turns the Religion Clauses on their heads." His final comment on the matter asked for prospective consideration, "One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion, thus eliminating the denial of equal protection to children in church-sponsored schools, and take a more realistic view that carefully limited aid to children is not a step toward establishing a state religion...").

²⁴² *Wolman*, *supra* note 174.

²⁴³ Ohio Rev. Code Ann. § 3317.06 (1976).

²⁴⁴ *Wolman*, *supra* note 174.

²⁴⁵ *Id.*

²⁴⁶ *Wolman v. Essex*, 417 F. Supp. 1113 (ND Ohio 1976).

²⁴⁷ *Wolman*, *supra* note 174.

²⁴⁸ *Id.*

Clause.²⁴⁹ However, the Court, in a 7-2 vote, ruled that the State could not provide instructional materials and fund field trips and stay within the confines of the Establishment Clause.²⁵⁰

Justice Blackmun delivered the opinion of the Court. The majority referenced the *Lemon*²⁵¹ Test in their arguments that supported sections of Ohio's program. The *Lemon* Test states that a law "must have a secular legislative purpose, must have a principal or primary effect that neither advances or inhibits religion and must not foster an excessive government entanglement with religion."²⁵² According to the majority, some parts of the Ohio program passed the first prong of the *Lemon* Test because its secular principle provided a sound education for its citizens.²⁵³ The majority believed that other parts of the Ohio law had difficulty with the second and third prongs of the Test. "The effect and the entanglement" language in *Lemon*'s second and third prongs presented the biggest hurdles the Court.²⁵⁴

Taking up the textbook question, the majority argued that the loan of textbooks to nonpublic students was similar to the programs approved in the *Allen* and *Meeks* cases. Important to the majority's decision was the fact that the books were the same for private and public students. The majority ruled that textbook distribution to nonpublic students was constitutional and passed the *Lemon* Test.²⁵⁵

Addressing the testing issue, the majority reported that the testing and scoring of the tests concentrated on secular subjects and did not include any religious subjects.²⁵⁶ According to the majority, the State had an obligation to its students, both public and private, to insure a

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Lemon*, *supra* note 91, at 612-613.

²⁵² *Wolman*, *supra* note 174 at, 233.

²⁵³ *Id.* at 236.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 237-238.

²⁵⁶ *Id.* at 239.

satisfactory secular education. The State may also mandate that all schools, both public and private, “meet certain standards of instruction” and guarantee minimum standards are met.²⁵⁷ The majority observed that there was no excessive entanglement when standardized tests were based on secular subjects and were used to measure academic achievement, thus satisfying the U. S. Constitution and the *Lemon* Test.²⁵⁸

After addressing the instructional components of the legislation, the majority addressed the diagnostic services. The services provided were speech, hearing, psychological and therapeutic. Except for the physicians, all other employees providing the services were public school employees. The public school employees would test students on private school property. It was argued by the taxpayers that public school employees working on private school property would create “an impermissible opportunity for the intrusion of religious influence.”²⁵⁹ The taxpayers believed the public school “staff might engage in unrestricted conversation with (private school students) and ...may fail to separate religious instruction from secular responsibilities.”²⁶⁰ The majority relied on earlier decisions in *Everson* and *Allen* that states were allowed “to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials.”²⁶¹ These services “were not thought to offend the Establishment Clause.”²⁶²

²⁵⁷ *Id.* at 240. *See also*, *Pierce*, *supra* note 133.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 242.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 242. Quoting *Allen* at 616-617.

²⁶² *Id.* at 242-248. (The majority acknowledged that the *Meek* Court found a Pennsylvania law, similar to the Ohio law, unconstitutional because a publicly funded teacher, instructing on private school property, may convey a religious message. As a result the Court was concerned in *Meek* that the State would have to constantly monitor the program on the school premises. However, the majority claimed that the Ohio program was not likely to create the same burden. The majority emphasized that the Ohio program dealt with “diagnostic services” where aid to religion was dubious. The majority argued that there were two reasons why the diagnostic services were not the same as

As for the instructional materials and equipment, the District Court offered up the following opinion: under the Ohio program, instructional materials and instructional equipment that were used in public schools could be used in nonpublic schools. The secular services and materials used in both public and private schools would be exactly the same. The District Court found this section of the program to be constitutional and it did not “distinguish” it from the loan of textbooks approved in *Meek*.²⁶³ Despite the opinion of the lower court, the U. S. Supreme Court contended that “even though the loan ostensibly was limited to neutral and secular instructional material and equipment, it inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise.”²⁶⁴

While the District Court had ruled in favor of funding field trips because it saw a nexus with *Everson*, which allowed reimbursement to private school parents for the cost of transporting their children to and from school, the Supreme Court disagreed. The lower court found that providing aid directly to private school parents, as opposed to direct aid to the private school, was constitutionally acceptable because the private school did not directly benefit from such aid.²⁶⁵ The majority rejected this argument on two grounds: “First, the nonpublic school controls the timing of the trips...their frequency and destinations. Second, although a trip location may be

teaching or counseling. The majority stated first, “diagnostic services...have little or no educational content and are not closely associated with [an] educational mission” and second, the public school employee “has only limited contact with the child” and the “contact involves...the use of objective and professional testing methods”. Therefore, the majority reasoned “providing diagnostic services on the nonpublic school premises will not create an impermissible” entanglement between church and state.).

²⁶³ Wolman, *supra* note 246, at 1117.

²⁶⁴ Wolman, *supra* note 174 at, 250-251. (The majority criticized Ohio for trying to push this legislation through the back door. After the *Meek* decision, which involved direct loans to nonpublic schools, Ohio immediately reversed course and “decided to channel the goods through the parents and pupils.” The majority continued, “Despite the technical change in legal bailee, the program in substance is the same as before.”).

²⁶⁵ Wolman, *supra* note 246, at 1125.

educationally beneficial...it is the individual teacher that makes the trip meaningful.”²⁶⁶ The majority found that it was actually the schools and not the students who were the true recipients of the government aid.²⁶⁷ The majority reasoned that school field trips, which they considered “an integral part of the educational experience”, were designed, organized, and led by teachers working for a sectarian institution.²⁶⁸ As a result the majority saw a link between the funding of field trips and the funding of educational materials and equipment that was struck down in *Meek*; therefore, they declared those sections of the Ohio law unconstitutional because direct aid was going to private schools.²⁶⁹

The majority concluded that Ohio’s program was constitutional in regards to providing students’ books, standardized testing and scoring, diagnostic, therapeutic and remedial services to private schools. Conversely, Ohio’s provisions for providing instructional materials and equipment and field trips were deemed unconstitutional.²⁷⁰

²⁶⁶ Wolman, *supra* note 174.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 253-254.

²⁷⁰ *Id.* at 255-266. (In their dissents Justices Brennan, Marshall, Powell and Stevens pointed to various aspects of the majority’s ruling that brought up past and future concerns. Justice Brennan took issue with the amount of money that was used to support the Ohio program. He also took up the “divisive political potential” cause, believing that this could lead to future problems. In his dissent Justice Marshall believed that *Allen* was the true culprit and it undermined the separation of church and state. He questioned the *Allen* decision by stating “Although the texts are formally loaned to the students or their parents, the reality is that they are provided to the school.” Justice Marshall saw no difference between the loan of books, approved in *Allen* and in *Wolman*, and the offer of instructional materials. Justice Marshall agreed with Justice Brennan and mentioned the potential that Ohio’s program had for being “politically divisive”. Justice Powell rebuffed the argument that religious strife is an inherent by-product of funding sectarian school and he argued, “The risk of significant religious or denominational control over our democratic processes – or even deep political division along religious lines – is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court.” Justice Powell questioned the majority’s ruling on field trips. His concentration was on the transporting of the students and not on the role of the teacher. He countered that the aid granted did not go to the teacher’s salary. He contended that Ohio’s program to fund field trips was “limited” to funding the bus and the bus driver and the purpose was the “physical movement between the school and the secular destination.” Justice Stevens took a strict approach and advocated for a hard “line drawn by the Establishment Clause.” To Justice Stevens there was no difference “between direct and indirect subsidies, or between instructional materials like globes and maps on the one hand and instructional materials like textbooks on the other.”)

In a break from such decisions as *Levitt*, *Nyquist* and *Wolman*, the Supreme Court would revert back to the *Everson* and *Allen* decisions and approve tax deductions for private school parents in *Mueller v. Allen*²⁷¹ because the deductions were available to all parents.

Mueller v. Allen (1983)

In 1982 a Minnesota law²⁷² was established that gave parents tax deductions for tuition, textbooks, and transportation for their children to elementary and secondary schools. While these tax deductions could be applied to any state citizen, in reality it was private school parents who were able to take advantage of the deductions. Claiming that the statute violated the Establishment Clause by providing financial support to religious schools, taxpayers in Minnesota brought suit against the Commissioner of the Department of Revenue for the State of Minnesota, Clyde E. Allen, in United States District Court for the District of Minnesota. The District Court found that the statute was “neutral on its face and in its application and does not have a primary effect of either advancing or inhibiting religion.”²⁷³ The case was appealed to the United States Court of Appeals for the Eighth Circuit. Agreeing with the District Court, the Appeals Court found that the Establishment Clause of the First Amendment was not violated by this statute.

After the two lower courts ruled that the statute was in compliance with the Establishment Clause, the case was appealed to the U. S. Supreme Court. The Court ruled in favor of the Minnesota statute and used the three-prong *Lemon* Test to support its decision. The Court stated: one, the statute had a secular purpose, which was supporting the education of its

²⁷¹ *Mueller*, *supra* at 175.

²⁷² Minnesota Stat. § 290.09, subd. 22 (1982).

²⁷³ *Mueller*, *supra* at 175, at 392 (quoting *Mueller* 514 F. Supp. 998, 1003 (1981)).

citizens; two, the statute did not result in advancing or inhibiting religion; and three, the statute did not create an excessive entanglement issue between the government and religion.

The majority began by summarizing the Minnesota statute that allowed “taxpayers, in computing their state income tax, to deduct certain expenses for the education of their children.”²⁷⁴ The deduction was “limited to actual expenses incurred for the ‘tuition, textbooks and transportation’ of dependents attending elementary or secondary schools.”²⁷⁵ The majority admitted that this issue presented a sticky situation for the Court, which in the past had wrestled with “interpretation and application” of Establishment Clause questions.²⁷⁶

The majority emphasized that the Supreme Court’s past practice had shown that some examples of government aid to private schools parents and their children were acceptable and were not necessarily an infringement on the Establishment Clause. The decisions in *Everson* (transportation reimbursement) and *Allen* (loaning of textbooks) were cited by the majority as examples where the Court found the Establishment Clause was not violated when tax dollars supported private school families. The majority also stated that there have been other decisions that have “struck down arrangements” that have offered aid to private schools and the parents who support them.²⁷⁷ Citing the *Lemon*, *Levitt*, *Meek* and *Wolman* cases, the Court found that part or all of the state statutes that provided aid to private schools and/or the parents who supported them were unconstitutional.²⁷⁸

Weighing these two divergent approaches, the majority’s main concern was whether the Minnesota law fell under the rulings made in *Everson* and *Allen* or did it fall under the

²⁷⁴ *Id.* at 390.

²⁷⁵ *Id.* at 391.

²⁷⁶ *Id.* at 392.

²⁷⁷ *Id.* at 393.

²⁷⁸ *Id.*

constraints of the decisions in the *Levitt*, *Meek* and *Wolman* cases.²⁷⁹ The taxpayers, who appealed to the Court, wanted the ruling in *Nyquist* to guide the Court's decision.²⁸⁰ In *Nyquist* the Court ruled "invalid a New York statute providing public funds for the maintenance and repair" of private schools and the awarding of "tuition grants to the parents of public school children attending private schools."²⁸¹ The Court rejected the use of the *Levitt*, *Meek*, *Wolman*, and *Nyquist* cases and relied on the *Lemon* Test to decide the case.

The first part of the *Lemon* Test asks if a statute has a secular purpose. The majority argued that "little time need be spent on the question of whether the Minnesota tax deduction has secular purpose."²⁸² After concluding that it was "essential to the political and economic health of any community" to see that all children are properly educated, the majority continued, "...there is a strong public interest in assuring the continued financial health of private schools."²⁸³ The majority argued "such schools relieve public schools...of a great burden" which as a result creates a "benefit for all taxpayers."²⁸⁴ The majority referenced Justice Powell's opinion in the *Wolman* case where he contended that our country's past has benefitted from the existence of private schools. Private schools have offered an "educative alternative" to public education, private schools have created a "wholesome competition" between private and public

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 411-412. (In his dissenting opinion Justice Marshall claimed the majority would like to distinguish the Minnesota "tax deduction" from the "tax benefit" in *Nyquist*, which was struck down. Criticizing the majority's view, Justice Marshall stated that the tax deduction was "designed to yield...the same amount" of deductions for every family, while the *Nyquist* tax benefit was a "predetermined amount which depended on the tax bracket of each taxpayer." Justice Marshall called this a "distinction without a difference." Justice Marshall pointed out that the state's motives may be to offer direct assistance with the parents, but in the end it was the private school that certainly benefitted from such aid.)

²⁸¹ *Id.* at 394.

²⁸² *Id.*

²⁸³ *Id.* at 395.

²⁸⁴ *Id.*

schools, and private schools can relieve the “tax burden” of its citizenry.²⁸⁵ In Justice Powell’s opinion all of this only improved public education.²⁸⁶

Moving on to the second part of the *Lemon* Test, the Court asked whether the statute had the primary effect of advancing or inhibiting religion.²⁸⁷ Important to the majority was the fact that the Minnesota statute in question was “one of among many deductions...available under Minnesota tax laws.”²⁸⁸ Another important aspect for the Court was that the Minnesota law allowed “all parents” no matter where they sent their children to school to apply for the tax deduction.²⁸⁹ The majority found that the Minnesota law was more in line with the decisions made in *Everson* and *Allen* than in *Levitt*, *Meek* and *Wolman* or *Nyquist*. In *Everson* and *Allen* both public and private school families were eligible for benefits, while in *Nyquist* only private schools or private school parents were eligible for government aid. The majority concluded that “state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.”²⁹⁰

The majority admitted that this aid may, as a result, trickle down to the private school; however, “aid to parochial schools is available only as a result of decisions of individual parents.”²⁹¹ According to the majority past dangers that were associated with Establishment Clause challenges did not apply to the present day.²⁹² The majority believed:

²⁸⁵ *Id.* at 394. quoting *Wolman* at 262.

²⁸⁶ *Id.* at 395.

²⁸⁷ *Id.* at 396.

²⁸⁸ *Id.* (Some of the deductions listed in the statute included: summer school tuition, tuition for private tutoring, Montessori tuition, cost of tennis shoes and sweat suits for physical education, camera expenses, and rentals for ice skate.). *See also* note #2.

²⁸⁹ *Id.* at 398.

²⁹⁰ *Id.* at 399.

²⁹¹ *Id.*

²⁹² *Id.* at 400.

The risk of significant religious or denominational control over our democratic process – or even of deep political division along religious lines – is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court.²⁹³

The majority noted that past views of some sort of political divisiveness were antiquated in today's society. They further stated, "The historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit...that eventually flows to parochial schools from the neutrally available tax benefit at issue."²⁹⁴

Another claim by the taxpayers was that the statute truly benefitted only the parents who sent their children to private schools because parents who sent their children to public schools could not enjoy the tax deductions. Arguing that the statute was "facially neutral" and therefore the petitioners' claim had no basis,²⁹⁵ the majority rejected this argument. In essence what the majority said was that it is not the concern of the Court when a law is "neutral" and citizens do not take advantage of the tax deductions set up by that law.²⁹⁶ In addition to this line of thinking, the majority reasoned that private school parents placed upon themselves an extra "burden" of financing a private school education.²⁹⁷ The majority believed the State, which benefitted from not having to seek more taxes for schools because some of its citizens chose to send their children to private schools, was within its rights to relieve those same parents and provide them with tax deductions.²⁹⁸

²⁹³ *Id.* quoting *Wolman* at 263.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 401.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 402.

²⁹⁸ *Id.*

Taking up the third part of the *Lemon* Test, the Court asked if the statute caused any excessive entanglement between church and state. The Court did not see an entanglement issue because the only opportunity that may have presented an improper relationship would be with the tax deduction for textbooks. Relying on its decision in *Allen*, where the Court upheld the loan of secular textbooks to parents or children attending private schools, the Court ruled that this was a moot point because the only books that could be deducted on a parents tax form were secular textbooks.²⁹⁹ Ultimately the Court did not view this as an excessive entanglement issue.³⁰⁰

Grand Rapids v. Ball (1985)

In 1976 the Supreme Court would make a similar ruling to the one made in *Meek*.³⁰¹ In Grand Rapids, Michigan, the public school district created the School Shared Time Program and Community Education Program.³⁰² The programs provided additional after-school classes for students in several private schools. The programs received funding from the public school system and were taught by teachers hired by the public school system. Classes were conducted in private school classrooms, which were rented by the public schools and bore signs identifying them as public school classrooms while the classes were in session.³⁰³ Some of the Shared Time teaching staff had private school teaching experience. The staffs in the Community Education

²⁹⁹ *Id.* at 403.

³⁰⁰ *Id.*

³⁰¹ *Meek*, *supra* note 173, at 370. (In *Meek*, the Court found that a Pennsylvania program violated the Establishment Clause because it provided “significant danger that religious doctrine will become intertwined with secular instruction.”).

³⁰² *Grand Rapids*, *supra* note 176.

³⁰³ *Id.* at 378. (See note #2. The sign read: “Grand Rapids public schools’ room. This room has been leased by the Grand Rapids public school district, for the purpose of conducting public school educational programs. The activity in this room is controlled by the Grand Rapids school district.”)

Program were considered part-time public employees and their ranks were comprised of full-time private school teachers.³⁰⁴ Taxpayers in Grand Rapids filed suit in District Court challenging that both programs violated the Establishment Clause of the First Amendment. The District Court declared the programs unconstitutional and on appeal the United States Court of Appeals for the Sixth Circuit affirmed. The Supreme Court reviewed the case and affirmed both lower courts' decisions.³⁰⁵ The Court held that the two programs violated the Establishment Clause because they both had the effect of promoting and supporting religion.³⁰⁶

The Court described the Shared Time Program as “classes during the regular school day that are intended to be supplementary to the ‘core curriculum’ courses that the State of Michigan requires as part of an accredited school program.”³⁰⁷ The courses taught included “remedial and enrichment” art, math, music, physical education, and reading. The teachers in the program were “full-time employees of the public schools” and “all of the supplies, materials, and equipment used in connection with the Shared Time program” were provided by the public school system.³⁰⁸

The Court explained that the Community Education Program was available to students and adults. The courses offered included arts and crafts, home economics, Spanish, gymnastics, yearbook production, drama, newspaper, humanities, chess, model building, and nature appreciation.³⁰⁹ The teachers in the program were considered “part-time public employees”, but in many cases these same teachers were fully employed private school teachers.³¹⁰

³⁰⁴ *Id.* at 373.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 375.

³⁰⁸ *Id.* at 376.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 376-377.

Both programs were led by a public school employee who provided information to a private school liaison on the courses scheduled to be offered. The private school liaison would decide which courses would be offered and the classrooms that would be used. The public school system would rent the classrooms from the private school which had to be free of any religious symbols. In addition, a sign stating that the room was a “public school classroom” and was rented by the Grand Rapids School District had to be posted in every room used.³¹¹ While the two programs were open to all students, both public and private, the majority stated that at the time of the lawsuit, “There is no evidence that any public school student has ever attended a Shared Time or Community Education class in a nonpublic school.”³¹² In addition, the majority pointed out, “Forty of the forty-one schools at which the programs operate are sectarian in character.”³¹³

The majority made note of the District Court decision that relied upon the *Lemon* Test.³¹⁴ The District Court decided that both programs did not violate the first part of the test, the secular purpose requirement. However, the lower court ruled that the program did not meet the criteria for the second and third prongs, the primary effect and excessive entanglement prongs. Important to the lower court’s decision was that the programs were held exclusively in private schools and solely served private school students. This violated the second prong of the *Lemon* Test where it is impermissible for a government-supported program to “advance or inhibit” religion. The third

³¹¹ *Id.* at 377-378.

³¹² *Id.* at 378.

³¹³ *Id.* at 379. (Twenty-eight of the schools were Roman Catholic and twelve schools were operated by various Protestant denominations.).

³¹⁴ *Lemon*, *supra* note 91.

part of the *Lemon* Test was violated because an improper “level of entanglement” existed between the public and private schools.³¹⁵

After considering the District Court’s ruling, the majority based their opinion on the “guarantees of the Establishment Clause.”³¹⁶ The majority stated the Court’s “...goal has been to give meaning to the sparse language and broad purposes of the Clause, while not unduly infringing on the ability of the States to provide the welfare of their people.”³¹⁷ The majority continued stating, “...secular purpose cannot validate government aid to parochial schools when the aid has the effect of promoting a single religion...or when the aid unduly entangles the government in matters religious.”³¹⁸

The Court, agreeing with the lower courts, nullified the Shared Time Program as a violation of *Lemon*’s second prong where public money cannot have the effect of advancing or inhibiting religions. In the Court’s opinion the after-school program was promoting a secular purpose.³¹⁹ The following conditions were problematic for the Court: first, 40 of the 41 schools participating in the program were sectarian in nature; second, such teachers working in these schools could easily advance a religious message; third, a “symbolic link” existed between the government and religion and as a result students could interpret governmental endorsement of a particular religion; and fourth, religions may be “directly promoted” as a result of financing of religious schools.³²⁰

³¹⁵ Grand Rapids, *supra* note 176, at 380-381.

³¹⁶ *Id.* at 381.

³¹⁷ *Id.*

³¹⁸ *Id.* at 381-382.

³¹⁹ *Id.* at 383.

³²⁰ *Id.* at 385.

The Court took a strict approach and declared “Establishment Clause jurisprudence is characterized by few absolutes; the Clause does absolutely prohibit government-financed or government-sponsored indoctrination in the beliefs of a particular religious faith.”³²¹ According to the Court, any support of “indoctrination” to a particular belief could possibly damage the “individual” as well as have a negative impact on “the resulting religious beliefs.”³²² Citing the decisions in *Meek*³²³ and *Lemon*,³²⁴ the Court argued “state sponsored instructional personnel” would improperly endorse a religious message.³²⁵ The Court believed that the Grand Rapids private school teachers who had been hired by the public school system to teach in the after-school program would naturally bring “the tenets and beliefs of their particular faiths” to the after school program.³²⁶ In other words, the Court believed that these same private school teachers did not shed their religious beliefs at the end of the school day and don the guise of public school instructors in the after-school program. According to the Court, it was next to impossible for these teachers to forego inculcating religious beliefs “before the same religious school students and in the same religious school classrooms.”³²⁷

Next, the Court turned their attention to the “symbolism of a union between church and state.”³²⁸ The majority stated that if the end result of an educational program is “a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.”³²⁹ The Court was concerned about “categories of programs in which public funds

³²¹ *Id.*

³²² *Id.*

³²³ *Meek*, *supra* note 173, at 370.

³²⁴ *Lemon*, *supra* note 91, at 615.

³²⁵ *Grand Rapids*, *supra* note 176, at 386-387.

³²⁶ *Id.* at 385.

³²⁷ *Id.* at 386-388.

³²⁸ *Id.* at 390.

³²⁹ *Id.* at 389.

are used to finance secular activities that religious schools would otherwise fund from their own resources.”³³⁰ However, there are programs where the Court ruled that some government aid does not advance religion. The Court upheld such aid because it was given to parents and not directly to private schools: *Allen* (loan of books was permissible), *Wolman* (books and other services were permissible, but not instructional materials and field trips), and *Everson* (reimbursement for transportation was permissible).³³¹ While the Grand Rapids School District argued that the Shared Time program and the Community Education program “supplemented the curriculum with courses not previously offered in the religious schools,”³³² it was the students who truly received the aid and not the private school. The Court countered that “no meaningful distinction can be made between aid to the student and aid to the school.”³³³ The Court maintained that “masking the aid to individual students” still violated the Establishment Clause.³³⁴

The Court concluded that the two after-school programs “have the effect of promoting religion in three ways:” (1) the private school instructors who were hired by the public school system cannot escape the cloak of their religious beliefs. Whether “subtly or overtly”, under the plan in *Ball*, students would be inculcated with religious beliefs; (2) the “symbolic union of church and state” is unavoidable when government aid is used to support education in a religious setting; and (3) “the programs in effect subsidize the religious functions of the parochial schools

³³⁰ *Id.* at 393.

³³¹ *Id.*

³³² *Id.* at 395.

³³³ *Id.* at 396.

³³⁴ *Id.*

by taking over a substantial portion of their responsibility for teaching secular subjects.”³³⁵ Thus, the Court’s ruling limited state aid to private schools.

1986 – 2000: A Perceivable Shift in U.S. Supreme Court Rulings –

School Vouchers Gain More Momentum

Introduction

After *Everson*, *Allen*, *Levitt*, *Nyquist*, *Meek*, *Wolman*, *Mueller*, and *Ball* the Court continued to define their stance on how public tax dollars could be used and not used in supporting private school families and private school education. The next set of cases would begin to broaden that scope. In *Witters v. Washington*,³³⁶ which involved a blind college student receiving financial aid to attend a religious college; *Zobrest v. Catalina*,³³⁷ which involved using tax dollars to pay an interpreter for a deaf student who attended a private school; *Agostini v. Felton*,³³⁸ which involved public school teachers working in private schools; and *Mitchell v. Helms*³³⁹ which involved public money being spent on instructional materials used in private schools, the Court would expand their opinion on public money reaching private school interests.

Witters v. Washington (1985)

The Court would decide a case in 1985 that would begin to indicate that they were open to state aid reaching individuals who in turn would use the aid at private schools. *Witters v.*

³³⁵ *Id.* at 397.

³³⁶ *Witters v. Washington*, 474 U.S. 481 (1986).

³³⁷ *Zobrest v. Catalina*, 509 U.S. 1 (1993).

³³⁸ *Agostini v. Felton*, 521 U.S. 203 (1997).

³³⁹ *Mitchell v. Helms*, 530 U.S. 793 (2000).

Washington Department of Services for the Blind concerned a legally blind college student, Larry Witters, who applied for government aid to help defer his costs at a Christian college.³⁴⁰ It was Mr. Witters' intention to become a pastor, missionary or youth director in a Christian church.³⁴¹

Mr. Witters, who was a resident of the State of Washington, applied to the State's Commission for the Blind for financial aid.³⁴² The Commission denied Mr. Witters' application for aid because he would use the money on a religious education.³⁴³ The Commission based their decision on the Washington State Constitution which prohibited state funds from being used for religious instruction.³⁴⁴ Mr. Witters sued State Superior Court, which upheld the Commission's decision.³⁴⁵ The case went to the Washington Supreme Court and the court upheld the Commission's decision; however, they did not rely on Washington's State Constitution, but instead relied on the Establishment Clause of the First Amendment.³⁴⁶ Mr. Witters appealed his case to the U. S. Supreme Court.

The central question for the Court was whether Larry Witters could use public funds to pursue a degree in religious education or was such use "an impermissible direct subsidy" and a violation of the Establishment Clause?³⁴⁷ In rendering its decision, the majority employed the

³⁴⁰ Witters, *supra* note 336.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ Washington State Constitution Article I Section 11 states: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." And Article IX Section 4 states: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

³⁴⁵ Witters, *supra* note 336.

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 487.

Lemon Test.³⁴⁸ The unanimous Court found that the first part of the *Lemon* Test was met. It was clear to the majority that the program in question was developed to “promote the well-being of the visually handicapped” through financial aid.³⁴⁹ The majority ruled that the Washington statute was secular and did not violate *Lemon*’s first prong.³⁵⁰ The second prong presented a more difficult decision. The majority contended that “the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution.”³⁵¹ The majority stated that on the one hand it was permissible for State-paid employees to make contributions to religious organizations,³⁵² but on the other hand it is not permissible for the State to grant any aid “directly” to a religious school.³⁵³

The majority asserted that the government aid given was “paid directly to the student, who transmits it to the educational institution of his or her choice.”³⁵⁴ If aid finds its way to a religious school, it was “only as a result of the genuinely independent and private choices” of the individual.³⁵⁵ Therefore the majority argued the following points: first, Washington’s plan did not “create a financial incentive for students to undertake sectarian education;”³⁵⁶ second, Washington’s plan did not “provide greater or broader benefits for recipients who apply their aid to religious education” and the aid was not “limited...to students at sectarian institutions;”³⁵⁷ and

³⁴⁸ *Lemon*, *supra* note 91, at 612.

³⁴⁹ *Witters*, *supra* note 336, at 485.

³⁵⁰ *Id.* at 485.

³⁵¹ *Id.* at 486.

³⁵² *Id.* at 486-487. (The Court stated, “For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary.”).

³⁵³ *Id.* at 487. (The Court stated, “It is equally well settled, on the other hand, that the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is “that of a direct subsidy to the religious school” from the State.”).

³⁵⁴ *Id.* at 487.

³⁵⁵ *Id.* at 487.

³⁵⁶ *Id.* at 488.

³⁵⁷ *Id.* at 488.

third, students receiving this aid had the freedom to choose from a variety of schools. According to the majority “aid recipients have full opportunity to expend...aid on...secular education, and as a practical matter have rather greater prospects to do so” and consequently it “means that the decision to support religious education is made by the individual, not by the State.”³⁵⁸

The Court steered clear of directly addressing *Lemon*’s third prong, the “entanglement” issue. However, the majority made the following statement, “...the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer[s] any message of state endorsement of religion.”³⁵⁹ The Court “rejected the claim that...extension of aid under Washington’s vocational rehabilitation program to finance” a student’s education at a religious school is “is inconsistent with the Establishment Clause.”³⁶⁰ Future cases would look carefully at the Court’s argument that state aid could be used by private individuals and applied to religious institutions.

Zobrest v. Catalina Foothills School District (1993)

In a case similar to the *Meek*³⁶¹ (where the Court allowed the purchase of textbooks for private schools, but prohibited public school personnel from working with private school students) and *Ball*³⁶² (where the Court invalidated after school programs that provided public employees to act as instructors within private schools) decisions, the U. S. Supreme Court ruled

³⁵⁸ *Id.* at 488.

³⁵⁹ *Id.* at 489.

³⁶⁰ *Id.* at 489.

³⁶¹ *Meek*, *supra* note 173.

³⁶² *Grand Rapids School District*, *supra* note 176.

in 1993 that the Establishment Clause would not be violated by the presence of publicly-funded sign language interpreter working with a student in a private school.³⁶³

Zobrest v. Catalina Foothills School District concerned Larry Zobrest, a deaf private high school student in Arizona. Prior to high school Larry Zobrest attended public school, where a sign language interpreter was assigned to assist him in school.³⁶⁴ The sign language interpreter was assigned according to the provisions in Individuals with Disabilities Education Act (IDEA).³⁶⁵ Upon entering the private high school Zobrest's parents sought to continue the same services for their son.³⁶⁶ The public school district where the Zobrests resided declined the parent's request for a sign language interpreter on grounds that it would violate the Establishment Clause of the First Amendment.³⁶⁷ The Zobrest family filed suit in District Court arguing that the school district was obligated to pay for the interpreter because IDEA was neutral on the type of school a student could attend.³⁶⁸ The District Court decided that the Establishment Clause would be violated if the interpreter was assigned to a private school.³⁶⁹ The lower court was specifically concerned with the entanglement issue between church and state.³⁷⁰ The Zobrests appealed the case to the U. S. Court of Appeals for the Ninth Circuit.³⁷¹ The Court of Appeals agreed with the lower court and stated that supporting the placement of an interpreter in a private school would have the primary effect of advancing religion and would be in violation of

³⁶³ Zobrest, *supra* note 337.

³⁶⁴ *Id.*

³⁶⁵ Individual with Disabilities Education Act Pub. L. No. 101-476, 104 Stat. 1142 (Enacted in 1990, this United States federal law provides early intervention, special education, and related services to children with disabilities.) <http://idea.ed.gov/>.

³⁶⁶ Zobrest, *supra* note 337.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 5.

³⁷¹ *Id.*

the Establishment Clause.³⁷² Zobrest's parents appealed the case to the U. S. Supreme Court on grounds that the public school district denied their son's rights under IDEA and the Free Exercise Clause of the First Amendment.³⁷³ In a 5-4 decision the U. S. Supreme Court found that supplying a sign language interpreter would not violate the Establishment Clause.

The majority outlined the District Court's decision and the Court of Appeals decision, which used the *Lemon* Test to decide the case.³⁷⁴ The District Court held that providing a sign language interpreter would "offend the Establishment Clause" because "the interpreter would act as a conduit for the religious inculcation" of the student. The lower court reasoned that the government aid would benefit the "religious development" of the student.³⁷⁵ The Court of Appeals affirmed the lower court's decision and used the three part *Lemon* Test to make its decision.³⁷⁶ The first part of the test was not violated because the IDEA program had a secular purpose.³⁷⁷ The second part was violated because providing a sign language interpreter "would have the primary effect of advancing religion."³⁷⁸ The third part was violated because a "symbolic union of government and religion" would exist.³⁷⁹ The dissenting judge countered that the IDEA program was available to "all children" and thus passed "constitutional muster".³⁸⁰

The majority turned the Court's attention to the relationship between church and state.³⁸¹ The majority stated that the Court has "never said" that religious institutions can never receive

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.* at 3-4.

³⁷⁵ *Id.* at 4-5.

³⁷⁶ *Id.* at 5.

³⁷⁷ *Id.* at 5.

