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ARTICLES

GOD, MONEY, AND SCHOOLS: VOUCHER PROGRAMS IMPUGN THE SEPARATION OF CHURCH AND STATE

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INTRODUCTION

Religious conservatives have experienced a "spectacular rise to power and respectability during the 1990s."¹ Unlike the religious conservative movements of the 1980s, which faltered and dissolved, the religious conservative movements of the 1990s have succeeded in expanding their membership and influence across the country.² One third of American voters now identify themselves as evangelical Christians.³ Reverend Pat Robertson's Christian Coalition, perhaps the nation's most prominent conservative religious organization, currently claims 1.7 million members nationwide.⁴ Dr. James Dobson's Focus on the Family, another prominent religious conservative group, claims to have a mailing list of 3.5 million

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2. Id.
4. Jeffrey A. Roberts & Virginia Culver, Religious Right Sets Sights on State Politics, DENV. POST, Jan. 15, 1996, at 1A; Judy Keen, Reed Teetering on GOP Abortion Plank, USA TODAY, June 20, 1996, at 8A.
names.\(^5\)

With their large memberships, religious conservative groups have become politically influential. Religious conservatives in general, and the Christian Coalition in particular, have been cited as key allies in the Republican electoral wins in 1994.\(^6\) Such groups also actively participated in the 1996 presidential election.\(^7\) In fact, aides to Dr. Dobson claimed that over 500 delegates to the 1996 Republican convention were Dobson followers.\(^8\) In addition to their success on the national level, conservative Christians may hold strongest influence on local school boards where they are well represented across the nation.\(^9\)

Their presence on local school boards reflects the significant concern which religious conservatives have for education; this concern has prompted conservative religious groups to attempt to influence education in a variety of ways. For instance, both the Christian Coalition and Focus on the Family have proposed so-called "religious equality" amendments to the U.S. Constitution to circumvent the existing constitutional restrictions on prayer in school.\(^10\) If ratified, these amendments would tamper with the religious freedoms in the Bill of Rights for the first time since it was ratified 200 years ago. Religious conservatives have also lobbied for legislation that they claim would make public schools reinforce so-called "traditional religious values."\(^11\) In addition to their lobbying efforts, Focus on the Family has produced an educational video promoting abstinence, and opposing safe sex, which has been purchased by over 11,000 public schools.\(^12\)

Conservative religious groups, including the Christian Coalition, have also been lobbying for school voucher legislation that would enable parents to use state funds to pay for educating their children at private schools including religious schools.\(^13\) The

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Christian Coalition included a “school choice” (i.e. voucher) plan in its “Contract with the American Family,” a series of legislative proposals patterned after the GOP’s 1994 “Contract with America.”

Religious conservatives and other voucher supporters have succeeded in making school vouchers a major political issue. Legislators have introduced bills that would provide federal funds for vouchers (for both sectarian and nonsectarian schools) in both houses of Congress, and Republicans in the House of Representatives have sought to implement a voucher program in the District of Columbia. In addition, state governments have witnessed an influx of legislative efforts towards implementing voucher programs. Since the beginning of 1992, voucher legislation that would spend state money on private schools has been proposed in at least twenty-three states and the Commonwealth of Puerto Rico. Some states have considered voucher legislation several times within the last few years. At least eight states introduced voucher legislation in 1996 alone.

14. See Richard Benedetto, Christian Group Calls for ‘Contract With Family,’ USA TODAY, May 17, 1995, at 6A; The Christian Coalition’s ‘Contract with the American Family,’ CHRISTIAN CENTURY, May 24, 1995, at 560. Voucher plans are sometimes referred to by other names such as “school choice programs” or “opportunity scholarships.” The particular name used is not important, however, because the programs all operate in essentially the same way, and the Supreme Court has made it clear that it is the “substantive impact” of a program and not the label attached to it that matters. See Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973).


For example, the California Assembly passed a bill that would provide state-funded vouchers to students in the worst-performing public schools in the state. The vouchers, which the bill euphemistically calls "opportunity scholarships," would enable the students either to attend their current public school, another public school, or a private school. Vouchers for students attending private schools would have a value equal to either the tuition for the private school or ninety-percent of the state allotment per pupil, whichever is less. Although the bill is not expected to pass the state senate, it marks the second major effort in 1996 by California voucher proponents. Earlier in 1996, voucher proponents failed to place a voucher initiative on the November ballot, and in 1993, California voters resoundingly rejected a voucher ballot initiative. Similarly, the Connecticut legislature recently rejected proposed voucher legislation for the third year in a row, and the Florida legislature adjourned without voting on a bill that would provide vouchers for use at both sectarian and nonsectarian private schools.

Part of the reason that voucher proposals have become widespread may be that vouchers appear deceptively tame in comparison to other proposed school legislation. For instance, another plank of the Christian Coalition's "Contract with the American Family" is the Parental Rights and Responsibilities Act. Despite its relatively innocuous title, this legislation would have detrimental effects. It would allow parents to challenge and restrict the teaching of secular subjects in public schools, as opposed to simply allowing parents to have their own children "opt-out" of instruction to which they object. The legislation also authorizes parents who believe the government is interfering with their children to unleash a flood of litigation in which the government would constantly need to prove that state actions are "essential to accomplish a compelling governmental interest" and are "the least restrictive means of accomplishing the compelling interest." In addition, the proposed Act would make it more difficult for the government to intervene when a parent's actions have endangered the health or welfare of a child. When compared to bills like the Parental Rights and Responsibilities Act, vouchers that give money to parents to secure private religious education, and may not encourage lawsuits, do not seem too objectionable.

Alternatively, voucher programs have been portrayed as the

21. Id.
22. Voucher Petition Fails in California, supra note 18.
“panacea” to the nation’s ailing public school systems. In either scenario, the facts are often interwoven with fiction.

Although vouchers contrast favorably with more extreme proposals, they create political controversy. Proponents of vouchers argue that these plans will improve education (especially for poor children), give parents more choice, more control, and promote religious values. Opponents contend that voucher plans harm public education because they take needed money away from public schools; disproportionately benefit wealthy students because vouchers cover only a fraction of the cost of private education; offer no real assistance to those students whose families have the least information and money; and raise the possibility of providing state funds to schools that may discriminate on the basis of factors like race, religion, disability, and/or socio-economic status. Voucher opponents also note that several studies indicate that voucher programs do not improve student achievement. Moreover, voucher programs infringe on private schools' autonomy by making them financially dependent on the government and by requiring schools to submit to government compliance reviews.

Legally, the voucher controversy centers around the First Amendment to the U.S. Constitution and parallel provisions in state constitutions. Broadly speaking, proponents argue that vouchers pass scrutiny under both federal and state constitutions while opponents contend that vouchers violate the separation of church and state mandated by the Establishment Clause of the First Amendment, as well as similar provisions in state constitutions.


26. Green, supra note 25, at 54.

27. Egle, supra note 17, at 472, 499-500. Some legal analysts have also examined voucher programs under the Equal Protection Clause of the Fourteenth Amendment. See, e.g., EDD DOERR ET AL., THE CASE AGAINST SCHOOL VOUCHERS 20 (1995); Egle, supra note 17, at 487-99.

Voucher opponents argue that, under the Supreme Court's rulings, the distinction between the state making a check out to parents who then select a school and the state sending the money directly to the school is a specious one. Currently, legal challenges to existing voucher plans are pending in state courts in Wisconsin and Ohio.

This Article argues that school voucher programs that include religious schools are unconstitutional. Part I contends that the U.S. Supreme Court precedents indicate that voucher programs are generally unconstitutional. Part II argues that the Milwaukee voucher plan violates both the Wisconsin and U.S. Constitutions. Similarly, Part III contends that the Cleveland voucher plan violates both the Ohio and U.S. Constitutions. Part IV asserts that state constitutions generally appear to prohibit school vouchers. As an example, this Part utilizes a case involving a Puerto Rico constitutional challenge against voucher programs. Finally, the Article concludes that, no matter how courts analyze these programs, voucher plans have the principal effect of unconstitutionally advancing religion.

I. VOUCHERS AND THE U.S. CONSTITUTION

This Part argues that voucher plans that provide unrestricted government aid to religious schools violate the Establishment Clause of the First Amendment as interpreted by the U.S. Supreme Court. This Part supports this conclusion by surveying the Supreme Court's cases that interpret the Establishment Clause.

As early as the 1940s, the federal courts have ruled that the Establishment Clause applies to the actions of state governments through the Fourteenth Amendment. When the Court has heard Establishment Clause challenges to state aid to religious schools, it generally has struck down such aid programs. However, the Court has upheld some programs that provide aid to religious schools when the subsidies are earmarked for non-sectarian uses such as the purchase of secular textbooks for all students.

