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**A legal analysis of issues related to educational vouchers and
public funds for private elementary and secondary schools**

McConnell, Charles Candler, Jr., Ed.D.

The University of North Carolina at Greensboro, 1990

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A LEGAL ANALYSIS OF ISSUES RELATED TO EDUCATIONAL
VOUCHERS AND PUBLIC FUNDS FOR PRIVATE
ELEMENTARY AND SECONDARY SCHOOLS

by

Charles C. McConnell, Jr.

A Dissertation Submitted to
the Faculty of the Graduate School at
The University of North Carolina at Greensboro
in Partial Fulfillment
of the Requirements for the Degree
Doctor of Education

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Approved by


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APPROVAL PAGE

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For over 340 years public financial support for religious and secondary schools has been ever present in American political and religious life. Public tax monies, tax credits, and other types of public fund assistance for non-public schools was part of the American settlers' European religious heritage. However, educational vouchers, as such, were never part of either European religious heritage or early American history.

The purpose of this study was to describe the extent to which a public funded voucher legislative enactment could be challenged and litigated and the constitutional reasons for litigation. Predicated upon Supreme Court tax credit and other school finance decisions, espècially the 1983 Mueller decision as an analogy, this study developed a framework spelling out constitutional elements, i.e., voucher legislative properties versus constitutionality of voucher legislation -- that must be resolved before a voucher legislative enactment would satisfy constitutional muster.

Based upon an analysis of the data the following conclusions were presented:

(1) There appears to be a more permissive attitude on behalf of the Supreme Court toward public funding of religious

elementary and secondary schools.

(2) The Supreme Court's Mueller decision makes possible increased public funding for private sectarian schools.

(3) As the result of Mueller, many states have and/or are attempting voucher and/or tuition tax credit legislation.

(4) As the result of Mueller, competition between the "private" and "public" sector has received greater attention.

(5) As the result of Mueller, for any voucher and/or tax credit legislative enactment to pass constitutional muster, satisfying the tri-part test, a statute must contain the adjective "all" as in all parents with children in schools.

(6) Even though in Mueller, the Court raised the issue of the tri-part test in resolving constitutional issues, the tri-part test is still the constitutional standard against which to measure all legislative enactments, seeking to publicly fund religious elementary and secondary schools.

(7) As the result of Mueller, the use of qualitative data in singling out a special class of American citizens for public funding is in question.

(8) As the result of Mueller, and the emergence of pro-choice environment in America there is likely to be a major impact on American public education.

(9) The lack of consistency of Mueller with previous Supreme Court decisions, i.e. Lemon I, and III, Nyquist, Levitt, Regan, Sloan, Grand Rapids, and other decisions suggests that Mueller is the landmark decision addressing a new constitutional standard.

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CHAPTER I
INTRODUCTION

1.0 Overview

For over 340 years public financial support for religious elementary and secondary schools has been ever present in American political and religious life. Public tax monies, tax credits, and other types of public fund assistance for non-public schools was part of American settlers' European religious heritage. However, educational vouchers, as such, were never part of either European religious heritage or early American history.¹

The Establishment Clause of the United States Constitution has been part of American history of education. Justice Hugo Black wrote his interpretation of this clause in 1947 in the Everson case when he stated:

Neither a state nor the Federal Government can pass laws which aid one religion, aid all religions, or prefer one religion over another...No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion...In the words of Jefferson, the clause against establishment of religion was intended to erect a "wall of separation between Church and State."²

¹ Harry G. Good and James D. Teller, A History of American Education, (New York, The Macmillan Company, 1973), p. 37.

² Everson v. Board of Education, 330 U.S. 1 (1947).

R. Freeman Butts gave a synopsis of the Establishment Clause issue in his article entitled "A History and Civics Lesson For All of Us."³ He wrote that in the 1780's an establishment of religion was a "multiple establishment" whereby public aid could go to several churches, and that this is what the majority of framers, particularly Madison, intended to prohibit in the First Amendment.⁴

Butts went on to note that neither Madison nor the majority of framers intended for government to disdain religion. They intended that republican government guarantee equal rights of conscience to all persons, but it took some 150 years before Madison's views were applied specifically to the states through the Fourteenth Amendment.⁵ This major issue, focusing on the Establishment Clause is central to a voucher or voucher related legal system for education.