³⁷⁸ *Id.* at 5.

³⁷⁹ *Id.* at 5.

³⁸⁰ *Id.* at 5.

³⁸¹ *Id.* at 8.

government aid without being in violation of the First Amendment.³⁸² The majority cited churches receiving police and fire protection as examples where government aid can directly benefit a religious organization, and the majority asserted that “government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge because sectarian institutions may also receive attenuated financial benefit.”³⁸³ The majority cited the *Mueller*³⁸⁴ and *Witters*³⁸⁵ cases to illustrate their point. In *Mueller* the Court found that a Minnesota statute that offered tax deductions to parents for educational expenses did not violate the Establishment Clause. Even though the vast majority of those who benefitted from the statute were private school parents, the Court ruled that all parents were afforded the opportunity to file for deductions.³⁸⁶ In *Witters* the Court found that a blind college student could receive government aid and apply it to his private school expenses. The Court ruled that the aid was given neutrally and the recipient was free to disburse the aid as he saw fit.³⁸⁷

According to the majority, the same analysis in *Mueller* and *Witters* applied to *Zobrest*. The aid offered through IDEA was provided “neutrally to any child qualifying” and without any consideration regarding the school the student attends.³⁸⁸ The aid was given to the parents who then make a private choice on where to send their child. It is only as a result of the parent’s choice that the sign language interpreter accompanies the student to a private school.³⁸⁹ The

³⁸² *Id.* at 8.

³⁸³ *Id.* at 8.

³⁸⁴ *Mueller*, *supra* note 175.

³⁸⁵ *Witters*, *supra* note 336.

³⁸⁶ *Mueller*, *supra* note 175.

³⁸⁷ *Witters*, *supra* note 336.

³⁸⁸ *Zobrest*, *supra* note 337.

³⁸⁹ *Id.* at 10.

majority insisted that *Zobrest* was “an even easier case than *Mueller* and *Witters*” because money to pay for the interpreter never found its “way into sectarian schools’ coffers.”³⁹⁰

The school district refuted the argument that *Mueller* and *Witters* applied to *Zobrest*. The school district, instead, would submit the decisions in *Meek*³⁹¹ and *Ball*³⁹² had more of a connection with *Zobrest* because those decisions denied offering government financed educational services to private schools.³⁹³ In *Meek* the Court ruled that the same public school materials and equipment could not be supplied to private schools. The Court also ruled that public school personnel could not offer services like remedial assistance to private school students in an after school program.³⁹⁴ In *Ball* the Court ruled that public school employees could not teach supplementary classes in an after-school program in private schools.³⁹⁵ The school district contended that if services in *Meek* and *Ball* were denied, then it follows that the interpreter in *Zobrest* was not allowed.³⁹⁶

The majority countered that “reliance on *Meek* and *Ball* is misplaced for two reasons.”³⁹⁷ First, *Meek*³⁹⁸ and *Ball*³⁹⁹ included “direct grants of government aid” that went to the private schools. The private schools received a direct benefit from the services provided by public school instructors and the instructional materials and equipment that was made available. Unlike the *Meek* and *Ball* cases, the private school in the *Zobrest* case was “not relieved of an expense

³⁹⁰ *Id.* at 10.

³⁹¹ *Meek*, *supra* note 173.

³⁹² Grand Rapids School District, *supra* note 176.

³⁹³ *Zobrest*, *supra* note 337.

³⁹⁴ *Id.* at 11.

³⁹⁵ *Id.* at 11.

³⁹⁶ *Id.* at 11.

³⁹⁷ *Id.* at 12.

³⁹⁸ *Meek*, *supra* note 173.

³⁹⁹ Grand Rapids School District, *supra* note 176.

that it otherwise would have assumed.”⁴⁰⁰ Any benefit the private school received was due to the “private choice of individual parents.”⁴⁰¹ Second, the sign language interpreter’s job was far different than that of the public school teacher assigned to an after-school program in a private school. The mere presence of a public employee in a private school did not necessarily mean an automatic violation of the Establishment Clause. The majority insisted, “Nothing in this record suggests that a sign language interpreter would do more than accurately interpret whatever material is presented to the class as a whole.”⁴⁰² The majority continued, “The sign language interpreter...will neither add to nor subtract from that environment, and...such assistance is not barred by the Establishment Clause.”⁴⁰³

The majority concluded that IDEA was a “neutral government program” that dispensed benefits “not to schools but to individual handicapped children” who, in conjunction with their parents, then makes a personal choice to attend a private school.⁴⁰⁴ The Establishment Clause did not prohibit “the school district from furnishing him with a sign language interpreter.”⁴⁰⁵

Justices Blackmun, Souter, and O’Connor dissented. In his dissent Justice Blackmun disagreed with the majority on the presence of a public employee placed in a private school. He asserted that “relaying religious messages” violated the Establishment Clause.⁴⁰⁶ Justice Blackmun supported the two points the school district used to originally deny the use of a sign language interpreter in a private school.⁴⁰⁷ First, IDEA did not declare that a sign language interpreter must be given to a student at a private school when a public school offers the same

⁴⁰⁰ Zobrest, *supra* note 337, at 12.

⁴⁰¹ *Id.* at 12.

⁴⁰² *Id.* at 13.

⁴⁰³ *Id.* at 13.

⁴⁰⁴ *Id.* at 13.

⁴⁰⁵ *Id.* at 13-14.

⁴⁰⁶ *Id.* at 14.

⁴⁰⁷ *Id.* at 15.

services.⁴⁰⁸ Second, a section of IDEA⁴⁰⁹ prohibited the “use of federal funds to pay for ‘religious worship, instruction, or proselytization’” which would be a direct violation of the Establishment Clause.⁴¹⁰

While the *Ball* decision had the effect of limiting certain aid finding its way to private schools, the Court’s decisions in *Witters* and *Zobrest* had the opposite effect, thus opening up ways for government aid to reach private schools. In fact, the decisions in *Witters* and *Zobrest* would bring about a reversal of a previously-decided U. S. Supreme Court case.

Agostini v. Felton (1997)

In 1978 taxpayers in New York sued because a state program used Title I⁴¹¹ funds to send public school teachers into private schools to provide remedial education.⁴¹² The school

⁴⁰⁸ *Id.* at 15.

⁴⁰⁹ *Id.* at 15. (See note 7 which discusses IDEA regulation 34 CFR § 76.532(a)(1) (1992) which barred the use of tax dollars to pay for sectarian uses.).

⁴¹⁰ *Id.* at 14-24. (Justice Blackmun described the relationship in question as one “where the secular and the sectarian are intertwined” and where “government assistance to the educational function of the school necessarily entails governmental participation in the school’s inculcation of religion.” Justice Blackmun stated that the government employee “would be required to communicate the material covered in religion class...in an environment so pervaded by discussions of the divine, the interpreter’s every gesture would be infused with religious significance.” Justice Blackmun stated that the government employee “would be required to communicate the material covered in religion class...in an environment so pervaded by discussions of the divine, the interpreter’s every gesture would be infused with religious significance. Justice Blackmun countered the majority’s argument on two fronts. First, the Court was blinded by the notion that only the “pupil and the parents” received the benefit “rather than...sectarian schools.” Second, the Court saw the interpreter as only someone who relayed information and not someone who was immersed in the inculcation of religious dogma. Justice Blackmun concluded that *Zobrest* was unconstitutional. He argued that, “...our cases make clear that government crosses the boundary when it furnishes the medium for communication of a religious message.” He continued, “...it is beyond question that a state-employed sign-language interpreter would serve as the conduit for...religious education, thereby assisting” a religious school’s message. Finally Justice Blackmun believed that the action approved by the majority permitted and endorsed “ongoing, daily and intimate governmental participation in the teaching and propagation of religious doctrine.”)

⁴¹¹ Title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6301 et seq.) (The Act states “The purpose of this title is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.” The basic principle behind Title I is that schools with large populations of low-income

board and parents filed suit in the District Court for the Eastern District of New York. The District Court found in favor of the board and the parents.⁴¹³ The case was appealed to the Court of Appeals for the Second Circuit and they reversed the lower court's decision. Citing the U. S. Supreme Court decisions in *Meek* and *Wolman*, the Court of Appeals found that the Board of Education violated the Establishment Clause because public school teachers were sent into private schools to teach.⁴¹⁴ In 1985 the case reached the U. S. Supreme Court as *Aguilar v. Felton* 473 US 402.⁴¹⁵

In 1995 the New York City school board and a group of private school parents filed an injunction under Rule 60(b)(5) of the Federal Rules of Civil Procedure,⁴¹⁶ which states that when a rule of law no longer has merit then related cases may be reviewed.⁴¹⁷ The school board and parents contended that the rule of law had been altered by recent U. S. Supreme Court decisions, namely *Witters*⁴¹⁸ and *Zobrest*.⁴¹⁹ The school board and parents filed suit in the District Court for the Eastern District of New York. The District Court ruled that the decision in *Aguilar* was still

students will receive supplementary federal funds to help in meeting students' educational needs. Typically Title I funds are used to assist low-income students who are underperforming in math and reading.) <http://www2.ed.gov/policy/elsec/leg/esea02/pg1.html>.

⁴¹² Agostini, *supra* note 338.

⁴¹³ *Id.*

⁴¹⁴ *Felton v. U.S. Secretary of Education* 729 F. 2nd 48, 50 (1984).

⁴¹⁵ *Agostini v. Felton* 521 U.S. 203 (1997) overturned *Aguilar v. Felton* 473 U.S. 402 (1985) In *Aguilar* the Court held that the Establishment Clause was violated when the City of New York sent public school teachers into private schools to provide remedial education to disadvantaged children consistent with Title I.

⁴¹⁶ Agostini, *supra* note 338. (The rule states: "Rule 60. Relief from a judgment or order. (b) Grounds for relief a final judgment, order, or proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable.".) <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20Rules-Civil%20Procedure.pdf>.

⁴¹⁷ *Id.*

⁴¹⁸ *Witters*, *supra* note 336.

⁴¹⁹ *Zobrest*, *supra* note 337.

valid.⁴²⁰ The case was appealed to the Court of Appeals for the Second Circuit who agreed with the lower court's decision.⁴²¹

In 1997 the U. S. Supreme Court in a 5-4 ruling reversed the *Aguilar* decision on several points.⁴²² First, the program did not “result in governmental indoctrination.”⁴²³ Second, it did not “define aid recipients by reference to religion” or influence religious “beliefs or practices” so recipients could acquire State services.⁴²⁴ Third, it did not “create an excessive entanglement that advanced or inhibited religion.”⁴²⁵ Finally, there was “significant change in the Supreme Court’s post-*Aguilar* establishment of religion clause law” which entitled petitioners the opportunity to apply Rule 60(b)(5).⁴²⁶

Before taking up the constitutionality of using monies from the Title I Program for use in private schools, the majority reviewed the program’s main components.⁴²⁷ Title I, enacted by Congress in 1965 and subsequently reenacted for many years after,⁴²⁸ provided funds to Local Educational Agencies (LEA’s) which in turn provided the following services to students: remedial education, guidance and job counseling.⁴²⁹ Eligible students had to meet two criteria: reside in a low income public school district and be at risk of failing.⁴³⁰ Title I funds were to be made available to all eligible students in both public and private schools. However, the aid

⁴²⁰ Agostini, *supra* note 338, at 214.

⁴²¹ *Id.* at 214.

⁴²² *Id.* at 234.

⁴²³ *Id.* at 234.

⁴²⁴ *Id.* at 235.

⁴²⁵ *Id.* at 235.

⁴²⁶ *Id.* at 235.

⁴²⁷ *Id.* at 208.

⁴²⁸ Title I was last revised and reauthorized with the No Child Left Behind Act of 2001. <http://www2.ed.gov-policy/elsec/leg/esea02/index.html>.

⁴²⁹ Agostini, *supra* note 338, at 209.

⁴³⁰ *Id.* at 209.

received by the private school student had to meet certain requirements related to the use of public school employees which are listed below.⁴³¹

1. They were employees of the Board of Education and accountable only to their supervisors.
2. They could only teach those children who met the eligibility criteria for Title I.
3. Their materials and equipment would be used only in the Title I program.
4. They could not engage in team-teaching or other cooperative instructional activities with private school teachers.
5. They could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private school.

In addition to the above conditions placed on the public school teachers, “all religious symbols were to be removed from all classrooms that were used,” and to make sure the rules were followed “a publicly employed field supervisor was to make at least one unannounced visit to each teacher’s classroom every month.”⁴³²

Maintaining that the Title I program violated the Establishment Clause, in 1978 New York taxpayers sued the Board of Education in District Court.⁴³³ The District Court ruled in favor of the Board of Education. The case was appealed to the Court of Appeals which overturned the lower court’s ruling. Basing its ruling on decisions made in *Meek*⁴³⁴ and

⁴³¹ *Id.* at 209. (Under Title I, aid could not supplant any school wide programs and the aid had to be controlled by the Local Education Agency (LEA). In the private school environment Title I funds paid for public school employees who then provided after school remedial services to private school students. The services provided to private school students had to be secular, neutral and non-ideological.)

⁴³² *Id.* at 212.

⁴³³ *Id.* at 212.

⁴³⁴ *Meek*, *supra* note 173.

Wolman,⁴³⁵ the Court of Appeals for the Second Circuit found the use of Title I funds for private school students to be unconstitutional. The matter was appealed to the U. S. Supreme Court, and in a 5-4 decision the Court found that the Title I program offered in the private schools was unconstitutional because it violated the Establishment Clause.⁴³⁶

In 1995 the New York City Board of Education and a new set of private school parents whose children qualified for Title I services filed motions in District Court seeking relief under Federal Rule of Civil Procedure 60(b)(5).⁴³⁷ The District Court ruled that Rule 60(b)(5) did not apply and supported the *Aguilar* decision. The Court of Appeals for the Second Circuit agreed with the lower court and the case was appealed to the U. S. Supreme Court.⁴³⁸ According to the majority the central question on this new issue was: “Are petitioners entitled to relief from the District Court’s permanent injunction under Rule 60(b)(5)?”⁴³⁹

The majority stated: “Petitioners point to three changes...that they believe justify their claim for relief under Rule 60(b)(5).”⁴⁴⁰ One, the high cost⁴⁴¹ of running the Title I program for

⁴³⁵ *Wolman*, *supra* note 174.

⁴³⁶ *Aguilar*, *supra* note 415, at 414. (The majority stated, “Despite the well-intentioned efforts taken by the City of New York, the program remains constitutionally flawed owing to the nature of the aid, to the institution receiving the aid, and to the constitutional principles that they implicate [state and federal actions should not] hinder a particular faith or faith generally through the advancement of benefits or through the excessive entanglement of church and state in the administration of those benefits.”).

⁴³⁷ Federal Rule of Civil Procedure 60(b)(5) states, “Relief from a judgment or order. (b) Grounds for relief a final judgment, order, or proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable.” <http://www.uscourts.gov/uscourts/RulesAndPolicies-/rules/2010%20Rules/Civil%20Procedure.pdf>.

⁴³⁸ *Agostini*, *supra* note 338, at 214. (The District Court denied the Rule 60(b) motion on the merits because *Aguilar*’s demise had “not yet occurred.” The Court of Appeals for the Second Circuit “affirmed substantially” for the reasons stated in the District Court’s opinion.).

⁴³⁹ *Agostini*, *supra* note 338, at 215.

⁴⁴⁰ *Agostini*, *supra* note 338, at 215.

⁴⁴¹ *Agostini*, *supra* note 338, at 213. (After the decision in *Aguilar*, the Board of Education modified its Title I program so it could continue supplying services to students who attended private schools. Instead of offering Title I

private school students off private school property justifies a “modification”.⁴⁴² Two, “a majority of justices have expressed their views that *Aguilar* should be reconsidered.”⁴⁴³ Three, subsequent cases since *Aguilar* may have “undermined” the Court’s decision and those cases include: *Witters*, *Zobrest*, and *Rosenberger*.⁴⁴⁴

The taxpayers rejected these arguments because “the cost of providing Title I services off-site were known at the time *Aguilar* was decided” and the cases mentioned by the petitioners were not “relevant” and did not apply to *Aguilar*.⁴⁴⁵ Even though the majority had agreed with the residents about the high cost of an off-site program, they ruled that the petitioners presented the Court with a legitimate question in regards to Rule 60(b)(5).⁴⁴⁶

Comparing *Aguilar*’s decision with the decision in *Ball*, the majority mapped out their rationale.⁴⁴⁷ In *Ball*, the Court held that two private school programs (Shared Time and Community Education) violated the Establishment Clause because it had the effect of promoting and supporting religion.⁴⁴⁸ Using the ruling in *Meek*, the *Ball* Court ruled that a teacher working

instruction to private school students at their schools, the Board went back to its previous practice of providing instruction at public school sites, at leased sites, and in mobile classrooms parked near the private school. From the 1986-1987 school year until the Court heard the second round of arguments in 1997, the Board had spent over \$100 million in providing Title I services to private school students. Costs incurred included: computer-aided instruction, leasing sites and mobile instructional units, and transporting students to those sites.).

⁴⁴² Agostini, *supra* note 338, at 216.

⁴⁴³ Agostini, *supra* note 338, at 216.

⁴⁴⁴ *Rosenberger v. University of Virginia* 515 U.S. 819, 839-840 (1995) (involving the public funding of a religious magazine on a state supported college campus. The Court ruled in a 5-4 decision that the University did violate the students’ free speech rights and further the University erred when it claimed that an establishment of religion would exist if the school paid for printing costs. The majority relied on past decisions (*Everson*, *Witters*, and *Mueller*) to support its finding in favor of government programs in “their neutrality toward religion.” According to the majority, one of the main purposes of any university is to offer a forum for a variety of views. As a result, the Court ruled that some of those opinions may be religious, they do not necessarily violate the Establishment Clause.).

⁴⁴⁵ Agostini, *supra* note 338, at 218.

⁴⁴⁶ *Id.* at 218.

⁴⁴⁷ *Id.* at 218.

⁴⁴⁸ *Id.* at 218.

in the program could by design or by accident promote religious beliefs.⁴⁴⁹ Fearing that the “symbolic union of church and state” would send children a message that the government was “endorsing” religious doctrine, the Court could not support the Shared Time and Community Education programs.⁴⁵⁰ The Court felt that a religious message was being “subsidized” by the government.⁴⁵¹ Irrelevant to the Court was “the fact that the program was provided to the student [and] that the program only supplemented the courses offered by the parochial schools.”⁴⁵² Conceding that the “New York Title I program challenged in *Aguilar* closely resembled the Share Time program struck down in *Ball*”, the majority argued that “the New York City’s Title I suffered from the same” entanglement issues brought up in *Lemon* and *Meek*.⁴⁵³ In addition to the reasons referenced in the *Ball* case, the Court’s decision in *Aguilar* stated that “public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.”⁴⁵⁴

Despite the fact that the *Aguilar* decision found the New York’s use of Title I funds improper, the majority believed that cases subsequent to *Aguilar* had “modified in two significant respects the approach we use to assess indoctrination.”⁴⁵⁵ First, the Court had abandoned the idea that just because a public school employee was placed on private school property that religious indoctrination is “inevitable”.⁴⁵⁶ The majority’s second point was that they had abandoned the rule relied on in *Ball* that “all government aid that directly aids the

⁴⁴⁹ *Id.* at 219.

⁴⁵⁰ *Id.* at 219.

⁴⁵¹ *Id.* at 220.

⁴⁵² *Id.* at 221.

⁴⁵³ *Id.* at 221.

⁴⁵⁴ *Id.* at 222.

⁴⁵⁵ *Id.* at 223.

⁴⁵⁶ *Id.* at 223.

educational function of a religious school was invalid.”⁴⁵⁷ After all, the *Witters* decision did not find that the Establishment Clause was violated when it allowed a tuition grant to go to a blind college student seeking a religious education. The assertion from the majority was that “this transaction was no different from a State’s issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution.”⁴⁵⁸ Moreover, citing *Zobrest*, the majority stressed the public money spent on the sign language interpreter did not find its way into the religious schools “coffers”.⁴⁵⁹

Unlike their decisions in *Ball* and *Aguilar* the Court was now claiming in their *Zobrest* and *Witters* decisions that an advancement of religions did not automatically take place when a public school employee “simply...enters a parochial school.”⁴⁶⁰ Citing the example of the sign language interpreter in *Zobrest*, the majority contended that she would not “inculcate religion by altering her translation of classroom lectures.”⁴⁶¹ As the majority pointed out, *Zobrest* also rejected the *Ball* decision that the mere “presence of Title I teachers in parochial school classrooms will...create the impression of a ‘symbolic union’ between church and state.”⁴⁶² Continuing their reliance on *Zobrest*, the majority observed that “in all relevant respects” the Title I services provided by New York City mirror the services provided by the sign language interpreter.⁴⁶³ Citing two other similarities between *Agostini* and *Zobrest*, the Court found that in both cases aid was “provided to students at whatever school they choose” and services provided

⁴⁵⁷ *Id.* at 225.

⁴⁵⁸ *Id.* at 226.

⁴⁵⁹ *Id.* at 225-228.

⁴⁶⁰ *Id.* at 226.

⁴⁶¹ *Id.* at 226.

⁴⁶² *Id.* at 227.

⁴⁶³ *Id.* at 228.

were “supplemental” to the courses already offered and therefore they did not reduce any costs to the private schools.⁴⁶⁴

Addressing Justice Souter’s dissenting conclusions, the majority countered that the programs in *Zobrest* and *Agostini* were analogous.⁴⁶⁵ Justice Souter questioned the Court’s ruling in three areas.⁴⁶⁶ One, Justice Souter maintained that money went “directly” to religious schools; two, religious schools received an undue benefit that allowed them to save money they would have spent otherwise; and, three, more students were served in the *Agostini* case than in *Witters* and *Zobrest*.⁴⁶⁷

Refuting these claims, the majority stated, “Title I funds never reach the coffers of religious schools” and “funds are distributed to a public agency (an LEA) that dispenses services directly to the eligible students.”⁴⁶⁸ There was no “evidence in the record” to suggest that New York City had “provided services that supplant those offered” in private schools.⁴⁶⁹ Continuing their response to Justice Souter’s argument that the number of students participating was relevant, the majority declared, “We are [not] willing to conclude that the constitutionality of an aid program depends on the number of sectarian students who happen to receive the otherwise neutral aid.”⁴⁷⁰ Supporting their decision, the majority used their decision in *Mueller* to rebut Justice Souter’s assertion that the number of participants mattered. In *Mueller*⁴⁷¹ the Court reasoned that it was difficult to determine how many people may or may not benefit from “the

⁴⁶⁴ *Id.* at 228.

⁴⁶⁵ *Id.* at 228.

⁴⁶⁶ *Id.* at 228.

⁴⁶⁷ *Id.* at 228.

⁴⁶⁸ *Id.* at 226.

⁴⁶⁹ *Id.* at 229.

⁴⁷⁰ *Id.* at 229.

⁴⁷¹ *Mueller*, *supra* note 175.

constitutionality of a facially neutral law.”⁴⁷² Concluding their response to Justice Souter’s claim, the majority stated that “...placing full-time employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination.”⁴⁷³

Another issue the Court addressed was whether the aid offered by the government provided “a financial incentive to undertake religious indoctrination.”⁴⁷⁴ Stating that “this incentive is not present” provided it was given on the “basis of neutral, secular criteria”, the majority found that the program did not “favor or disfavor religion.”⁴⁷⁵ While *Ball* and *Aguilar* paid no attention to the “incentive” issue, other past cases decided in favor of programs that “provided aid to *all* eligible children regardless of where they attended school.”⁴⁷⁶ The majority stated that the New York program fell in line with the programs where aid was available to all students -- namely the programs approved by decisions in *Everson*, *Allen*, *Witters* and *Zobrest*.⁴⁷⁷

The entanglement issue was addressed by the majority when they stated that “not all entanglements...have the effect of advancing or inhibiting religion.”⁴⁷⁸ The majority continued “interaction between church and state is inevitable” and there has always been some permissible “levels of involvement between the two.”⁴⁷⁹ The majority emphasized that the entanglement must be “excessive” before it violates the Establishment Clause. In the *Aguilar* decision the Court ruled that the Title I program had three elements that caused an excessive entanglement.⁴⁸⁰ First, the program would need persistent “monitoring by public authorities” to make sure religion

⁴⁷² *Id.* at 230, quoting *Mueller* at 401.

⁴⁷³ *Id.* at 230.

⁴⁷⁴ *Id.* at 231.

⁴⁷⁵ *Id.* at 231.

⁴⁷⁶ *Id.* at 231.

⁴⁷⁷ *Id.* at 231.

⁴⁷⁸ *Id.* at 233.

⁴⁷⁹ *Id.* at 233.

⁴⁸⁰ *Id.* at 233.

was not inculcated.⁴⁸¹ Second, the program needed “administrative cooperation” between the public school system and the private schools.⁴⁸² Third, the program might heighten “political divisiveness” between secular and non-secular factions.⁴⁸³

Addressing these conditions, the majority insisted that the first assumption was false. They stated that “after *Zobrest* we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment.”⁴⁸⁴ The majority also debunked the last two issues because they “are insufficient by themselves to create an ‘excessive’ entanglement.”⁴⁸⁵ Summing up the entanglement dilemma, the majority stated, “New York City’s Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination, define recipients by reference to religion, or create an excessive entanglement.”⁴⁸⁶

By overturning *Aguilar*, the Court widened its approach on how public funds could be used by private school parents and perhaps private schools themselves. Three years later the U.S.

⁴⁸¹ *Id* at 233.

⁴⁸² *Id* at 233.

⁴⁸³ *Id* at 233.

⁴⁸⁴ *Id* at 234.

⁴⁸⁵ *Id* at 234.

⁴⁸⁶ *Id* at 241-254. (The dissent objected and stated that *Aguilar* was still relevant law because one, the program supported and sanctioned religion and, two, cases following *Aguilar* did not supplant *Aguilar*’s ruling. In his dissent, Justice Souter stated that the Court had misapplied past Establishment Clause decisions. He claimed that the end result “is to repudiate the very reasonable line drawn in *Aguilar* and *Ball* and to authorize direct state aid to religious institutions on an unparalleled scale, in violation of the Establishment Clause.” Building his dissent on the decisions in *Aguilar* and *Ball*, Justice Souter asserted that “both schemes ran afoul of the Establishment Clause” because “state-paid teachers conducting classes in sectarian” schools may infuse religion into their lessons. After stating that “the government’s...instruction” created a “symbolic union of church and state,” he further asserted that the programs took on the “functions of the religious schools by assuming responsibility for teaching secular subjects the schools would otherwise be required to provide.”).

Supreme Court would apply a “neutrality” principle in a Louisiana case involving federal tax dollars being used by private schools.⁴⁸⁷

Mitchell v. Helms (2000)

Chapter 2 of the Educational Consolidation and Improvement Act of 1981⁴⁸⁸ supplied funds to state and to local educational agencies.⁴⁸⁹ These funds were used to loan educational equipment and materials (e.g. library materials, computers and computer software) to schools.⁴⁹⁰ Under Chapter 2 private schools in the State of Louisiana received the same materials provided to the public schools.⁴⁹¹ The aid had to be offered to both private and public schools and in order to receive the aid, certain stipulations needed to be met by the private schools.⁴⁹² The private schools that received the aid could not use the materials to replace existing materials and equipment.⁴⁹³ The aid could only add on to what the schools already had and the materials and equipment had to be “secular, neutral and nonideological.”⁴⁹⁴ Private schools could not “gain control” of the aid or own the materials and equipment provided by the funds.⁴⁹⁵

⁴⁸⁷ Mitchell, *supra* note 339, at 809.

⁴⁸⁸ Chapter 2 of the Education Consolidation and Improvement Act of 1981, Pub. L. 97-35, 95 Stat. 469, as amended, 20 U. S. C. §§ 7301-7373 began as the Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. 89-10, 79 Stat. 55. Today the ESEA is better known as the No Child Left Behind Act.

⁴⁸⁹ Mitchell, *supra* note 339.

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.*

⁴⁹² *Id.*

⁴⁹³ *Id.*

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.*

In 1985 taxpayers in Louisiana sued in District Court for the Eastern District of Louisiana citing that the use of Chapter 2 funds by private schools violated the Establishment Clause.⁴⁹⁶ In 1990 the District Court found in favor of the taxpayers and stated that aid given to private schools amounted to government directly aiding religion because most of the private schools receiving these funds were Catholic.⁴⁹⁷ In 1997 the Court of Appeals for the Fifth Circuit agreed with the District Court's decision.⁴⁹⁸ Relying on the U. S. Supreme Court's decisions in *Meek* and *Wolman*, the Appeals Court ruled that Chapter 2 violated the Establishment Clause because federal tax dollars were used to purchase materials and equipment for private schools.⁴⁹⁹

Voting 6-3, the U. S. Supreme Court found that Chapter 2 did not run afoul of the Establishment Clause. Using *Lemon*'s first and second prongs and the latest ruling in *Agostini*, the Court rendered its decision. The Court reasoned that Chapter 2 did not violate the establishment of religion clause because the law met *Lemon*'s first condition of having a secular purpose and it met *Lemon*'s second condition of not inhibiting or advancing a religious purpose. The Court replaced *Lemon*'s third prong (whether a government action resulted in an excessive entanglement between government and religion) with its decision in *Agostini*:

As we indicated in *Agostini*, and have indicated elsewhere, the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action.⁵⁰⁰

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.*

⁴⁹⁸ *Helms v. Picard*, 151 F. 3d 347 (1998).

⁴⁹⁹ *Mitchell*, *supra* note 339.

⁵⁰⁰ *Id.* at 809.

As a result of their reliance on *Agostini*, the Court found that their previous decisions in *Meek* and *Wolman* were “no longer good law.”⁵⁰¹

Justice Thomas announced the opinion of the Court. Chapter 2 was a federally supported aid program that allotted funds to state and local government entities. The state and local governments then lent educational equipment and materials to public and private schools. Each school’s enrollment was the determining factor on the amount of the aid. The question before the Court was whether Chapter 2, as applied in Jefferson Parish, Louisiana, was a law respecting an establishment of religion because many of the private schools receiving Chapter 2 aid in the Jefferson Parish were religiously affiliated.⁵⁰²

Taking up the issue of private schools receiving aid, the majority pointed out that “participating private schools receive Chapter 2 aid based on the number of children enrolled in each school.”⁵⁰³ The majority quoted from the Chapter 2 program that any funds used may only “supplement” existing funds.⁵⁰⁴ The majority pointed out several limitations that were placed on private schools that received the aid.⁵⁰⁵ One, any aid had to be “secular, neutral and non-ideological.”⁵⁰⁶ Two, private schools could not regulate the aid.⁵⁰⁷ Three, private schools had to fill out an application “detailing which items the school seeks and how it will use them.”⁵⁰⁸ If the application was approved, then the local government agency would purchase the materials and equipment requested and would lend them to the private school.

⁵⁰¹ *Id.* at 808.

⁵⁰² *Id.* at 801.

⁵⁰³ *Id.* at 802.

⁵⁰⁴ *Id.* at 802.

⁵⁰⁵ *Id.* at 802.

⁵⁰⁶ *Id.* at 802.

⁵⁰⁷ *Id.* at 803.

⁵⁰⁸ *Id.* at 803.

The Establishment Clause of the First Amendment orders that “no law respecting an establishment of religion” be enacted. The majority observed that “since *Everson*” it has become increasingly difficult to decipher and apply this mandate. The majority noted that in *Agostini* the Court was able to bring some lucidity to their decisions.⁵⁰⁹ Before *Agostini* the *Lemon* Court used the following to determine if a government action violated the Establishment Clause: first, does the law have a secular purpose, second, does the law have a primary effect of advancing or inhibiting religion, or, third does the law create an excessive entanglement between government and religion. The ruling in *Agostini* sharpened that approach in two ways: first, does the law result in government indoctrination, and, second, does the law define its recipients by reference to religion?⁵¹⁰

In considering this case the majority did not take on the secular issue and only judged the case based on Chapter 2’s “effect.”⁵¹¹ Considering the effect question, the Court only looked at the *Agostini* criteria, namely the issue of indoctrination and asked whether the law defined its recipients by reference to religion.⁵¹² Using *Agostini*, the majority outlined the first issue by asking if a connection could be made between the religious activity in a school and any government action related to the school.⁵¹³ According to the majority the answer to that question was whether a government action “subsidized religion.”⁵¹⁴ The majority addressed the issue on indoctrination by claiming the Court has used “the principal of neutrality” as the bellwether in

⁵⁰⁹ *Id.* at 807.

⁵¹⁰ *Id.* at 808.

⁵¹¹ *Id.* at 808.

⁵¹² *Id.* at 808.

⁵¹³ *Id.* at 809.

⁵¹⁴ *Id.* at 809.

“upholding aid that is offered to a broad range of groups...without regard to their religion.”⁵¹⁵

The majority emphasized, “If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.”⁵¹⁶

To make sure the issue of “neutrality” was properly applied the majority maintained, “We have repeatedly considered whether any governmental aid that goes to a religious institution does so” only when individuals have made true independent and private choices.⁵¹⁷ The majority believed that the ruling in *Agostini* required the Court ask whether the criteria for allocating the aid created a “financial incentive” for religious-minded parties.⁵¹⁸

Next the majority took up the taxpayers’ assertion that the Chapter 2 program was unconstitutional because one, the aid goes “directly” to religious schools and therefore it “is always impermissible” and, two, the aid is “divertible to religious schools” and this “is similarly impermissible.”⁵¹⁹ The majority explained the “direct and indirect” issue by stating that recent cases (*Agostini*, *Witters* and *Zobrest*) have been decided “not through the direct/indirect distinction but rather through the principle of private choice.”⁵²⁰ Again the majority used previous cases (*Zobrest* and *Witters*) to formulate the majority’s opinion that “divertability” is a nonissue. Quoting from their opinion in *Allen*, the majority stated, “So long as the governmental aid is not itself ‘unsuitable for use in the public schools because of religious content’ and

⁵¹⁵ *Id.* at 809.