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31. State ex rel. Thompson v. Jackson, 546 N.W.2d 140, 142 (Wis. 1996) (dismissing the original action brought before the Wisconsin Supreme Court and lifting the stay of proceedings in the trial court).
32. DOERR ET AL., supra note 27, at 18.
33. Green, supra note 25, at 43.
34. Id. at 49 n.59.
In earlier decisions on state funding of private school tuition, the Supreme Court prohibited tuition reimbursements and tax credits for private school tuition payments. In Committee for Public Education and Religious Liberty v. Nyquist and Sloan v. Lemon, the Court struck down educational programs in New York and Pennsylvania that allowed parents of private school students to recover a portion of their private educational expenses from the state. Parents of public school students were not qualified to take advantage of the New York and Pennsylvania programs. Writing for the Court in Nyquist, Justice Powell stated that "insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions." Programs that aid and advance religion run afoul of the Establishment Clause under the Court's ruling in Lemon v. Kurtzman.

The decisions in Nyquist and Sloan also rejected the notion that the Establishment Clause is not implicated where the state aids sectarian schools indirectly by channeling money through the parents of private school students rather than giving the money directly to the school. The Court held that neither the name given to the program nor the manner in which the funds were routed was dispositive. Instead, the substantive impact of the aid program determined its constitutionality.

In some of the Establishment Clause cases decided after Nyquist and Sloan, however, the Court moved away from some of the principles it had announced in the early 1970s. Using the Lemon test less strictly, the Court upheld some subsidy programs that provided for private choice in education. In Mueller v. All--
len, for example, the Court upheld a state income-tax deduction for educational expenses for the parents of all public and private school children in the state.\(^4\) Furthermore, in *Witters v. Washington Department of Services for the Blind*, the Court held that use of state-funded scholarships for the disabled to pay bible college tuition was constitutional.\(^5\)

While some observers have regarded *Mueller* and *Witters* as indications that voucher programs will pass constitutional muster,\(^6\) this interpretation of the cases is questionable.\(^7\) Although voucher plans are arguably analogous to the tax deduction upheld in *Mueller* because they both involve private choice by parents and may be available to the parents of children attending all types of schools, these two factors alone do not determine constitutionality. Rather, the *Mueller* Court considered many factors, including the availability of many deductions for all taxpayers not just those with school children.\(^8\) Writing for the majority, Justice Rehnquist "expressed ‘considerable doubt’ as to the constitutionality of ‘outright grants to low-income parents.’"\(^9\) Justice Rehnquist’s statement statement is an apt synopsis description of voucher plans that pay the voucher’s value to the parents of children attending private schools.

A careful reading of *Witters* appears to offer even less support for vouchers than *Mueller*. First and foremost, *Witters* dealt with college scholarships rather than primary or secondary education. The Supreme Court has consistently drawn a distinction between college and university level education and elementary and primary school education.\(^10\) College students tend to be less susceptible to religious indoctrination and have more academic freedom, even at

\(^{44}\) Green, supra note 25, at 60.
\(^{45}\) Id. at 63.
\(^{46}\) See, e.g., Egle, supra note 17, at 486 (suggesting that “a liberal interpretation of *Mueller*” might allow a voucher plan to withstand constitutional scrutiny); Kemerer & King, supra note 17, at 308 (suggesting that *Mueller* and *Witters* support the constitutionality of some school voucher plans).
\(^{47}\) Green, supra note 25, at 42.
\(^{48}\) Id. at 60 (construing Mueller v. Allen, 463 U.S. 388 (1983)).
\(^{49}\) Id. at 71 (quoting Mueller, 463 U.S. at 394, 396 n.6). See also Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 806-07 (1973) (Rehnquist, J., dissenting in part) (distinguishing between “tax deductions and exemptions” and “outright grants”).
\(^{50}\) Green, supra note 25, at 71 n.180 (citing Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 384 n.6 (1985); Roemer v. Board of Pub. Works, 426 U.S. 736, 750 (1976); Tilton v. Richardson, 403 U.S. 672, 686 (1971)). See also State ex rel. Wis. Health Facilities v. Lindner, 280 N.W.2d 773, 779 (Wis. 1979); Kemerer & King, supra note 17, at 308.
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religious colleges and universities. Conversely, primary and secondary students tend to be more “impressionable.” Furthermore, sectarian primary and secondary schools frequently “provide an integrated secular and religious education . . . [and] are often devoted to the inculcation of religious values.” Given these differences between elementary and secondary education and post-secondary education, courts will not likely view Witters as an exclusive basis of support for vouchers for primary and secondary school students. In addition, Witters limited its holding to the facts of the case which did not include a program bent towards religion.

The Supreme Court’s decision in Zobrest v. Catalina Foothills School District reinforced the proposition that Mueller and Witters do not offer much support for the constitutionality of voucher programs. In Zobrest, the Court held that state funding for a sign-language interpreter needed by a hearing-impaired student attending a sectarian high school was constitutional. However, relying on Mueller and Witters, Chief Justice Rehnquist’s opinion anchored its holding on several factors including the independent and private choice of schools, the lack of bias towards religion in the statute approving the funding (the federal Individuals with Disabilities Education Act), the purchase of a neutral service (i.e. translation), and the absence of any relationship between qualification for the aid and attendance at the school in question. In contrast, vouchers do not provide a neutral service and tend to be

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51. Roemer, 426 U.S. at 750, quoted in Green, supra note 25, at 71 n.180; Tilton, 403 U.S. at 686, quoted in Green, supra note 25, at 71 n.180.
53. Lindner, 280 N.W.2d at 779-80 (citing Meek v. Pittenger, 421 U.S. 349, 366 (1975)). See also Green, supra note 25, at 41, 46-49 (discussing the sectarian nature of private schools).
54. Green supra note 25, at 63-64 & n.143. Justice Marshall, writing for the majority, enumerated elements regarding the program in Witters that led the Court to conclude that the program was not skewed towards religion. Among these, the Court commented that the program was “truly broad-based” because the program’s availability was not contingent upon the “sectarian-non-sectarian, or public-non-public nature of the institution involved.” Id. at 63-64 (quoting Witters, 474 U.S. at 487). The Court further noted that the program did not “create a financial incentive” for the students to choose sectarian instead of secular schools. Id. at 64 (quoting Witters, 474 U.S. at 488). The Court instead opined that the funds that flowed to the schools did so only as a result of the students’ independent decision to participate in the program. Id.
heavily skewed towards religion. Given the decisions in Zobrest and its predecessors, it appears unlikely that the Supreme Court would conclude that a voucher plan that includes religious schools is constitutional.  

II. THE MILWAUKEE PARENTAL CHOICE PROGRAM

In 1990, Wisconsin enacted the first voucher plan in the nation that allowed students to use public money to pay for education at private schools. As originally enacted, the Milwaukee Parental Choice Program (MPCP) allowed any Milwaukee student in grades K through twelve to attend, at no cost to the student's family, "any nonsectarian private school" in the city, provided that:

(1) the family income does not exceed 175% of the poverty level;

(2) the pupil was enrolled in a public school in the city, was attending a private school under this program, or was not enrolled in school the previous year;

(3) the private school notifies the State Superintendent [of Education] of its intent to participate in the program . . .

(4) the private school complies with 42 U.S.C. § 2000d [prohibiting discrimination based on race, color, or national origin in programs receiving federal money]; and

(5) the private school meets all health and safety laws or codes that apply to public schools.

Pursuant to the program, participating private schools also had to "submit to financial and performance audits by the state." No private school could have more than forty-nine percent of its enrolled students receiving vouchers, and any school receiving more applications from participating students than it could accept had to choose from among those students randomly. Under the MPCP the state would send approximately $2500 in education funds (money which would otherwise go to the public schools) directly to private schools for each participating student they enrolled. Participation in the program was limited to one percent of

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57. DOERR ET AL., supra note 27, at 17.
58. Cf. Kemerer & King, supra note 17, at 311 (arguing that the legal future of school vouchers is questionable or at least unclear).
59. Egle, supra note 17, at 461.
60. Davis v. Grover, 480 N.W.2d 460, 463 (Wis. 1992).
61. Id.
62. Egle, supra note 17, at 470.
63. Davis, 480 N.W.2d at 463.
the students in Milwaukee. In this form, the MPCP survived a challenge brought under the state constitution.

The exclusion of sectarian schools in the original MPCP prevented an Establishment Clause challenge, but the program spawned a federal lawsuit in which the plaintiffs charged that the exclusion of religious schools violated their rights under the Free Exercise Clause of the First Amendment. The district court granted summary judgment for the state. While the plaintiffs' appeal was pending, the Wisconsin legislature amended the MPCP to allow sectarian schools to participate in the program. Furthermore, the amendment made tuition checks payable to the parent, although still directing those checks to the private school and requiring the parent to endorse the check over to that school. These changes to the MPCP gave rise to the legal challenges currently pending in the Wisconsin state courts.