In the late 1950's voucher advocates began appearing on the American scene. George R. La Noue listed several of these advocates in his book Educational Vouchers: Concepts and Controversies. Among those most prominent in the voucher movement La Noue listed the following:

(1) Milton Freidman, whose pro-voucher essay on the role of government in education represented a traditional

³R. Freeman Butts, "A History and Civics Lesson for All of Us," Educational Leadership, May 1987, p. 21-24.

⁴Ibid., p. 21.

⁵Ibid., p. 22.

Republican philosophy of the marketplace; (2) Christopher Jencks, whose 1970 report from Harvard analyzed several kinds of vouchers and supported a carefully regulated voucher system; (3) John E. Coons, William H. Cluse, III, and Stephen D. Sugarman, authors of Private Wealth and Public Education.⁶

La Noue stated that most observers believed that the only way left to provide substantial aid to private schools was through vouchers.⁷ He noted that the entanglement between state and church schools and mentioned that tax credits for private schooling would have the same functional consequences as a voucher.⁸

Vouchers and tax credits spoken of by La Noue in 1972 were two of the major elements of the Ronald Reagan administration's social platform. "We care about you and your children. We believe the days of federal experts making decisions in your name are over." With these words, President Reagan's undersecretary of the U.S. Department of Education launched what his department said was its campaign for educational vouchers.⁹

⁶George R. La Noue, Editor, Educational Vouchers: Concepts and Controversies (New York: Teachers College Press, 1972), p. V-VI.

⁷Ibid., p. VII.

⁸Ibid., p. VII.

⁹Ann C. Lewis, "Ed's Pro Choice Plan: If at First You Don't Succeed," Phi Delta Kappan (January, 1986), Volume 67, Number 5, p. 311.

Will parents of public school children in the 1990's have the choice of using vouchers to provide their children with an education?

Judith Areen and Christopher Jencks state that a voucher system seeks to free schools from the restrictions which inevitably accompany their present monopolistic privileges. The idea of the voucher system is relatively simple. A publicly accountable agency would issue a voucher to parents based on the cost of educating those parents' children. The parent could take this voucher to any school which agreed to abide by the rules of the voucher system. Each school would turn its vouchers in for cash to the state, federal, or local agency responsible for redeeming vouchers. "Thus parents would not longer be forced to send their children to the school around the corner simply because it is around the corner."¹⁰

William Snider stated that choice was an idea based on the American system--and it may, some people say, provide an effective grassroots means for making reform a reality.¹¹ Snider also reported that Former Secretary of Education William Bennett believed choice is among a cluster of ideas

¹⁰George R. La Noue, Editor, Educational Vouchers: Concepts and Controversies (New York: Teachers College Press, 1972), p. 51.

¹¹William Snider, "The Call for Choice: Competition in the Educational Marketplace," Education Week--A Special Report (June 24, 1987), p. C-1.

that fit together well-ideas like accountability and school level autonomy. "The idea has won," Bennett contended. "There will be people who will balk at extending choice to private schools; there will be people who object to other parts of it, but the general principle has won."¹² The word "balk," as used by Secretary Bennett, is a key to the study undertaken in this document because there have been many legal roadblocks along the way to choice/vouchers in American education.

The court cases which apply directly and indirectly to vouchers and tuition tax credits provides mixed signals concerning their constitutionality. In July, 1985, in Aguilar v. Felton the Supreme Court ruled that federal funds financing educational programs in New York City religious elementary schools were unconstitutional.¹³ Soon thereafter, in November of 1987, former Secretary of Education William Bennett announced a proposal called "The Equity and Choice Act" which would provide education vouchers to parents of Chapter I children. Thus, each eligible child could be entitled to a voucher for a sum estimated at approximately \$600 to be expended at the school of the child's choice--either public

¹²Ibid., p. 2.

¹³Aguilar v. Felton, 105 S. Ct. 3232 (1985).

or nonpublic schools.¹⁴ Although the Reagan administration's proposal has not been implemented, there has not been any major statement that the issue is dead. Former President Reagan had the President's Committee on Privatization which recommended that the federal government adopt policies giving parents more latitude in choosing schools for their children. The recommendation effectively backed a voucher system for federal education programs by urging Congress to "adopt policies to increase parental choice at elementary and secondary levels."¹⁵

1.1 Purpose Of The Study

This study draws upon historical attempts to project the potential legality of using tax funds to finance a voucher system under which students could seek a school of choice within either public and/or private educational sectors including religious elementary and secondary schools. The study describes the extent to which a public funded voucher legislative enactment could be challenged and litigated and the constitutional reasons for litigation. Predicated upon Supreme Court tax credit and other school finance decisions,

¹⁴ Ann C. Lewis, "Ed's Pro Choice Plan: If at First you Don't Succeed," Phi Delta Kappan (January, 1986), Volume 67, Number 5, p. 311.