⁵¹⁶ *Id.* at 809.

⁵¹⁷ *Id.* at 810, quoting *Agostini* at 226.

⁵¹⁸ *Id.* at 813, quoting *Agostini* at 231 (“This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion.”)

⁵¹⁹ *Id.* at 814.

⁵²⁰ *Id.* at 816.

eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern.”⁵²¹ Therefore, the way the aid was used did “not affect the criteria governing the aid’s allocation and thus does not create any impermissible incentive under *Agostini*’s second criterion.”⁵²²

The majority continued their assertion that the “divertability of aid” is not the real issue but whether the aid had an “impermissible content.”⁵²³ The majority explained, “Where the aid would be suitable for use in a public school, it is also suitable for use in any private school.”⁵²⁴

Addressing the dissent’s comment on divertability, the majority argued:

The dissent would find an establishment of religion if a government-provided projector were used in a religious school to show a privately purchased religious film, even though a public school that possessed the same kind of projector would likely be constitutionally barred from *refusing* to allow a student bible club to use that projector in a classroom to show the very film, where the classrooms and projectors were generally available to student groups.⁵²⁵

Furthermore the majority questioned the dissents “resurrection of concern for political divisiveness.”⁵²⁶ The majority stated the Court has, in the past, “disregarded” this concern.⁵²⁷

The majority also contended that the issue of the sectarian nature of the schools or the students that receive the aid no longer matters.⁵²⁸ Speaking on the nature of sectarian schools, the

⁵²¹ *Id.* at 820, quoting *Allen* at 245.

⁵²² *Id.* at 820.

⁵²³ *Id.* at 822.

⁵²⁴ *Id.* at 821.

⁵²⁵ *Id.* at 822.

⁵²⁶ *Id.* at 825.

⁵²⁷ *Id.* at 825.

⁵²⁸ *Id.* at 825.

majority stated, “...its relevance in our precedents is in sharp decline.”⁵²⁹ Speaking on the “religious nature” of students, the majority stated:

...the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government’s secular purpose. If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be.⁵³⁰

The majority seemed to be taken aback by the dissents’ divisiveness comment when it stated, “...the inquiry into the recipient’s religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive.”⁵³¹ They described the “hostility” towards “pervasively sectarian schools” as “shameful.”⁵³² They further cited the “history of exclusion” some sectarian schools have dealt with the “near passing” of the Blaine Amendment⁵³³ in the 1870’s. The majority summed up the Court’s attitude towards this bias, “...nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs...”⁵³⁴ The majority continued, “This doctrine, born of bigotry, should be buried now.”⁵³⁵

⁵²⁹ *Id.* at 826.

⁵³⁰ *Id.* at 827.

⁵³¹ *Id.* at 828.

⁵³² *Id.* at 828.

⁵³³ The original Blaine amendment was a proposed amendment to the federal Constitution. The amendment took its name from its sponsor, Representative James Blaine of Maine, who introduced the amendment on December 14, 1875. The text of his proposed amendment reads as follows: *No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, or shall any money so raised or lands so devoted be divided between religious sects or denominations.* Taken from Blaine amendment webpage and H.R.J. Res. 1, 44th Cong., 1st Sess. 4 Cong. Rec. 205 (1875) (statement of Rep. Blaine).

⁵³⁴ Mitchell, *supra* note 339, at 829.

⁵³⁵ *Id.* at 829.

In conclusion, the majority applied *Agostini*'s two criteria (i.e. aid is available to all and aid is given on the basis of "neutral, secular criteria that neither favor nor disfavor religion") and found that Chapter 2 did not violate the Establishment Clause of the First Amendment.⁵³⁶ The majority summed up their opinion by stating:

Chapter 2 does not result in governmental indoctrination, because it determines eligibility for aid neutrally, allocates that aid based on the private choices of the parents...and does not provide aid that has an impermissible content. Nor does Chapter 2 define its recipients by reference to religion.⁵³⁷

The intersection of religion and law as it pertains to the funding of religious schools has been and still is controversial. During the past fifty years, the U.S. Supreme Court has heard a variety of cases centering on the constitutional legitimacy of distributing public tax dollars that directly or indirectly relate to private schools. As a result of the first case, *Everson*, aid was distributed, not to the school directly, but to parents of private school students. Subsequent cases, from *Allen* to *Mitchell*, have also allowed reimbursement as the Courts have struggled with the issue of whether or not the government may provide assistance to children who attend religious schools. The summarized timeline of these cases has revealed, not only the tremendous difficulty faced in interpreting the Establishment and Free Exercise Clauses, but also their broader application, culminating in the *Mitchell* decision and therefore setting the stage for the *Zelman* case.

⁵³⁶ *Agostini*, *supra* note 338, at 231.

⁵³⁷ *Mitchell*, *supra* note 339, at 829.

2002: The *Zelman* Decision*Zelman v. Simmons-Harris* (2002)

Facts and History

In the early 1990's, the Cleveland public school system was considered one of the worst in the country.⁵³⁸ Even though Justice Stevens disagreed with the majority's decision to sustain the school choice program in Cleveland, he felt it necessary in his dissent to use phrases like "severe educational crisis" and "disastrous conditions" when describing the circumstances surrounding the Cleveland public school system.⁵³⁹

A 1996 report from the Cleveland City School District Performance Audit stated that the Cleveland public school system was in the middle of a "crisis that [was] perhaps unprecedented in the history of American education."⁵⁴⁰ The statistics for Cleveland public schools were bleak: 18 state standards for minimal acceptable performance were not met; only 10% of high school freshmen could pass a basic proficiency examination; more than 66% of high school students dropped out before graduation; and 25% of all seniors failed to graduate. Those that did graduate high school could barely read, write, or compute at grade level.⁵⁴¹ Finally, student test scores in the Cleveland public schools lagged behind their counterparts in other Ohio public schools.⁵⁴²

⁵³⁸ William D. Henderson, *Demography and Desegregation in the Cleveland Public Schools: Toward a Comprehensive Theory of Educational Failure and Success*, Vol. 26, No. 457 New York University Review of Law & Social Change, (2002) (detailing an in-depth analysis on the conditions of the Cleveland Public School System, which the author called "foundering" and "dismal").

⁵³⁹ *Zelman*, supra note 22, at 684.

⁵⁴⁰ *Id.* at 644.

⁵⁴¹ *Id.* at 644.

⁵⁴² *Id.* at 644.

As a result of the Auditor's report, the Federal District Court in Cleveland ordered that the city's public school system be taken over by the State of Ohio.⁵⁴³ The Ohio State General Assembly responded as well by passing a statute granting Cleveland parents three options. Parents could either transfer their child to a neighboring public school, transfer their child to an approved private school within the city's limits, or remain in the same public school and get reimbursed for the cost of enrolling their child in a tutoring program.⁵⁴⁴ The new law, called the Pilot Project Scholarship Program,⁵⁴⁵ was enacted to help Cleveland families whose limited economic resources gave them few alternatives.⁵⁴⁶ If parents opted to transfer the child out of their current school, the program was essentially reduced to two choices: a public school option and a private school option.⁵⁴⁷

Public School Option

The public school option allowed Cleveland parents to transfer their child to a different public school within the Cleveland public school system or to any public school district that bordered the Cleveland district.⁵⁴⁸ Public school options included charted and magnet schools. Any public schools that accepted the transferring students received a tuition credit for each

⁵⁴³ *Reed v. Rhodes*, 934 F. Supp. 1533, 1560 Dist. Court, ND Ohio (1996) (The District Court ordered "The State Superintendent is directed to assume immediate supervision and operational, fiscal and personnel management of the (Cleveland Public School) District, including, but not limited to, administration of its educational policies and all other powers incident thereto during the state of crisis confronting the said District and until further order of this Court.").

⁵⁴⁴ Ohio Rev. Code Ann. §§ 3313.974-3313.979. <http://codes.ohio.gov/orc/3313>.

⁵⁴⁵ The scholarship program is now officially called the Cleveland Scholarship and Tutoring Program. *See* www.edchoice.ohio.gov.

⁵⁴⁶ Zelman, *supra* note 22, at 644.

⁵⁴⁷ Ohio Rev. Code Ann. § 3313.975(B), (C)(1). <http://codes.ohio.gov/orc/3313>.

⁵⁴⁸ Ohio Rev. Code Ann. § 3313.975(C). <http://codes.ohio.gov/orc/3313>.

student in addition to the money allocated by the state for all students enrolled in the school.⁵⁴⁹

Any Cleveland public school that lost students to transfers also forfeited the tax dollars associated with those students.⁵⁵⁰

Private School Option

The second option for parents was to send their child to a private school. Private schools were defined as any “religious or nonreligious” schools that were within the boundaries of the Cleveland district.⁵⁵¹ Certain conditions had to be met before a private school could accept any scholarship students. Private schools had to be located within the City of Cleveland and agree to accept all requirements set forth in the state-sponsored scholarship program.⁵⁵² Private schools accepting the tuition reimbursement could not discriminate based on race, ethnicity, national origin, or religion.⁵⁵³

Scholarships for families opting for a private school were based on financial need.⁵⁵⁴ Provided that the private school tuition was greater than the scholarship being offered, the following conditions governed the disbursement of scholarship funds.⁵⁵⁵ Families whose gross income was 200 percent above the federal poverty line qualified for a scholarship not to exceed

⁵⁴⁹ Ohio Rev. Code Ann. § 3313.976(C). <http://codes.ohio.gov/orc/3313>.

⁵⁵⁰ Ohio Rev. Code Ann. § 3313.979. <http://codes.ohio.gov/orc/3313>.

⁵⁵¹ Ohio Rev. Code Ann. § 3313.975(A)(3). <http://codes.ohio.gov/orc/3313>.

⁵⁵² Ohio Rev. Code Ann. § 3313.976 (A)(1)(2). <http://codes.ohio.gov/orc/3313>.

⁵⁵³ Ohio Rev. Code Ann. § 3313.976 (A)(4). <http://codes.ohio.gov/orc/3313>. (There are a total of eleven different requirements for private schools before they can be approved to accept scholarship students.)

⁵⁵⁴ Ohio Rev. Code Ann. § 3313.978(C)(1). <http://codes.ohio.gov/orc/3313>. *See also* parent fact sheet at: <http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEDetail.aspx?page=3&TopicRelationID=672&ContentID=5766&Content=128704>.

⁵⁵⁵ *Id.*

75 percent of the private school tuition or no more than \$1,875 per year.⁵⁵⁶ Families whose income was below the 200 percent poverty line qualified for a scholarship not to exceed 90 percent of the tuition or no more than \$2,500 per year.⁵⁵⁷ For the 2012-2013 school year the 200 percent guideline is still in effect; however, the maximum amount of the scholarship is currently \$4,250 for grades K-8, and \$5,000 for grades 9-12.⁵⁵⁸ Under the provisions of the statute, all private school registration fees, book fees, and other additional costs were the responsibility of the parents.⁵⁵⁹ Parents needed only to verify their Cleveland address to renew the scholarship and all renewals ended at grade 12.⁵⁶⁰

Tutoring Program

Regarding the tutoring program, students and their parents that opted to stay with their assigned Cleveland public school were eligible for tutoring services.⁵⁶¹ Parents could hire private tutors and then present receipts for reimbursement.⁵⁶² As with the awarding of scholarships, families qualified in the same way for tutoring reimbursements. Families above the 200% poverty line received 75 percent of the amount charged for tutoring, up to \$360. Families below the 200 percent level received 90 percent of the amount charged for tutoring, not to exceed

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.*

⁵⁵⁸ See Cleveland Scholarship Parent Fact Sheet at: <http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODE-Detail.aspx?page=3&TopicRelationID=672&ContentID=5766&Content=128704>.

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.*

⁵⁶¹ Ohio Code, *supra* note 551.

⁵⁶² Ohio Rev. Code Ann. § 3313.976(D) & Ohio Rev. Code Ann. § 3313.979(C). (Another item of note concerning the tutoring program was that “The state superintendent shall approve providers who *appear to possess* (italics added) the capability of furnishing the instructional services they are offering to provide.” There did not appear to be any kind of vetting for tutors.).

\$360.⁵⁶³ After 2007 the \$360 tutoring cap was raised to \$400, where it still remains.⁵⁶⁴ The total number of tutorial grants offered to families in a certain district had to equal the total number of tuition aid scholarships in the same district.⁵⁶⁵ Those families that elected to attend a private school were not afforded any tutoring opportunities.⁵⁶⁶

The Decision

In a 5-4 decision the Supreme Court reversed the court of appeals decision and ruled in favor of the program, stating that it did not violate the Establishment Clause of the First Amendment.⁵⁶⁷ Chief Justice William Rehnquist delivered the opinion of the court.⁵⁶⁸

In July of 1999, taxpayers in Ohio sued in the United States District Court, N.D. Ohio, Eastern Division claiming that the Ohio Pilot Project Scholarship Program violated the Establishment Clause of the United States Constitution.⁵⁶⁹ One month later, the District Court chose to temporarily suspend the program while hearing the case.⁵⁷⁰ In December of 1999, the District Court found in favor of the taxpayers. The State of Ohio appealed to the U. S Court of Appeals, Sixth Circuit, which affirmed the District Court's decision, stating that the program

⁵⁶³ *Id.*

⁵⁶⁴ *Id.*

⁵⁶⁵ Ohio Code, *supra* note 551.

⁵⁶⁶ Ohio Rev. Code Ann. § 3313.978. <http://codes.ohio.gov/orc/3313>.

⁵⁶⁷ Zelman, *supra* note 22.

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.*

violated the Establishment Clause.⁵⁷¹ The decision was appealed to the U. S. Supreme Court and argued on February 20, 2002.⁵⁷²

The Establishment Clause has been interpreted to mean that the government may not establish any one religion and may not set up a preference of one religion over another.⁵⁷³ The Court found that the Ohio program had a “valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system.”⁵⁷⁴ The ultimate question for the Court was whether the Ohio program had the impermissible “effect” of promoting or obstructing religion.⁵⁷⁵ To address this question, the majority concentrated their opinion on private choice and neutrality.⁵⁷⁶

Private Choice

Finding a difference between programs that provide direct aid to private schools (see *Mitchell* and *Agostini*) and aid given directly to parents who then choose how the aid is to be spent, the majority used the Court’s reasoning in three cases (*Mueller*, *Witters*, and *Zobrest*) to reject the Establishment Clause challenge.⁵⁷⁷ First, the *Zelman* Court looked to the *Mueller* decision which found that the Establishment Clause was not violated because parents who sent

⁵⁷¹ *Id.*

⁵⁷² *Id.*

⁵⁷³ U.S. Const. amend. I. See, e.g., McConnell, *supra* note 70 and Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 Hastings L.J. 901, (April, 1993).

⁵⁷⁴ *Zelman*, *supra* note 22, at 649-650.

⁵⁷⁵ *Id.*

⁵⁷⁶ *Id.* at 650-651.

⁵⁷⁷ *Id.* at 650-652.

their children to private schools benefited from a tax deduction program.⁵⁷⁸ The private decisions of parents were the key to the Court’s argument.⁵⁷⁹ Borrowing the reasoning in *Mueller* and applying it to the Ohio program in *Zelman*, the majority stated that the Minnesota tax break was one of “true private choice, with no evidence that the State deliberately skewed incentives toward religious schools [and] was sufficient for the program to survive scrutiny under the Establishment Clause.”⁵⁸⁰ Second, the Court in *Witters* found that a program that gave tuition aid to a blind student who then spent the money enrolling in a religious college did not violate the Establishment Clause. Using the reasoning in *Witters*, the Court stated in *Zelman* that “aid...that ultimately flows to religious institutions does so only as a result of genuinely independent and private choices of aid recipients.”⁵⁸¹ Third, the Court in *Zobrest* found that public tax dollars used to pay a sign language interpreter for a deaf student who attended a private school did not violate the Establishment Clause.⁵⁸² Again the Court found in *Zobrest* that the parent’s choice to enroll their disabled son in a private school was their own decision and government influence in this instance did not exist.⁵⁸³ The *Zelman* Court tied all three cases together using private choice as the cornerstone for finding that the Ohio statute did not violate the Establishment Clause.⁵⁸⁴

The common thread in *Mueller*, *Witters*, and *Zobrest* is that parents receiving the aid were making the decisions on where the aid went.⁵⁸⁵ In *Zelman* the Court concluded that the government’s involvement ended “with the disbursement of benefits” and any incidental

⁵⁷⁸ *Id.* at 649-650.

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.* at 650-651.

⁵⁸¹ *Id.* at 650-652.

⁵⁸² *Id.*

⁵⁸³ *Id.*

⁵⁸⁴ *Id.* at 649.

⁵⁸⁵ *Id.* 650-652.

advancement of religion was perceived and not supported by the facts, where parents made a private choice and directed the funds to the school that best fit their needs.⁵⁸⁶ In the Court’s view, the Establishment Clause rulings in *Mueller*, *Witters*, and *Zobrest* were consistent with each other and were applied to the Ohio program in *Zelman*.⁵⁸⁷

Neutral to Religion

In addition to believing the Ohio program was one of “true private choice” on par with *Mueller*, *Witters*, and *Zobrest*,⁵⁸⁸ the Court stated that the program was “neutral in all respects to religion” on three levels.⁵⁸⁹ One, it was one of many programs that Ohio enacted to provide educational assistance to Cleveland parents; two, aid was made available to a wide range of parents without “reference to religion”; and three, all schools, religious or nonreligious, could participate.⁵⁹⁰

The Court also made it clear that the Ohio program did not provide any added incentives to private schools.⁵⁹¹ Families who opted to take the financial aid and apply it to a private school were still responsible for the remainder of the private school tuition.⁵⁹² Parents who chose an adjacent public school paid nothing extra.⁵⁹³

⁵⁸⁶ *Id.* at 652-653.

⁵⁸⁷ *Id.* at 652-653.

⁵⁸⁸ *Id.* at 653-654.

⁵⁸⁹ *Id.* at 653-654.

⁵⁹⁰ *Id.* at 653-654.

⁵⁹¹ *Id.* at 653-654.

⁵⁹² *Id.* at 654-655.

⁵⁹³ *Id.* at 654-655.

The dissenting Justices argued that there was a “public perception that the State [was] endorsing religious practices and beliefs.”⁵⁹⁴ However, the majority countered that private choice did not equal government endorsement of religion.⁵⁹⁵ The Court stated that this was an issue of an Ohio program helping students and not a state endorsement of religion.⁵⁹⁶ The minority pointed out that many more parents who participated in the program chose religious schools over secular private schools and other public schools.⁵⁹⁷ The majority countered that it was an accepted reality that more religious schools were located in Cleveland and that this was not relevant to the constitutional question of the Ohio program.⁵⁹⁸ In answer to the minority’s assertion that parents choose religious schools over public schools, the majority stated, “The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations or most recipients choose to use the aid at a religious school.”⁵⁹⁹

To recap their argument that the Ohio statute violated the Establishment Clause, the minority suggested the Court look at the *Nyquist* decision to decide this case.⁶⁰⁰ The majority rejected this suggestion, stating that *Nyquist* was different from *Zelman* because, in *Nyquist*, the financial aid offered by the State of New York went directly to the private school without ever

⁵⁹⁴ *Id.* at 654-655.

⁵⁹⁵ *Id.* at 654-655.

⁵⁹⁶ *Id.* at 655-656.

⁵⁹⁷ *Id.* at 703-704 (“...of 56 private schools in the district participating in the voucher program, 46 of them are religious; 96.6% of all voucher recipients go to religious schools, only 3.4% to nonreligious ones.”).

⁵⁹⁸ *Id.* at 655-656.

⁵⁹⁹ *Id.* at 659-660.

⁶⁰⁰ *Id.* at 661-662.

going to the parents.⁶⁰¹ The majority concluded that the Ohio Scholarship program “...is entirely neutral with respect to religion.”⁶⁰²

In sum, the majority’s opinion that the Cleveland Voucher Program did not violate the Establishment Clause relied on two main points. First, parents had a choice between enrolling their children in a public school or a private school.⁶⁰³ Second, the voucher program was neutral toward religion.⁶⁰⁴

Justice O’Connor’s Concurrence

Concurring with the majority, Justice O’Connor wrote a separate opinion for two reasons.⁶⁰⁵ First, Justice O’Connor wrote that the *Zelman* decision was not inconsistent with “other government programs” and second, “prior Establishment Clause” decisions had supported parents’ rights to “true private choice.”⁶⁰⁶

Consistent with Other Programs

Addressing the first issue of *Zelman*’s connection to other government programs, Justice O’Connor addressed Justice Souter’s dissenting claim that the Ohio Scholarship program favored

⁶⁰¹ *Id.* at 661-662 (In 1973 the Court ruled in *Nyquist* that tuition grant money went directly to sectarian schools. By reimbursing parents for a portion of the tuition bill, the State relieved the financial burden on parents. This in turn allowed parents to continue to choose private schools and the result was that government funds played an improper role in supporting a parent’s decision to enroll their child in a private school. The Court ruled that the effect of the aid was to support private schools and, thus, the Establishment Clause was violated.).

⁶⁰² *Id.* at 662-663.

⁶⁰³ *Id.* at 662-663.

⁶⁰⁴ *Id.* at 662-663.

⁶⁰⁵ *Id.* at 663-664.

⁶⁰⁶ *Id.* at 663-664.

private schools, specifically religious schools.⁶⁰⁷ She asserted that the money reaching private religious schools was not as extensive as Justice Souter would claim.⁶⁰⁸ While the facts stated that 96 percent of participating students attended a religious school and 82 percent of the schools participating were religious schools, Justice O'Connor countered that "these statistics do not take into account all of the reasonable educational choices that may be available to students in Cleveland public schools."⁶⁰⁹ She compared the \$2,250 tuition assistance that low income families received to the \$4,518 per pupil expenditure for the public magnet schools in Cleveland and the \$7,097 per student allocation for all other Cleveland public schools.⁶¹⁰ Justice O'Connor stated:

...the amount spent on religious private schools [\$8.2 million] is minor compared to the \$114.8 million the State spent on students in the Cleveland magnet schools...the \$8.2 million...pales in comparison to the amount of funds that federal, state and local governments already provide religious institutions.⁶¹¹

Pointing to tax breaks for non-for-profit organizations, Justice O'Connor stated that more than religious schools received a government benefit.⁶¹² Besides tax exemptions, she mentioned Medicare, Medicaid, Pell Grants, and the G.I. Bill of Rights as other examples of where aid is available to institutions like hospitals, churches, colleges and universities.⁶¹³ Summing up the comparison between Ohio's program and other similar government programs, Justice O'Connor

⁶⁰⁷ *Id.* at 663-664.

⁶⁰⁸ *Id.* at 663-664.

⁶⁰⁹ *Id.* at 663-664 (Citing a report on the racial and economic conditions of the private and public Cleveland school systems, Justice O'Connor stated, "When one considers the option to attend community schools, the percentage of students enrolled in religious schools falls to 62.1 percent. If magnet schools are included in the mix, this percentage falls to 16.5 percent.").

⁶¹⁰ *Id.* at 663-664.

⁶¹¹ *Id.* at 663-664.

⁶¹² *Id.* at 664-665.

⁶¹³ *Id.* at 664-665.

stated that the Cleveland voucher program did not offer religious institutions “substantial” or “atypical” government support.⁶¹⁴

Consistent with Prior Decisions

In the second part of her concurrence, Justice O'Connor relied on the *Lemon* Test⁶¹⁵ and the decision in *Agostini* to further her argument that the Establishment Clause had not been violated by the decision in *Zelman*.⁶¹⁶ When originally implemented, a statute passed the *Lemon* Test only if it had “a secular legislative purpose,” if its “principal or primary effect” was one that “neither advance[d] nor inhibit[ed] religion,” and if it did “not foster an excessive government entanglement with religion.”⁶¹⁷ Justice O'Connor noted the evolution of *Lemon* and combined it with the *Agostini* decision.⁶¹⁸ She noted that the Court's ruling in *Agostini* “folded the entanglement inquiry into the primary effect inquiry.”⁶¹⁹ This inquiry emphasized whether or not “a program that distributes aid to beneficiaries, rather than directly to service providers, has the primary effect of advancing or inhibiting religion.”⁶²⁰ Ultimately, Justice O'Connor asked two questions: one, was aid given in a “neutral fashion” without regard to who received it or the organization to which it was applied, and two, did parents have an option between a public and private organization?⁶²¹ Concluding that the *Zelman* decision was true to prior Establishment

⁶¹⁴ *Id.* at 668-669.

⁶¹⁵ *Lemon*, *supra* note 91.

⁶¹⁶ *Zelman*, *supra* note 22, at 668-669.

⁶¹⁷ *Lemon*, *supra* note 91, at 612-613.

⁶¹⁸ *Zelman*, *supra* note 22, at 668-669.

⁶¹⁹ *Id.* at 668-669.

⁶²⁰ *Id.* at, 669-670.

⁶²¹ *Id.* at 669-670.

Clause decisions, Justice O'Connor reasoned that the aid was neutral to both parents and the schools that benefitted and parents had a choice between public and private schools.⁶²²

Believing that Cleveland parents had “true private choice”, Justice O'Connor observed that some parents chose religious schools not affiliated with their own religion and that no students were denied admittance to any private school.⁶²³ Judging that there was no financial advantage afforded parents who opted for sending their child to a religious school, Justice O'Connor concurred with the majority opinion.⁶²⁴

Justice Thomas' Concurrence

In addition to Justice O'Connor's concurrence, Justice Clarence Thomas wrote his own concurring opinion. In his opinion, Justice Thomas' main concern was for the African-American students in Cleveland. Justice Thomas asserted that the voucher program was an answer to institutional racism. Quoting from *Brown v. Board of Education*,⁶²⁵ Justice Thomas wrote that all children were guaranteed an opportunity to an equal education.⁶²⁶ In his opinion the Cleveland public school system had “continually fail[ed]” minority students and the city's deplorable public school system conditions affected black children in disproportionate numbers.⁶²⁷ According to

⁶²² *Id.* at 669-670.

⁶²³ *Id.* at 669-671.

⁶²⁴ *Id.* at 669-671.

⁶²⁵ *Brown*, *supra* note 26.

⁶²⁶ *Id.* at 670-676.

⁶²⁷ *Id.* at 677.

Justice Thomas, this “academic emergency” was reason enough to enact vouchers.⁶²⁸ In his conclusion Justice Thomas advocated for inner city school children when he stated:

The failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives. If society cannot end racial discrimination, at least it can arm minorities with the education to defend themselves from some of discrimination’s effects.⁶²⁹

The Dissent

Justice Souter seemed to write the primary dissent,⁶³⁰ as he was joined by Justices Breyer, Stevens, and Ginsburg. Justice Souter believed that “doctrinal bankruptcy” was at hand when the Ohio program was instituted.⁶³¹ Justice Souter’s dissent detailed the jurisprudence from *Mueller* to *Zelman* and through his criticism on those decisions he disparaged the majority’s dependence on what he called “inadequate reliance” on the positions of “neutrality and free choice”.⁶³²

Problem with Neutrality

As for neutrality, Justice Souter argued that the amount of \$2,500 to attend a private school rendered the support for neutrality indefensible. In his opinion, the government aid

⁶²⁸ *Id.* at 677.

⁶²⁹ *Id.* at 684.

⁶³⁰ Powers, *supra* note 16, at 1061 (“While there were three separate dissenting opinions, Justice Souter’s seemed to be the principal dissent, as it was joined by all of the dissenters.”) and Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 Harv. L. Rev. 163, 185 (2002) (“It was Justice Souter’s dissent that had the hallmarks of being the principal dissent. His was the only opinion that all of the dissenters joined.”).

⁶³¹ *Zelman*, *supra* note 22, at 689.

⁶³² *Id.* at 693-696.

improperly “skewed the scheme” towards religion.⁶³³ While it was clear to the majority that “all” schools could participate, it was not so clear to Justice Souter who contrasted the tutoring aid the public school parent received (the maximum amount available was \$360) to the private school scholarship available (the maximum amount available was \$2,500).⁶³⁴ It was Justice Souter’s opinion that \$360 versus \$2,500 did not translate to a neutral environment for parents.⁶³⁵

Problem with Choice

Justice Souter also found fault with the majority’s argument on choice.⁶³⁶ He argued that because the vast majority of parents who used vouchers sent their children to Catholic schools, choice did not truly exist.⁶³⁷ For Justice Souter, true private choice existed when parents were “free to send the money in either a secular direction or a religious one.”⁶³⁸ However this was not the case for the Cleveland Voucher Program where the vast majority of the aid went to religious schools.⁶³⁹

The crux of Justice Souter’s dissent relied on his assertion that the “aid to religious schools approved today is unprecedented, both in number of dollars and in the proportion of systemic school expenditures.”⁶⁴⁰ He argued that the “greater the aid, the greater its proportion to religious schools existing expenditures, and the greater the likelihood that public money was

⁶³³ *Id* at 697.

⁶³⁴ *Id* at 697-698.

⁶³⁵ *Id* at 697-698.

⁶³⁶ *Id* at 699.

⁶³⁷ *Id* at 699.

⁶³⁸ *Id* at 699.

⁶³⁹ *Id* at 700.

⁶⁴⁰ *Id* at 709.

supporting religious as well as secular instruction.”⁶⁴¹ Justice Souter maintained that the Ohio Scholarship Program violated the Establishment Clause.⁶⁴² He believed a door had been opened and was fearful of the government becoming too involved in religion.⁶⁴³ Finally Justice Souter contended, “When government aid goes up, so does reliance on it; the only likely thing to go down is independence.”⁶⁴⁴

Justice Breyer joined in the dissent and wrote “parental choice” did not “significantly alleviate the constitutional problem.”⁶⁴⁵ Believing that our “Constitutional doctrine” was developed to avoid “religious strife,” Justice Breyer claimed that vouchers provided aid to parents with the possibility of the government unintentionally creating tension between secular and non-secular groups.⁶⁴⁶

Justice Stevens also wrote a dissent and questioned if government tax dollars should be used to “indoctrinate” students in religious schools.⁶⁴⁷ He refuted the majority’s opinion with three points: first, it mattered not whether a school system was under performing; second, it was inconsequential that just because a program had a variety of options it did not violate the Establishment Clause; and third, it was irrelevant that the choice was a private one.⁶⁴⁸

⁶⁴¹ *Id* at 709.

⁶⁴² *Id* at 712.

⁶⁴³ *Id* at 712.

⁶⁴⁴ *Id* at 716.

⁶⁴⁵ *Id* at 718.

⁶⁴⁶ *Id* at 720.

⁶⁴⁷ *Id* at 685.

⁶⁴⁸ *Id* at 685.

Justice Stevens concluded, “Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of democracy.”⁶⁴⁹

2002-2011: Post-*Zelman* – Do We Have a Mandate?

Introduction

After the *Zelman* decision, voucher supporters eagerly awaited the new programs that would be created.⁶⁵⁰ While the eagerness grew, others offered caution.⁶⁵¹ A court case in Florida and a voters’ referendum in Utah would suppress any thoughts of a *Zelman* mandate.

In his editorial to the *Washington Post*, then Secretary of Education Ron Paige hailed the Supreme Court’s decision.⁶⁵² Echoing Justice Thomas’ comments in *Zelman* about economic inequities Secretary Paige proclaimed, “At issue in this case was the future of thousands of low-income students stuck in some of the most poorly performing schools in the country.”⁶⁵³

⁶⁴⁹ *Id* at 687.

⁶⁵⁰ Carlton-Smith, *supra* note 68, Edelstein, *supra* note 68, and Leonard, *supra* note 68.

⁶⁵¹ Kenneth R. Howe and Kevin G. Welner, *School Choice and the Pressure to Perform: Déjà Vu for Children with Disabilities*, Remedial and Special Education vol. 23 n. 4 (Jul-Aug 2002) (stating that vouchers were “short-sighted” and that they could “create exclusive, private academies” funded by tax dollars); Melissa Rogers, *Traditions of Church-State Separation: Some Ways They Have Protected Religion and Advanced Religious Freedom and How They Are Threatened Today*, 18 J. L. & Pol. 277 (2003) (warning that private school vouchers would be followed by more government regulations); and Mary Elizabeth Hill Hanchev, *Resisting Efforts to Provide Public Funding for Parochial Education in the Wake of Zelman v. Simmons-Harris: A Primer for North Carolina Advocates*, 1 First Amend. L. Rev. 85 (Spring, 2003) (raising the questions about future state constitutional amendments to combat vouchers and about the inevitable government regulations facing religious schools that receive government aid).

⁶⁵² Rod Paige (Secretary of Education 2001-2005), *Editorial “A Win for America’s Children”*, Washington Post, June 28, 2002, at A29.