A. The Constitutionality of the Original MPCP

The Wisconsin Supreme Court ruled that its state constitution did not prohibit the use of state-funded vouchers for nonsectarian private schools. As discussed above, the original MPCP included only nonsectarian private schools. When a group of Milwaukee parents sued to force the State Superintendent of Public Instruction to implement the MPCP, several organizations intervened to challenge the constitutionality of the program. Opponents of the MPCP argued that the program violated Article IV, Section 18 of the state constitution governing the passage of local and/or private legislation, Article X, Section 3 of the state constit-

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64. Id. at 464.
65. Id. at 477. Two voucher schools closed in 1996 amid allegations of financial improprieties, and two other voucher schools are experiencing significant financial difficulties. Barbara Miner, Problems Escalate at Voucher Schools, RETHINKING SCH., Summer 1996, at 9.
67. Id.
68. Plaintiffs' Complaint at 5-7, Jackson v. Benson, No. 95CV1982 (Wis. Cir. Ct. Dane County, filed August 1, 1995). The changes to the payment scheme were apparently intended to make the plan less susceptible to constitutional challenge, but, as is discussed infra notes 107-08 and accompanying text, these changes do little, if anything, to make the plan more constitutional. 69. Id. at 2-3. Conversely, as a result of the statutory changes to the MPCP, the United States Court of Appeals for the Seventh Circuit vacated the lower court decision in Miller v. Benson and remanded the case with instructions to dismiss it as moot. Miller, 68 F.3d 163 (7th Cir. 1995).
70. Davis v. Grover, 480 N.W.2d 460, 460 (Wis. 1992).
71. Article IV, Section 18 reads as follows:
The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be
tution mandating the creation of "uniform school districts,"72 and an implied constitutional doctrine allowing public funds to be expended only for public purposes.73

The majority of the court ruled against the MPCP's opponents on all three grounds. First, the court found that the MPCP constituted neither local nor private legislation, and thus, it was not subject to the procedural restrictions of Article IV, Section 18.74 The court next ruled that even if the schools did receive state funds, private schools participating in the MPCP program did not qualify as district schools and therefore fell outside the scope of Article X, Section 3 of the Wisconsin Constitution.75 On the question of public purpose, the court stated that the only dispute among the parties was whether or not the MPCP imposed sufficient government oversight on the participating private schools. The court ruled that the supervision required by the MPCP was sufficient to satisfy the public purpose doctrine implicit in the Wisconsin Constitution.76 Because the MPCP survived all three of the opponents' challenges, the majority declared the program constitutional.77

One justice filed a concurring opinion, the theme of which was "[l]et's give choice a chance!"78 Three justices filed dissenting opinions. The first dissenter argued that the MPCP violated both

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72. Article X, Section 3 reads as follows:
The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours.

74. Id. at 467-73.
75. Id. at 473-74.
76. Id. at 474-77.
77. Id. at 462-63.
78. Id. at 477, 478 (Ceci, J., concurring). Although Justice Ceci's short concurrence does briefly touch on the constitutional roles of the legislature and the judiciary, much of the opinion is devoted to lauding the legislature's attempt to alter "the sacred cow of status quo." Id.
Article IV, Section 18 and Article X, Section 3. The second dissenter argued that the MPCP violated Article X. However, the second dissenter suggested that no determination could be made regarding Article IV, Section 18 because the court never announced a coherent test for judging the constitutionality of a statute under that provision. The final dissenter argued that the MPCP violated Article IV, Section 18.

None of the opinions addressed the constitutionality of including sectarian private schools in the MPCP because the program did not allow such schools to participate. However, in 1995 Wisconsin amended the MPCP to allow sectarian-private schools to participate (perhaps in response to the lawsuit in *Miller v. Benson*). Two groups of plaintiffs promptly filed suits challenging the constitutionality of the amended MPCP under both state and federal constitutional provisions requiring the separation of church and state. After the two cases were consolidated, Wisconsin's governor petitioned the Wisconsin Supreme Court for leave to bring an original action in the Wisconsin Supreme Court. In the Wisconsin Supreme Court, the justices split evenly, while one justice did not participate. Three justices found that the amended MPCP violated the state constitution, and three justices asserted that the MPCP did not violate any constitutional provision. Consequently, the Wisconsin Supreme Court dismissed the original action and lifted the stay of proceedings in the trial court.

**B. Analysis of the Amended MPCP Under the Wisconsin Constitution**

Given the existing case law, it seems that the trial court should find the MPCP amendments unconstitutional. The provision of the state constitution on separation of church and state appears to provide grounds for the court to strike down the amended MPCP without reaching the federal constitutional question. Article I, Section 18 of the Wisconsin Constitution states in part “nor

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79. *Id.* at 478-81 (Heffernan, C.J., dissenting).
80. *Id.* at 481-85 (Abrahamson, J., dissenting).
81. *Id.* at 485-90 (Bablitch, J., dissenting).
83. *Id.* at 2-3; Plaintiffs' Complaint at 1-2, *Milwaukee Teachers' Educ. Assoc. v. Benson*, No. 95 CV1997 (Wis. Cir. Ct. Dane County, filed Aug. 1, 1995). The Milwaukee Teachers' Association complaint also challenged the amended MPCP under Article IV, Section 18 and the public purpose doctrine. *Id.*
84. State ex rel. Thompson v. Jackson, 546 N.W.2d 140, 142 (Wis. 1996).
85. *Id.*
shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." According to the Wisconsin Supreme Court, the phrase "religious societies" refers to all religious organizations, and the word "seminaries" simply means schools. Consequently, for purposes of Article I, Section 18, a private school which provides religious instruction and is operated by a religious group is a "religious seminary." This would seem to furnish a basis for the constitutional infirmity of the MPCP.

The overwhelming majority of private schools in the United States are religious schools, and the private schools in Milwaukee are no exception. Of the 107 private schools operating in Milwaukee during the 1994-1995 academic year, seventy-nine percent were religious. These religious schools enrolled ninety-one percent of the roughly 22,000 students attending private schools in Milwaukee during the 1994-1995 academic year. Prior to the final enactment of the amended MPCP, 102 private schools had notified the Wisconsin Superintendent of Public Instruction that they wished to participate in the new program, and at least sixty-nine percent of these schools included are sectarian. The vast majority of schools participating in the amended MPCP would therefore be "religious seminaries," and the vast majority of participating students would likely be attending those seminaries. For these reasons, Article I, Section 18 applies to the amended MPCP. Because the primary effect of using state money to pay tuition at these schools is the advancement of religion, the amended MPCP should violate the Wisconsin Constitution. The Wisconsin Constitution states that the purchase of services from a religious institution for a public purpose is constitutional provided that there is no establishment of religion. An establishment of religion occurs under

86. Wis. Const. art. I, § 18.
88. Id.
90. Plaintiffs' Complaint at 7, Jackson v. Benson, No. 95CV1982, (Wis. Cir. Ct. Dane County, filed Aug. 1, 1995). Of the 57 schools that have applied to participate in the MPCP for the 1996-97 school year, 84% are religious. See Miner, supra note 38. See generally Kemerer & King, supra note 17, at 308 (noting that, nationally, "85% of private schools are religiously affiliated.").
Article I, Section 18 when the act in question has the primary effect of advancing religion. The "primary effects" test asserts that state funds "have[e] the primary effect of advancing religion when [they] flow[] to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." The Wisconsin Supreme Court has noted that private primary and secondary schools are generally not just religious but are also "pervasively sectarian." The court has also stated that "the very purpose of many [private] elementary and secondary schools is to provide an integrated secular and religious education. The schools often devote themselves to the inculcation of religious values." Clearly, most, if not all, of such schools' religious missions subsume their functions. Any state education funds flowing to these schools therefore have the primary effect of unconstitutionally advancing religion.

The Wisconsin Supreme Court has twice held that religious missions do not subsume certain functions at religious schools. However, both of those cases are distinguishable from the MPCP. In *State ex rel. Warren v. Nusbaum,* the court examined a statute enabling the state to purchase dental education from Marquette University, a Catholic institution. The court held that the provision of dental education did not involve religious instruction. Here, however, the voucher program infuses money directly into schools that teach religion as a principle part of their curriculum. *Nusbaum* is also distinguishable from the MPCP because it involved university-level education. As noted earlier, the courts have consistently drawn a line between primary and secondary education and post-secondary education, and the courts have treated the two types of education differently in terms of constitu-

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94. *Id.* at 659.
95. *State ex rel. Warren v. Nusbaum*, 219 N.W.2d 577, 583 (Wis. 1974). Although the court described the primary effect test in the context of the federal constitution here, its discussion of Article I, Section 18 implies that the same test applies to both constitutions. *Id.* at 585; *see also*, *State ex rel.* Wis. Health Facilities Auth. v. Lindner, 280 N.W.2d 773, 783 (Wis. 1979). 96. *Lindner*, 280 N.W.2d at 779 (citing *Meek* v. Pittenger 421 U.S. 349 (1975); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); *Levitt* v. Committee for Pub. Educ., 413 U.S. 472 (1973)). 97. *Lindner*, 280 N.W.2d at 779-80 (citing *Meek*, 421 U.S. at 366 (1975)). *See also* *Green*, *supra* note 25, at 41 n.16 (describing most religious schools as having curricula that include "religious indoctrination, worship, and general instruction from a religiously centered perspective"). 98. 198 N.W.2d 650, 652 (Wis. 1972). 99. *Id.* at 659-60.
In a separate case also entitled *State ex rel. Warren v. Nusbaum*, the court ruled that public funds could aid religious schools' special education programs for handicapped children because such education did not involve religion. In the second *Nusbaum*, the court focused on the "character" of special education by asserting that "a professional educator of mentally retarded children is not involved in the inculcation of religious tenets." The same, however, cannot be said of the general education provided by the MPCP. The circumstances under which the Wisconsin Supreme Court has concluded that programs at parochial schools are not religious in nature is entirely distinct from the MPCP program. Therefore, the court should conclude that the primary effect of the MPCP is to advance religion in violation of the Wisconsin Constitution.

C. Analysis of the Amended MPCP Under the U.S. Constitution

If the court considers the federal constitutional question, the court should strike down the amended MPCP, as it unconstitutionally advances religion. As previously described in *Nyquist* and *Sloan*, the Supreme Court held that programs designed to reimburse parents for private school tuition were unconstitutional because such programs advanced religion. In Wisconsin, MPCP vouchers that enable parents to send their children to religious schools would have the same "purpose and inevitable effect" of advancing religion in the same way the reimbursements and credits in *Nyquist* and *Sloan* did. Because the MPCP would financially promote the religious missions maintained by most private schools, the MPCP fails the second prong of the *Lemon* test.

As the state sends the MPCP checks to the private schools and only requires parents to endorse the checks over to the schools, the voucher's financial benefit flows directly from the state to the private schools. The pretense of making the check out to the parent does not render the aid to the private schools indirect. The U.S. Supreme Court has asserted that it is concerned with the

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100. See *supra* notes 50-52 and accompanying text regarding the distinction between college education, and that at a primary or secondary level.
101. 219 N.W.2d 577 (Wis. 1974).
102. *Id.* at 584-85.
103. *Id.* at 584.
104. See *supra* notes 90-92 and accompanying text for a discussion of the type of schools involved with the MPCP.
105. See *supra* notes 35-40 and accompanying text for a discussion of *Nyquist* and *Sloan*.
106. *Nyquist*, 413 U.S. at 793.
substantive impact of a private school aid programs.\textsuperscript{107} Even if the courts determine that the aid to the schools is only indirect, the MPCM still remains unconstitutional because "[t]he economic effect of direct and indirect assistance often is indistinguishable"\textsuperscript{108} and because "[a]id may have [the] effect [of a direct subsidy] even though it takes the form of aid to students or parents."\textsuperscript{109} A determination that aid is indirect does not end the constitutional inquiry.\textsuperscript{110}

Moreover, the decision in \textit{Mueller} is also unlikely to change the outcome of the \textit{Lemon} analysis as it applies to the MPCM. Although the MPCM is available to all parents with school-aged children, unlike the programs in \textit{Nyquist} and \textit{Sloan}, the MPCM is still distinguishable from the program in \textit{Mueller}. One fact that significantly influenced the Court's decision in \textit{Mueller} was that the tax deduction at issue was one of many tax deductions available to all citizens of the state.\textsuperscript{111} The MPCM, on the other hand, is only available to financially qualified Milwaukee parents who have school children. No comparable benefit exists for those who do not have children in school.\textsuperscript{112} In addition, the Court questioned the constitutionality of tuition grants to low-income families.\textsuperscript{113} The Court would have to stretch significantly its holding in \textit{Mueller}, therefore, to prevent the MPCM from failing the second and third prongs of the \textit{Lemon} test.\textsuperscript{114}

The Court's decision in \textit{Witters} is also unlikely to furnish support for the MPCM's constitutionality. \textit{Witters} dealt exclusively with a college scholarship created for non-religious purposes, was limited to its facts, and featured only a single individual seeking to use state funds to pay for a religious education. The scholarship in

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\item \textsuperscript{107} Green, \textit{supra} note 25, at 59 nn.\textsuperscript{115-16} (citing \textit{Sloan}, 413 U.S. at 832; \textit{Nyquist}, 413 U.S. at 783, 786).
\item \textsuperscript{108} Grove City College v. Bell, 465 U.S. 555, 565 (1984) (citing \textit{Mueller} v. \textit{Allen}, 463 U.S. 388, 396 n.6 (1983)).
\item \textsuperscript{109} \textit{Witters} v. Washington Dept. of Serv. for the Blind, 474 U.S. 481, 487 (1986).
\item \textsuperscript{110} \textit{Mueller}, 463 U.S. at 399; \textit{Nyquist} 413 U.S. at 780-81; \textit{Sloan}, 413 U.S. at 831-32.
\item \textsuperscript{111} Green, \textit{supra} note 25, at 60-61 (construing \textit{Mueller} v. \textit{Allen}, 463 U.S. 388 (1983)).
\item \textsuperscript{112} Technically the MPCM applies to any "city of the first class." Davis v. Grover, 480 N.W.2d 460, 469 (Wis. 1992). However, as of 1992, Madison was the only city in Wisconsin other than Milwaukee that had a large enough population to qualify as a "first class" city. \textit{See id.} Even if other cities have since grown in size, clearly not all parts of the state qualify as cities of the first class.
\item \textsuperscript{113} Green, \textit{supra} note 25, at 71 (quoting \textit{Mueller}, 463 U.S. at 394, 396 n.6).
\item \textsuperscript{114} \textit{See} Egle, \textit{supra} note 17, at 485-86.
\end{itemize}
Witters also existed before anyone sought to use it for religious education. Because the amended MPCP was designed for elementary and secondary education, was created primarily, if not exclusively, for the purpose of advancing religious education, and was designed to impact more than one person seeking to use public money to purchase a religious education, this program is distinguishable from Witters, and should fail the Lemon test.

The commentators' suggestion that the Court no longer strictly enforces the Lemon test does not enhance MPCP's chance of surviving constitutional scrutiny. The Court still appears concerned with the divisiveness that might result from a program that aids religious institutions. Programs like the MPCP could lead to the division of society along religious lines, and the battle over access to the program's sizable benefits could engender a great deal of political divisiveness.

Additionally, it is unlikely that either of the two frameworks that the justices have developed to clarify or replace the Lemon test would allow the MPCP to pass constitutional muster. Justice O'Connor has developed a framework in which an Establishment Clause violation occurs when government endorses or disapproves of religion. When using this analysis, the Court has often found violations of the Establishment Clause in elementary and secondary school settings. In Grand Rapids School District v. Ball, for example, Justice O'Connor found an establishment of religion where the state paid a parochial school teacher. Because the use of MPCP voucher money to pay tuition at private religious schools would be analogous to, if not the same as, the state paying parochial school teachers, the MPCP should be an unconstitutional endorsement of religion under Justice O'Connor's endorsement test.

115. See supra notes 50-54 and accompanying text for a discussion of Witters.
116. See supra note 46-47 and accompanying text for a discussion regarding the strict enforcement of the Lemon test.
117. See DOERR ET AL., supra note 27, at 19.
118. Id. at 479-82.
119. Id. at 486.
120. 473 U.S. 373 (1985).
121. Id.; Egle, supra note 17, at 486.
122. See id. Justice Kennedy developed the second framework used to analyze Establishment Clause cases. This framework, known as the "coercion" analysis, is also unlikely to provide a basis for the MPCP's constitutionality. Justice Kennedy's framework consists of two principles: "government may not coerce anyone to support or participate in a religion . . . [and] government may not give direct benefits to religion in such a degree that establishes a de facto state religion. Id. at 482. Justice Kennedy's framework has largely been
III. THE OHIO VOUCHER PLAN

Cleveland's voucher program has also run a preliminary course in the Ohio courts. An Ohio trial court recently reviewed Cleveland's voucher plan enacted in June 1995 by the Ohio legislature, and an appeal is expected soon.\textsuperscript{123} The Ohio plan permits 1500 Cleveland students in kindergarten through third-grade to receive state funds whether they attend private, sectarian or non-sectarian schools.\textsuperscript{124} But for the voucher plan, the funds given to these students would normally be directed to the Cleveland public schools.\textsuperscript{125} Once in the program, a student would remain eligible for voucher assistance through the eighth grade.\textsuperscript{6} The state pays ninety percent of a participating student's tuition up to $2250 if the student's family has an income not greater than twice the federal poverty index. For all other participating students, the state pays seventy-five percent of tuition up to $2250.\textsuperscript{7} The checks are payable to the parents of the participating students, and like the

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\item[125.] \textit{Id.} Scott Stephens & Desiree F. Hicks, \textit{Educators, Others Sue Over School Vouchers}, CLEV. PLAIN DEALER, Jan. 11, 1996, at 1B.
\item[126.] Gatton, 1996 WL 466499, at *2; Stephens & Hicks, \textit{supra} note 125.
\item[127.] Stephens & Hicks, \textit{supra} note 125; Memorandum from the National Committee for Public Education and Religious Liberty (PE&RL) to PE&RL Organizational Members (March 25, 1996) (on file with author). \textit{But see} Plaintiffs Complaint at 4, Simmons-Harris v. Goff, No. 96CVH-01-721 (Ohio Ct. C.P. Franklin County, filed July 31, 1996) (describing the vouchers as having a maximum value of $2500).
\end{enumerate}
\end{footnotesize}
MPCP, the state would mail the checks to the schools directly.\textsuperscript{128} For private schools to participate in the program, the schools must meet certain state requirements including prohibiting discrimination based on race, religion, or ethnicity.\textsuperscript{129} The requirements also prohibit the teaching of hatred based on race, ethnicity, national origin, or religion.\textsuperscript{130} Furthermore, the plan does not limit how participating private schools may use the voucher funds (other than those inherently imposed by the requirements described above).\textsuperscript{131} Although the legislation creating the Cleveland plan allows scholarships to pay tuition at participating public schools in neighboring school districts, none of these schools have elected to take part in the program.\textsuperscript{132}