⁶⁵³ *Id.*

Secretary Paige concluded that *Zelman*'s most significant point was that the parents, rather than the government, made the decision about where to send their children to school.⁶⁵⁴

Months after the *Zelman* decision Frank Kemerer⁶⁵⁵ offered a more temperate comment in his paper.⁶⁵⁶ For Mr. Kemerer, the *Zelman* decision gave a "green light" to voucher supporters "only from the perspective of the federal constitution." His point was that state constitutions may hold sway over the whole deal because there are obstructions specifically built into state constitutions⁶⁵⁷ that would prohibit state funds from reaching sectarian schools.⁶⁵⁸ Mr. Kemerer reported that besides a flat-out statement prohibiting state funds from reaching sectarian schools, there are other obstacles which included "restricting public funding to public schools only, requiring all education to be under state control, and requiring the legislature to assure that education serves a public purpose."⁶⁵⁹ His point was that there were more complications for vouchers in state constitutions than just Blaine Amendments. Due to these adverse conditions, Mr. Kemerer predicted the future of vouchers was at best uncertain.⁶⁶⁰

⁶⁵⁴ *Id.*

⁶⁵⁵ Frank R. Kemerer teaches education law and policy courses at the University of San Diego School of Law and School of Leadership and Education Sciences. He has written two books on school choice *School Choice Tradeoffs* (University of Texas Press, 2002), and *School Choice and Social Controversy* (Brookings Institution Press, 1999). In 2002 he wrote a position paper for the National Center for the Study of Privatization in Education at Teachers College, Columbia University. On its website the Center describes itself as "...provid[ing] independent, non-partisan information on and analysis of privatization in education. The Center's program includes research, evaluation, conferences, publications, and dissemination on a full range of issues regarding privatization of education from pre-school to higher education, both national and international." <http://www.ncspe.org/>.

⁶⁵⁶ Frank R. Kemerer, *The U. S. Supreme Court's Decision in the Cleveland Voucher Case: Where to from Here?*, Occasional Paper No. 51 National Center for the Study of Privatization in Education, Teachers College Columbia University (July 2002) http://ncspe.org/publications_files/538_OCCP51.pdf.

⁶⁵⁷ *Id.* at 2 (referring to Blaine Amendments).

⁶⁵⁸ *Id.*

⁶⁵⁹ *Id.* at 9.

⁶⁶⁰ *Id.* at 13.

Despite the apparent opening *Zelman* created, voucher measures took some hits in Florida⁶⁶¹ and Utah.⁶⁶² The Florida state legislature, with support from Governor Jeb Bush, enacted a statute that created the Opportunity Scholarship Program (OSP). The OSP was designed to allow parents, whose children attended a failing Florida public school, the option to send their children to a private school or a nearby public school. Taxpayers in Florida challenged the law and filed suit. The trial court ruled in favor of the tax payers and stated the OSP was unconstitutional. On appeal the First District Court of Appeals supported the trial court's decision. The case was appealed to the Florida Supreme Court which agreed with the previous decisions. Citing the Florida State Constitution that stipulated that a system of free public education be provided to every child, the State Supreme Court overturned the OSP and concluded that using state funds to provide students with a private school education was prohibited.⁶⁶³ Voucher supporters would fair no better in Utah.

In 2007 the state legislature in Utah enacted a voucher plan, the Parent Choice in Education Act (PCEA), for any student in the state.⁶⁶⁴ The plan would grant vouchers to students to attend a private school.⁶⁶⁵ The Utah legislature reasoned that parents were the best informed to make choices for their children, including the educational environment that would best fit their child.⁶⁶⁶ Scholarships were to be awarded exclusively on financial need and would be applied to the cost of tuition at a private school.⁶⁶⁷ Depending on the level of a family's income eligibility,

⁶⁶¹ Bush vs. Holmes 919 So. 2d 392 (2006).

⁶⁶² In 2007 Utah created a state wide voucher program. See <http://le.utah.gov/~2007/bills/hbillenr/hb0148.htm> . The statute was voted down by the voters in a referendum on November 8, 2007. <http://www.foxnews.com/story/0,2933,308936,00.html>.

⁶⁶³ Bush, *supra* note 661, at 397-398.

⁶⁶⁴ Utah, *supra* note 662.

⁶⁶⁵ *Id.*

⁶⁶⁶ *Id.*

⁶⁶⁷ *Id.*

full year scholarships would range from \$3000 to \$5000 per student. To offset the loss of revenue that a school district might encounter, the PCEA included a provision that allowed school districts to recoup lost funding based on a loss of enrollment to private schools. In essence, Utah was willing to financially support both public schools and the parents who chose to send their students to a private school.⁶⁶⁸

The PCEA attempted to address the neutrality and choice issues outlined in *Zelman*. Addressing the neutrality concern over any assistance reaching a private school, the PCEA specified that “school-age children are the primary beneficiaries of the [aid]...and any benefit to private schools...is indirect and incidental.”⁶⁶⁹ Speaking to the question on who directs the aid and where it lands, the PCEA identified parents as the ones making the “genuine and independent private choices” and not the government.⁶⁷⁰

Despite the legislature’s attempts to create a voucher program that neutrally applied aid and gave parents a genuine private choice, Utah voters in November of 2007 repealed the PCEA via a referendum initiated by teachers’ unions.⁶⁷¹

This was a blow to voucher supporters who were counting on the voucher plan in Utah, a politically conservative state,⁶⁷² to be a template for more plans across the country.⁶⁷³

⁶⁶⁸ *Id.*(a public school that lost a scholarship recipient to a private school would receive matching revenues for a period of time of no more than five years or until the student graduated from high school, whichever came first).

⁶⁶⁹ *Id.*

⁶⁷⁰ *Id.*

⁶⁷¹ *Voters Rescind Legislature's School Voucher Law in Utah*, Washington Post, November 12, 2007, at B02.

⁶⁷² A Gallup Poll ranking Utah the third most conservative state in the U.S.

<http://www.gallup.com/poll/141677/wyoming-mississippi-utah-rank-conservative-states.aspx>; and Daniel B. Wood, *State Initiatives: New Jersey Rejects Stem-Cell Research, Utah Axes Vouchers*, Christian Science Monitor, November 9, 2007, at 2, (quoting John Matsusaka, president of the Initiative and Referendum Institute at the University of Southern California “What this says to me is if you can't pass a voucher measure in Utah, you are going to have a real hard time doing it anywhere. Even in a very conservative state, voters seem to hesitate using public funds to send kids to private schools.”). <http://www.csmonitor.com/2007/1109/p02s01-uspo.html>.

⁶⁷³ *Id.* and Linda Greenhouse, *2,691 Decisions*, New York Times, July 13, 2008, at A4, (stating in part, “The voucher movement, even though its constitutional shackles had been removed, stalled almost everywhere, owing not

The *Zelman* decision had a ripple effect in other cases in Washington, Maine, Washington D.C., and Arizona. However, in these subsequent cases the voucher movement seemed to stall. The following decisions seemed to muddy the waters further or at the very least set voucher supporters back a few steps. Resting on a “razor-thin”⁶⁷⁴ majority, the *Zelman* decision did not usher in a mandate for systemic voucher initiatives.

Locke v. Davey (2004)⁶⁷⁵

In 1999, the State of Washington established the Promise Scholarship Program (PSP) to assist students, who qualified financially, with college tuition costs. The scholarship specifically stated that the funds could not be used for the pursuit of a degree in theology. Joshua Davey, a student who qualified for aid, was denied tuition assistance from the State of Washington because he was pursuing a theology degree. The State maintained that its constitution prohibited it from awarding the scholarship funds to students like Davey. Washington’s constitution contains a Blaine Amendment prohibiting State funds from reaching any religious groups. Davey believed that the State’s constitution infringed upon his religious rights. Taking his case to the District Court for the Western District of Washington, Davey sued on the grounds that the denial of scholarship funds violated his rights under the Free Exercise Clause of the First Amendment.

to the intervention of federal judges but to resistance from state courts, teachers' unions and taxpayers. An ambitious legislative campaign by voucher advocates in 2004 ended in defeat in state after state. The court can only do so much. It can lead, but the country does not necessarily follow.”). http://www.nytimes.com/2008/07/13/weekinreview/13linda.html?pagewanted=all&_r=0.

⁶⁷⁴ Powers, *supra* note 16, at 1061 (arguing the 5-4 decision was on shaky ground because of “political pressure” from teachers’ unions, the average age of the justices indicated a possible change in the future makeup of the Court, and the tenor of the dissent in *Zelman*) and Fried, *supra* note 630 (proposing that “Justice Souter’s opinion carried an unstated but unmistakable oppositionist message, a commitment to continued dissent.”).

⁶⁷⁵ *Locke v. Davey* 540 U.S. 712 (2004).

The District Court did not accept Davey's constitutional claims and found in favor of the State. Davey appealed to the United States Court of Appeals for the Ninth District who ruled in favor of Davey on grounds that the prohibition was unconstitutional. Overturning the Court of Appeals decision, the Supreme Court found the State of Washington's constitution could be much more expansive in regards to avoiding an establishment of religion. While the U.S. Supreme Court believed the federal constitution did not prohibit the use of funds to support Davey's religious education, the Court ruled that Washington's constitution could include a stricter policy than the federal constitution on the prohibition of State funds reaching Davey.⁶⁷⁶

Justice Rehnquist delivered the opinion of the Court. Several points were made in the majority's decision. First, The PSP was not presumptively unconstitutional.⁶⁷⁷ The Court reasoned that the PSP did not "disfavor" religion.⁶⁷⁸ According to the Court the PSP did "not deny to ministers the right to participate in political affairs" and it did "not require students to choose between their religious beliefs and receiving a government benefit."⁶⁷⁹ Second, it was not true that because the PSP funded training for all secular professions; the State had to fund training for religious professions.⁶⁸⁰ Maintaining that educating a minister was "essentially a religious endeavor," the Court ruled that the Establishment Clause would be violated.⁶⁸¹ Third, there was nothing in Washington's constitution or in the application of the PSP that suggested any "animus towards religion."⁶⁸² Pointing out that the PSP was actually friendly toward religion, the Court stated that PSP recipients were allowed to attend religious colleges and enroll

⁶⁷⁶ *Id.*

⁶⁷⁷ *Id.* at 720.

⁶⁷⁸ *Id.* at 720.

⁶⁷⁹ *Id.* at 720.

⁶⁸⁰ *Id.* at 720.

⁶⁸¹ *Id.* at 721.

⁶⁸² *Id.* at 720.

in religious courses.⁶⁸³ The majority concluded that the “State’s interest” in not funding the pursuit of religious degrees outweighed the “minor burden” placed on Promise Scholars to only pursue secular degrees.⁶⁸⁴

Although the *Zelman* decision set up ways for public money to reach religious institutions that was not a violation of the Establishment Clause, the decision in *Locke* presented another impediment to voucher supporters.⁶⁸⁵ Voucher supporters looking for a positive outcome in the *Locke* decision were blocked by more precise language in state constitutions prohibiting vouchers for religious education.⁶⁸⁶ Likewise, those looking for a pro-voucher decision in a Court of Appeals case in Maine would be equally disappointed.

Eulitt v. State of Maine (2004)⁶⁸⁷

The question before the United States Court of Appeals for the First Circuit was whether the Equal Protection Clause of the U.S. Constitution required Maine to give tuition funds to private sectarian secondary schools on behalf of parents who resided in areas of the State that did not offer public education. Maine’s law,⁶⁸⁸ dating back to 1981, provided that when a free public education was not available, parents were able to send their children to a private school. Under

⁶⁸³ *Id.* at 724-725 (See note 9: “The State notes that it is an open question whether the Washington Constitution prohibits nontheology majors from taking devotional theology courses. At this point, however, the Program guidelines only exclude students who are pursuing a theology degree.”).

⁶⁸⁴ *Id.* at 725.

⁶⁸⁵ Powers, *supra* note 16, at 1052-1053

⁶⁸⁶ *Id.*

⁶⁸⁷ *Eulitt v. State of Maine* 386 F. 3d 344 (2004).

⁶⁸⁸ Me. Rev. Stat. Ann. tit. 20-A, § 2951(2) (2005) <http://www.mainelegislature.org/legis/statutes/20-A/title20-Asec2951.html> .

the law, the State would cover the cost of the tuition to a private school. However, State law prevented any payment of tuition to private religious schools.

Parents John and Belinda Eulitt brought suit against the State declaring that the restriction on paying for private religious school tuition violated the Equal Protection Clause of the Fourteenth Amendment. Asserting that the State's action discriminated against their religious practice, the parents filed suit in United States District Court for the District of Maine. The District Court found in favor of the State and ruled that the Equal Protection Clause did not mandate "the provision of public funds to private sectarian schools, even when a school district has chosen to subsidize the payment of tuition to private nonsectarian schools on a limited basis."⁶⁸⁹

The Eulitts appealed to the United States Court of Appeals for the First Circuit. Using the decision in *Davey*, the Appeals Court ruled that the State law prohibiting state funds from reaching sectarian schools did not violate the parents' Equal Protection rights under the Fourteenth Amendment. The court wrote:

Maine's decision not to extend tuition to religious schools does not threaten any civil or criminal penalty...it does not in any way inhibit political participation...it does not require residents to forgo religious convictions in order to receive the benefit offered by the state – secular education.⁶⁹⁰

Furthermore the court stated that, Maine was justified "in concentrating limited state funds on its goal of providing secular education" and "avoiding entanglement" issues by not

⁶⁸⁹ Eulitt, *supra* note 687, at 355.

⁶⁹⁰ *Id.* at 355.

supplying those funds to private religious schools.⁶⁹¹ As with the *Davey* decision, a post-*Zelman* decision did not support vouchers.

American Jewish Congress v. Corporation for National and Community Service (2005)⁶⁹²

AmeriCorps,⁶⁹³ under the auspices of the Corporation for National and Community Service, provided programs and training for volunteers who taught in impoverished Catholic schools. The American Jewish Congress (AJC) brought suit against AmeriCorps and the University of Notre Dame in U.S. District Court for the District of Columbia because they contended that aspects of the community service program involving Notre Dame's students violated the Establishment Clause. The United States Court of Appeals for the District of Columbia ruled that the program did not violate the Establishment Clause.

Judge Randolph wrote the opinion of the court. After completing community service at impoverished Catholic schools, qualified students at the University of Notre Dame received an AmeriCorps Education Award that could be applied to their own school tuition or to repay existing student loans. Notre Dame students in the program taught secular and religious subjects in disadvantaged Catholic schools.⁶⁹⁴

⁶⁹¹ *Id.* at 355.

⁶⁹² *Am. Jewish Cong. v. Corp. for Nat'l and Cmty. Serv.*, 399 F. 3D 351 (2005).

⁶⁹³ AmeriCorp is a U.S. federal government program created in 1993 by the National and Community Service Trust Act. According to their website, "AmeriCorps is a national network of programs that engages more than 70,000 Americans each year in intensive service to meet critical needs in communities throughout the nation." AmeriCorp volunteers fill some of the following roles: "tutor and mentor disadvantaged youth, fight illiteracy, teach computer skills, and manage or operate after-school programs." <http://www.americorps.gov/>.

⁶⁹⁴ *Am. Jewish Cong.*, *supra* note 692, at 355.

AJC brought suit alleging that the AmeriCorps program had the effect of advancing religion.⁶⁹⁵ AJC's suit purported that there were two ways the AmeriCorps program was unconstitutional. The AJC claimed that the AmeriCorps program was not neutral towards religion and that participants did not exercise true private choice.⁶⁹⁶ The district court agreed with AJC and found that the program violated the Establishment Clause of the First Amendment. The Court of Appeals for the District of Columbia reversed that decision.⁶⁹⁷

In writing the opinion of the Appeals Court, Judge Randolph cited U.S. Supreme Court decisions in *Zelman*, *Zobrest*, *Witters*, and *Mueller* where the Court found programs of "true private choice" did not infringe upon the Establishment Clause.⁶⁹⁸ The Appeals Court claimed that government aid set up through the auspices of AmeriCorp was neutral toward religion and therefore the Establishment Clause was not violated.⁶⁹⁹ Quoting from *Zelman*, the Appeals Court stated that the Establishment Clause was not violated when aid was given to a wide range of individuals who on their own decided where to direct the government funds.⁷⁰⁰ The Appeals Court found the same conditions in the AmeriCorps program. The court reasoned that no reasonable person would infer that the government was improperly influencing AmeriCorps to direct the funds towards religious purposes.⁷⁰¹

The Appeals Court cited the following as reasons why the AmeriCorps program was neutral: (1) "participants [were] chosen without regard to religion"; (2) "the awards [were] available to a broad class of citizens"; (3) "individuals who elect[ed] to teach religion in addition

⁶⁹⁵ *Id.* at 354.

⁶⁹⁶ *Id.* at 357-358.

⁶⁹⁷ *Id.* at 355.

⁶⁹⁸ *Id.* at 356.

⁶⁹⁹ *Id.* at 356.

⁷⁰⁰ *Id.* at 356, quoting *Zelman* at 652.

⁷⁰¹ *Id.* at 356

to secular subjects [did] so as a result of their own genuine and independent private choice”; and (4) “AmeriCorps create[d] no incentives for participants to teach religion...and they may count only the time they spend engaged in non-religious activities toward their service hours requirement.”⁷⁰² The Appeals Court claimed that a government-sponsored program could be constitutional even when religious choices outweighed secular choices.⁷⁰³ Citing the example in the *Zelman* decision, the Appeals Court pointed out that the vast majority of schools in the Ohio’s aid program were religious.⁷⁰⁴ In the AmeriCorps case, “only 328 of the 1608 schools employing AmeriCorps participants...were religious schools.”⁷⁰⁵

Echoing the decision in *Zelman*, the Appeals Court concluded that educational awards to AmeriCorps participants did not promote religion.⁷⁰⁶ The court decided that the Establishment Clause was not violated because there was a “true private choice” for teachers in choosing between private and public schools.⁷⁰⁷

Anderson v. Town of Durham (2006)⁷⁰⁸

Based on the Supreme Court ruling in *Zelman*, parents in Maine filed a suit against the State claiming that a state law, which prohibited the funding of sectarian education, now violated their Free Exercise right to choose a religious education for their children. The Supreme Court of Maine ruled that the law did not violate the Free Exercise Clause because the State did not

⁷⁰² *Id.* at 357.

⁷⁰³ *Id.* at 358.

⁷⁰⁴ *Id.* at 358, quoting *Zelman* 655-658.

⁷⁰⁵ *Id.* at 357.

⁷⁰⁶ *Id.* at 359.

⁷⁰⁷ *Id.* at 359.

⁷⁰⁸ *Anderson v. Town of Durham*, 2006 ME 39, P1 (2006).

provide funds to parents so they could in turn use those funds to send their children to a religious school. The court ruled that the law was constitutional because it was designed to avoid any excessive entanglement issues between the government and religion.

The Maine statute⁷⁰⁹ authorizes the use of tax dollars to pay tuition at approved private schools on behalf of students who live in districts that do not have a public high school, as long as the school is nonsectarian.⁷¹⁰ A group of parents in Maine contested the section of the law that prohibited funds reaching religious schools. They asserted that the decision in *Zelman* had changed the law and made the Maine statute unconstitutional in respect to the Free Exercise Clause.⁷¹¹ Before 1980, Maine's tuition statute permitted payment of public funds to approved sectarian schools for tuition payment purposes. In 1980, in response to a member of the Legislature, Maine's Attorney General issued an opinion stating that using public funds to pay tuition at private, religious schools violated the Establishment Clause.⁷¹² In response, the Maine legislature created Section 2951(2) which disallowed any funds reaching religious schools.⁷¹³

The majority relied on the Supreme Court decision in *Locke*⁷¹⁴ citing that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."⁷¹⁵ In other words, just because the Supreme Court ruled in *Zelman* that vouchers were legal, it did not necessarily mean that state laws forbidding the release of such funds were unconstitutional. Basically the Supreme Court stated in the *Locke* decision that Washington State

⁷⁰⁹ Maine, *supra* note 688.

⁷¹⁰ Anderson, *supra* note 708.

⁷¹¹ *Id.* at P1.

⁷¹² *Id.* at P5.

⁷¹³ *Id.* at P5.

⁷¹⁴ Locke, *supra* note 675.

⁷¹⁵ Anderson, *supra* note 708.

could permit scholarship money to go to a sectarian school, but it could also deny it without violating the Free Exercise Clause.⁷¹⁶

Relying on the decision in *Eulitt* the Maine Supreme Court stated that the Maine statute posed “no impermissible burden on religion” and because it did not prevent parents from choosing a religious education for their children. In essence, the Maine Supreme Court reasoned that protection from government encroachment did not also automatically mean that the government was obligated to supply funds to support religious education.⁷¹⁷ The Court reasoned in *Eulitt* that there was “legitimate concern about excessive entanglement with religion” when the State considered funding private education.⁷¹⁸

The parents maintained that the State of Maine made “a range of choices available to a group” when it allowed funds to be used by parents choosing non-public schools for their children. Furthermore, they reasoned the State could not “limit those choices” without violating the Free Exercise Clause.⁷¹⁹ The Maine Supreme Court responded that while *Zelman* allowed Maine to enact “some form of tuition payment”, the decisions in *Locke* and *Eulitt* “held it [was] not compelled to do so.”⁷²⁰ In other words, any state-sanctioned publicly-funded school choice initiative did not automatically mean tax dollars could be used by parents to help send their children to religious schools.

⁷¹⁶ *Id.* at P37-38.

⁷¹⁷ *Id.* at P40.

⁷¹⁸ *Id.* at P42.

⁷¹⁹ *Id.* at P48 (This is Justice Scalia’s argument in his dissent in *Locke* at 727-733).

⁷²⁰ *Id.* at P61.

Arizona Christian School Tuition Organization v. Winn (2009)⁷²¹

This case involved a group of tax payers contesting an Arizona law that allowed individuals or companies to receive state tax credits for donating to school tuition organizations. These school tuition organizations then created scholarships for students who wished to attend private schools. Many of these schools were religious in nature. Before outlining the details in this case, it should be noted that there is a need to reference both the U.S. Supreme Court decision and the decision in the case preceding it, namely *Winn v. Arizona Christian School Tuition*, 562 F. 3d 1002 (2009).⁷²² While the U.S. Supreme Court relied on their constitutional interpretation on the legal standing of taxpayers to file suit against the government, the Appeals Court used the school voucher decision in *Zelman* to make their ruling.

The State of Arizona offered its citizens tax credits for donations to school tuition organizations (STOs).⁷²³ The statute offered a yearly dollar-for-dollar tax credit up to \$500 for individual taxpayers and \$1000 for married couples filing jointly for contributions to a STO.⁷²⁴ Although taxpayers could choose the child who would benefit from their donation, parents were not allowed to donate to their own child's tuition needs.⁷²⁵ STOs in turn created scholarships for students attending private schools. STOs were private nonprofit programs that allotted no less than ninety percent of their funds for scholarships to private school students in elementary and

⁷²¹ *Arizona Christian School Tuition Organization v. Winn* 131 S. Ct. 1436 (2011).

⁷²² *Winn v. Arizona Christian School Tuition*, 562 F. 3d 1002 (2009).

⁷²³ *Arizona*, *supra* note 721, at 1440.

⁷²⁴ *Id.* at 1440.

⁷²⁵ *Id.* at 1440.

high school.⁷²⁶ Many of the STOs worked exclusively with private religious schools.⁷²⁷ Responding to what they felt was an infringement on the Constitution, a group of Arizona taxpayers sued the State on grounds that the STO tax credit violated the Establishment Clause of the First Amendment.⁷²⁸

Finding that the statute did not violate the Establishment Clause, the U.S. District Court ruled in favor of the State program.⁷²⁹ The taxpayers appealed to the U.S. Court of Appeals for the Ninth District, which reversed the District Court's ruling.⁷³⁰ The Court of Appeals ruled that the Arizona statute did not fall in line with the U.S. Supreme Court's decision in *Zelman*.⁷³¹ In the *Zelman* decision the U. S. Supreme Court found in favor of the Cleveland voucher program because parents had "true private choice" about where their child would attend school and the Cleveland program was neutral toward religion.⁷³² According to the Appeals Court, the *Winn* case differed from the *Zelman* decision because parents and taxpayer choices were different in both cases.⁷³³

The Appeals Court pointed out the parents in *Zelman* had true private choice because the financial aid went directly to them and not the schools. The *Zelman* decision held that parents

⁷²⁶ *Id.* at 1440.

⁷²⁷ Winn, *supra* note 722, at 1006 (Arizona did not set up any rules for how STOs would pick the schools that they would support or which students would receive scholarships. While STOs could reward scholarship based on financial need, the Arizona statute did not stipulate that the money had to be given to those in need. Several STOs provided scholarships only to religious schools. The largest STO was the Catholic Tuition Organization of the Diocese of Phoenix, which awarded scholarships exclusively to students attending Catholic schools in Phoenix.)

⁷²⁸ Arizona, *supra* note 721, at 1441.

⁷²⁹ *Id.* at 1441.

⁷³⁰ *Id.* at 1441.

⁷³¹ Winn, *supra* note 722, at 1007.

⁷³² *Zelman*, *supra* note 22, at 670-671.

⁷³³ Winn, *supra* note 722, at 1013.

were then free to spend the money on a public or private school.⁷³⁴ Contrary to the Cleveland program, the Arizona statute did not provide scholarships directly to parents.⁷³⁵ Instead the scholarship money first came from taxpayers and then through a private scholarship organization.⁷³⁶ Taxpayers could restrict their donations to a specific STO.⁷³⁷ The STOs that received taxpayer contributions were the responsible parties when it came to disbursing the funds.⁷³⁸ The STOs collected the funds, selected the school that would benefit from the financial aid, and decided the conditions under which the scholarship would be awarded.⁷³⁹ Deciding that this was not the same true private choice found in *Zelman*, the Appeals Court ruled in *Winn* that taxpayers and STOs exercised greater control over the disbursement of funds than did the parents. Ultimately the Appeals Court found that the Arizona statute violated the Establishment Clause of the First Amendment.⁷⁴⁰ The Appeals Court decision was appealed to the U.S. Supreme Court.

The U.S. Supreme Court ruled that the Arizona statute did not violate the U.S. Constitution. Unlike the Appeals Court, the Supreme Court did not use their decision in *Zelman* to render their ruling. Relying instead on taxpayer standing in an Establishment Clause case,⁷⁴¹ the Court rejected the taxpayers claim that the Arizona law was unconstitutional.⁷⁴²

⁷³⁴ *Id.* at 1016.

⁷³⁵ *Id.* at 1016.

⁷³⁶ *Id.* at 1016.

⁷³⁷ *Id.* at 1016. (“For example, by choosing to give state-reimbursed money to the Catholic Tuition Organization of the Diocese of Phoenix, which plaintiffs allege to be the largest STO, taxpayers can make their portion of the program aid available only to parents who are willing to send their children to Catholic schools.”).

⁷³⁸ *Id.* at 1016.

⁷³⁹ *Id.* at 1016.

⁷⁴⁰ *Id.* at 1016.

⁷⁴¹ *Flast v. Cohen*, 392 U.S. 83 (1968).

⁷⁴² *Arizona*, *supra* not 708, at 1442.

While *Zelman* seemed to usher in a new era for vouchers, the decisions in cases like *Locke v. Davey*, *Eulitt v. Maine*, and *Anderson v. Durham* denied voucher supporters the kind of mandate they were looking for. However, the decisions in *American Jewish Congress v. Corporation for National and Community Service* and *Arizona Christian School Tuition Organization v. Winn* fell more in line with *Zelman* and the principles of parental choice and neutrality.

School Voucher Programs

Parental Choice Program – Milwaukee

In 1990, the Milwaukee Parental Choice Program (MPCP), the first school voucher program in a major city, was started in Milwaukee, Wisconsin.⁷⁴³ When the MPCP first got started, 337 students participated in the program in seven schools.⁷⁴⁴ When the program was created, religious schools were not an approved option for parents. After the Wisconsin Supreme Court declared that the program did not violate the U. S. Constitution,⁷⁴⁵ religious schools were included and as a result more students were added to the program. According to the MPCP facts and figures, for the 2012-2013 school year there were 112 private schools participating in the program, with 24,941 students receiving a voucher.⁷⁴⁶ In 2011, the Wisconsin State legislature

⁷⁴³ John F. Witte, *The Market Approach to Education: An Analysis of America's First Voucher Program* 43-48 Princeton, NJ: Princeton UP, (2000).

⁷⁴⁴ Milwaukee Parental Choice Program, <http://www.schoolchoicewi.org/k12/detail.cfm?id=4>.

⁷⁴⁵ *Jackson v. Benson*, 218 Wis.2d 835 (1998).

⁷⁴⁶ Wisconsin Department of Public Instruction: Milwaukee Parental Choice Program. <http://dpi.state.wi.us/sms/-choice.html>.

expanded vouchers by approving the Parental Private School Choice Program, which created a separate voucher program in the City of Racine.⁷⁴⁷

In June 2013, Governor Walker signed into law the Wisconsin Parent Choice Program (WPCP) which in effect expanded the Milwaukee and Racine programs state-wide.⁷⁴⁸ The new state program grants school vouchers to families who do not reside in Milwaukee or Racine.⁷⁴⁹ For the 2013-14 school year the enrollment in the WPCP is capped at 500 students and there is an enrollment cap of 1000 students in the following years.⁷⁵⁰ To qualify, a family's income cannot be more than 185% of the federal poverty level.⁷⁵¹

Scholarship and Tutoring Program – Cleveland

Following in Milwaukee's footsteps, the State of Ohio in 1996 offered Cleveland residents school vouchers.⁷⁵² Originally called the Pilot Project Scholarship Program (PPSP), the Cleveland voucher program was designed to give Cleveland parents options.⁷⁵³ In the early 1990s the Cleveland public school system was considered one of the worst performing districts in the country.⁷⁵⁴ Just like in Milwaukee, the Cleveland voucher program started small and grew over time. Beginning with the 1996-1997 school year, 1,996 Cleveland students received a

⁷⁴⁷ Milwaukee and Racine Parental Choice Programs. http://legis.wisconsin.gov/lfb/publications/informational-papers/documents/2013/26_milwaukee%20and%20racine%20parental%20choice%20programs.pdf.

⁷⁴⁸ Wisconsin Parent Choice Program. <http://docs.legis.wisconsin.gov/statutes/statutes/118/60>.

⁷⁴⁹ Milwaukee, *supra* note 746.

⁷⁵⁰ *Id.*

⁷⁵¹ *Id.*

⁷⁵² Cleveland Scholarship and Tutoring Program, *supra* note 544.

⁷⁵³ Ohio Pilot Project Scholarship Program. Cleveland parents were given three options: first, their children could remain in the current public school and receive a stipend for tutoring services; second, they could transfer their children to another Cleveland public school or an neighboring public school outside of Cleveland; and third, they could transfer their children to a private school and receive a voucher to help defer costs. Most parents selected option three. <http://codes.ohio.gov/orc/3313.975>.

⁷⁵⁴ Henderson, *supra* note 538.

voucher and they attended fifty-five private schools.⁷⁵⁵ By the year 2012, the total number of students in Cleveland receiving a voucher was close to 6,000.⁷⁵⁶ While the Cleveland voucher program remains intact for its residents, the State of Ohio has expanded vouchers, called the EdChoice Scholarship Program, to the rest of its citizens.⁷⁵⁷ In 2012, the EdChoice Scholarship had granted a total of 15,900 Ohio students, not including Cleveland students, a voucher.⁷⁵⁸ In another comparison to Milwaukee, the Cleveland voucher program withstood a battle in the courts culminating in a 2002 U.S. Supreme Court decision that found the Cleveland voucher program did not violate the Establishment Clause of the Constitution.⁷⁵⁹

Opportunity Scholarship Program – Washington D.C.

After the Alum Rock experiment failed in the 1970's, the federal government stepped away from the idea of incorporating school vouchers and left matters to individual states. That changed in 2003 when Congress passed the Opportunity Scholarship Program (OSP) for residents in Washington D.C. The OSP was originally set up by the D.C. School Choice Incentive Act of 2003.⁷⁶⁰ For the 2012-2013 school year the OSP provided funds to 1,584 low-

⁷⁵⁵ Paul E. Peterson and William G. Howell, *An Evaluation of the Cleveland Voucher Program after Two Years*. Cambridge, Mass.: Program on Educational Policy and Governance, Harvard U, (1999). (detailing the early years of the Cleveland voucher program). <http://www.hks.harvard.edu/pepg/PDF/Papers/clev2ex.pdf>.

⁷⁵⁶ Ohio Department of Education, <http://education.ohio.gov/Topics/Other-Resources/Scholarships/Cleveland-Scholarship-Tutoring-Program>.

⁷⁵⁷ Ohio's EdChoice Scholarship Program <http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEPrimary.aspx?page=2&TopicRelationID=667>.

⁷⁵⁸ *Id.*

⁷⁵⁹ Zelman, *supra* note 22.

⁷⁶⁰ DC School Choice Incentive Act of 2003: Opportunity Scholarship Program. <http://www2.ed.gov/programs/dcchoice/legislation.html>.

income students to attend any one of the fifty-two participating schools.⁷⁶¹ Each year Congress has to reauthorize the OSP, and while there has been strong debate on both sides of the political aisle, the OSP has been continually renewed.⁷⁶²

Choice Scholarships – Indiana

The State of Indiana’s program, officially called the Choice Scholarship Program (CSP), began with the 2011-2012 school year and the number of eligible families was capped at 7,500. For the 2012-2013 school year the eligible family number was capped at 15,000. For the 2013-2014 school year all Indiana families will be eligible. For Indiana residents the voucher amounts are determined in three different ways, with the smallest of the following amounts being awarded to parents:⁷⁶³

- Tuition and fees
- \$4,500 for grades 1 through 8
- An amount based off of the per-student State funding formula for the student’s school district of residence, determined as follows:
 - 90 percent of funding formula amount if the family income falls within 100 percent of the Reduced School Lunch eligibility

⁷⁶¹ Opportunity Scholarship Program: Fact Sheet Summary 2012-2013. http://www.dcscholarships.org/elements/_file/OSP/Program%20Data/DC%20OSP%20Program%20Fact%20Sheet%20-%20SY%202012-13%20%28-Summary%29%281%29.pdf.