\textbf{A. Analysis of the Cleveland Voucher Plan Under the Ohio Constitution}

The Ohio Constitution appears to provide grounds for striking down the Cleveland voucher plan. In this regard, two provisions of the Ohio Constitution are relevant to this case: specifically, Article I, Section 7, which deals with religious liberty and separation of church and state;\textsuperscript{133} and Article VI, Section 2, which provides for funding for public schools and denies religious sects control over state school funds.\textsuperscript{134}

\begin{itemize}
\item \textsuperscript{128} \textit{Gatton}, 1996 WL 466499, at *13. This payment scheme, like the one included in the amended MPCP, should have no effect on the constitutionality of the voucher plan. See \textit{infra} note 169 and accompanying text.
\item \textsuperscript{129} \textit{Gatton}, 1996 WL 466499, at *2.
\item \textsuperscript{130} \textit{Id}.
\item \textsuperscript{131} \textit{Complaint for Declaratory and Injunctive Relief at 8, Simmons-Harris v. Goff, No. 96CVH-01-721 (Ohio Ct. C.P. Franklin County, filed July 31, 1996).}
\item \textsuperscript{132} \textit{Gatton}, 1996 WL 466499, at *12.
\item \textsuperscript{133} Article I, Section 7 reads as follows: All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship and to encourage schools and the means of instruction.
\textsuperscript{134} \textit{OHIO CONST.} art I, \S 7.
\item \textsuperscript{134} Article VI, Section 2 reads as follows:
As interpreted by the Ohio courts, Article VI, Section 2 likely prohibits school voucher programs. In interpreting this constitutional provision, the Ohio state courts have not clearly defined the scope and meaning of the phrase “control of” which appears in the text of the Article. Judging the constitutionality of a state statute that provided busing for all school children in the state, including those attending private religious schools, the court of common pleas held that the state legislature and the boards of education retained control over the money used for the busing without defining the “constitutional and legal sense” of “control.”

After reviewing a state statute that provided aid and school material to private schools, the Ohio Supreme Court ruled that the private schools did not have control of any state school funds, but, again, the court never clearly explained the application and meaning of the term “control.”

It remains unclear how these precedents apply to school voucher programs because in both of the above cases the government directed the money to the public school boards which then procured the “neutral” services from which the private schools received some benefit. However, the decision in Protestants and Other Americans United for Separation of Church and State v. Essex suggests that the Cleveland voucher plan is unconstitutional. Essex pointed out that the items and services provided to private schools under the challenged statute were not for use in the schools' religious missions. Rather, the public school districts used the funding to supply personnel who provided religiously neutral services for students with special needs. Essex specifically noted that the State Board of Education had the power to reject any request that might be used to impermissibly promote religion. The court argued that “[d]irect money subsid[ies]” to religious schools would not be constitutional.

The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but, no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.

137. Id. at 605; Honohan, 244 N.E.2d at 544-45.
138. 275 N.E.2d 603 (Ohio 1971).
139. Id. at 605.
140. Id. at 605, 608.
141. Id. at 606.
142. Id. (construing Walz v. Tax Comm’n, 397 U.S. 664, 675 (1970)). Although the court held that providing an indirect benefit to religious schools
The Cleveland voucher plan is distinguishable from the statute in Essex because it does not restrict its support to religiously neutral matters. Because no restrictions exist regarding the uses to which the private sectarian schools can allocate the money, the schools could use the voucher money to promote and support religious activity and education. In addition, the Cleveland voucher plan provides the kind of direct subsidies that the Essex court stated would be unconstitutional. Additionally, the Cleveland voucher plan on its face falls outside the scope of the court's holding allowing certain aid to religious schools that confer only an "indirect benefit from general programs" and that do not give "exclusive rights to, or control of" state education funds to the religious schools. Accordingly, the plan runs afoul of Article VI, Section 2 of Ohio's Constitution.

Assuming, arguendo, that the courts decide that Article VI, Section 2 does not render the Cleveland voucher plan unconstitutional, Article I, Section 7 appears to provide grounds for finding the voucher plan unconstitutional. The Ohio Supreme Court has interpreted this Section of the constitution to mean that a municipality cannot raise funds or spend tax money to support or maintain a sectarian school. The money that the Cleveland vouchers would provide to private sectarian schools amounts to public education funds that the government would normally allocate to Cleveland's public schools. Because the program does not impose any limits on the use of the money, the schools are free to apply

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144. Although the voucher checks are made payable to the parents of the participating students, the checks are sent to the schools, the parents must endorse the checks to the schools, and the money is deposited into the schools' accounts. Gatton v. Goff, Nos. 96CVH-01-193, 96CVH-01-721, 1996 WL 466499, at *3 (Ohio Ct. C.P. July 31, 1996). As the Court of Common Pleas has stated, courts must look at the substance rather than the form of the programs designed to aid religious education. Moore v. Board of Educ., 212 N.E.2d 833, 843 (Ohio Ct. C.P. 1965). Given the facts above, the substance of the aid in the Cleveland voucher plan flows to the private schools. However, even if the aid were ruled indirect, that would not insulate the program from constitutional challenge.
147. See supra notes 127-30 and accompanying text for a discussion of the funding of the Cleveland voucher program.
the public funds to support and maintain their religious missions.

The resulting arrangement would be analogous to the one that the court of common pleas struck down in Moore v. Board of Education. In Moore, a parent challenged a public school district's plan under which the public school teachers taught religious instruction to the public school children during the children's release times. Although the court noted that public school teachers have the right to teach religious education outside of the public school setting, the court held that, in the view of "impressionable children," the teaching of religion in the immediate vicinity of the school, by the same people who the state paid to teach secular subjects, eroded the separation of church and state. The Cleveland voucher plan, in precisely the same manner as Moore, enables the state to funnel money to private sectarian schools to pay for the education of "impressionable children." Despite the pretext of moving to an adjacent building, these children received religious instruction from the same teachers who provided secular instruction. For the same reasons, the Cleveland voucher plan should be found unconstitutional.

It should be noted that the Cleveland voucher program is distinguishable from another statute which the Ohio courts found constitutional under Article I, Section 7. In Honohan v. Holt, the court of common pleas upheld a program that used state money to pay for busing for all students in the state. The court held that "indirect benefits" received by religious schools as a result of busing their students did not constitute "support" of a 'place of worship' within the meaning of Article I, Section 7. Any benefits conferred by busing in Honohan were indirect because, according to the U.S. Supreme Court, transportation is a general welfare benefit analogous to police protection or sewer service. Furthermore, the school board, and not the religious schools themselves, organized and procured the transportation. The school

149. Id. at 835. Three of the district's four elementary schools had only Catholic students despite a distribution of non-Catholic students throughout the district. Id.
150. Id. at 843.
151. See Complaint for Declaratory and Injunctive Relief at Attachment B, Simmons Harris v. Goff, No. 96CVH-01-0721 (Ohio Ct. C.P. Franklin County July 31, 1996) (reproducing publications, produced by private sectarian schools approved to participate in the program, which boast of incorporating religious teachings into all instruction).
board was also the entity responsible for spending the state funds.\textsuperscript{155}

The tuition payments under the Cleveland voucher plan do not constitute a "general benefit" to the public, thus distinguishing the Cleveland voucher plan from the busing plan reviewed in \textit{Honohan}. The court in \textit{Honohan} determined that because the busing plan benefited the students rather than the students' schools, the plan did not violate the Establishment Clause.\textsuperscript{156} In reaching this conclusion, the Court relied on \textit{Everson} and explained that a government could provide "general welfare benefits" directed towards everyone without violating constitutional mandates against state establishment of religion.\textsuperscript{157} By paying or contributing to the tuition of private religious schools, the voucher program benefits the parents who wish to send their children to those schools; the principal effect of the voucher program under these circumstances is government support of religious schools. The distinction between public support of parochial schools and general welfare support is manifest.

Conversely, the Cleveland voucher program involves a direct benefit in the form of payments to cover tuition charges. Neither the U.S. Supreme Court nor the Ohio courts have ruled that payments of money, even if nominally channeled through a third party, constitute a general service comparable to transportation or police protection. Thus, the holding in \textit{Honohan} regarding indirect benefits does not apply to the Cleveland voucher program.