⁷⁶² Emma Brown, *Private-school Vouchers Go to about 300 D.C. Students*, Washington Post, August 4, 2012 (detailing the “perennial debate” that occurs between the White House and Congress when the federally funded OSP needs be renewed). http://articles.washingtonpost.com/2012-08-04/local/35494029_1_voucher-recipients-parochial-schools-public-schools.

⁷⁶³ Indiana Choice Scholarship Program. <http://www.doe.in.gov/choice>.

- 50 percent of funding formula amount if the family income is above 100% but under 150 percent of the Reduced School Lunch eligibility
- If the participating private schools' tuition and fees are lower than the amounts above, the voucher is worth the lower amount

To be eligible to receive voucher students, private schools have to meet several conditions, including accreditation from the Indiana State Board of Education. They must also administer the state-wide testing program (ISTEP) and they are obligated to participate in Indiana's school improvement initiative. While private schools are not subject to regulations affecting course content, religious instruction, teaching practices, and staffing issues like hiring, schools receiving voucher students must meet the mandatory curriculum expectations outlined by the State Board of Education for all public and private schools. As of this writing the Indiana State Supreme Court has upheld the Choice Scholarship Program.⁷⁶⁴

Lack of Judicial and Voter Support – School Voucher Failures in Florida and Utah

As previously mentioned, vouchers have become an established offering in the cities of Milwaukee, Cleveland, and Washington D.C. However, other attempts at initiating vouchers, specifically state-wide voucher programs, have not experienced the longevity seen in the big cities. In 2006 and 2007, two voucher programs, one in Florida and the other in Utah, were dismantled. In Florida, the state Supreme Court struck down a state voucher law⁷⁶⁵ and in the

⁷⁶⁴ Meredith v. Pence, 984 NE 2d 1213 (2013). <http://www.in.gov/judiciary/opinions/pdf/03261301bd.pdf>.

⁷⁶⁵ Bush, *supra* at 661.

same year Utah enacted a state law⁷⁶⁶ providing vouchers to every family, a voter's referendum struck down the law.⁷⁶⁷

Privately Funded School Vouchers

In addition to the publicly funded vouchers in places like Milwaukee, Cleveland, Washington D.C., and Indiana, private voucher programs can be found in major cities throughout the United States. Two such programs, the Student Sponsor Partners (SSP) and the Children's Scholarship Fund (CSF), both based in New York City, have awarded privately funded vouchers to selected applicants since 1986 and 1998, respectively.⁷⁶⁸ According to the SSP website, in 1986 the SSP awarded forty-five scholarships for students to use at one of two private high schools. In 2012, those numbers increased to 1,400 students choosing from twenty-eight different private, mostly Catholic, high schools. Since its inception, the CSF has granted vouchers to over 130,000 students and for the 2012-2013 school year they have awarded 25,700 students with vouchers. In Chicago a group called Freedom to Learn Illinois (FLI) provides privately funded scholarships to low-income families whose children are entering kindergarten or first grade. Scholarships are in the amount of \$5,000 and may be applied to any private school.

⁷⁶⁶ Utah Education Vouchers, <http://le.utah.gov/~2007/bills/hbillenr/hb0148.htm>.

⁷⁶⁷ The Utah Legislature created two voucher programs; the first, enacted in 2005 was targeted to children with disabilities and enrolled less than 200 students; the second, enacted in 2007, would have created an all-inclusive voucher program for every private school student. Public school supporters, including the Utah School Boards Association, formed an alliance to challenge the program and successfully brought a referendum to the voters. In November 2007, the voters repealed the voucher program by a vote of 62% to 38%. <http://www.nea.org/home/-17956.htm>.

⁷⁶⁸ Student Sponsor Partners, <http://www.sspnyc.org/> and Children's Scholarship Fund, <http://www.scholarship-fund.org/drupal1/>.

This past school year (2012-2013) a total of fifteen scholarships were awarded from a pool of over 200 applications.

Public Support – Polls and Surveys

Polling completed in the last decade with the American public on school vouchers found a mixed bag of data – with neither side of the debate able to claim a mandate. Depending on the questions asked, it would appear that vouchers are not very popular or vouchers are gaining steam in public opinion. In a 2009 Gallup Poll only 2 percent of respondents cited vouchers as the best way to improve schools, which is consistent with a similar poll Gallup conducted in 2004.⁷⁶⁹ Countering the findings in 2004 and 2009, a Phi Delta Kappa/Gallup poll in 2012 found that support for school vouchers in America had risen from 34 percent to 44 percent.⁷⁷⁰ Looking at the specific questions and responses can shed some light on how polls can differ. In the 2009 poll, where vouchers received only a 2 percent favorable response, parents were asked an open-ended question: *Just your opinion, what would be the best way to improve kindergarten through 12th grade education in the U.S. today?* Respondents came up with twenty-two different answers. While vouchers received a low percent of responses, so did *getting rid of No Child Left Behind* – 3 percent, *abolishing teacher unions* – 3 percent, and *spending more time in school* – 2 percent.

However, when parents were asked the following question in 2012: *Do you favor or oppose allowing students and parents to choose a private school to attend at public expense?* 44 percent of those responding favored school vouchers. Recently the *Chicago Tribune* in collaboration

⁷⁶⁹ Gallup Poll, *Voucher Issue Elicits No Clear Public Sentiment and Satisfaction with Education*. <http://www.gallup.com/home.aspx?ref=logo>.

⁷⁷⁰ Phi Delta Kappa/Gallup, <http://www.pdkintl.org/poll/docs/2012-Gallup-poll-full-report.pdf>.

with the Joyce Foundation and the University of Chicago conducted a survey of Chicago adults and asked them a series of questions about the state of Chicago Public Schools (CPS). One question parents were asked was: *When schools consistently underperform would you agree or disagree with giving parents a tuition voucher so that they can send their children to a private school?* 46.5 percent of those responding favored school vouchers, while 47 percent were against vouchers.⁷⁷¹ With the most recent Gallup poll in 2012 and the *Chicago Tribune* poll in 2013 it would appear that while vouchers have gained in popularity with parents, the poll results do not offer any kind of mandate either way.

Issues Facing Chicago Public Schools

In the State of Illinois the problems facing public education are no less severe than they are in any other state. This especially holds true for the state's largest school district. The City of Chicago Public School system, with more than 400,000 students, over 21,000 teachers, and 681 schools, and a budget over \$5.1 billion,⁷⁷² is the third largest public school district in the United States.⁷⁷³ The Chicago Public Schools (CPS) have been called “underperforming” and the conditions facing CPS students have been described as “challenging” and “extensive”. A 2011 report supports these claims:

⁷⁷¹ Joyce Foundation – Chicago Tribune Education Survey, According to the report, this was a study of Chicago Public Schools' parents and other residents of the city regarding their views on teacher evaluation and education reform. It was conducted by the University of Chicago on behalf of The Joyce Foundation and the Chicago Tribune between February 7-28, 2013. 1010 adults took part in the survey. <http://www.joycefdn.org/assets/1/7/NORC-report.pdf>).

⁷⁷² Chicago Public Schools. Stats and Fact Sheet. http://www.cps.edu/about_cps/at-a-glance/pages/stats_and_facts.aspx.

⁷⁷³ National Center for Educational Statistics, http://nces.ed.gov/pubs2010/100largest0809/tables/table_a01.asp.

- About one-third or a little more than 125,000 CPS students are in underperforming schools.
- In 2011 only 7.9 percent of CPS 11th graders would graduate ready for college.⁷⁷⁴
- Compared to the 2011 national high school graduation rate of 72 percent,⁷⁷⁵ CPS had a high school graduation rate of just 57.5 percent.
- “Achievement gaps”⁷⁷⁶ for CPS minority students have continued to grow for the past twenty years.⁷⁷⁷

Who made these claims and called CPS underperforming and who used these statistics to drive home the point? The answer: CPS. Through their own internal audit, CPS made these conclusions public in a November 2011 press release.⁷⁷⁸ In response to this, Jean-Claude Brizard, the CPS CEO at the time, announced the creation of ten “turnaround” schools affecting 5,800 students. “Turnaround” schools were described as “a top-to-bottom school transformation” with “comprehensive teacher training that prepares them to tackle the challenges of growing student achievement within low-performing schools. Students return in the fall to renovated facilities, a

⁷⁷⁴ Press Release, Chicago Public Schools, *CPS Proposes Providing 7,800 Students with Access to Higher Quality School Options* (November 30, 2011) http://www.cps.edu/News/Press_releases/Pages/11_30_2011_PR1.aspx.

⁷⁷⁵ Editorial Projects in Education (EPE) Research Center, *National Graduation Rate Rebounds; 1.2 Million Students Still Fail to Earn Diplomas*, Education Week June 7, 2011. A national report from *Education Week* and the Editorial Projects in Education Research Center found that the nation’s high school graduation rate had increased to 72 percent - the highest level in more than twenty years. http://www.edweek.org/media/diplomascount2011_press-release.pdf).

⁷⁷⁶ University of Chicago. *Consortium On Chicago School Research Finds Graduation Rates Lower Than Typically Reported* (stating in a 2004 study of CPS graduates that the gap between African-American students and others was pronounced – “among boys, only 39 percent of African-Americans graduate by age 19, compared with 51 percent of Latinos, 58 percent of whites, and 76 percent of Asians”). <http://www.news.uchicago.edu/releases/05/050202.-chicago-schools.shtml>.

⁷⁷⁷ Press Release CPS, *supra* note 774.

⁷⁷⁸ *Id.*

new curriculum, new principal, new teachers, and an entirely new culture of success.”⁷⁷⁹ Six of the ten “turnaround” schools were to be handed over to Academy for Urban School Leadership (AUSL). The AUSL describes itself on its website as “a non-profit organization whose mission is to improve student achievement in Chicago’s high-poverty, chronically failing schools through its disciplined transformation process, built on a foundation of specially trained AUSL teachers.”⁷⁸⁰ The press release also went on to mention the possible closing and/or relocation of another ten schools.⁷⁸¹

However two years later not much is different for the majority of students in the Chicago public schools. CEO Brizard is no longer leading CPS, but little else has changed the plight of the low-income public school students. While attempting to “turnaround” ten schools is a start, it hardly puts a dent into improving the number of schools for tens of thousands of students affected by an inadequate education system. As of this writing the 2013 school report cards for CPS are not available, however the statistics for the 2012 school year are no different than those reported in 2011.⁷⁸² Compared to the rest of the State, CPS high school graduation rates continue to lag behind the rest of the State by more than twenty percentage points (83.3 percent for the State and 61.1 percent for CPS).⁷⁸³ This narrative seems to be perpetual. All across our country major cities are confronted with poor public schools and the challenge of what to do to improve the situation.

⁷⁷⁹ *Id.*

⁷⁸⁰ Academy for Urban School Leadership, According to its website, the AUSL was created in 2001 by Arne Duncan, Martin Koldyke, and Dr. Donald Feinstein to develop the Chicago Teacher Residency, a specialized training program for teachers in urban schools. <http://www.ausl-chicago.org/about>.

⁷⁸¹ Press Release CPS, *supra* note 774.

⁷⁸² CPS Report Card, <http://www.cps.edu/schools/pages/2012schoolprogressreportcards.aspx>.

⁷⁸³ *Id.*

The Debate Continues

From the “A Nation at Risk” report to No Child Left Behind, school reform has been a much debated topic throughout the country.⁷⁸⁴ Public schools have been under a microscope, and demands for higher test scores and accountability have created favorable conditions for pro-voucher advocates. In a *Chicago Tribune* editorial, 2011 was dubbed “The Year of School Choice.”⁷⁸⁵ The editorial cited various state voucher programs in Indiana, Ohio, and Wisconsin that have either been newly-implemented or expanded. Under Indiana’s plan,⁷⁸⁶ parents whose combined annual income does not exceed \$61,000 are eligible for a voucher, and by 2014, all families, no matter what their income level, will be eligible. In Ohio, available vouchers have increased from 15,000 to 60,000.⁷⁸⁷ In Wisconsin, the Milwaukee program was expanded to include the city of Racine, and, as a result, 3,000 more students have become eligible.⁷⁸⁸ Taking a different approach, Arizona and Oklahoma now provide savings account and tax credit opportunities to assist private school parents.⁷⁸⁹

⁷⁸⁴ NCLB, *supra* note 11.

⁷⁸⁵ Editorial, *The Other Transformers*, Chicago Tribune, July 14, 2011, at <http://www.chicagotribune.com/news/-opinion/editorials/ct-edit-reform-20110714,0,4493363.story>.

⁷⁸⁶ Indiana Choice Scholarships were authorized under Indiana House Bill 1003 and was signed into law on May 5, 2011. (The law provides vouchers for private school parents. To receive a voucher, a student must attend a public school for two semesters prior to enrolling in the scholarship program and transferring to a private school. Students in grades 1-8 may receive a maximum of \$4500. For the 2011-2012 school year no more than 7,500 total students may obtain a voucher. That number increase to 15,000 for the 2012-2013 school year and beginning in the 2013-2014 school year, all students in Indiana may participate in the voucher program.). See <http://www.in.gov/apps/-lisa/session/billwatch/billinfo?year=2011&request=getBill&docno=1003>.

⁷⁸⁷ Separate from the Cleveland Scholarship and Tutoring Program that was decided in *Zelman*; the Ohio EdChoice Scholarship Program offers vouchers to all Ohio students who attend poor-performing public schools. The voucher must be used to attend a private charter school. See <http://www.education.ohio.gov/GD/Templates/Pages/ODE/-ODEDetail.aspx?page=3&TopicRelationID=667&ContentID=46154&Content=107728>.

⁷⁸⁸ Created in 1990, the Milwaukee Parent Choice Program is the nation’s oldest voucher program. See <http://dpi.state.wi.us/sms/choice.html>.

⁷⁸⁹ For more information concerning Arizona’s tax credit program please see <http://www.azdor.gov/TaxCredits/-SchoolTaxCreditsforIndividuals.aspx>) and for more information on Oklahoma’s program see <http://www.ok-legislature.gov/BillInfo.aspx?Bill=sb969>.

Naturally, taking public money and using it for private purposes has been a touchy subject. The contentious debate over the distribution of public money to private-sectarian schools has been on the national scene for over a hundred years.⁷⁹⁰ The 1870's saw a rise in nativist sentiment where established Americans were hesitant to welcome the newest wave of European immigrants. Most of these new arrivals came from predominantly Roman Catholic countries and brought with them their religion and customs. In 1875, Representative James Blaine of Maine proposed an amendment to the U. S. Constitution that would forbid federal funds going to private organizations. Even though the Blaine Amendment failed at the federal level, it still resonates in thirty-seven state constitutions today.⁷⁹¹

Between 1875 and 1955, the voucher debate remained essentially dormant until economist Milton Friedman championed the voucher cause.⁷⁹² Pointing out built-in flaws in our system of public education, Friedman proposed school choice for parents.⁷⁹³ Subsequent state legislatures and some municipalities sought out avenues for public money to reach private school parents and ultimately private schools. In reaction to this, voucher opponents challenged them in court, and the litigation, both state and federal, debated this issue in the ensuing years. Several Supreme Court decisions in the 1980s and 1990s had pro-voucher leanings. Some believed the

⁷⁹⁰ DeForrest, *supra* note 32.

⁷⁹¹ Blaine Amendments, *supra* note 76.

⁷⁹² Friedman, *supra* note 18, at 123-125.

⁷⁹³ *Id.*

culminating case to decide vouchers would be *Zelman v. Simmons-Harris*⁷⁹⁴ which tested the constitutionality of the Cleveland voucher system.⁷⁹⁵

In the 2002 case, *Zelman*,⁷⁹⁶ the United States Supreme Court ruled that school vouchers were permissible, under certain circumstances, thus flaming a debate that is still controversial today.⁷⁹⁷ After the decision, many⁷⁹⁸ felt the *Zelman* case would open the door for vouchers for all. Legislators, judges, parents, teachers, and school administrators have argued about school vouchers and continue to do so. The purpose of this dissertation is to outline the history surrounding the Supreme Court decision in *Zelman* and review the legal issues surrounding the debate over the implementation of vouchers in Illinois. Ultimately, this paper suggests ways the State of Illinois could implement some form of a school voucher system for the City of Chicago.

After 135 years, the ideas of James Blaine and Milton Friedman, in addition to the opinions rendered in a multitude of court cases, may be applied in the State of Illinois which finds itself at an important juncture: Should school vouchers be implemented as a choice for families with school-age children who are “districted” and sent to underachieving public schools? Which leads to another interesting question: Why can a military veteran use a G.I.

⁷⁹⁴ *Zelman*, *supra* note 22.

⁷⁹⁵ Elisha Winkler, *Current Event: Simmons-Harris v. Zelman*, 10 Am. U.J. Gender Soc. Pol'y & L. 757, (2002) and Tracy Overstreet, *Constitutional Law—Simmons-Harris v. Zelman: Will Ohio's School Voucher Program Pass Its Final Exam?*, 32 U. Mem. L. Rev. 211, (2001).

⁷⁹⁶ *Zelman*, *supra* note 22.

⁷⁹⁷ See e.g., <http://www.csmonitor.com/2007/0322/p13s02-legn.html>. (Detailing the continuing debate in Utah over school vouchers.) See also *Chicago Tribune* http://blogs.chicagotribune.com/news_columnists_ezorn/2010/02/-voucherrhubarb.html). (detailing the argument in favor and against school vouchers.).

⁷⁹⁸ Crystal Goodson, *Constitutional Law – Establishment Clause - State School Voucher Program Indirectly Funding Tuition at Private Religious Schools Does Not Violate the Establishment Clause*, 33 Cumb. L. Rev. 175, (2002); Thomas J. Davis, *Vouching for Vouchers? Zelman v. Simmons - Harris in Light of Lessons on Ends and Means from Brown v. Board of Education*, 6 Rutgers Race & L. Rev. 31(2004); and Jennifer D'Alessandro, *The Vitality of Vouchers -- Learning about school choice can put money in your pocket*, VARBusiness (August 5, 2002).

Bill⁷⁹⁹ – in essence a school voucher – on a college education at a private religious school, but the same veteran cannot receive a school voucher for her own children to attend a private religious school from kindergarten to twelfth grade?

Attempts in Illinois to Create School Voucher Programs

In the past few years two separate bills were introduced in the Illinois General Assembly that would have created vouchers for parents and their children. The first was introduced in 2009 by then State Senator James Meeks. From 2003 until January of 2013 Senator Meeks represented the 15th district, which comprised parts of the south side of Chicago and several southern suburbs. Senator Meeks' proposal would have created the Illinois School Choice Program. The voucher bill, which would have provided reimbursement to private schools wishing to enroll eligible students, did not make it out of committee, so a formal vote was never taken.⁸⁰⁰

⁷⁹⁹ U.S. Department of Veteran Affairs, (The G.I Bill provides financial assistance to members of the military to attend college. The financial aid may be used at a public or private institution.) <http://www.gibill.va.gov/>.

⁸⁰⁰ Illinois General Assembly. Illinois School Choice Program Bill, SB2494 96th General Assembly. 2011. Qualifying families would have applied for vouchers under one of three categories. One, families whose income did not exceed three times the federal poverty level (for 2009 the approximate federal poverty level for a family of five was \$26,000.00) would have qualified for a voucher that would have equaled the amount of the private school tuition but not exceeded the “foundation level”. The foundation level for 2009-2010 school year was \$6119.00. Two, families whose income fell in between three and four times the federal poverty level would have qualified for either one-half the foundation level or the cost of tuition, whichever was the lesser. Three, families whose income exceeded four times the federal poverty level would have received the amount of the “flat grant” as provided by the Illinois School Code. The flat grant was set at \$218.00 per pupil. The bill never made it out of committee. <http://ilga.gov/legislation/BillStatus.asp?DocNum=2494&GAID=10&DocTypeID=SB&LegID=48830&SessionID=76&SpecSess=&Session=&GA=96>.

The most recent school voucher bill in Illinois was introduced by State Representative LaShawn Ford in January 2013.⁸⁰¹ Representative Ford's district encompasses parts of the west side of Chicago and parts of several surrounding western suburbs. Representative Ford's voucher bill, if it becomes law, would create the School Choice Act and would amend the Illinois Lottery Law.⁸⁰² The basic premise of the bill is to redirect the state's lottery proceeds to a general education fund and from there a voucher would be distributed to any student who lived in the "20 zip codes that generated the greatest amount of sales of State lottery tickets in 2012".⁸⁰³ As of August 2014, the bill remained in the Illinois House and was referred to a rules committee.⁸⁰⁴

Summary

Chapter Two provided a summary of the legal issues involved with challenges to school voucher legislation. It began with an historical perspective of the First Amendment and a review of the purpose of the Constitution's Religion Clauses and an examination of the court cases that helped define the Establishment Clause Tests. What followed next was an investigation of the Establishment Clause and its relationship with public schools. Through a detailed examination of eight relevant Supreme Court cases, this study provided insight into the difficulty our legislatures

⁸⁰¹ Illinois School Choice Act. HB0076 98th General Assembly. <http://www.ilga.gov/legislation/98/HB/PDF/09800-HB0076lv.pdf#page=1&zoom=auto,0,800>.

⁸⁰² *Id.*

⁸⁰³ *Id.*

⁸⁰⁴ Illinois School Choice Bill, *supra* note 800.

have with how, when, and where it is permissible to allow religion into our public schools.

Religious schools right to exist, as decided by the U.S. Supreme Court, was also examined.

After addressing the Establishment Clause and its relationship with public schools, this study turned back to the relevant judicial precedent determining the constitutionality of school vouchers. In this section a total of eighteen cases were divided into three groups. The first group of cases contained an analysis of legal decisions from 1947 to 2000 which opened the door or set up roadblocks for school vouchers. The second part of the analysis concentrated solely on the U.S. Supreme Court's decision in *Zelman v. Simmons-Harris* (2002).⁸⁰⁵ After a review of *Zelman*, the study turned to the third group of cases that followed the *Zelman* decision. Covering the years 2002 to the present, an analysis was provided for five court cases, both federal and state, where the support for *Zelman* wavered.

The final part of Chapter Two examined the school voucher programs in Milwaukee, Cleveland, Washington, D.C., and Indiana. Attention was also given to failed programs in Florida and Utah. Publicly funded vouchers and public opinion polls on the subject were also considered. Finally, Chapter Two concluded with stating the issues facing the Chicago Public Schools System as well as recent attempts in Illinois to create a voucher program.

Chapters Three follows with a description of the research involved. Utilizing Professor Derrick Bell's theory on social change, Chapter Four will frame the analysis of school vouchers and examine the political and legal events to evaluate whether or not Bell's theory can be employed at times when state legislation or important court decisions supported or prevented low-income families from attending the school of their choice.

⁸⁰⁵ *Zelman*, *supra* note 22.

CHAPTER THREE

METHODOLOGY

In order to provide state legislators in Illinois with a relevant legal history of school vouchers, a legal research methodology was employed for this study. Research included an extensive search for relevant sources of law, including federal and state law, regulations, case law, related law review articles, scholarly publications, and other documents. Legal opinions both in favor and those opposed to school vouchers were studied and considered. Each case was properly cited according to the rules of citation found in *The Bluebook: A Uniform System of Citation*.⁸⁰⁶ The brief of each case included a summary of the important facts that defined the dispute, a procedural history, a presentation of the legal issue(s) in question, the holding or in other words the court's decision, the court's rationale or reasoning behind its decision, and an analysis or examination of the significance of the case and its influence on other cases and legislation.

Using deductive analysis and triangulation, these sources were reviewed, analyzed, and synthesized to construct an historical perspective on the development of school vouchers and a current merger of perspectives on their present legal status. The most contemporary legal issues were considered with the purpose of formulating a recommendation to state legislators in Illinois.

⁸⁰⁶ *The Bluebook: A Uniform System of Citation*, Eighteenth Edition. published by The Harvard Law Review Association (2007).

By employing an exhaustive examination of all relevant information, the conclusions used to prepare said recommendations are designed to be fully informed and topically definitive.

CHAPTER FOUR

ANALYSIS

Education is one of those semi-singular terms in the language that one should always consider placing in either italics or quotation marks. This is because it is impossible to use the term without creating a schematic framework in the mind of the audience. Everyone has a conception of it. In fact, it is one of the few terms in the language that has social, historical, legal and moral implications. In his book the *Moral Imperative of School Leadership*, Michael Fullan outlines the “moral condition” that exists between public schools and society.⁸⁰⁷ Echoing John Dewey, Fullan believes that our democratic society is charged with a moral imperative to raising the bar and closing the gap for all students. One of Fullan’s tenets is for “whole system reform”.⁸⁰⁸ He believes that the entire system needs to refocus as well as adapt and change. Fullan contends that when we “change the situation...we have a chance to change the people’s behavior.”⁸⁰⁹ For the purposes of this study, this Chapter means to frame the field within its engendered context both historically and morally. It is the contention of this researcher that the educational system and, more importantly, the process of education has the unique ability to act as an emancipatory agent within the societal context. The contention is that through an examination of the historical elements of school voucher programs and an application of the

⁸⁰⁷ Michael Fullan, *The Moral Imperative of School Leadership*. Corwin Press, Inc. 2003

⁸⁰⁸ *Id* at 2.

⁸⁰⁹ *Id* at 2.

moral obligation held by schools, it will become evident that said programs allow for an effective way to bring about meaningful, substantive social change.

While it is true many times movements in education are deemed to have “revolutionized” the field, a more astute observation will show that education, as both an art and a science, is primarily evolutionary. It is never the case that the field has revolutionized itself. Rather, it builds upon its contextual frameworks of the past to address the issues of the present with consideration for the future.⁸¹⁰ Therefore, in order for one to fully grasp the issues at play in a discussion regarding the efficacy of school vouchers, one would be remiss to not consider the lengthy historical situation within which this educational movement rests. It is also the case that the schools have a moral obligation to provide children with an opportunity to participate in the promise of a democratic, capitalistic society. That is to say schools are charged with the authority to prepare the next generation for the act of full participation in American Life.⁸¹¹ Only by considering both the historical and moral implications surrounding vouchers can one fully reach the conclusions that emancipatory change is more possible when the status quo is challenged in this specific instance.

Professor Derrick Bell’s Theory on Social Change

The most significant academic perspective directly related to this emancipatory conceptualization of vouchers is found within contemporary theories regarding social change.

⁸¹⁰ Emel Ultanir, *An Epistemological Glance at the Constructivist Approach: Constructivist Learning in Dewey, Piaget, and Montessori*. Online Submission, International Journal of Instruction v5 n2 p195-212 (2012).

⁸¹¹ George Counts, *Dare the School Build a New Social Order?*, New York: John Day Company. (1932).

This study will draw from Professor Derrick Bell's theory on Social Change, specifically.

Professor Bell theorized that four conditions must be present in order for social change, such as access for low-income families to quality schools, to be cemented. Professor Bell's conditions:

1. "Initially or over time, the issue gains acceptance from a broad segment of the populace;
2. the issue protects vested property in all its forms through sanctions against generally recognized wrongdoers;
3. the issue encourages investments, confidence, and security through a general upholding of the status quo; and
4. while recognizing severe injustices, the issue does not disrupt the reasonable expectations of society."⁸¹²

For the purposes of this study, conditions one, three and four were of primary relevance and, therefore, were considered. The second condition is also considered, but at a lesser significance. This study examined the political and legal events to evaluate whether or not Bell's theory can be employed at times when state legislation or important court decisions supported or prevented low-income families from attending the school of their choice. These conditions were also specifically important because of the degree to which they were able to develop the moral agency within the historical and legal context. As this study examined, the voucher movement, while primarily a moral one, was impacted by the historical and legal constructs of the nation. In fact, in order to impact the movement at all, one must find ways to work within the reality of the current situation. These three conditions of Bell's theory were the best entry points to transition

⁸¹² Bell, *supra* note 31, at 635.

thinkers, policy makers and stakeholders to a place where they are better able to see the opportunities presented by dismissing current educational policies and understandings as a priori.

Bell's First Condition

Bell theorizes that in order for social change to be able to be manifested, the culture must be in a place to accept it. This first condition explains that if one hopes to bring about change that is emancipatory, one must acknowledge the degree to which the populace at large has come to see the ideas behind the change as acceptable. An examination of the constitutional and legal frames surrounding and impacting the issue of school choice will show that the idea itself has, overtime, indeed gained acceptance.

While it may seem that by appropriating Bell's theory one can examine the issue of school vouchers through only a lens of achieving social justice, it is not the case. Indeed, when discussing the issues surrounding state and federal monies going to private and parochial agencies, one has to consider the legal context first. It is for this reason that one must begin any discussion regarding vouchers with an examination of the First Amendment to the United States Constitution.

While it is true that the Constitution makes no direct mention to education, it does act as a legal guide as to how the state may approach the religious sector. The first section of the First Amendment is designed to prevent two things: one, the establishment of a national religion, often referred to as the Establishment Clause and two, the preference of one religion over another,

often referred to as the Free Exercise Clause. However basic and straightforward these clauses may seem, the issues of establishment and free exercise have been debated in State Courts and the United States Supreme Court on numerous occasions. One area where agreement on the intent of the First Amendment usually ends involves the Establishment and Free Exercise Clauses and their relationships with religious schools. Whereas some are convinced that there should never be a connection between government and religion, others maintain that such a relationship is inevitable. When this debate reaches the courts, contradiction and confusion are inherent in the discussion. During the past sixty years, both sides of the argument have been well-represented in our court systems as the result of lawsuits challenging the interpretation of these clauses.

The First Amendment itself is not the end of the conversation, however. The concept of Judicial Review established the need for the court system to act as arbitrator between the framers' intentions and the application of their words.⁸¹³ Several cases specific to the pragmatics of the separation of church and state as it can be applied; both conceptually and legally, act as benchmarks that need to be considered when examining any voucher system. There are four pivotal Supreme Court decisions that need to be considered when establishing an historical perspective. The majority opinions in *Everson*, *Lemon*, *Agostini*, and *Mitchell* act as a road map to guide the establishment of public practice and acceptance of private, religious schools receiving public monies. In fact the decisions also build a consensus around the expanded use and application of these funds. When one considers this "road map," one is also able to see how the decisions justify the voucher system within Bell's framework of public acceptance.

⁸¹³ John Yoo and Saikrishna Prakash, *The Origins of Judicial Review*. University of Chicago Law Review, Vol. 69 (2003).

The *Everson* ruling indeed opened a door in terms of allowing public monies to be used to support private, religious schools. In this case the idea that the state could fund the transportation cost accrued when children attended a private, religious school was ratified by the Court. The Court stated that this payment was in no way a subsidy that could read as detracting from the wall between church and state. The decision in *Everson* is of primary importance in terms of vouchers because of the degree to which it informed the legal conversations that were to follow.

The *Lemon* case is the most immediate and significant continuation of said conversation. In debating exactly where the wall between church and state was impacted by the use of public monies in private, religious schools, the Court – through the *Lemon* decision – established a three-pronged test to make the determination. This test mandated that government funds could only be used when: 1) any such funds must be applied to services that are solely secular; 2) any such aid may neither advance nor inhibit religion; 3) any such aid must not create “an excessive entanglement with religion.”⁸¹⁴ This “*Lemon* Test” became the new prism through which all programs and initiative were to be viewed. It became the arbitrator of the First Amendment as it applied itself to issues of religious schooling.

In *Agostini* the Court continued to develop their position regarding this issue. Here the Court established an extension of the intertwining of the two educational systems when it came to public resources to help struggling students attending religious schools. The only condition added to the *Lemon* Test was that when public schools supplied academic assistance to these students, the program had to maintain religious neutrality. This specific legal conversation

⁸¹⁴ *Lemon*, *supra* note 91.

culminated in the decision of the *Mitchell* case. Here the Court cleared up the language concerning “excessive entanglement.” The new standard was to center on a primary effect component.

The historical perspective brought to the First amendment centers on three primary cases. The decisions handed down in these cases allowed for clarity to be brought to the legislatures and makers of educational policy. They, in fact, further clarified the law of the land. The end result of the cases also builds the first of Bell’s conditions.

Over time it has indeed become the case that the issue has developed a sense of social acceptance. Before the *Mitchell* case, there was a clear argument that there was a limited opportunity to bring about social justice through this reform movement, not because of the limitations of the movement itself, but because the perception of readiness amongst the populace. The Court’s actions can be viewed as the road map from strict separation to a contextual one.

Bell’s theory rests within the contextual frame as it is predisposed to consider the opportunity to bring about social change in terms of the social understandings and underpinnings that might allow for the change to take place. While it is true that the impetus for social change itself is born out of a moral allowance, in order for the change to have a chance to actually manifest large scale social augmentation, Bell’s theory suggests that not only those responsible for bringing about the change but also those impacted by it need to have achieved a level of readiness. For this reason it is important to continue to examine the progression of the school voucher movement as it has developed. By moving this way, one is able to not only understand

the political and judicial landscape that has developed over time but also the interpretation of that landscape that has grown into conventional wisdom regarding the issue.

Between 1947 and 1968 the courts, having developed language and decisions regarding the partition between church and state as it exists in the educational setting, moved to consider the voucher movement directly. First, *Everson v. Board of Education* acted as a gradual movement toward both restating the importance of the Establishment Clause and also narrowed its specific implementation as it impacted public monies in a religious school. By affirming that the wall between church and state must remain “high and impregnable,” while also allowing for parents to be reimbursed for the cost of transporting their school-aged children to religious schools, this decision created an environment where a more sophisticated view of the Establishment Clause was needed. It raised the notion of contextual application of said Clause. The Court went one further when they handed down the *Board of Education v. Allen* decision. In this decision, the court acknowledged that there was a duality to the religious school. Such an institution was both focused on academic learning and faith-based development. In this case, the majority continued to implement this new “understanding” of the Establishment Clause. By stating that public funds could go to purchase academic textbooks, the majority acknowledged that it was no longer the case that a religious school could only be seen as advancing a specific religious belief.

These rulings would become heavily cited in the years that followed when policy makers and lower courts would consider the legality of public monies going to private, religious schools. At the core of every decision was the matter of advancing religious beliefs. This specific part of the argument would be the major one at play in the cases from 1973-1985. During this time the

Court was asked to consider the implications of the doors that had been opened by their previous, recent verdicts.

In *Levitt v. Committee for Public Education* the Court held that it was unconstitutional for the state to compensate private, religious schools for the cost of developing state-mandated tests. The argument laid out in the decision acknowledged that this testing would, by the very nature of the schools developing them, be “drafted with an eye...to inculcate students in the religious” dogma of a specific faith by funding the instruction of it.⁸¹⁵ Here the Court saw the possibility for the wall developed by the Establishment Clause to have the potential to be breached. Unlike textbook programs that supported only secular teachings, such a testing plan would, indeed, act as the state legitimizing a specific faith. In *Grand Rapids v. Ball* the Court continued to develop their view point when they found the Shared Time and Community Education Program to be unconstitutional. Here the Court viewed the compensation of educators within a nonpublic setting to be problematic because this specific program, according to the majority opinion, promoted religion in three ways: 1) the people working in this program were private school instructors who would be unable to not represent their religious beliefs in the instructional process; 2) the “symbolic union” created between church and state in this instance was such that the students could be reasonably expected to receive specific instruction regarding religious beliefs; 3) the program itself was an appropriation of large parts of the private, religious schools responsibilities.

These cases indeed show the Court walking back some of their earlier decisions when it comes to the role of public monies in private, religious schools. However, it really should be

⁸¹⁵ Levitt, *supra* note 171, at 480.

seen more as their developing conditions rather than complete rebuke. Here we see the development of Bell's condition within the proper context. This is true because of the outcome of the *Mueller v. Allen* case which allowed for a state statute to remain in standing even though the only ones who could benefit from its tax deductions were those who sent their children to private, religious schools. Just like with other social justice issues the Court took time to develop its mind regarding the specific legal applications of the larger movement.

As this development continued, the Court continued to use specific cases to apply past legal precedent and framer intentionality to more contemporary cases. Here the Court developed their understanding of the particulars of the *Lemon* Test by considering the flow of any monies that might be used in a private, religious school. In *Witters v. Washington Department of Services for the Blind* the Court found that, when the *Lemon* Test was applied, there was no constitutional problem with allowing a student to use state funds to pursue a Ministry Degree at a Christian school. The argument the student made was that he would have been able to receive aide, based on his visual impairment, if he was pursuing a secular profession. The Court ruled, unanimously, that the *Lemon* Test was not violated because the money in question went to an individual who chose to give it to a religious institution; therefore, the state was not directly sending money to said institution. This precedent would become instrumental in the expansion of voucher-like programs in the future.

The summative decision handed down by the Court regarding this issue is, indeed, the *Zelman v. Simmons-Harris*. In this decision the Court ruled 5-4 that a school voucher system in Ohio was constitutional because the program was based within the states' rights to provided educational opportunities for its children and that the only way any state money actually ends up

in a religious, private school is when individuals chose to spend it there. Here we see an expansion of the *Witters* decision. In that case, the majority clearly identified the negligible amount of money being considered in that specific instance as a mitigating factor. However, *Zelman* ignored that provision and pushed the matter forward even when large sums of money were to be funneled. The majority saw that this case was more about the choice in a marketplace and less about the religious indoctrination of students.

The impacts of these cases are still being felt throughout the field. Every year legislatures and courts are looking to establish more clarity when it comes to the exact nature of public money going to private, religious schools. While it is true that there is no clear legal mandate, that is not the pressing issue here. What we are left to consider is the degree to which Bell's conditions for social change have been met. It is indeed the case that, overtime, the issue has developed in such a way that acceptance has become likely. Initially, the court threw up a firewall between public and religious schools. However, as one can see by examining the decisions culminating in *Zelman*, that firewall had been breached.

By extension there is an applicability of Michael Fullan's argument that there exists a "moral imperative" for public schools which "focuses on raising the bar and closing the gap in student learning for all children regardless of background."⁸¹⁶ Fullan's book, *The Moral Imperative of School Leadership*, details approaches for restructuring school culture through reform. Fullan is seeking for the shifts that are needed to provide all students a quality education with high expectations. Fullan's premise is, then, that schools are the best chance of impacting the most impactful element of personal success: a quality education. Here we see a need for

⁸¹⁶ Fullan, *supra* note 807.

reform to not only address the problems within schools, but emancipate all those involved in the schooling process from the beliefs, structures, and systems that have consistently provided subpar results. This supplies one with both the moral obligation and philosophical framework from whence to implement said emancipatory shifts. This study will further explore the connection between Fullan's moral imperative and Bell's Third condition.

This examination shows the degree to which Bell's theory, indeed, is properly placed within the context of cultural understandings and societal norms. Initially, it was the case that the firewall developed by the justices was the accepted norm of the legal minds of the nation. This bled into the legislative frame as well. However, over time, the country developed more of an acceptance of the concept of public funding for private, religious schools. The idea has become more commonplace. This progression of thinking and understanding is a perfect example of the first condition as put forward by Bell. This examination of the progression of legal acceptance to the idea of public monies going to religious schools is an exemplification that Bell's first condition has been met.

Bells' Second Condition

This paper focuses exclusively on school vouchers as a possible option for low-income families who reside in a large urban school district. The implementation of school vouchers could potentially have an impact on a number of different areas. One of those areas where vouchers could be a threat is with schools that are predominately white. The second condition

from Professor Bell's theory on social change contends that "vested property"⁸¹⁷ (i.e. white schools) would need to be protected.

In his book *Silent Covenants*⁸¹⁸ and in his follow up New York University Law Review article, *Colloquium: Relearning Brown: Applying the Lessons of Brown to the Challenges of the Twenty-First Century*, Professor Bell concentrates on the *Brown* decision and its role in protecting white interests. According to Bell, pre-*Brown* segregated schools "provided whites with a [feeling] they were superior to blacks."⁸¹⁹ Bell argues that *Brown* came to pass because white interests converged with black interests.⁸²⁰ In other words, when the white majority was willing to desegregate schools, "the demand for equality had been satisfied and blacks had no just cause for complaint."⁸²¹ The *Brown* decision "legitimized" arrangements.⁸²² That is, while blacks remained poor and lacked the resources to move to the suburbs, their "status was no longer a result of the denial of equality."⁸²³ Rather, "it marked a personal failure to take advantage of one's [defined] equal status."⁸²⁴ While the *Brown* decision afforded opportunists to blacks to attend desegregated schools, white flight to the suburbs prevented true integration across all public schools – particularly those in inner-cities.⁸²⁵

How are vouchers and the second condition related? In *Silent Covenants* Bell mentions school vouchers as a possible solution to parents not satisfied with educational outcomes in inner-city public schools. In fact, Bell states, "disenchantment with desegregation as a means of

⁸¹⁷ Bell, *supra* note 31, at 635.

⁸¹⁸ Derrick Bell. *Silent Covenants*. New York: University Press, (2004).

⁸¹⁹ Bell, *supra* note 31, at 638.

⁸²⁰ *Id.* at 639.

⁸²¹ *Id.* at 636.

⁸²² *Id.*

⁸²³ *Id.*

⁸²⁴ *Id.*

⁸²⁵ Bell, *supra* note 811, at 110.

solving educational inequalities led to alternative means of achieving effective school for those not able to escape to the suburbs or enroll in expensive private schools.”⁸²⁶ Bells sees a “resurgence” of inner-city educational options including tuition vouchers as a means for addressing this “disenchantment.”⁸²⁷

Bell’s Third Condition

By developing a mindset over time that shifted legal interpretation from one of absolutism to one of contextualization, the Court’s decisions have also allowed for Bell’s third condition to have been met. By redefining the voucher movement as an opportunity to exercise choice, proponents of the movement appropriated capitalistic language to make their movement about a fundamental precept of the American Situation. This use of markets has transitioned the voucher movement away from one of change to one of upholding the status quo of the market place.

An overview of the decisions regarding vouchers will show that the ideas surrounding their legal status have developed over time. No single decision has been revolutionary; instead they have all been evolutionary. The Court has used a constructivist approach to dealing with the issue so that schooling in this country is still a stable element of society. While it is true that the Court has moved from the firewall to a more market-based finality, it is also true that the state of American education is still relatively constant. The largest parochial agency in education today is

⁸²⁶ *Id.* at 161.

⁸²⁷ *Id.*

the Catholic Schools.⁸²⁸ However, enrollment in those schools and the number of schools themselves has dwindled consistently from their peak in the 1960's. In the United States Catholic Elementary and Secondary Schools 2013-2014: The Annual Statistical Report on Schools, Enrollment, and Staffing, the National Catholic Education Association details trend data that shows a continuing decline in the number of students who are attending Catholic schools.⁸²⁹ According to this report, the influx of potential monies into their system from public sources has not had the specific effect of directly impacting their enrollment numbers.⁸³⁰

The perception of public schools is also maintaining at a near constant level. In 2010, the Gallup Organization released data showing that, while most of the population feels that public schools in general were failing, parents were relatively happy with their local public school and sent their children there.⁸³¹ Here are some details Gallup collected from 1985 through 2010: Americans continue to believe their local schools are performing well, but that the nation's schools are performing poorly.⁸³² 77 percent of public school parents give their child's school a grade of an "A" or "B," while only 18 percent of all Americans grade the nation's public schools with the same letter grades. This was true even when school vouchers were available.⁸³³

All of the attention and litigation that has been focused on the voucher movement seems to have had little impact on the perceptions and actions of the general public. It is still the case that people send their children to the local school a preponderance of the time. What we see here

⁸²⁸ National Catholic Education Association, <http://www.ncea.org/data-information/catholic-school-data>.

⁸²⁹ *Id.*

⁸³⁰ *Id.*

⁸³¹ Gallup Poll: Americans' Views of Public Schools Still Far Worse Than Parents' August 25, 2010 <http://www.gallup.com/poll/142658/americans-views-public-schools-far-worse-parents.aspx>.

⁸³² *Id.*

⁸³³ *Id.*

is a negligible impact in terms of the beliefs and behaviors of the consumers in the educational market place. For this reason, Bell's condition is further advanced considering those beliefs and behaviors are the mitigating factor when one considers the degree to which the public schools have been negatively impacted.

Bell's third condition forces all social activists to consider the pragmatic realities of the power of the status quo. To illustrate the influence of the status quo, we can look again at Michael Fullan and his reflections on Change Theory.⁸³⁴ In his paper, *Change Theory – A Force for School Improvement*, Fullan argues that Change Theory can be a powerful tool in enlightening our approach to educational reform. Specifically, Fullan considers those theories that have more value and are more likely to bring about a lasting change. Relevant to this study Fullan points out the “negative aspect” of the power of the status quo.⁸³⁵ According to Fullan, “There are many things occurring in the system that favor the status quo by diverting energy to maintenance activities, which are at the expense of devoting resources and attention to continuous improvement.”⁸³⁶ These activities can often be confused with meaningful action and even reform, but really only reaffirm the organizations structure. Fullan cites “distractors” in the educational system that can empower the status quo and they are: collective bargaining conflicts, unnecessary bureaucracy, and constantly seeking to address managerial issues.⁸³⁷ For Fullan, “theories of action must have the capacity to change the larger context.”⁸³⁸ Here we see a new premium placed on the concept of action as a catalyst for change. For there to be systemic

⁸³⁴ Michael Fullan. *Change Theory – A Force for School Improvement*. Centre for Strategic Education. Seminar Series Paper No. 157, November 2006.

⁸³⁵ *Id.* at 10.

⁸³⁶ *Id.* at 10.

⁸³⁷ *Id.* at 10.

⁸³⁸ *Id.* at 10.

change Fullan contends that building capacity is a necessary “strategy that increases the collective effectiveness of a group to raise the bar and close the gap of student learning.”⁸³⁹

These individual capacities include developing the knowledge, competencies, resources, and motivation that can bring about the “positive pressure” needed to affect the status quo.

In a perfect world policy makers and educators would concern themselves only with questions that begin with the word “should.” When we consider “should” we need not consider how, when, or where. We are not able to exist in an idealized vacuum, and Bell understood this. Instead he calls on us to place reform in a garden where it can grow. We have decades of legal precedent regarding school vouchers. The U.S. Supreme Court has made several landmark decisions in just the last few decades that have impacted the narrative. Even with that, schooling in the United States remains a consistent system. This reform movement has yet to show itself as running so counter to the status quo as to become problematic. The investments that have been made in this movement have not drastically shifted funding in such a way that public schools are being adversely impacted. In fact, while Catholic School enrollment has dropped, public school enrollment is expected to set a new record every year over the next decade.⁸⁴⁰

In order to fully understand the degree to which the education of children is a moral issue that lines up with Bell’s theory, one needs to consider the specifics surrounding the achievement gap. While it is true that student achievement is, indeed, difficult to quantify, it must be considered as a quantifiable element for the purposes of this academic discussion. For the purposes of this examination, the National Assessment of Education Progress (NAEP)

⁸³⁹ *Id* at 10.

⁸⁴⁰ National Center for Educational Statistics, <http://nces.ed.gov/fastfacts/display.asp?id=65>.

assessment will be used. The NAEP assessment is a reading and mathematics test administered to a nationally representative sample of students at the age of 9, 13, and 17.⁸⁴¹ While there is a wealth of information from NAEP to study, one part of the 2012 report uses data from 1971 and 1973 and compares them to results from 2012 and finds higher scores for 9 and 13 year olds and not much difference for 17 year olds.⁸⁴² When viewed over time, the results present a representative understanding of students' ability as identified by the results of the exam. For this reason Bell's third condition can be considered to have been met.

The use of federal funding to address the gaps in achievement is another area where Bell's condition has crossed the threshold. A study of student achievement in a national level over the past decade shows that schools receiving targeted and school-wide Title I assistance have made significant gains when it comes to closing the achievement gap created by the poverty demographic.⁸⁴³ Through federal monies delineated to these schools, while the federal government has also been advancing funding through vouchers, schools have seen their ability to educate the most vulnerable students rise. While it is true that the achievement gap, in all its forms, is still a serious issue for educators in this country, one can see that the federal government is still using funding mechanisms to address the needs of those in poverty who attend public schools. This is a clear indication that while more funding has been diverted to private institutions, there is still a schematic to be sure that schools in need receive aid that can improve the academic standing of those students. It would seem that the existence and

⁸⁴¹ The Nation's Report Card: Trends in Academic Progress 2012, National Center for Educational Statistics. <http://nces.ed.gov/nationsreportcard/>.

⁸⁴² *Id.*

⁸⁴³ Nancy Kober, Jennifer McMurrer, and Malini Silva, *State Test Score Trends through 2008-09, Part 4: Is Achievement Improving and Are Gaps Narrowing for Title I Students?*. Center on Education Policy. (2011).

prevalence of voucher systems has not negated the ability of the government to meet the financial needs of those in need.

Bell's third condition calls us to consider the ramifications of social change to those who will not directly benefit from it. It is a pragmatic approach. There is no way a democracy would manifest social change that so drastically changed the status quo that the majority found themselves with a radically lessened social experience. Over time the establishment and expansion of policies that allow public funding to go to private schools has not negatively impacted the traditional school model. In fact, there are academic gains and a positive perception by the public of their educational choices. For this reason it is this researcher's contention that Bell's third contention has been met.

Bell's Fourth Condition

Another of Bell's conditions that is directly at play in the debate regarding the school voucher program is his fourth. It is the case that the implementation of a school voucher system does have, at its heart, the desire and motivation to recognize injustices while not disrupting the reasonable expectations of those not directly responsible for the wrongs that created the injustice itself. An examination of the nature of failing schools and the consequences associated with their existence coupled with an understanding of the impacts of a school voucher system will show that this issue clearly meets the benchmark set by Bell's fourth condition.

It is also the case that during the course of time when voucher programs and access to other alternatives to traditional public education grew, the achievement level of students attending traditional public schools also rose. Results from the NAEP exams over the past decade indicate that student achievement in both reading and math has increased over that time period. While it is true that students may not be at anticipated levels in terms of grade level, they are making progress when viewed both in terms of their cohort and when viewed globally. Thus, drawing on this data point, one can conclude that the U.S. is making the same trend gains as most other industrial nations.⁸⁴⁴

This assessment seems an ideal focal point for several reasons. First the data that it produces is presented across grades and states in a biannual timeline. Second the assessment itself exists outside of individual state standards and is, often, above the standards put forward by some of the states. This, combined with the fact that there is no “high stakes” element to the exam allows the results to be considered independent and “manipulation-free.”⁸⁴⁵ There has been discussion regarding the degree to which the data from NAEP, specifically the cross-grade statements can be considered to be the final statement regarding even the tracking of student achievement over time.⁸⁴⁶ Also, education experts remind us that only through a varied assessment system can student achievement come close to being quantified, especially if said quantification is going to be used to make instructional decisions.⁸⁴⁷ However, it is also the case

⁸⁴⁴ David Thissen, *Validity Issues Involved in Cross-Grade Statements about NAEP Results*. American Institutes for Research. (2012).

⁸⁴⁵ Marni Bromberg and Christina Theokas, *Breaking the Glass Ceiling of Achievement for Low-Income Students and Students of Color. Shattering Expectations Series*. Education Trust. (2013).

⁸⁴⁶ Thissen, *supra* note 833.

⁸⁴⁷ Stephen Chappuis, Jan Chappuis and Rick Stiggins, *Classroom Assessment For Student Learning—Doing It Right, Using It Well*. Portland, OR: Educational Testing Service. (2006).

that if one hopes to draw from a data point that is most likely to provide a cross section of student achievement across the country, the NAEP offers the best opportunity to do that due to its construction and administration.⁸⁴⁸

An examination of this achievement data shows that, even though national reform has had the closing of the achievement gap at its heart, the research has shown that “patterns evident so far do not suggest a strong effect of NCLB on achievement gaps.” (Trends in Academic Achievement Gaps in the Era of NCLB p. 4).⁸⁴⁹ In fact, even though there has been some movement regarding the closing of the achievement gap, the gap itself still exists and is substantial. When one considers that “the black-white gap in reading skills is roughly half of a standard deviation at the beginning of kindergarten but then widens to about three-fourths of a standard deviation by the end of third grade and to nearly a whole standard deviation by the end of eighth grade,” one can see that public schools are still failing to provide an adequate education to students of color.⁸⁵⁰

Even when one considers that there has been some movement regarding the closing of the achievement gap, one must consider the reality that “black, Hispanic and low-income students were more than three times as likely as their peers to perform within the lowest achievement category in 2011.”⁸⁵¹ More alarming is the fact that when one considers achievement at the high end, the gap has increased over time. When considering math scores specifically, 1 in 10 white students scored in the advanced level on the fourth grade math exam while only 1 in 50 Hispanic

⁸⁴⁸ Bromberg, *supra* note 834.

⁸⁴⁹ Trends in Academic Achievement Gaps in the Era of NCLB, *supra* note 830.

⁸⁵⁰ Sean F. Reardon, Rachel A. Valentino, and Kenneth A. Shores, *Patterns of Literacy among U.S. Students*. *Future of Children*, 22(2), 17-37 (2012).

⁸⁵¹ Bromberg, *supra* note 834.

students and 1 in 100 black students achieved at the same level. When the achievement at advanced levels is considered, achievement that is most corollary with college success, the gap has actually widened recently and continually.⁸⁵² Most alarming is that when the poverty factor is added in, as identified by students receiving free and reduced lunch, the gap widens even more.

While it is true that the NAEP is the test of record, it is also true that school achievement data is currently managed at the state level. One must also consider the degree to which the achievement gap exists when an examination of this assessment data is conducted. This data also shows that the achievement gap exists in both reading and mathematics and that the gains that are being made are not enough to close it.⁸⁵³ Through an examination of testing data at three different intervals (4th grade, 8th grade, and a high school level) this researcher was able to examine the achievement scores in three bands: basic and above, proficient and above, and advanced. The conclusions were that, even with the intensity provided by the NCLB legislation, children from minority and low income families were under performing their white, affluent counter-parts and were not making the desirable gains needed to close the gap.

This information is what legitimizes the first contention of Bell's fourth condition. There indeed is a statistically relevant level of discrepancy between the achievement of white students and the achievement of students of color. The achievement gap exists as a statistical reality; however, it needs to be dealt with an issue of social justice. If this researcher is to develop an action research project that can truly be emancipatory in nature, this researcher must develop a

⁸⁵² Bromberg, *supra* note 834.

⁸⁵³ Naomi Chudowsky, Victor Chudowsky, and Nancy Kober, *State Test Score Trends through 2007-08, Part 3: Are Achievement Gaps Closing and Is Achievement Rising for All?*. Center on Education Policy. (2009).

plan that functions from the perspective of bringing about the greatest social change as a means to achieve some measure of social justice. “In the contemporary United States, universal schooling is available for all students regardless of socioeconomic class, race, or ethnicity. However, substantial disparities in educational achievement...exist. These disparities deny the common good by significantly undermining the ability of individuals to participate in the American society.”⁸⁵⁴ There are direct economic advantages that correlate with the advancement of learning in this country (Bureau of Labor Statistics, 2013). These statistics show a direct correlation between unemployment and education level as well as earnings and education level. When we see that education allows for a greater ability to earn a living, we understand that the achievement gap is a direct contributor to the continuation of poverty.

The second conduit of the fourth condition now must be examined. According to Bell the issue must not disrupt the reasonable expectations of society. It is not this researcher’s contention that the students achieving at high levels are drawing on any privilege other than those that are the byproducts of the hegemonic principles of their reality. While it is true that Bell’s theory would suggest that the environment itself is an unjust one, the student benefiting from the current system should be considered blameless and, therefore, not deserving of unreasonable distress in the righting of the wrongs. In order for this to be the case, it has to be that the establishment of a school voucher system would not necessitate a disruption to the schooling of these students. The research would be clear to support this contention.

⁸⁵⁴ Rachel Collopy, Connie Bowman, and David A. Taylor, *The Educational Achievement Gap as a Social Justice Issue for Teacher Educators*, *Catholic Education: A Journal of Inquiry and Practice*, Vol. 16, No. 1 (2012).

The research surrounding the effectiveness of school vouchers is, in and of itself, an entire research project. However, in order to meet Bell's fourth standard, one need only show that the establishment of such a program does not necessitate a negative effect on the current students benefiting from the status quo. While it would be this researcher's contention that a voucher system would "raise all ships," there is some discussion regarding the efficacy of that statement. Typical anti-voucher rhetoric includes the following opinions: *the funding assertion*⁸⁵⁵ – vouchers take money away from already cash-strapped public schools and further damage the inadequate conditions for poor urban students; *the extra scrutiny assertion*⁸⁵⁶ – if the government provides money to private schools, then more invasive government control of those schools will follow; *the religious assertions*⁸⁵⁷ – vouchers for private sectarian schools promote religion and violate the Establishment Clause of the U.S. Constitution; and vouchers will likely cause increased religious conflict in our country.⁸⁵⁸ While the feelings on either side are strong and the arguments continue to be debated, the research presented herein suggests not only that a continuation of the status quo is an assurance that schools do not improve, but also that the potential impact on the current students benefiting from that status quo would be negligible.⁸⁵⁹

The question then becomes: Are we comfortable keeping the status quo in place because it benefits some at the expense of others? And another more pointed question was asked by voucher critic Gordon MacInnes, "Is it fair to deny educational opportunities to low-income children with motivated parents in order to maintain a 'better mix' of strivers and nonstrivers in

⁸⁵⁵ Chemerinsky, *supra* note 19.

⁸⁵⁶ Swift, *supra* note 20 and Finkelman, *supra* note 20.

⁸⁵⁷ Chemerinsky, *supra* note 21.

⁸⁵⁸ Zelman *supra* note 22, at 686, 729. (Steven, J., dissenting) (citing potential for vouchers to cause "religious strife"); (Breyer, J., dissenting) (fearing that vouchers can cause "religiously based conflict" in society); Everson, *supra* note 22, at 53-54 (Rutledge, J., dissenting).

⁸⁵⁹ The National Education Association, *supra* note 23 and the Friedman Foundation, *supra* note 23.

public schools?”⁸⁶⁰ While he still maintains his anti-voucher stance, MacInnes admitted that this was an “uncomfortable question.”⁸⁶¹

However, a meta-analysis of 19 empirical studies that examined the effect of vouchers on the performance of public schools showed there was no occurrence of the quality of the public school option being negatively impacted.⁸⁶² Since the funding in these scenarios allows for the student to bring their “money with them” any amount of money lost by a school was offset by the fact that the student no longer needed services provided by the school. Also, since, by definition, a voucher system allows a student or parent to choose what school they want, there would not be a case that a student attending a school that is currently meeting their needs would have to leave for another educational option. So, regardless of the degree to which vouchers might alleviate the achievement gap and allow for a movement of social and economic justice, the contention is that allowing for the option does not place undue hardship on those not responsible for the wrongs of the current system. This combined with the examination of the achievement gap allows for the fourth condition to be met.

Education is a moral exercise. It is one of the few elements of the American Experience that is a provided and protected right for all. It therefore becomes one of the quickest ways to impact the American culture. It acts as an entry point for social change. Change theorist Michael Fullan has said a “moral imperative” exists to raise the bar and close the gap for all

⁸⁶⁰ James Forman Jr. *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*. 54UCLA L.REV. 547 (2007) p. 567. Quoting Gordon MacInnes, *Kids Who Pick the Wrong Parents and Other Victims of Voucher Schemes* (1999) The Century Foundation.

⁸⁶¹ *Id.*

⁸⁶² Greg Forster, *Promising Start: An Empirical Analysis of How EdChoice Vouchers Affect Ohio Public Schools*, Friedman Foundation for Educational Choice. (2008).

students.⁸⁶³ Coupled with his credo all students deserve a quality education with high expectations, Fullan looks to school leaders to bring about the necessary shifts to ensure this quality. Fullan's premise on change and Bell's Framework connect nicely. While Fullan believes schools offer the best chance of impacting students with a quality education, Bells' Framework provides the philosophical foundation to begin implementing these emancipatory shifts.

The school voucher system has shown itself to be a potential agency for the improvement of the living conditions of millions of Americans. While it is true that the debate regarding the degree to which this agency can be effective, there is no argument that in its conception it does have the ability to become truly emancipatory. Using Bell's framework one can see that it is also in line with agreed upon contingencies of social change. By meeting three of the four standards established, the voucher system does, indeed, have the potential to not only win the theoretical argument but also meet the standard of practicality.

Challenges to the Application of Bell's Theory

While it is true that the research contained herein affirms the fact that Professor Bell's conditions have indeed been met, there is room for discussion on this point. The exigency for this discussion exists in the interpretation of the data's implications on the points addressed within this study (1, 3, and 4), the overall context of the conditions themselves as they relate to impacting individual thought, and the lack of a fully developed 2nd condition. It would be naïve

⁸⁶³ Fullan *supra* note 807.

to submit the findings here without an entry level consideration for any potential counterarguments.

Bell's conditions exist in a place where language meets ideas. This is to say that two individuals might seem to agree with them even if they actually do not. The struggle is in fully vetting exactly what the terminology means from both a linguistic and psychological perspective. For example, while it is true that this research finds the data to suggest that there has indeed been over time acceptance from a broad segment of the population toward public funding of private schools, this is clearly a point that needs to be agreed upon by individuals. The research has shown that the numbers of people supporting such an idea has increased over time. However, according to a 2014 Gallup Poll the numbers of people supporting such funding has decreased slightly over the past three years.⁸⁶⁴ The contention made here is that this slight regression is not significant enough to impact the overall trend data. Also, it is not now nor ever has been the case that a majority of Americans believe in this movement. However, a "broad segment" does not necessitate a majority. The conclusions made here do claim that the lower standard established by Bell has indeed been met.

Another area where one must think through the potential ramifications is in consideration of the 3rd and 4th condition. While it is true that the recommendations made here would create an environment where this condition is met in the short term, one must consider what full implementation might look like and the impact it would have on the status quo. What if vouchers were made the law of the land? One could argue that such a tectonic shift in

⁸⁶⁴ Gallup Poll. *46th Annual PDK/Gallup Poll of the Public's Attitudes Toward the Public Schools*. <http://pdkintl.-org/programs-resources/poll/>.

educational funding would accelerate educational reform in such a way that it is impossible to understand the degree to which either the status quo would be upheld or the reasonable expectations of those not responsible for the wrongs would be disrupted. This research acquiesces to this point; however, it is also the case that any future is indeed unknowable. Perhaps then the better way to examine these elements of Bell's conditions is not through a one-time application, but rather as applied constantly through the steps of social change.

Finally, Bell's 2nd condition seems to have little to do with the contentions made in this study. This is for one reason, it is impossible to label any of the actors in the educational setting as "wrongdoers." While it is true that the current system exists as hegemony, this does not mean that those that benefit from it are doing wrong. Instead they are passive participants within a system that existed before they contributed to it. While one could argue that there is a moral obligation for every person to think about the life situation of everyone else, it is not the case that being primarily concerned about oneself and one's family is the same as actively displacing another. Outside of any action that meets this standard of responsibility, the educational system is indeed different than the sum of its parts. It may produce wrong even though those who comprise it never behave as wrongdoers.

CHAPTER FIVE

CONCLUSION AND SUMMARIES

Introduction

This final Chapter is broken into six parts. The first section offers a summary of the study and provides an overview of the entire project. The specific problem surrounding school vouchers will be outlined and the research question will be restated. There will also be a brief review of the court cases presented in Chapter Two. The second section will present the findings. Using information presented from Chapter Four, this second section will analyze Professor Bell's theories and how they apply to the research. Section two will also address the influence of political will on this study's topic. Section three will provide concluding statements drawn by this researcher. The conclusions will be based on the research questions in Chapter One and will bring the research to its completion. The fourth section will discuss the potential implications from the result of this study. Future research will be the topic of section five. Attention will be given to what questions are left unanswered. Section six will provide a complete summary of this project.

Part 1

Summary of the Study

This study began with the premise that since the 1983 report “A Nation at Risk”,⁸⁶⁵ not much had changed for inner city, low-income, minority students. The report’s dire warnings of a “rising tide of mediocrity”⁸⁶⁶ continue to be debated by both public school supporters and their critics. Nevertheless, the thirty year debate has generated few concrete solutions on ways to improve the public education for low-income minority students living in our big cities. While our nation’s best students can generally be found in predominately white, suburban, and middle to upper-middle class school districts, our weakest students can generally be found in predominately inner-city school districts with high minority populations.

After the “Nation at Risk” report was published, several reform movements and initiatives, all geared to fixing the perceived problem with public education, were considered. These reforms have included improving instruction, lengthening the school day, lowering class sizes and improving teacher training. Merit pay for educators has also been considered and continues to be debated. In addition to the above reform efforts, school choice options have been instituted in several cities. These alternatives include magnet schools, charter schools, and school vouchers. It was this last option, school vouchers, which became the focus of this study.

⁸⁶⁵ A Nation at Risk, *supra* note 1.

⁸⁶⁶ A Nation at Risk, *supra* note 1, at 9.

School Vouchers as a Possible Solution to the Plight of Our Public Schools

For the purposes of this study, school vouchers were described as government (in most cases state governments) coupons given directly to parents who then spend it on the private school of their choice. This government allowance led to heated debates about the use of tax dollars going directly or indirectly (depending on your view) to private, and in most cases religious, schools. Commentators on both sides of the discussion have presented compelling reasons for and against school vouchers.

Arguments representing the pro-voucher side include: *the values assertion*⁸⁶⁷ – vouchers allow all parents the right to send their children to schools which reflect their values; *the civil rights assertion*⁸⁶⁸ – vouchers provide poor children the same opportunity to a quality education as children who come from wealthy families; *the free market assertions*⁸⁶⁹ – vouchers create needed competition between private and public schools and this competition makes both schools better; and vouchers eliminate the monopoly public schools have, and as a result it affords parents the option to choose the best environment for their children.

Those opposed to vouchers typically espoused the following: *the funding assertion*⁸⁷⁰ – vouchers take money away from already cash-strapped public schools and further damage the meager conditions for poor urban students; *the extra scrutiny assertion*⁸⁷¹ – if the government provides money to private schools, then more intrusive government oversight of those schools

⁸⁶⁷ Powers, *supra* note 16, at 1063-1064.

⁸⁶⁸ Moe, *supra* note 17.

⁸⁶⁹ Freidman, *supra* note 18.

⁸⁷⁰ Chemerinsky, *supra* note 19.

⁸⁷¹ Swift, *supra* note 20 and Finkelman, *supra* note 20.

will follow; *the religious assertions*⁸⁷² – vouchers for private sectarian schools promote religion and violate the Establishment Clause of the U.S. Constitution; and vouchers have the potential to cause increased religious conflict in our country.⁸⁷³ The public debate on school vouchers remains robust and contentious.