\textbf{B. Analysis of the Cleveland Voucher Plan Under the U.S. Constitution}

The Cleveland voucher plan also appears to violate the U.S. Constitution for the same reasons that the MPCP violates the U.S. Constitution. Similar to the MPCP vouchers, the Cleveland voucher program enables parents to send their children to religious schools and thereby advances religion in the same manner as the reimbursements and credits did in \textit{Nyquist} and \textit{Sloan}. In both \textit{Nyquist} and \textit{Sloan}, the U.S. Supreme Court declared that such advancement violates the second prong of the \textit{Lemon} test.\textsuperscript{158} Con-

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\item \textsuperscript{155} Id. at 544.
\item \textsuperscript{156} Id. at 545.
\item \textsuperscript{157} Id.
\item \textsuperscript{158} Brief for \textit{Amici Curiae} Am. Humanist Assoc. et al., at 2-8, Gatton v. Goff, Nos. 96CVH-01-0193, 96CVH-01-0721, 1996 WL 466499 (Ohio Ct. C.P. July 31, 1996). Of the 54 schools approved to participate in the Cleveland program by March 1996, 81% were sectarian. Memorandum from The National Comm. for Pub. Educ. & Religious Liberty (PE&RL) to PE&RL Organizational Members (March 25, 1996) (on file with author). As of June 13, 1996,
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sequently, the Cleveland plan fails the second prong of the *Lemon* test because the substantive impact of the indirect flow of the money would be the unconstitutional advancement of religion.\(^{159}\)

The Cleveland voucher plan is also distinguishable from the program in *Mueller*. Like the MPCP vouchers, and unlike the tax deduction program in *Mueller*, the Cleveland voucher plan is not available to all citizens in the state.\(^{160}\) Ohio citizens living outside of Cleveland and Cleveland residents without children cannot receive the type of comparable benefit that provided the basis for the Supreme Court to uphold the tax deduction in *Mueller*.\(^{161}\) Here, too, the Court would need to stretch significantly its holding in *Mueller* to prevent the voucher plan from failing the second and third prongs of the *Lemon* test.\(^{162}\) In addition, *Witters* does not support the Cleveland plan because the Cleveland plan applies to primary and secondary education, while the plan discussed in *Witters* applied to college education. Furthermore, the Cleveland voucher plan is skewed towards religion in sharp contrast to the program in *Witters* which was directed at the secular study of dentistry.\(^{163}\)

**C. Why the Trial Court Erred in Gatton v. Goff**

1. **Application of the Primary Effects Prong of the Lemon Test**

The court erred when it interpreted and applied the primary effects prong of the *Lemon* test. *Gatton* correctly identified the majority of participating schools as sectarian and correctly concluded that the main constitutional question was "whether the scholarship program provides those schools with aid in a manner

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159. See *supra* notes 35-40 and accompanying text for a discussion of the *Nyquist* and *Sloan* decisions.

160. The statute creating the voucher plan, passed in June 1995, technically called for the state to implement the plan in a single school district that, as of March 1995, was under a federal court order mandating state management of the district. Cleveland's was the only school district that qualified under the statute. *Gatton*, 1996 WL 466499, at *1.


which is constitutionally impermissible."\textsuperscript{164} However, the court misread the U.S. Supreme Court’s decisions addressing the question of whether school-aid to sectarian schools is constitutionally permissible.

The court asserted that "the Nyquist Court repeatedly emphasized the distinction between direct and indirect aid to private sectarian schools"\textsuperscript{165} and implied that Nyquist banned only direct aid. However, the court offered no citations to support its contention that this direct/indirect distinction was made "repeatedly." Furthermore, the court completely ignored the Nyquist Court’s statement that “the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered.”\textsuperscript{166} Despite Gatton, Nyquist stands for the proposition that the degree of circuitousness of the aid stream plays a limited role in the constitutional analysis of voucher programs rather than for the proposition that the degree of circuitousness in the allocation of funds is conclusive.

Gatton also misread Nyquist when it stated that “[t]he Nyquist Court explicitly declined to apply its decision” to a program that made public funds available to students at both public and private schools.\textsuperscript{167} It appears from this skewed interpretation that the Supreme Court distinguished between programs that included public schools from those that excluded public schools. However, the Supreme Court actually stated that it “need not decide” whether the inclusion of public schools made any difference to the constitutional analysis.\textsuperscript{168} Nyquist never stated that a program including public schools is immune from constitutional challenge.

The Cleveland court’s departure from School District of the City of Grand Rapids v. Ball furnishes another example of Gatton’s misreading of the Supreme Court’s “direct aid” cases. The court understood Ball to support its muddled interpretation that the pivotal issue is whether or not the aid flows directly to the school. In Ball, the Supreme Court discussed programs that gave public aid to religious schools in different forms. The Court concluded that “these differences in form were insufficient to save programs whose effect was indistinguishable from that of a direct subsidy to the religious school.”\textsuperscript{169} Thus, the concern in Ball was

\textsuperscript{164} Gatton, 1996 WL 466499, at *9.  
\textsuperscript{165} Id.  
\textsuperscript{166} Nyquist, 413 U.S. at 781.  
\textsuperscript{167} Gatton, 1996 WL 466499, at *9.  
the aid's effect rather than the manner in which the aid reached the schools.

The Gatton court's summation of the "direct aid" cases underscores the court's confusion. In opining that the controlling factor in the "direct aid" cases was that the state subsidized the religious school's secular functions thereby leaving the school with more money for their sectarian functions, Gatton wrongfully concluded that aid flowing directly to religious schools would not be objectionable. This result, which the court itself earlier noted was the source of objection in Nyquist, demonstrates that the Gatton court attempted to shape the analysis to conform to the court's predisposed conclusion.

The court's reading of the "indirect aid" cases also appears misguided. The court relies primarily on Mueller v. Allen. While the court was correct in asserting that the Supreme Court distinguished the plan in Mueller from the plan in Nyquist, Gatton ignored the most important factor in the Supreme Court's distinction—a program that benefits public and private schools must benefit the entire citizenry, not just parents of school children. The court's description of the class of citizens who can take advantage of the program puts a different gloss on the statement that "a program which 'neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.'"

As in its interpretation of Nyquist, Gatton attributes inflated importance to the parental choice factor in construing Mueller. The court claims that Mueller stands for the proposition that channeling aid through parents "can insulate a program from a challenge on Establishment Clause grounds." While the Supreme Court noted that sending aid to the schools via the parents "reduced the Establishment Clause objections" to the program, it did not hold that such tactics vitiated Establishment Clause concerns altogether. In fact, Mueller quoted with approval the Court's statement in Nyquist that aid funneled through parents is

171. Id. at *9 (noting that the Nyquist Court objected to the fact that the program at issue did not restrict the aid to secular functions).
172. Gatton, 1996 WL 466499, at *11 (quoting Mueller, 463 U.S. at 398-99). It is also worth noting that the Supreme Court did not say that the program in Mueller was the kind that the Court had reserved judgment on in Nyquist. The Court actually said that the Mueller program was "similar" to the program that the Court did not rule on in Nyquist. Mueller, 463 U.S. at 398.
only one of the numerous factors to be considered.\textsuperscript{175}

\textit{Gatton} continued to misread Supreme Court precedent by making three interpretive mistakes when it considered the impact of \textit{Witters v. Washington Department of Services for the Blind}. Although the court noted that the Supreme Court considered it important that the Washington program was not skewed \textit{in its operation} towards religion,\textsuperscript{176} the court failed to notice the larger significance of the point. Determining whether or not a program is skewed in practice requires statistical examination on data regarding the program uses. This requirement undermines \textit{Gatton}'s contention that \textit{Mueller} intimates that statistical data need not be used to examine a facially neutral statute and suggests that \textit{Mueller} simply involved a refusal by the Supreme Court to examine the contested program as applied. Second, \textit{Gatton} failed to consider the premise that aid to university level education can be distinguished from aid to secondary education. Finally, the court failed to observe that \textit{Witters} sought to limit its holding to its facts.\textsuperscript{177} As a result of these misinterpretations, \textit{Gatton} misapplied the relevant Supreme Court decisions on school aid cases.

In its discussion regarding the lack of public school participation, the \textit{Gatton} court failed to examine its constitutional impact. Instead, the court simply pronounced the program constitutional because, after a cursory review of how the program was applied, the court found the voucher program was facially neutral.\textsuperscript{178} This conclusion directly conflicts with \textit{Witters}. The precendental value of \textit{Witters} gleaned by \textit{Gatton} was the mistaken notion that channeling aid to parents prevents any Establishment Clause challenge. As discussed above, both \textit{Mueller} and \textit{Nyquist} demonstrate that the channeling of funds is only one of numerous considerations.\textsuperscript{179} If the court had taken other considerations into account, it should have found the Cleveland voucher program unconstitutional because the vouchers have the effect of directly subsidizing religious institutions, independent of whether such funds aid either the religious or secular programs of those schools.\textsuperscript{180}

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\item[175.] \textit{Id.}.
\item[176.] \textit{Gatton}, 1996 WL 466499, at *12.
\item[177.] See supra note 54 and accompanying text for a discussion regarding the \textit{Witters} decision.
\item[178.] \textit{Id.} at *14-15.
\item[179.] See supra note 56 and accompanying text for a list of factors to be considered when reviewing the constitutionality of funding that ultimately reaches sectarian schools.
\item[180.] \textit{Witters v. Washington Dept. of Serv. for the Blind}, 474 U.S. 481, 487 (1986) (stating that aid may have the effect of a direct subsidy to a religious institution even though it is nominally aid to parents or students).
\end{enumerate}
\end{footnotesize}
Gatton's conclusion regarding the primary effects prong of the Lemon test is convoluted. The court claims that the program does not "pose any of the dangers the Supreme Court was concerned with" in its Establishment Clause cases because the program does not reimburse parents for tuition payments to the religious schools nor does it subsidize the religious functions of the schools.\textsuperscript{181} The Supreme Court made it clear in Nyquist that there is no constitutional difference between a tuition reimbursement and a tuition grant.\textsuperscript{182} Here, the Cleveland plan subsidizes more than just secular functions because the plan subsidies according to its terms are not restricted to nonsectarian functions. Thus, Cleveland voucher money can be used to subsidize religious activities directly. This program falls within the danger zones that ultimately concerned the Supreme Court including "sponsorship, financial support, and active involvement of the sovereign in religious activity."\textsuperscript{183} Gatton, therefore, erred in its assessment of the second prong of the Lemon test.