A Social Justice Framework

A social justice approach was used to frame this study. This study assumed that access to quality public schools was both a legal and a moral right. At the heart of this legal and moral right was the idea of social justice. Social justice was defined as “...the quality of fairness that exists within communities or societies. Educational leaders are held responsible for the extent to which fairness and equity exist in a school community.”⁸⁷⁴ Thus, this study postulated that access to quality public schools would be a right for all students, regardless of race, family income, or the location of their home. In 1954, the U.S. Supreme Court addressed the disparities in public education and ruled that separate educational opportunities for whites and blacks were unconstitutional.

The ground-breaking case *Brown v. Board of Education*⁸⁷⁵ found that separate but equal public schools left black students at a disadvantage. The Court ruled in *Brown* that segregating black students in so-called equal but separate public schools was unconstitutional. While *Brown*

⁸⁷² Chemerinsky, *supra* note 21.

⁸⁷³ Zelman *supra* note 22, at 686, 729. (Steven, J., dissenting) (citing potential for vouchers to cause “religious strife”); (Breyer, J., dissenting) (fearing that vouchers can cause “religiously based conflict” in society); Everson, *supra* note 22, at 53-54 (Rutledge, J., dissenting)..

⁸⁷⁴ Toft-Everson and Hazle, *supra* note 25.

⁸⁷⁵ *Brown*, *supra* note 26.

addressed the rights of all students to attend quality public schools, this study went one step further from *Brown* and asked: how fair was the environment in which poor performing public schools were the only option for blacks and other minorities? Was it inherently unequal when some families got to choose a better school, be it private or public, merely based on the location of their home or the income the family generated? More precisely – sixty years after *Brown* did we still have *de facto* segregation in our schools? *Brown* guaranteed all students equal access to quality *public* schools, but what if those public schools did not offer the “quality” parents were looking for? If inequalities still existed, then another question was asked: what options did black and other minority parents have if they were not satisfied with the public schools?

In order to fully develop this process of thought and answer the pertinent questions, Professor Derrick Bell’s Theories on social change were employed. Professor Bell suggested that four conditions must be present in order for social change, such as access for blacks and minorities to quality schools, to be cemented. Professor Bell’s four conditions are:

1. “Initially or over time, the issue gains acceptance from a broad segment of the populace,
2. The issue protects vested property in all its forms through sanctions against generally recognized wrongdoers,
3. The issue encourages investments, confidence, and security through a general upholding of the status quo, and
4. While recognizing severe injustices, the issue does not disrupt the reasonable expectations of society.”⁸⁷⁶

⁸⁷⁶ Bell, *supra* note 31.

This study considered conditions 1, 3, and 4 of primary importance and examined political and legal events to judge whether or not Bell's theory could be employed at times when state legislation or important court decisions supported or prevented low-income families from attending the school of their choice.

Historical and Legal Aspects of School Vouchers

To provide a proper historical and legal perspective this project outlined the origins of school vouchers. The idea for school vouchers was first disseminated by economist Milton Friedman. Professor Friedman was a libertarian who promoted free markets and capitalism. Friedman first mentioned school vouchers in a 1955 journal article,⁸⁷⁷ but not until 1962, when he dedicated an entire chapter to the topic in his book *Capitalism and Freedom*, did the idea of school vouchers become part of the public debate.⁸⁷⁸ After Friedman published his thoughts on school vouchers, Professor James Coleman conducted a study in 1982 that reported students in Catholic schools performed better than their public school counterparts. Coleman, a sociologist and professor at the University of Chicago at the time of the study, interpreted the findings and concluded that students learned more in an environment where there were strong bonds between parents, teachers, and religious leaders.⁸⁷⁹ In 1990, John E. Chubb and Terry M. Moe completed reanalysis of Coleman's findings and concluded private schools had more autonomy and therefore, they were more inclined to be better organized and be run with more efficiency than public schools. Chubb and Moe echoed Milton Friedman's assertion that parents should be given

⁸⁷⁷ Friedman, *supra* note 18, at 123-44.

⁸⁷⁸ *Id.*

⁸⁷⁹ Coleman, *supra* note 35.

a choice when it comes to the education of their children. Chubb and Moe deemed parents – not the government – as the best judges for selecting the appropriate school for their children. As an alternative to the inherent deficiencies they saw in public schools, Chubb and Moe supported the idea of school vouchers as an option.⁸⁸⁰

While there are several anti-voucher voices, this study cited two groups that countered the findings by Coleman, Chubb, and Moe: the Center on Education Policy (CEP) and the National Education Association (NEA). The CEP has used their own research stating it is difficult to decipher results from school voucher studies and the NEA argued that vouchers did not improve conditions for public school students.

In 2011, the CEP came out with a report on school vouchers.⁸⁸¹ The report, titled *Keeping Informed about School Vouchers*, synthesized findings on school vouchers and found it was difficult to draw any conclusions about their effectiveness and the positive impact that some studies claim.⁸⁸² After reviewing twenty-seven different studies, the CEP found the majority of those studies were funded or otherwise supported by pro-voucher organizations.⁸⁸³ According to the CEP, when school voucher studies were supported by organizations sympathetic to vouchers – then it was possible that an unfair bias played a role in the positive conclusions drawn about vouchers.⁸⁸⁴ The CEP recommended that an “independent advisory committee” be established to certify that school voucher studies be conducted in a fair and evenhanded manner.⁸⁸⁵

⁸⁸⁰ Chubb and Moe, *supra* note 36.

⁸⁸¹ CEP, *supra* note 37.

⁸⁸² CEP Report, *supra* note 38.

⁸⁸³ *Id.* at 47.

⁸⁸⁴ *Id.* at 47.

⁸⁸⁵ *Id.* at 47.

The NEA, the largest union in the United States, has vehemently fought against any voucher program.⁸⁸⁶ The NEA listed several reasons why vouchers were unsuccessful and impractical. According to the NEA, vouchers actually denied access to a large majority of students. Where vouchers existed, the NEA claimed lotteries inherently excluded a majority of students from receiving a voucher. In addition, limited space was available in private schools for public school students wishing to transfer to a private school. NEA also contended that student achievement was not significantly increased with vouchers. Using the results of studies done on voucher programs in Milwaukee and Cleveland, which found no significant academic growth for voucher recipients, the NEA argued that vouchers have failed to improve student test scores. The lack of accountability with state oversight of private schools and the cost to the taxpayer for sending students to private schools were other arguments set forth by the NEA in opposition to vouchers.⁸⁸⁷

While the school voucher debate was argued by pundits on both sides of the issue, over the last few decades state legislatures enacted laws that channeled public tax dollars to private schools. Some of those laws are still in place while others were turned over by the courts. Over the course of seventy years a myriad of court cases, both state and federal, addressed public funds reaching private schools. In 2002, the U.S. Supreme Court finally addressed the school voucher issue. In the 2002 case, *Zelman v. Simmons-Harris*,⁸⁸⁸ the U.S. Supreme Court ruled that school vouchers were permissible, under certain circumstances, thus flaming a debate that is still

⁸⁸⁶ NEA, *supra* note 42.

⁸⁸⁷ NEA, *supra* note 43.

⁸⁸⁸ *Zelman*, *supra* note 22.

controversial today.⁸⁸⁹ Legislators, judges, parents, teachers, and school administrators have argued about school vouchers and continue to do so. The purpose of this dissertation was to outline the history surrounding the Supreme Court decision in *Zelman* and review the legal issues surrounding the debate over the implementation of vouchers in Illinois. Ultimately, this paper suggests possible ways the State of Illinois could implement a limited school voucher system in the City of Chicago.

Before a deeper discussion on the history of school vouchers could begin, this researcher felt it important to provide a synopsis of the Blaine Amendment⁸⁹⁰ and its influence on state constitutions. In 1875, Representative James Blaine of Maine proposed an amendment to the U.S. Constitution that would forbid federal funds going to private organizations. The Blaine Amendment came about at a time when there were strong nativist feelings about immigration. Blaine's amendment to the U.S. Constitution passed in the House, but it fell short by four votes in the Senate.⁸⁹¹ Even though the Blaine Amendment failed at the federal level, it still resonates in thirty-seven state constitutions today.⁸⁹² While the specific language in the state constitutions varies from state to state, the purpose of any of the states' Blaine amendments is to stop public money from reaching sectarian institutions – particularly private schools.

To further illustrate the impact of the Blaine Amendments, this study presented a review on the continual debate on the intent and the influence of the Blaine Amendment. This study used one example from 2007, when the U.S. Commission on Civil Rights (CCR) took up the issue and summoned a conference in Washington D. C. on the status and effect of Blaine

⁸⁸⁹ Voucher debate, *supra* note 45.

⁸⁹⁰ DeForrest, *supra* note 32.

⁸⁹¹ Blaine Amendment, *supra* note 76.

⁸⁹² *Id.*

Amendments.⁸⁹³ The CCR heard from two different groups – those in support of state Blaine Amendments and those opposed. The backdrop for this investigation included how Blaine Amendments place constitutional restrictions on school vouchers.

In their written report to the CCR, the Anti-Defamation League (ADL)⁸⁹⁴ assumed a pro-Blaine stance. The ADL reported that Blaine Amendments stopped the government from providing financial support to religious institutions.⁸⁹⁵ The ADL acknowledged that anti-Catholicism may have been at the root of the Blaine Amendments in the 1870's. However, ADL's argument was that present-day Blaine Amendments were no longer filled with any bias against Catholics. The ADL listed several reasons why they believed school vouchers were not advantageous. They argued that school vouchers were "bad public policy" because they threaten the constitutional principle of separation of church and state.⁸⁹⁶ Without government control, the ADL feared that vouchers supported schools that discriminated against minorities and promoted the creation of private schools that were not as inclusive as our current public school system.⁸⁹⁷ The ADL's final concern about vouchers was that they did not help the poorest of the poor. They argued that most vouchers did not cover the entire cost of attending a private school. As a result, the ADL reasoned that vouchers only served a select few who can supplement the costs of private school tuition.⁸⁹⁸

The ADL contended that because of our diverse population we needed a public school system that unites and ties us all together. School vouchers take needed funds away from the

⁸⁹³ CCR Blaine Report, *supra* note 79.

⁸⁹⁴ The Anti-Defamation League, *supra* note 81.

⁸⁹⁵ U.S. Commission on Civil Rights, *supra* note 82.

⁸⁹⁶ CCR Blaine Report, *supra* note 79, at 50.

⁸⁹⁷ *Id.* at 51.

⁸⁹⁸ *Id.* at 51.

poorest parts of that diverse population and the neediest children suffer the consequences. In the opinion of the ADL, Blaine Amendments helped prevent this from happening. The ADL concluded that the introduction of school vouchers undermined our American system of public education.

Contradicting the ADL's position was the Institute for Justice (IJ),⁸⁹⁹ represented by, Richard D. Komer, Senior Litigation Attorney for the IJ. Calling the American public school system an expensive failure, Komer argued that the education monopoly held by the government was disproportionality affecting minority students.⁹⁰⁰ Using civil rights as the foundation for his argument, Komer argued against the Blaine Amendments and the negative impact it has on minority students and their lack of opportunities. Komer argued public schools were not meeting the needs of a large portion of the student population – namely low-income students who were primarily members of minority groups. Komer claimed that low-income minority students were worthy of an education equal to the education more affluent students received.⁹⁰¹

According to Komer, school choice evened the playing field for disadvantaged students. However, Komer contended the Blaine Amendments stifled the opportunity for minority groups to have a choice. School vouchers were necessary to emancipate low-income students from failing schools, but Komer argued that Blaine Amendments must first be stricken from state constitutions. Komer believed that once this was accomplished school vouchers would become more readily available to low-income students, and as a result provide them equal opportunities to a quality education that their more affluent counter parts already enjoyed.

⁸⁹⁹ Institute for Justice, *supra* note 86.

⁹⁰⁰ *Id.*

⁹⁰¹ *Id.*

Vouchers: Status and Public Opinion

After outlining the debate on school vouchers, this study presented overviews on school voucher programs. These programs included Milwaukee Parental Choice Program (MPCP), Cleveland's Pilot Project Scholarship Program (PPSP), the Opportunity Scholarship Program (OSP) in Washington, D.C., and Indiana's Choice Scholarship Program (CSP). All of these programs had the following in common: qualifying low-income minority students received money from the government to apply to school of their choice. As of this writing, all four programs are still operating.

However, not all school voucher attempts have been successful. This study detailed two such efforts in Florida and Utah that failed to sustain themselves. In 2006 and 2007, two voucher programs, one in Florida and the other in Utah, were dismantled. In Florida, the state Supreme Court struck down a state voucher law⁹⁰² and in the same year Utah enacted a state law⁹⁰³ providing vouchers to every family. The following year a voter's referendum struck down the law.⁹⁰⁴

Besides publicly funded vouchers, privately funded vouchers have existed and this study mentioned two of them. The Student Sponsor Partners (SSP) and the Children's Scholarship Fund (CSF), both based in New York City, have awarded privately funded vouchers to selected applicants since 1986 and 1998, respectively.⁹⁰⁵ According to the SSP website, in 1986 the SSP awarded forty-five scholarships for students to use at one of two private high schools. In 2012,

⁹⁰² Bush, *supra* note 765.

⁹⁰³ Utah Voucher Law, *supra* note 662.

⁹⁰⁴ Utah Voucher Program, *supra* note 767.

⁹⁰⁵ Children's Scholarship Fund, *supra* note 768.

those numbers increased to 1,400 students choosing from twenty-eight different private, mostly Catholic, high schools. Since its inception, the CSF has granted vouchers to over 130,000 students and for the 2012-2013 school year they have awarded 25,700 students with vouchers. In Chicago a group called Freedom to Learn Illinois (FLI) provides privately funded scholarships to low-income families whose children are entering kindergarten or first grade. Scholarships are in the amount of \$5,000 and may be applied to any private school. This past school year (2012-2013) a total of fifteen scholarships were awarded from a pool of over 200 applications.

This study also cited public opinion polls and surveys concerning school vouchers. Completed in the last decade, these polls and surveys presented a mixed bag of data on the issue. Phrasing of questions and the types of follow up questions appeared to have an affect on responses. Based on the poll and survey results cited, drawing any concrete conclusions about public opinion on school vouchers would be problematic.

The Plight of the City of Chicago Public School System

The premise of this study was to offer to low-income parents of the City of Chicago an option to the City's public school system. This study needed to identify the problems facing public education in the City of Chicago. As reported in the introduction of this study, the City of Chicago Public Schools (CPS), with more than 400,000 students, over 21,000 teachers, and 681 schools, and a budget over \$5.1 billion,⁹⁰⁶ was the third largest public school district in the

⁹⁰⁶ For more details on CPS statistics and facts see http://www.cps.edu/about_cps/at-a-glance/pages/stats_and_facts.aspx.

United States.⁹⁰⁷ CPS had been called “underperforming” and the conditions facing CPS students were described as “challenging” and “extensive”. In their own 2011 report CPS admitted that about one-third or a little more than 125,000 CPS students were in underperforming schools, only 7.9 percent of CPS 11th graders graduated ready for college,⁹⁰⁸ and compared to the 2011 national high school graduation rate of 72 percent,⁹⁰⁹ CPS had a high school graduation rate of just 57.5 percent.

What was the response from CPS? The creation of ten “turnaround” schools affecting 5,800 students. “Turnaround” schools were described as “a top-to-bottom school transformation” with “comprehensive teacher training that prepare[d] them to tackle the challenges of growing student achievement within low-performing schools. Students return[ed] in the fall to renovated facilities, a new curriculum, new principal, new teachers, and an entirely new culture of success.”⁹¹⁰ Six of the ten “turnaround” schools were handed over to Academy for Urban School Leadership (AUSL). The AUSL described itself on its website as “a non-profit organization whose mission is to improve student achievement in Chicago’s high-poverty, chronically failing schools through its disciplined transformation process, built on a foundation of specially trained AUSL teachers.”⁹¹¹ The press release also went on to mention the possible closing and/or relocation of another ten schools.⁹¹²

However two years later not much was different for the majority of students in the Chicago public schools. CEO Brizard was no longer leading CPS, but little else has changed the

⁹⁰⁷ NCES, *supra* note 773.

⁹⁰⁸ Press Release CPS, *supra* note 774.

⁹⁰⁹ Education Week and the Editorial Projects in Education Research Center, *supra* note 775.

⁹¹⁰ Press Release CPS, *supra* note 774.

⁹¹¹ AUSL, *supra* note 780.

⁹¹² Press Release CPS, *supra* note 774.

plight of the low-income public school students. While attempting to “turnaround” ten schools was a start, it hardly put a dent into improving the number of schools for tens of thousands of students affected by an inadequate education system. As of this writing the 2013 school report cards for CPS are not available, however the statistics for the 2012 school year are no different than those reported in 2011.⁹¹³ Compared to the rest of the State, CPS high school graduation rates continued to lag behind the rest of the State by more than twenty percentage points (83.3 percent for the State and 61.1 percent for CPS).⁹¹⁴ This narrative seems to be perpetual. All across our country major cities are confronted with poor public schools and the challenge of what to do to improve the situation.

The Voucher Debate Continues

While Chicago’s public education problems are severe, they are not unique. From the “A Nation at Risk” report to No Child Left Behind, school reform remains a much debated topic throughout the country.⁹¹⁵ Public schools have been under a microscope, and demands for higher test scores and accountability have created favorable conditions for pro-voucher advocates. In a *Chicago Tribune* editorial, 2011 was dubbed “The Year of School Choice.”⁹¹⁶ The editorial cited various state voucher programs in Indiana, Ohio, and Wisconsin that have either been newly-implemented or expanded. Under Indiana’s plan,⁹¹⁷ parents whose combined annual income does not exceed \$61,000 are eligible for a voucher, and by 2014, all families, no

⁹¹³ CPS Report Card, *supra* note 782.

⁹¹⁴ *Id.*

⁹¹⁵ NCLB, *supra* note 11.

⁹¹⁶ *Chicago Tribune*, *supra* note 785.

⁹¹⁷ Indiana vouchers, *supra* note 786.

matter what their income level, will be eligible. In Ohio, available vouchers have increased from 15,000 to 60,000.⁹¹⁸ In Wisconsin, the Milwaukee program was expanded to include the city of Racine, and, as a result, 3,000 more students have become eligible.⁹¹⁹ Taking a different approach, Arizona and Oklahoma now provide savings account and tax credit opportunities to assist private school parents.⁹²⁰

Unsurprisingly, taking the public's tax dollars and using it for private purposes has been a controversial business. The quarrels over the distribution of tax dollars to private-sectarian schools have been on the national scene for over a century.⁹²¹ The 1870's saw a rise in nativist emotion where established Americans were hesitant to welcome the newest wave of European immigrants. Most of these immigrants came from predominantly Roman Catholic countries and brought with them their religion and customs. In 1875, Representative James Blaine of Maine proposed an amendment to the U. S. Constitution that would forbid federal funds going to private organizations. Even though the Blaine Amendment failed at the federal level, it still resonates in thirty-seven state constitutions today.⁹²²

Between 1875 and 1955, the voucher debate remained essentially dormant until economist Milton Friedman championed the voucher cause.⁹²³ Illustrating the built-in flaws in our system of public education, Friedman suggested school choice for all parents.⁹²⁴ Subsequent state legislatures and some municipalities pursued possible ways for public money to reach private school parents and eventually private schools. In reaction to this, voucher opponents

⁹¹⁸ Ohio Vouchers, *supra* note 787.

⁹¹⁹ Milwaukee vouchers, *supra* note 788.

⁹²⁰ Arizona school tax credit, *supra* note 789.

⁹²¹ DeForrest, *supra* note 20.

⁹²² Blaine Amendments, *supra* note 76.

⁹²³ Friedman, *supra* note 18, at 123-25

⁹²⁴ *Id.*

challenged them in the courts, and the litigation, both state and federal, debated this issue in the coming years. Numerous Supreme Court decisions in the 1980s and 1990s had pro-voucher predilections. Some believed the culminating case to decide vouchers would be *Zelman v. Simmons-Harris*⁹²⁵ which tested the constitutionality of the Cleveland voucher system.⁹²⁶

In the 2002 case, *Zelman*,⁹²⁷ the Court ruled that school vouchers were permissible, under certain circumstances, thus flaming a debate that is still controversial today.⁹²⁸ After the decision, many⁹²⁹ felt the *Zelman* case would open the door for vouchers for all. Legislators, judges, parents, teachers, and school administrators have argued about school vouchers and continue to do so. The purpose of this dissertation was to outline the history surrounding the Court's decision in *Zelman* and review the legal issues surrounding the debate over the implementation of vouchers in Illinois. Ultimately, this paper will suggest ways the State of Illinois could implement some form of a school voucher system for the City of Chicago.

After 135 years, the ideas of James Blaine and Milton Friedman, in addition to the opinions rendered in a dozens of court cases, may be applied in the State of Illinois which finds itself at an important juncture: Should school vouchers be implemented as a choice for families with school-age children who are “districted” and sent to underachieving public schools? Which leads to another interesting question: Why can a military veteran use a G.I. Bill⁹³⁰ – in essence a school voucher – on a college education at a private religious school, but the same veteran

⁹²⁵ *Zelman*, *supra* note 22.

⁹²⁶ Winkler, *supra* note 795.

⁹²⁷ *Zelman*, *supra* note 22.

⁹²⁸ Christian Science Monitor, *supra* note 797 and Chicago Tribune, *supra* note 797.

⁹²⁹ Goodson, *supra* note 798, Davis, *supra* note 798, and D'Alessandro, *supra* note 798.

⁹³⁰ G. I. Bill, *supra* note 799.

cannot receive a school voucher for her own children to attend a private religious school from kindergarten to twelfth grade?

School Voucher Attempts in Illinois

There have been previous attempts in Illinois to create school voucher programs, but in all cases those attempts have not bared any fruit. Two separate bills were introduced in the Illinois General Assembly that would have created vouchers for parents and their children. Senator Meeks' proposal would have created the Illinois School Choice Program. The voucher bill, which would have provided tax dollars to private schools wishing to enroll eligible students, did not make it out of committee, so a formal vote was never taken.⁹³¹

The most recent school voucher bill in Illinois was introduced by State Representative LaShawn Ford in January 2013.⁹³² Representative Ford's voucher bill, if it becomes law, would create the School Choice Act and would amend the Illinois Lottery Law.⁹³³ The basic idea of the bill is to redirect the state's lottery proceeds to a general education fund and from there a voucher would be distributed to any student who lived in the top twenty zip codes that generated the most sales of State lottery tickets in 2012.⁹³⁴ As of August 2014, the bill remained in the Illinois House and was referred to a rules committee.⁹³⁵

⁹³¹ Illinois School Choice Program, *supra* note 800.

⁹³² Illinois School Choice Act, *supra* note 801.

⁹³³ *Id.*

⁹³⁴ *Id.*

⁹³⁵ *Id.*

A Re-Statement of the Problem

With approximately 400,000 students, more than 22,000 teachers, and over 600 schools, the CPS is a behemoth of an organization.⁹³⁶ Attempting to reform a system as large and complex as the CPS is, indeed, challenging. While the attempts in 2012 to create ten so-called “turnaround” schools may have had an impact on a few thousand students, more than 400,000 students, of which eighty-six percent were minorities, were not afforded an opportunity to go to a better school.⁹³⁷ If our society is to hope for significant growth, we may need to prepare for systemic change.

Adding to the complexities of the situation is the problem with continued segregation in public schools. Gary Orfield’s 2009 study on public school segregation found that sixty years since the *Brown* decision, low-income minority students are more segregated today than they were in the 1950’s.⁹³⁸ According to Orfield, millions of non-white students are forced to attend high schools that he termed “dropout factories”, where large percentages do not graduate, have bleak futures in a tough economy, and are not properly prepared for college.⁹³⁹

Social justice concerns itself with equal economic, political and social rights and opportunities. Social justice in education advocates for our society to make available the best possible education to all students.⁹⁴⁰

Almost a hundred years ago educational scholar John Dewey, in his book *Democracy and Education*, outlined a thoughtful dichotomy as a means to developing a populace able to

⁹³⁶ CPS District Report, *supra* note 47.

⁹³⁷ *Id.*

⁹³⁸ Orfield, *supra* note 3.

⁹³⁹ *Id.*

⁹⁴⁰ Rebell, *supra* note 46.

contribute to the American Ideal. According to Dewey, a school system must provide students with both a rigorous curriculum that emphasized the acquisition of content knowledge and with the knowledge on how to live productive lives.⁹⁴¹ While both elements of this school are an important part of developing a society, it is the later that finds its focus, clearly, in the realm of social justice. If a society is to hope for a school system that does place students in a position to possess the myriad of skills, conceptual understandings, and personal abilities needed to be a fully formed, productive adult, that society may need to address the negative results that manifest when large parts of specific populations are not afforded the opportunity to participate in an educational culture and setting that facilitates such development.

Some have sought school vouchers as an answer to our public school woes. As the school voucher debate continues across Illinois, the plight of Chicago public school students remains grim and the prospect of fixing a system the size of CPS is daunting. In light of the *Zelman* decision and more recent lower court interpretations of this Supreme Court ruling, this paper makes a recommendation on school vouchers to Illinois State legislators.

Research Questions Re-visited

This study investigated the following research questions:

1. What is the relevant legal history of school vouchers?
2. To what extent do the legal and political frames (social justice) meet Bell's conditions for social reform?

⁹⁴¹ Dewey, *supra* note 61.

3. What affect do school vouchers have on assuring that low-income minority students have access to an equitable quality education?

After introducing the topic of school vouchers and laying out the issues surrounding the school voucher debate in Chapter One, Chapter Two provided a summary of the legal issues involved with these challenges to school voucher legislation. It began with an historical perspective of the First Amendment and a review of the purpose of the Constitution's Religion Clauses and an examination of the court cases that helped define the Establishment Clause Tests. What followed was an investigation of the Establishment Clause and its relationship with public schools. Through a detailed examination of relevant court cases, this researcher discussed the difficulty our legislatures have with how, when, and where it is permissible to allow religion into our public schools. Religious schools right to exist, as decided by the U.S. Supreme Court, was also examined.

After addressing the Establishment Clause and its relationship with public schools, this study presented the relevant judicial precedent determining the constitutionality of school vouchers. In this section the cases were divided into three groups. The first group of cases contained an analysis of legal decisions from 1947 to 2000 which opened the door or set up roadblocks for school vouchers. The second part of the analysis concentrated solely on the U.S. Supreme Court's decision in *Zelman v. Simmons-Harris* (2002).⁹⁴² Many thought that this was the seminal case for school vouchers.⁹⁴³ After a review of *Zelman*, the examination turned to the third group of cases that followed the *Zelman* decision. Covering the years 2002 to the present, I

⁹⁴² *Zelman*, *supra* note 22.

⁹⁴³ Carlton-Smith, *supra* note 68, Edelstein, *supra* note 68, and Leonard, *supra* note 68.

analyzed five court cases, both federal and state, where the support for *Zelman* fluctuated between solid to doubtful.

Chapter Two concluded with a report on existing school voucher programs in the cities of Milwaukee, Washington D.C, and Cleveland as well as a fairly new program in the State of Indiana. This research also detailed the decision in *Meredith v. Pence* (2013) – a case decided by Indiana’s State Supreme Court that validated the State’s school voucher program. The next section of this summary presents the findings.

Part 2

Findings

This second section will present the findings. Using information presented from Chapter Four, this section will analyze Professor Bell’s Theories and how they apply to the research.

At the beginning of this analysis it was assumed that access to quality public schools was both a legal and a moral right. It was the contention of this researcher that the educational system and, more importantly, the process of education had the unique ability to act as an emancipatory agent within the American society. The contention was that through an examination of the historical elements of school voucher programs and an application of the moral obligation held by schools, it would become evident that said programs allowed for an effective way to bring about meaningful, substantive social change.

To properly frame this issue of school vouchers a contemporary theory on social change was required. Accordingly, this study drew from Professor Derrick Bell’s theory on Social Change. Professor Bell theorized that four conditions must be present in order for social change,

such as access for blacks and minorities to quality schools, to be cemented. Professor Bell's conditions:

1. "Initially or over time, the issue gains acceptance from a broad segment of the populace;
2. the issue protects vested property in all its forms through sanctions against generally recognized wrongdoers;⁹⁴⁴
3. the issue encourages investments, confidence, and security through a general upholding of the status quo; and
4. while recognizing severe injustices, the issue does not disrupt the reasonable expectations of society."⁹⁴⁵

Chapter Two provided a detailed analysis of those court cases and legislative acts that either created an environment conducive to the formation of school vouchers or curtailed their development. In Chapter Four this study examined those political and legal events to evaluate whether or not Bell's theory could be applied to state legislation and the relevant court decisions that supported or prevented low-income minorities from attending the school of their choice. Bell's three conditions were also specifically important because of the degree to which they were able to develop the moral intervention within the historical and legal context.

As this study examined, the voucher movement, while primarily a moral one, was impacted by the historical and legal principles of the nation. In fact, in order to impact the movement at all, one must find ways to work within the reality of the current situation. Bell's first, third, and

⁹⁴⁴ For the purposes of this study, condition two did not apply and was not considered.

⁹⁴⁵ Bell, *supra* note 31.

fourth conditions represented the best starting points to transition legislators and stakeholders to a place where school vouchers can be considered viable.

Bell's first condition states, "Initially or over time, the issue gains acceptance from a broad segment of the populace."⁹⁴⁶ Bell supposed that in order for social change to be able to be manifested, the society must be ready to accept it. This first condition explained that if we hope to bring about change that was emancipatory, we must acknowledge the degree to which the society has come to see the ideas behind the change as acceptable. This study's examination of the constitutional and legal frames surrounding and impacting the issue of school choice showed that the idea itself has, overtime, indeed gained acceptance.

This study of school vouchers did not assume that Bell's theory could be examined through a social justice lens alone. Indeed, when discussing the issues surrounding state and federal monies going to private and parochial agencies, this study had to consider the legal context first. This legal analysis began with an examination of the First Amendment to the United States Constitution.

The U.S. Constitution makes no direct mention to education. However, when legislatures pass laws affecting education and those laws are challenged, the courts use the Constitution as a legal guide to render rulings on the enacted laws.

One area that sees these challenges is the First Amendment. The first section of the First Amendment is designed to prevent two things: one, the establishment of a national religion, often referred to as the Establishment Clause and two, the preference of one religion over another, often referred to as the Free Exercise Clause. Despite the clear language of these two sections,

⁹⁴⁶ *Id.*

the issues of establishment and free exercise have been debated in State Courts and the United States Supreme Court on numerous occasions.

The first part of the research examined the court decision when the Establishment and Free Exercise Clauses and their relationships with religious schools came into conflict. Whereas some were convinced that there should never be a connection between government and religion, others maintained that such a relationship was inevitable. When this debate reached the courts, contradiction and confusion were inherent in the discussion. During the past sixty years, both sides of the argument have been well-represented in our court systems as the result of lawsuits challenging the interpretation of these clauses.

Despite the fact the First Amendment set forth clear language on the relationship between church and state, the debate did not end there. The concept of Judicial Review established the need for the court system to act as an authority between the Constitution's language and the application of its words.⁹⁴⁷ Several cases addressing the separation of church and state have acted as benchmarks that need to be considered when examining any school voucher system. When this study considered school vouchers and their viability, four key cases stood out. The majority opinions in *Everson*, *Lemon*, *Agostini*, and *Mitchell* acted as a blueprint to guide the establishment of public practice and acceptance of private, religious schools receiving public tax dollars. In fact, the decisions also built a consensus around the expanded use and application of these funds. When one considers this "blueprint," one is also able to see how the decisions justify the voucher system within Bell's first condition concerning public acceptance.

The first ruling that opened the door for the debate on school vouchers was the Court's decision in *Everson*. In this case the idea that the state could fund the transportation cost accrued

⁹⁴⁷ Yoo and Prakash, *supra* note 813.

when children attended a private, religious school was ratified by the Court. The Court stated that this payment was in no way a subsidy that could read as detracting from the wall between church and state. The decision in *Everson* was the foundation for future legal opinions on public tax dollars reaching private schools.

The *Lemon* case continued the debate. In discussing exactly where the wall between church and state was impacted by the use of public monies in private, religious schools, the Court established a three-pronged test that determined a law's constitutionality. The *Lemon* Test mandated that government funds could only be used when: 1) government aid was applied to services that were solely secular; 2) government aid did not advance nor inhibit religion; 3) government aid did not create "an excessive entanglement with religion."⁹⁴⁸ The *Lemon* Test was the new authority on the First Amendment as it was applied to public monies reaching religious interests. Nevertheless, several years later the Court would reshape the *Lemon* Test.

In *Agostini* the Court continued to develop their position regarding this issue and made a ruling that restructured part of the *Lemon* decision. Here the Court established an extension of the intertwining of the two educational systems when it came to public resources to help struggling students attending religious schools. The only condition added to the *Lemon* Test was that when public schools supplied academic assistance to these students, the program had to maintain religious neutrality.⁹⁴⁹ This specific legal conversation culminated in the decision of the *Mitchell* case.

⁹⁴⁸ *Lemon*, *supra* note 91, at 612-13.

⁹⁴⁹ *Agostini*, *supra* note 338, at 234.

The *Mitchell* decision Court cleared up the language concerning “excessive entanglement.” The Court held that a law that provided educational materials and equipment to both public and private schools did not violate the Establishment Clause.⁹⁵⁰ Using *Agostini*, the Court replaced the excessive entanglement component with a primary effect component. In other words, the Court determined whether the legislation had an immediate and direct effect of advancing religion. The Court in *Mitchell* deemed the program did not advance religion. The new standard was to center on a primary effect component.

This study’s historical perspective concerning the First Amendment began with a concentration on four primary cases. The decisions handed down in *Everson*, *Lemon*, *Agostini*, and *Mitchell* allowed for clarity to be brought to the legislatures and makers of educational policy. The end result of the cases also supports the first of Bell’s conditions. Over time it has indeed become the case that the idea government aid reaching private schools has developed a sense of social acceptance. Prior to the *Mitchell* case, there was a clear argument that there was a limited opportunity to bring about social justice through this reform movement, not because of the limitations of the movement itself, but because the perception of readiness amongst the populace. The Court’s actions is evidence that shows America is moving away from a strict interpretation of the separation of church and state doctrine to a more contextual one.

The foundation of Bell’s theory rested within the contextual frame. Bell’s theory suggested that not only those responsible for bringing about the change but also those impacted by it need to have achieved a level of readiness. It was important for this research to continue to examine the progression of the school voucher movement – especially the acceptance of government funds reaching private schools. Over time legislative and legal decisions that

⁹⁵⁰ Mitchell, *supra* note 93.

influenced school vouchers created a conventional wisdom regarding this issue. This study presented an interpretation of that landscape.

Between 1947 and 1968 the courts, having developed language and decisions regarding the partition between church and state as it exists in the educational setting, moved to consider the voucher movement directly. First, *Everson v. Board of Education* acted as a gradual movement toward both restating the importance of the Establishment Clause and also narrowed its specific implementation as it impacted public monies in a religious school. By affirming that the wall between church and state must remain “high and impregnable,” while also allowing for parents to be reimbursed for the cost of transporting their school-aged children to religious schools, this decision created an environment where a more sophisticated view of the Establishment Clause was needed. It raised the notion of contextual application of said Clause. The Court went one further when they handed down the *Board of Education v. Allen* decision. In this decision, the court acknowledged that there was a duality to the religious school. Such an institution was both focused on academic learning and faith-based development. In this case, the majority continued to implement this new “understanding” of the Establishment Clause. By stating that public funds could be used to purchase academic textbooks, the majority acknowledged that it was no longer the case that a religious school could only be seen as advancing a specific religious belief. The *Allen* Court acknowledged that private religious schools also served a secular purpose. The decisions in *Everson* and *Allen* would impact Court decisions in the following decades.

The decisions in *Everson* and *Allen* would be cited in the years that followed when policy makers and lower courts would consider the legality of public monies going to private, religious

schools. The advancement of religious beliefs was at the core of several decisions cited in this study. This precise argument would be the central theme at play in the cases from 1973-1985. During this time the Court measured the implications of the doors that had been opened by their previous decisions. However, some Court decisions continued what *Everson* and *Allen* had started, while others did not.

At first glance the Court's decisions in *Levitt* and *Ball* might be construed as a roadblock to the gains made in *Everson* and *Allen*. In the *Levitt* decision the Court held that it was unconstitutional for the state to compensate private, religious schools for the cost of developing state-mandated tests. Likewise, the *Ball* Court viewed the compensation of educators within a nonpublic setting to be problematic because this specific program, according to the majority opinion, promoted religion. However, when we begin to pull back and look at the entire picture and take into account more Court decisions, we can see the decisions in *Levitt* and *Ball* began to limit the conditions where government aid reaching religious schools was permissible.

After parameters were set by *Levitt* and *Ball*, decisions in *Mueller* and *Witters* would open the door for voucher-like programs. In the *Mueller* decision the Court allowed for a state statute to remain in standing even though the only ones who could benefit from its tax deductions were those who sent their children to private, religious schools. Along the same lines, the Court decided in *Witters* there was no constitutional problem with allowing a man to use state funds to pursue a Ministry Degree at a Christian school. When we consider the Court's decisions over time, we begin to see the development of Bell's first condition. That is, over a period of time society began to accept the idea of public funds reaching citizens who when then in-turn spend that money on private religious schools.

In all of the decisions that this study considered, from *Everson* to *Witters* to *Mitchell*, the culmination would arrive in the Court's ruling in *Zelman*. This summative decision held that a school voucher system was constitutional because the program was based within the states' rights to provide educational opportunities for its children and that the only way any state money actually ended up in a religious, private school was when individuals chose to spend it there. In *Zelman*, the Court had now given credence to a parent's choice in the marketplace and was less concerned about the religious indoctrination of students.

Evolution, like nature itself, is evolutionary...not revolutionary. This includes the educational implications of government funding from religious organizations. It is not the case that one can point to a singular legal instance that acts as the capstone or even catalyst for the current levels of funding such schools receive. Instead one has to consider the concept of such funding as a mosaic, only fully realized when one steps away from its nuanced individual pieces to see its totality.

Using Bell's theory as conceptual framework leads one to fully understand the degree to which this issue has, indeed, functioned with a specific pattern of social change. In fact, if there were a singular case or legislative moment, this movement would be an example of a change to an institution that impacts people rather than a change to the socially accepted norms that are shared and reinforced by people. This examination shows that the idea of such funding has indeed traveled down a road that meets the conditions set forward by Bell. Each specific case and law has acted as a catalyst not for the larger idea itself, but for the next specific case and law. In this way the movement has never revolutionized the way we fund schools, but rather has

evolved our mindset. And that evolution is at that heart of Bell's theory. The next section will analyze Bell's third condition and how it can be applied to the school voucher issue.

Bell theorizes that in order for social change to be established, the culture must be in a place to accept it. His third condition states that the "issue encourages investments, confidence, and security through a general upholding of the status quo."⁹⁵¹

By developing a mindset over time that has shifted legal interpretation from one of absolutism to one of contextualization, the Court's decisions have also allowed for Bell's third condition to have been met. By redefining the voucher movement as an opportunity to exercise choice, proponents of the movement have been able to appropriate capitalistic language to make their movement about a fundamental precept of the American Situation. This use of markets has transitioned the voucher movement away from one of change to one of upholding the status quo of the market place.

Political Will

In addition to the religious and values implications of school vouchers, political influence has played a role as well. While this study's main emphasis did not concern itself with political associations and school vouchers, it is prudent to mention its impact here. Starting with Milton Freidman's assertion in the 1950's that parents were the best decision makers when it came to making school choices and up until to the 2002 *Zelman* decision, it has been theorized that conservative Christians had been the stalwarts championing the cause of school vouchers – with

⁹⁵¹ Bell, *supra* note 31.

little success.⁹⁵² In 2007, James Forman maintained that up until the *Zelman* decision school voucher advocates relied on a values claim to make their case. Likewise, David M. Powers wrote in 2009 that prior to the *Zelman* decision the majority of parents who supported school choice were Catholics and evangelical Christians, whose support for vouchers came from their need to be in control of what values their children were exposed to.⁹⁵³

When the *Zelman* decision was announced, the successful voucher argument avoided religion and values and instead concentrated on building a coalition. A coalition built on racial equality and education. This new angle, which Forman called a “racial justice claim”⁹⁵⁴ and which Powers called a “civil rights claim,”⁹⁵⁵ employed a political strategy in Milwaukee and Cleveland whereby voucher supporters solicited the involvement of black and Hispanic politicians and community leaders.⁹⁵⁶ According to Forman, this approach had “political advantages” and helped pave the way for the Court’s decision in *Zelman*.⁹⁵⁷ As a result, the voucher movement could now count among its leadership minorities and prominent Democrats.⁹⁵⁸ By tying education quality, not religion or values, to the voucher movement, the racial or civil justice claims could attract a wider and more diverse audience. Political barriers to a landscape that is more accepting of school vouchers still exist, but those hurdles are more easily cleared when a coalescing of originally divergent groups advocate for said vouchers. Professor Bell’s comments about interest-convergence seem to ring true here as well, “The

⁹⁵² Forman, *supra* note 848.

⁹⁵³ Powers, *supra* note 16, at 1063-1064.

⁹⁵⁴ Forman, *supra* note 848, at 547.

⁹⁵⁵ Powers, *supra* note 16, at 1063.

⁹⁵⁶ Forman, *supra* note 848, at 568.

⁹⁵⁷ *Id.* at 547

⁹⁵⁸ *Id.* at 568

interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”⁹⁵⁹

Part 3

Conclusions

This section will address the research questions in Chapter One. This section of the study will bring the research full circle. This study developed the following three questions:

1. What is the relevant legal history of school vouchers?
2. To what extent do the legal and political frames (social justice) meet Bell’s conditions for social reform?
3. What affect do school vouchers have on assuring that low-income minority students have access to an equitable quality education?

The following conclusions will address these questions in order.

The first question posed asks: What is the relevant legal history of school vouchers? To begin the legal section of this study, an examination is made of the First Amendment and its Establishment Clause. Consideration is also given to the little know Blaine Amendment (which still appears in thirty-eight different state constitutions), which prohibits tax dollars from reaching private school interests. Particular attention is paid to U.S. Supreme Court cases (namely *Everson*, *Lemon*, *Agostini*, and *Mitchell*) that would later be used by the *Zelman* Court. Coupled with the analysis of these four cases, eight more cases concerning the relationship between the Establishment Clause and public schools are studied and briefed.

⁹⁵⁹ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 523 (1980).

In addition to the Establishment Clause cases, other court cases, mostly U.S. Supreme Court cases, are simplified and analyzed. This is no small task. All in all, twenty-eight cases – some whose decisions favored school vouchers and some whose decisions inhibited their growth – are examined. Culminating in the *Zelman* decision, a clear picture and direction is established. That is, under certain circumstances school vouchers can exist in an urban setting – especially one beset with low performing public schools.⁹⁶⁰ However, it should also be clear that since the *Zelman* decision in 2002 school vouchers have not become prevalent. In fact, Frank Kemerer offered a more tepid comment in his paper.⁹⁶¹ While Kemerer admits *Zelman* gave the go ahead it did so only through a federal constitutional level. His point was that state constitutions may hold sway over the whole deal because there are obstructions (Blaine Amendments) specifically built into state constitutions that would prohibit state funds from reaching sectarian schools.⁹⁶² Due to these adverse conditions, Mr. Kemerer predicted the future of vouchers was at best uncertain.⁹⁶³ While this is certainly an inhibitor to a widespread school voucher program, it is this researcher's argument that such a universal program is unwarranted. In short, *Zelman* laid a foundation and it is up to local officials to map out a more detailed blueprint.

Having addressed the legality of school vouchers, the second research question needs to be answered. Consideration is now given to the second question: To what extent do the legal and political frames (social justice) meet Bell's conditions for social reform? In order for one to fully grasp the issues at play in a discussion regarding the efficacy of school vouchers, this study considers the lengthy historical situation within which this educational movement rests. This

⁹⁶⁰ *Zelman*, *supra* note 22.

⁹⁶¹ Kemerer, *supra* note at 656.

⁹⁶² *Id.*

⁹⁶³ *Id.*

study also considers the moral obligation schools have to provide children with an opportunity to participate in the promise of a democratic, capitalistic society. This study draws from Professor Derrick Bell's theory on Social Change and used three of his four conditions to examine the efficacy of school vouchers and its application for social reform. As a reminder, here are the three conditions that have been applied:

1. "Initially or over time, the issue gains acceptance from a broad segment of the populace;
2. the issue encourages investments, confidence, and security through a general upholding of the status quo; and
3. while recognizing severe injustices, the issue does not disrupt the reasonable expectations of society."⁹⁶⁴

Bell theorizes that in order for social change to be able to be manifested, the culture must be in a place to accept it. In addition to examining school vouchers through a social lens, it is also prudent to consider the legal context first. This study researched a number of court cases and applied Bell's first condition to their decisions.

To begin with, this study applies Bell's first condition to the following U.S. Supreme Court decisions, *Everson*, *Lemon*, *Agostini*, and *Mitchell*. These decisions act as a road map to guide the establishment of public practice and acceptance of private, religious schools receiving public monies. In Chapters two and four considerable space is provided examining each case. What follows are some abbreviated summaries to remind the reader of their impact. *Everson* – the Court's ruling opens a door in terms of allowing public monies to be used to support private, religious schools. In this case the idea that the state could fund the transportation cost accrued

⁹⁶⁴ Bell, *supra* note 31.

when children attended a private, religious school was ratified by the Court. *Lemon* – as a result of Court’s decision, the *Lemon* Test is created. The *Lemon* Test is the new lens through which all programs and initiative were to be viewed. The Court establishes a three-prong test to make determinations on when it was constitutional for public money to reach non-secular interests. *Agostini* – the Court’s decision continues to develop their position that in some instances public money can be used to help struggling students attending religious schools. *Mitchell* – here the Court clears up the language concerning “excessive entanglement.” The new standard is to center on a primary effect component. In other words, if a public supported program does not have the “primary effect” of advancing a religious message, than it does not breach the wall of separation of church and state.

Accordingly, the decisions also build a consensus around the expanded use and application of these funds. When one considers this blueprint, one is also able to see how the decisions justify the voucher system within Bell’s framework of public acceptance. The decisions handed down in these cases allowed for clarity to be brought to the legislatures and makers of educational policy. As a result, they further elucidated the law of the land. The end result of the cases establishes the first of Bell’s conditions.

While the decisions in *Everson*, *Lemon*, *Agostini*, and *Mitchell* establish a level of acceptance toward public monies reaching private hands, this is not the case in all future decisions. This study cites three cases in particular where the Court considers the implications of the doors that had been opened by their previous, recent verdicts. Again, what follows is a brief summary of those cases. *Levitt* - the Court decides that it is unconstitutional for the state to compensate private, religious schools for the cost of developing state-mandated tests. Unlike

Agostini that supported some assistance for private school students, such a testing plan would, indeed, act as the state endorsing a specific faith. *Grand Rapids* – citing *Lemon*, the Court state that government aid to private schools must not have the effect of promoting a religious program.

While these last three cases appear to show the Court walking back some of their earlier decisions, it really illustrates the Court developing parameters rather than repudiating a program. Here we see the development of Bell's condition within the proper context. This is true because of the outcome of *Mueller* - a case which allows for a state statute to remain in standing even though the only ones who could benefit from its tax deductions are those who send their children to private, religious schools. Following Bell's first condition, the Court takes time to develop its mind regarding the specific legal applications of the larger movement.

This development continues with the decision in *Witters*. *Witters* – applying the *Lemon* Test again, the Court decides there is no constitutional issue with allowing a student to use state funds to pursue a Ministry Degree at a Christian school. Once again the *Lemon* Test is employed by the Court and it is decided that no violation of the Constitution exists because the money in question goes to an individual who chooses to give it to a religious institution. The Court ruled the state was not directly sending money to the school. This precedent becomes integral in the expansion of voucher-like programs in the future.

All of this culminates in the *Zelman* decision. *Zelman* - In this decision the Court rules that a school voucher system in Ohio is constitutional because the program is based within the states' rights to provided educational opportunities for its children and that the only way any state money actually ends up in a religious, private school is when individuals choose to spend it

there. The majority decides this case is more about the choice in a marketplace and less about the religious indoctrination of students.

Therefore, this study shows the degree to which Bell's theory, indeed, is properly placed within the context of cultural understandings and societal norms. Originally, the parameters developed by the U.S. Supreme Court were the accepted norm of the legal minds of the nation. This trickled into the legislative setting as well. Over time the country developed more of an acceptance of the concept of public funding for private, religious schools. The idea has gradually become more acceptable. This progression of thinking and understanding is a perfect example of the first condition as put forward by Bell. After a thorough review of these cases, it is this researcher's contention that Bell's first condition has been met. The next section will address the degree to which Bell's third condition is met.

Professor's Bell's third condition, and the second one being considered by this study, asserts that for social reform to be sustainable a general upholding of the status quo is necessary. For this study status quo refers to the current state of affairs for public education in America. Upholding or maintaining the status quo for public education would mean that outside influences (i.e. school vouchers) would have minimal, if any, impact on public education. It is the belief of this researcher that, in fact, school vouchers do not negatively impact the status quo of public education.

Previously, an overview of the decisions regarding school vouchers demonstrated that the ideas surrounding their legal status were developed over time. No single legal decision on public money reaching private school interests created a new system for school vouchers to flourish. There was no bellwether moment for school vouchers. On the contrary, this process has been

evolutionary. The state of American education is still relatively constant. The largest parochial educational system today is the Catholic Schools.⁹⁶⁵ However, as was reported, enrollment in those schools and the number of schools themselves has dwindled consistently from their peak in the 1960's. Trend data continues to show a decline in the number of students who are attending Catholic schools.⁹⁶⁶ Consequently, adding monies into the private school system from public sources has not had the specific effect of directly impacting their enrollment numbers.⁹⁶⁷

In addition to public schools maintaining their enrollment numbers, how they are perceived by America has remained at a constant level. According to a 2010 Gallup Poll, parents were relatively happy with the local public school their children attended.⁹⁶⁸ While respondents gave lower marks to public education in general, Americans continue to believe their local schools are performing well.⁹⁶⁹

We have five decades of legal precedent regarding school vouchers. The U.S. Supreme Court has made several landmark decisions that have impacted the narrative. Even with that, schooling in the United States remains a consistent system. School vouchers have not proved to be counter to the status quo. The investments that have been made in this movement have not drastically shifted funding in such a way that public schools are being adversely impacted. In fact, while Catholic School enrollment has dropped, public school enrollment is expected to set a new record every year over the next decade.⁹⁷⁰

⁹⁶⁵ National Catholic Education Association, *supra* note 817.

⁹⁶⁶ *Id.*

⁹⁶⁷ *Id.*

⁹⁶⁸ Gallup Poll, *supra* note 820.

⁹⁶⁹ *Id.*

⁹⁷⁰ NCES, *supra* note 829.

Student achievement is another area that does not appear to be adversely affected by school vouchers. In 2012, The National Assessment of Education Progress (NAEP) assessment found that data from 1971 and 1973 that compared favorably to 2012 results. In fact, when comparing 1971 and 1973 scores with the 2012 results, the 2012 results showed higher reading and math scores for 9 and 13 year olds and not much difference for 17 year olds.⁹⁷¹ Student achievement in high-risk areas seems to be unaffected as well. A study of student achievement at a national level over the past decade shows that schools receiving targeted and school-wide Title I assistance have made significant gains when it comes to closing the achievement gap created by the poverty demographic.⁹⁷² Despite money being siphoned off to private schools for vouchers, public schools have seen an increase in their ability to educate the most vulnerable students. While it is true that the achievement gap is still a serious issue for educators in this country, one can see that the federal government is still using funding devices to address the needs of those in poverty who attend public schools. This is a clear sign that while more funding has been diverted to private schools, there is still a plan that public schools in need receive aid that can improve the academic standing of their students. It would seem that the existence of a voucher system has not negated the ability of the government to meet the financial needs of those in need.

Professor's Bell's third condition declares that for social reform to be sustainable a general upholding of the status quo is necessary. Bell's third condition calls us to consider the consequences of social change to those who will not directly benefit from it. This social change – manifested through school vouchers – has evolved over decades with no impact to the status quo.

⁹⁷¹ NCES, *supra* note 830.

⁹⁷² Kober, McMurrer, and Silva, *supra* note 832.

On the contrary, American education remains relatively constant. Enrollments are increasing and federal funds, through Title I funding, continue to assist public schools and their at-risk students. In short, over time we have seen that the establishment and expansion of policies that allow public funding to go to private schools has not negatively impacted the traditional school model. In fact, there have been academic gains and a positive perception by the public of their educational choices. For this reason it is this researcher's contention that Bell's third contention has been met. The next section will take up the final research question.

Professor's Bell's fourth condition, and the third one being considered by this study, claims that recognition of severe injustices does not disrupt the reasonable expectations of society. The analysis in Chapter Four makes the case that the implementation of a school voucher program does have, at its core, the desire and motivation to recognize injustices while not disturbing the reasonable expectations of society. Chapter Four's analysis uses an examination of the nature of failing schools and the consequences associated with their existence combined with an understanding of the social justice implications to illustrate this issue (i.e. the implementation of a school voucher program) clearly meets the standard set by Bell's fourth condition.

Data shows there is a statistically relevant level of discrepancy between the achievement of white students and the achievement of students of color.⁹⁷³ The achievement gap exists as a statistical reality; however, it needs to be dealt with an issue of social justice.

Under this lens it is true that Bell's theory would suggest that the environment itself is an unjust one, the student profiting from the current system should be considered blameless and, therefore, not deserving of unreasonable distress in the righting of the wrongs. Chapter Four's

⁹⁷³ Reardon, *supra* note 839.

analysis argues that the establishment of a school voucher system would not necessitate a disruption to the schooling of these students. Ultimately the analysis shows that regardless of the degree to which vouchers might alleviate the achievement gap and allow for a movement of social and economic justice, the contention is that allowing for the option does not place undue suffering on those not responsible for the wrongs of the current system. This combined with the examination of the achievement gap allows for the fourth condition to be met.

The final question is: What affect do school vouchers have on assuring that low-income minority students have access to an equitable quality education? Voucher opponents contend that diverting money from public schools to private schools would increase inequities. On the opposite side voucher supporters believe that school vouchers provide low-income minority families an opportunity to attend a quality private school. While the issue of school vouchers continues to be debated, some evidence exists that may aid us in figuring out their influence those that receive the vouchers and on the racial and economic makeup of neighboring public schools. Two groups stand out when one considers the effect of vouchers. This next section will analyze the impact on those that receive vouchers and the impact on the surrounding public schools.

Admittedly, there is not much evidence on how vouchers have affected voucher recipients. In 2002, one study analyzed student achievement data from Dayton, New York, and Washington D.C. The results were inconclusive – with no clear indication of improvement in student achievement.⁹⁷⁴ Another study, also completed in 2002, examined the impact of vouchers in Washington D.C. and found slight gains in student achievement in only the second year of a

⁹⁷⁴ William G. Howell, Patrick J. Wolf, David E. Campbell, and Paul E. Peterson, *School Vouchers and Academic Performance: Results from Three Randomized Field Trials*. Journal of Policy Analysis and Management. 21(2): 191-218. 2002.

three year analysis.⁹⁷⁵ However, when race was considered, there were slight gains for African American students – compared to white and Hispanic students who did not experience the same increases.⁹⁷⁶ Likewise, in a third separate study comparing voucher students in New York, Ohio, and, Washington D.C. the results for African American students were more encouraging when compared to other races.⁹⁷⁷

Along the same lines, some graduation rates have been analyzed with some positive comparisons favoring vouchers.⁹⁷⁸ According to a 2010 report released by the National Center for Education Evaluation and Regional Assistance high school voucher students in Washington D.C. graduated at a rate of 91 percent, while the average graduation rate in D.C. public high schools was 56 percent.⁹⁷⁹ Nevertheless, critics of school vouchers may point out that influences like parental involvement, or lack thereof, or socio-economic status had an impact on these percentages.

Inherent problems exist with some of these studies. First, these studies have a difficult time with comparing control groups (those who do not use vouchers) with experimental groups (voucher recipients). In many circumstances comparing public schools to private schools is cumbersome because the differences in their characteristics (i.e. demographics of staff and students, curriculum and assessment, access to resources, mission and focus, etc.) can vary greatly. In addition, because private schools are not required to report student data like the public

⁹⁷⁵ Helen F. Ladd, *School Vouchers: A Critical View*. Journal of Economic Perspectives, 16(4): 3-24. 2002.

⁹⁷⁶ *Id.*

⁹⁷⁷ Clive R. Belfield, *Vouchers and the Cleveland Scholarship Program: Little Progress So Far*. Economic Commentary, Federal Reserve Bank of Cleveland March 1 issue. 2006.

⁹⁷⁸ Jason L. Riley, *The Evidence Is In: School Vouchers Work*, Wall Street Journal - Eastern Edition, 3 May, 2011. <http://www.wsj.com/articles/SB10001424052748703396404576283381160558552>.

⁹⁷⁹ Patrick Wolf, Babette Gutmann, Michael Puma, Brian Kisida, Lou Rizzo, & Nada Eissa. *Evaluation of the DC Opportunity Scholarship Program: Impacts after Three Years*. (NCEE 2009-4050). Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education. March 2009.

schools, accessing private school data may be difficult. The next part in this section will address the effect of vouchers on the racial and economic makeup of surrounding public schools.

There is limited research examining the impact of school vouchers on the racial and economic makeup of surrounding public schools. Moreover, because school voucher programs are few in number, it would follow that small numbers of students use them. As a result, there could be minimal impact on the demographics of public schools. However, there are a couple of research studies to investigate. In 2012, a study conducted on the Milwaukee voucher program found no significant change in the racial makeup of surrounding public schools or in the price of housing in the same area.⁹⁸⁰ Patrick Wolf, the lead investigator on the study, surmised that the lack of change in demographics was because typical voucher students were minority students who transferred from heavily populated minority public schools to mostly minority private schools.⁹⁸¹ Conversely, in two separate studies, one in Milwaukee⁹⁸² and the other in Cleveland,⁹⁸³ researchers found lower levels of racial segregation at the private schools accepting voucher students compared to their local public school counterparts.

In short, depending on the researchers' affiliations, many of the results seem to be slanted toward one side of the argument or the other. Navigating these opinions and issues is difficult

⁹⁸⁰ Patrick J. Wolf, *The Comprehensive Longitudinal Evaluation of the Milwaukee Parental Choice Program: Summary of Final Reports, School Choice Demonstration Project Milwaukee Evaluation*, Report #36, February 2012. <http://www.uaedreform.org/downloads/2012/02/report-36-the-comprehensive-longitudinal-evaluation-of-the-milwaukee-parental-choice-program.pdf>. See also, Marcus A. Winters, *School Choice and Home Prices: Evidence from Milwaukee, Wisconsin, School Choice Demonstration Project*, University of Arkansas, Fayetteville, AR, 2009. http://www.uark.edu/ua/der/SCDP/Milwaukee_Eval/Report_12.pdf.

⁹⁸¹ *Id.*

⁹⁸² Greg Forster, *Segregation Levels in Milwaukee Public Schools and the Milwaukee Voucher Program*, School Choice Issues in the State (Indianapolis: Milton and Rose D. Friedman Foundation, 2006), <http://www.edchoice.org/Research/Reports/Segregation-Levels-in-Milwaukee-Public-Schools-and-the-Milwaukee-Voucher-Program.aspx>.

⁹⁸³ Greg Forster, *Segregation Levels in Cleveland Public Schools and the Cleveland Voucher Program*, School Choice Issues in the State (Indianapolis: Milton and Rose D. Friedman Foundation, 2006), <http://www.edchoice.org/Research/Reports/Segregation-Levels-in-Cleveland-Public-Schools-and-the-Cleveland-Voucher-Program.aspx>.

and there does not seem to be a clear cut answer or direction. In Parts 4 and 5 this study responds to these issues with practical suggestions for addressing the problems that have been raised in the research. There will be suggestions on what should be done coupled with how it can be done. In addition, future research will be considered. Some thought is given on what further could be studied in the area of school voucher research.

Part 4

Implications

The 2013-2014 deadline established by NCLB has expired. Public education in the U.S. is at another crossroads. Public perception of schools coupled with increased political pressure contributes to an environment open to school choice. Parents are more knowledgeable and savvy when it comes to judging their schools, but more information is needed.

Because school vouchers can illicit visceral responses on both sides of the discussion, it may be prudent to try and educate the public on what vouchers can and cannot do. In addition, if private schools are going to benefit from the potential increase in funding, then there should be some reciprocation from the private schools.

Where school vouchers exist or where they are introduced for the first time, they should be placed in the proper frame. School vouchers offer an option for parents to choose the school they believe best fits their child's needs. It should be clearly communicated that school vouchers are not the panacea that some have made them out to be. Our system of public education has its

positives and negatives, but it should not be forced on everyone. The same is true for private education – it is not necessarily for everyone. The message should be: you have options.

If vouchers provide private schools the bonus of an increase in enrollment and additional revenues, then it makes sense they be held accountable for state testing. Private schools accepting voucher students should be held to the same standards that their public school counterparts adhere to. Moreover, the results from private school testing should be made available to the public. It follows, if the private school cannot meet the same standards, then the government should pull the voucher funding from schools not making the grade.

Part 5

Future Research

With a subject as vast and controversial as school vouchers, this study was not able to address all of the issues. An attempt was made to answer some of them, but here is a breakdown on subjects that need further exploration.

More empirical evidence is needed on the efficacy of school vouchers. While there are studies presenting some data from Milwaukee, Cleveland, and Washington D.C., these represent only three – more information is needed. Here are three suggestions for addressing the need for more data.

1. Create an independent and bi-partisan state or federal board of examiners whose main responsibility would be to conduct unbiased research on school vouchers used by low-income minority students. If a government agency cannot be created, then public funds could be made available to accredited universities who would conduct the research. Longitudinal studies, using high-quality scientific methods, are needed to see the lasting effect of school vouchers. An

independent agency is best fitted to complete this task. The purpose of these studies would be to present evidence to the general public on the effectiveness of school vouchers.

2. Build a comprehensive evaluation for all voucher programs. Each program would be subject to an exhaustive evaluation that would include defining its mission, reviewing current approaches, and making plans for improvements. Ensure all stakeholders, including parents, students, teachers, and school leaders, are surveyed and participate in the evaluation. Use the results to inform stakeholders and make necessary improvements.
3. Future studies will be needed to determine the impact vouchers have on the low-income minority composition of both public and private schools. Related questions include: If racial disparities occur, should race be taken into account when vouchers are awarded? Or should vouchers be race-neutral? Furthermore, research may be needed on the possible impact vouchers have on the racial makeup of neighborhoods.

Part 6

Complete Summary

Education is a fundamental human right and essential for the exercise of all other human rights. It promotes individual freedom and empowerment and yields important development benefits. Yet millions of children and adults remain deprived of educational opportunities,

many as a result of poverty. – United Nations Educational, Scientific, and Cultural Organization (UNESCO)⁹⁸⁴

Our nation’s best students can generally be found in predominately white, suburban, and middle to upper-middle class school districts, while our weakest students can generally be found in predominately inner-city school districts with high minority populations.⁹⁸⁵ This study suggested that for over thirty years the reforms, programs, and initiatives created to combat this disparity have given us few sustainable solutions. In fact, it may be worse than before 1954 when the *Brown* decision forced the desegregation of public schools. According to one study, school segregation has increased dramatically across the country and minority students are more likely to attend poor performing schools than their white counterparts.⁹⁸⁶

So called movements labeled *Excellence*, *Restructuring*, and *Standards* were conceived and implemented – with little or no lasting impact.⁹⁸⁷ Several of the school reforms mentioned in Chapter One were broken down into two main categories: improving the schools (e.g. smaller class sizes, longer days, more technology, etc.) and improving the way we prepare teachers (e.g. more rigorous training, higher standards for evaluations, merit pay, etc.). In 1983 the federal report “A Nation at Risk” our society was warned of a “rising tide of mediocrity” in our public education system. This was followed almost twenty years later with the 2002 federal law No Child Left Behind (NCLB). NCLB mandated change and accountability – with the unrealistic goal of 100 percent of the students meeting or exceeding state standards by the 2013-2014 school

⁹⁸⁴ This quote begins the official United Nations’ statement on the fundamental right to an education. <http://www.unesco.org/new/en/right2education>.

⁹⁸⁵ Orfield, *supra* note at 3.

⁹⁸⁶ *Id.*

⁹⁸⁷ Hunt, *supra* note at 4.

year. Dire warnings and unrealistic approaches have had minimal impact. To put it in baseball parlance – there have been plenty of swings, but little contact.

So what's to be done? It is this researcher's contention that the one reform movement that was different from the others mentioned was school choice. This study considered school choice different because it was the only reform measure that leaves the decision on what is best for a student up to the parent. Of course, this would be a drastic change for an entire system. Therefore, a more localized plan would be in order.

For any real and systemic change to occur, Change theorist Michael Fullan concludes it must be “implemented locally.”⁹⁸⁸ In addition, Fullan contends change should be manageable.⁹⁸⁹ It follows, then that any voucher movement that has any chance of success needs to happen locally. It is this researcher's belief that deciding the best school for a child's education should be made at the kitchen table and not in some congressional, or worse, some bureaucrat's office. As Fullan states, “Wishful thinking and legislation have poor records as tools for social betterment.”⁹⁹⁰

That's not to say all legislation is inherently bad. On the contrary, many laws are enacted with the best of intentions. Of course, this researcher sees the benefit of the school voucher laws enacted in Milwaukee, Cleveland, and Indiana as a legitimate way for parents to exercise more control over their children's education.

While the topic of school choice is expansive, this study focused exclusively on school vouchers as a possible vehicle for low-income families who reside in a large urban school

⁹⁸⁸ Michael G. Fullan and Matthew B. Miles, *Getting Reform Right: What Works and What Doesn't*, Phi Delta Kappan 73, 10, pp. 744-52. 1992.

⁹⁸⁹ *Id.*

⁹⁹⁰ *Id.*

district. Some have sought school vouchers as an answer to our public school woes. As the school voucher debate continues across Illinois, the plight of Chicago public school students remains grim and the prospect of fixing a system the size of CPS is daunting. In light of the *Zelman* decision and more recent lower court interpretations of this Supreme Court ruling, this study supports the inclusion of vouchers. Therefore, it is recommended they be included as an option for Chicago's residents.

In the meantime, Illinois' neighbor, Indiana has enacted a far-reaching voucher program. The State of Indiana's program, officially called the Choice Scholarship Program (CSP), began with the 2011-2012 school year and the number of eligible families was capped at 7,500. For the 2012-2013 school year the eligible family number was capped at 15,000. For the 2013-2014 school year all Indiana families were eligible. As of this writing the Indiana State Supreme Court has upheld the Choice Scholarship Program.⁹⁹¹ The spot light may be on Illinois leaders to come to a consensus as to whether or not a voucher program will address the perceived deficiencies in the Chicago Public School system.

⁹⁹¹ Meredith, *supra* note 764.

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