The court also erred by refusing to test the Cleveland voucher plan against the entanglement prong of the Lemon test. The court's statement that the parties did not argue that the voucher program would create unconstitutional entanglement between church and state is inexplicable.\textsuperscript{184} The complaint filed by Dorris Simmons-Harris et al. clearly states:

Under the Scholarship Program, public funds will be used to support and maintain religious education, worship, and other religious activities. This use of public funds has the primary effect of advancing religion and fosters excessive entanglement between government and religion, in violation of the Establishment Clause of the First Amendment to the United States Constitution.\textsuperscript{185}

Because at least one set of plaintiffs specifically alleged unconstitutional entanglement in their complaint, the court was obligated to apply the third prong of the Lemon test to the facts of this case.\textsuperscript{186} If the court examined the Cleveland voucher plan for en-

\textsuperscript{181} Gatton, 1996 WL 466499, at *15.
\textsuperscript{182} Nyquist, 413 U.S. at 786-87.
\textsuperscript{183} Id. at 772 (quoting Walz v. Tax Comm'n., 397 U.S. 664, 668 (1970)).
\textsuperscript{184} Gatton, 1996 WL 466499, at *10 n.5.
\textsuperscript{185} Complaint for Declaratory and Injunctive Relief at 9, Simmons-Harris v. Goff, No. 96CVH-01-0721 (Ohio Ct. C.P. July 31, 1996) (emphasis added).
\textsuperscript{186} As for the court's concern about the continued validity of the entanglement portion of the Lemon test, see Witters v. Washington Dept. of Serv. for the Blind, 474 U.S. 481, 485 (1986) (stating that "We are guided . . . by the three-part test set out by this Court in Lemon") (emphasis added).
tanglement problems, it should have concluded that the program fosters excessive and impermissible entanglement of church and state.

The statute establishing the Cleveland voucher program states that to be eligible for participation in the program a school, must "not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion."

88 Given that some of the schools that have been certified for the program teach that their religion offers the only path to Heaven, their adherents are "the chosen people," and/or adherents of other religions are infidels, a serious possibility exists that the schools are teaching a form of intolerance. Accordingly, the voucher program's own requirements force the state to monitor closely the schools' policies and practices. Therefore, "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed." "These prophylactic contacts will involve excessive and enduring entanglement between state and church." It is manifest, therefore, that the Cleveland voucher plan violates the entanglement prong of the Lemon test.

3. Failure to Review The Voucher Program According To Ohio Constitutional Mandates

Gatton also went astray when it reviewed the state constitutional issues. The court found that "the state and federal protections in this area [separation of church and state] are coextensive." Having held that the voucher plan complied with the First Amendment, the court granted summary judgment for the defendants on plaintiffs' state constitutional claims. Assuming that the court did rule correctly on the federal constitutional issues, the court still erred by applying the state law precedents more broadly than was appropriate.

The court cited South Ridge Baptist Church v. Industrial Commission for the proposition that "Ohio courts... have recognized that the rights protected by Art. I, Section 7 of the Ohio Constitution are no more extensive than those protected by the First Amendment to the United States Constitution." South

190. Id.
Ridge Baptist Church, as the citation indicates, is a federal court case. In considering a challenge brought under both the state and the federal constitutions, the federal court attempted to determine how the Ohio courts interpret their state constitution. The federal court concluded that "[t]he Ohio courts have given no indication" that they would apply Article I, Section 7 in such a way as to provide more protection than the First Amendment. Nowhere, however did the federal court state that the Ohio courts had determined that the Ohio and U.S. Constitutions offered exactly the same measure of protection. Rather, the federal court — appropriately wary of extending state law — contended that the Ohio courts had not given enough guidance for a court of another jurisdiction to apply the principles of Article I, Section 7 in a particular way in a particular case.

In fact, the Ohio cases cited by Gatton do not establish that the separation of church and state provisions in the U.S. and Ohio constitutions are always coextensive. Gatton is correct in stating that the court in Honohan v. Holt disagreed with the assertion "that the Ohio constitutional provisions are 'more restrictive' than the provision of the First Amendment." Before Honohan, however, made the above-quoted assertion, the court agreed that Ohio courts need not follow the U.S. Supreme Court's interpretation of the U.S. Constitution to interpret the Ohio Constitution. Immediately following the above-quoted statement, the court interpreted Article I, Section 7 of the Ohio Constitution, and then it analyzed the statute at issue under that Section. Subsequently, the court interpreted and applied independently the provisions of the Ohio Constitution.

If Honohan believed that the rights protected by the Ohio Constitution were co-extensive with those protected by First Amendment, no reason existed to interpret and apply independently the provisions of the Ohio Constitution. Alternatively, the court could have asserted that the Ohio provisions provide the same protection as their federal counterparts and that the First Amendment discussion adequately addressed the question as to why the statute at issue did not violate the Ohio Constitution. The Honohan court's separate analysis strongly suggests that although the Ohio Constitution was perhaps no more restrictive than the U.S. Constitution when applied to the facts in that case, the Ohio

194. South Ridge Baptist Church, 676 F. Supp. at 808 (emphasis added).
196. Honohan, 244 N.E.2d at 543-44.
197. Id. at 544-46.
Constitution offered protection independent of the U.S. Constitution. This view is supported by the court's statement that "we are in agreement with the rationalization followed by the United States Supreme Court in *Everson* and in *Allen* as applied to the Ohio 'Bus Law' and that applying such reasoning to the Ohio constitutional provisions" produced the conclusion that the law in question did not violate the Ohio Constitution.198

The other Ohio case cited by the court is *Protestants and Other Americans United for Separation of Church and State v. Essex*. In *Essex*, the Ohio Supreme Court rejected the plaintiffs' state constitutional claim without extensive analysis.199 Contrary to *Gatton*'s suggestion, *Essex* does not imply that the state constitutional provision does not have meaning of its own. The Ohio Supreme Court made no reference to its discussion of the First Amendment issues in its discussion of the state constitution. It simply asserted that the facts conflicted with the wording of Article VI, Section 2 of the Ohio Constitution. It is, therefore, a daring legal leap to assert *Essex* furnishes the basis for the proposition that the Ohio Constitution never offers more protection than the First Amendment.

Rather than acknowledging that the state and federal constitutions protect coextensive rights, the cases cited by the court indicate that Ohio courts have previously examined the facts of each case under the Ohio Constitution200 by considering whether the rationales of U.S. Supreme Court decisions on the First Amendment apply to the case at hand. Consequently, *Gatton* should have considered whether it was sensible, in context, to apply the reasoning from federal decisions and whether the rulings of Ohio courts suggest a different approach. As discussed above,201 the decisions of the Ohio courts in cases like *Honohan* and *Essex* indicate that the Cleveland voucher plan violates the Ohio Constitution's guarantee of the separation of church and state. Consequently, the court should have struck down the Cleveland voucher program on state constitutional grounds, even if it did erroneously conclude that the program complied with the First Amendment to the U.S. Constitution.

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198. *Id.* at 545-46.
201. *See supra* notes 133-57 and accompanying text (Section A of Part III) for a discussion of *Honohan* and *Essex*. 
IV. VOUCHERS AND STATE CONSTITUTIONS

As is evident by the Wisconsin and Cleveland cases, vouchers appear likely to conflict with state constitutions in addition to the U.S. Constitution. Every state and the Commonwealth of Puerto Rico has constitutional provisions protecting religious freedom and liberty. These state constitutional provisions are typically stricter than the First Amendment. The constitutions of twenty-four states and Puerto Rico also contain explicit prohibitions against spending public funds on sectarian education.

These state constitutional provisions provide the basis for three prominent challenges to voucher legislation in the last three years. The first challenge arose in Puerto Rico after legislation passed in 1993 created a voucher program that included both sectarian and nonsectarian private schools. The legislation provided each participating student in second to twelfth grade with a $1500 voucher for each school year. The voucher could be used at any public or private school that chose to accept the student except for students transferring from one private school to another. Furthermore, no private school could have more than half of its students participating in the voucher plan. To qualify, a student's family income could not exceed $18,000.

Participating students who wished to attend private schools received certificates from the

203. Id.
204. The three challenges that will be discussed in this Article occurred in Puerto Rico, Wisconsin, and Ohio. State courts in Massachusetts, New Hampshire, Vermont, and Washington have also considered school voucher programs. In Massachusetts, New Hampshire, and Washington the plans were found unconstitutional. The Vermont court found the plan constitutional under the federal constitution, which it considered stronger on the issue of establishment of religion than the Vermont Constitution. Kemerer & King, supra note 17, at 309. However, the Vermont case is easily distinguishable from the voucher context. The court emphasized the fact that the defendant town did not maintain a high school of its own, and distinguished this situation from one in which a school district maintains its own schools and still pays for its students to attend private schools (i.e. a voucher situation). Campbell v. Manchester Bd. of Sch. Dirs., 641 A.2d 352, 359 (Vt. 1994). This case is also distinguishable from the voucher situation in that the court stated that there had been no showing that the program at issue here would result in any significant number of children attending religious schools or that the program created any monetary incentive for children to attend religious schools. Id. at 359-60. The same cannot be said of voucher programs. In addition, the court, acknowledging that it had an extremely limited factual record, restricted its holding to the facts of this particular case. Id. at 361. The court even acknowledged that the case might well be "atypical." Id. at 359. Consequently, even if one accepts the reasoning of Campbell, it has no real precedential value for the voucher context.
205. Rohter, supra note 28.
government. The students then had to turn the certificate over to the private school which submitted the certificate to the government for reimbursement. The program required participating private schools to comply with school health and safety laws, submit at least two reports per year on the performance of its students in the program, and admit students without discriminating on any of a variety of bases.

Asociacion de Maestros de Puerto Rico, a teachers' organization, brought suit in Puerto Rico alleging that part of the Special Scholarship and Free Selection of Schools Law, as the voucher program was formally known, violated both the federal and commonwealth constitutions. The Puerto Rico Superior Court ruled that the portion of the voucher program that provided money for students to attend private schools violated the Puerto Rico Constitution. The use of public funds to pay for teaching at and maintenance of private schools violated Article II, Section 5 of the Puerto Rico Constitution, which prohibits the expenditure of public money to support schools other than those of the Commonwealth of Puerto Rico. However, the court's opinion did not examine either the issue of separation of church and state under the Puerto Rico Constitution or the federal constitutional questions.

The defendants appealed to the Puerto Rico Supreme Court which affirmed the Superior Court decision. The opinion of the court relied heavily on Article II, Section 5 of the Puerto Rico Constitution which states, in part, that "no public property or public funds shall be used for the support of schools or educational institutions other than those of the state. Nothing contained in this provision shall prevent the state from furnishing any child non-educational services established by law for the protection or welfare of children." The court noted that the word "support" is not qualified in the constitutional text and concluded from the legislative history of this provision that the "Support Clause" should be

207. Id. at *13 (de Rodon, J., concurring). Participating schools were forbidden from discriminating on the basis of "race, sex, color, origin or social condition, physical disability, political ideas or religious beliefs." Id.
208. Id. at *2.
210. P.R. CONST. art. II, § 5, quoted in Asociacion de Maestros de P.R. v. Torres, Nos. AC-94-371, AC-94-326, 1994 WL 780744, at *7 (P.R. Nov. 30, 1994). The opinion of the court also dealt with issues of standing, as did the separate opinions. The discussions of standing will be ignored here because they are irrelevant to the primary focus of this Article.
interpreted broadly. However, the "Services Clause" was meant to be construed narrowly, according to the court's reading of the clause's history. The court concluded that the Services Clause was meant only to allow the Commonwealth to furnish private school students the same non-educational services it provides to public school students—(i.e. transportation). Taken together, the court argued that these two provisions "[do] not allow State support of any private educational institution, religious or otherwise."

The court found that the challenged section of the voucher program violated the constitutional prohibition against support of private schools because, by directly paying private schools for educating students, it "[gave] private schools a substantial aid, which in fact directly contributes to advancing their educative purpose." The court rejected the defendants' argument that the vouchers benefited the students rather than the private schools. The court reasoned that students are the key to a private school's continued existence; thus, the money which enables poor students to continue attending a private school supports that school. The program also supported private schools by providing economic incentives that encouraged students to attend those schools. Finally, the court distinguished the vouchers being challenged, which were for students who transferred from public to private schools, from the unchallenged vouchers, which were for students who transferred from private to public schools or from one public school to another. The first type of voucher constituted an expenditure by the government, while the latter two types simply constituted "internal administrative measures" that provided a lower magnitude of benefits to students.

Two judges filed concurring opinions, and two judges filed dissenting opinions. Although still declaring the voucher program unconstitutional, one of the concurring opinions argued that Article II, Section 5 could only be understood in the context of the separation of church and state despite the majority's assertion to the contrary. The concurring opinion further asserted that Section 5 does not simply prevent public spending on sectarian schools.

211. Asociacion de Maestros de P.R., 1994 WL 780744, at *7.
212. Id. at *8.
213. Id. at *7-8.
214. Id. at *8.
215. Id. at *9. Since the program aided the schools' educational mission, the court concluded that the program was not permitted under the Services Clause. Id. at *11.
216. Id. at *10.
217. Id. at *11.
only for the sake of preventing such spending. Rather, the clause is tightly linked to the general provision on the separation of church and state, and the drafters specifically designed it to maintain a division between church and state, preserve freedom of religion, and prevent an establishment of religion.\textsuperscript{218} The second concurring opinion found that the voucher program violated not only the prohibition on aid to private schools, but also Puerto Rico's constitutional mandate for the establishment and development of a public school system.\textsuperscript{219}

The first dissent charged the majority and the concurring opinions with judging the wisdom rather than the legality of the voucher plan.\textsuperscript{220} This opinion asserted that the guarantee in Article II, Section 5, of an education to every person implied the right to choose any school.\textsuperscript{221} The opinion later challenged the majority's interpretation of the Support Clause by arguing that the history of the provision indicated that it was meant to allow scholarships to students and that such scholarships benefit students rather than private schools.\textsuperscript{222} Finally, this dissent analyzed the voucher program under the First Amendment to the U.S. Constitution. After applying the \textit{Lemon} test to the program, the dissent concluded that the program was constitutional.\textsuperscript{223}

The second dissenting opinion also accused the majority of usurping the legislative function of the commonwealth.\textsuperscript{224} Nonetheless, this opinion argued for the voucher program on policy grounds by asserting that the court should have sought to reach an outcome that would “address the different social, political and economic problems that often affect” the commonwealth.\textsuperscript{225} The second dissent contended that rather than erecting “a ‘wall of separation’ between Church and State,” the government only needs to be neutral between religious groups.\textsuperscript{226} Because the voucher program treated all schools alike, whether public, private sectarian or private nonsectarian, the opinion concluded that the voucher plan did not violate any constitutional provision regarding

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\textsuperscript{218} Id. at *12-20 (de Rodon, J., concurring).
\textsuperscript{219} Id. at *21 (Berlingeri, J., concurring).
\textsuperscript{220} Id. at *23-24 (Garcia, J., dissenting). This accusation is somewhat hypocritical because Justice Garcia based part of his opinion on the proposition that validating the voucher plan would promote equality and help eliminate elitism in education. \textit{Id.} The opinion also ends with the invocation “HOW COSTLY FOR THE CHILDREN OF POVERTY!” \textit{Id.} at *36.
\textsuperscript{221} Id. at *23-24.
\textsuperscript{222} Id. at *29-30.
\textsuperscript{223} Id. at *33-35.
\textsuperscript{224} Id. at *37 (Lopez, J., dissenting).
\textsuperscript{225} Id. at *38, *46.
\textsuperscript{226} Id. at *44.
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the establishment of religion and, therefore, passed the Lemon test. Finally, the second dissent argued that the Support Clause does not prohibit the use of vouchers for private education, especially where the voucher is applied to private, nonsectarian education.

CONCLUSION

Analysis of the Wisconsin, Ohio, and Puerto Rico voucher plans strongly suggest that voucher plans run into constitutional difficulties on multiple levels. Almost half the states in the Union have constitutional prohibitions against giving state funds to private or religious schools. State courts should rule, as Puerto Rico’s did, that these provisions bar all aid to private schools. Even if courts rule, as the Wisconsin Supreme Court did, that some aid to private schools is constitutional, voucher plans run into trouble on other grounds. Because courts generally concern themselves with the substantive effect of aid to religious schools, they should find that voucher programs violate state and federal separation of church and state provisions. Private schools are overwhelmingly religious, and religious schools almost universally weave religion into all of their educational activities. Consequently, any money given to such schools has the primary effect of advancing religion. This violates the separation of church and state provisions in both state constitutions and the U.S. Constitution, as well as state prohibitions against aiding sectarian education.

Even if courts follow the superficial money trail they should find voucher programs unconstitutional. Recent voucher plans have nominally funneled subsidies to parents, but both the U.S. Supreme Court and state courts have held that direct grants to parents for religious school tuition violate the separation of church and state. The inescapable conclusion is that no matter how they are analyzed, voucher plans violate both state and federal constitutional guarantees of separation of church and state.

227. Id. at *45-46.
228. Id. at *46-48.