¹⁵ Julie Ann Miller, "Reagan Panel Avoids Private--School Issue in Choice Plan," Education Week (January 20, 1988), Volume VII, Number 17, p. 15.

this study develops a scenario spelling out constitutional elements, i.e., voucher legislative properties versus constitutionality of voucher legislation.

One major outcome of this study is the development of practical, legal guidelines for educational decision makers to have at their disposal if publicly funded vouchers become a reality for children with schools of choice within either the public or private sector. Listed below are the key questions which the writer has answered in establishing the guidelines.

1. What are the major legal issues regarding publicly funded vouchers for elementary and secondary school students?
2. What are the issues and factors likely to be included in a challenge to the Supreme Court involving public funds for use in a voucher system?
3. Which of the legal principles established by the landmark Supreme Court judicial decisions with language which can be related to public funded vouchers for elementary and secondary school students are applicable to state legislative enactments?
4. What specific trends can be determined from analysis of judicial decisions related to voucher issues?

1.2 Limitations of the Study

This study is limited to Supreme Court school finance decisions related to tax credits and tuition grants. Related Supreme Court school finance decisions, Cochran, Everson, and other cases are reviewed in order not only to develop the chronology of events but also to explain emerging Supreme Court constitutional logic related to public funds supporting legislative enactments assisting religious elementary and secondary schools. The study is limited to analysis of state legislative enactments providing tax credit and tuition grants to private schools. Also, proposed legislation, both federal and state, is reviewed.

Due to recent developments involving Federal and State initiatives relative to vouchers, tuition tax credits, and choice plans, it will be necessary to establish a cutoff date for the information used in this study or else a constant updating will be necessary. Therefore, the date of May 31, 1989, will be the cutoff date for information.

1.3 Definition of Terms

For the purpose of this study the following terms are defined.

1. Public Funding - Funds raised by taxes from the American public--either federal or state.
2. Public Schools - Schools established by the State, county, or city and maintained by public tax dollars.

3. Religious School - A school which in total or in part sponsors and teaches a particular religious theology or point of view to those attending.
4. Secular - Pertaining to this world and this life, earthly, and not religious in nature.
5. Tuition Tax Credit - Credit allowed as a deduction from taxes to be paid to a government agency for expenses incurred in the education of a child attending tuition charging schools.
6. Voucher - A paper that bears witness, as payment made, as in a checkbook. An educational voucher bears witness to a sum of money designated for a child's education to be redeemed at a school qualified to receive vouchers. It can be a certificate authorizing payments. For purposes of this study a voucher would have to be issued to parents by a public agency and parents could take the voucher to any school which agreed to abide by the rules of the voucher system.

1.4 Significance of the Study

Single religious establishments existed in nine of the early colonies, but by 1789 when the First Congress drafted the First Amendment, religious diversity had become such a powerful political force that seven states, which included the vast majority of Americans, had either disestablished

their churches or had never established any. Only six state constitutions still permitted an establishment of religion, and all six provided tax funds for several churches, not just one.¹⁶ These six states had their establishment of aid to their churches stopped when James Madison and other legislators passed the First Amendment.¹⁷

In the years since the passage of the Establishment Clause, many legal battles have ensued and the American people are still debating its exact meaning. Just how does it relate to public tax dollars for use in private, church supported schools?

In 1983 the Gallop Poll of the Public's Attitudes toward the Public Schools found that 51 per cent of the general public favored a voucher plan and that American blacks favored a voucher plan by 65 per cent to 23 per cent. Overall support for vouchers had increased significantly since the 1971 Gallup Poll when 38 per cent of the general public favored vouchers and 44 per cent opposed them.¹⁸

As an alternative to present funding plans, vouchers are based for the most part on desires of parents to exercise more control over the schooling of their children. Ellen Hoffman

¹⁶R. Freeman Butts, "A History Lesson for All of Us," Educational Leadership, May, 1987, p. 22.

¹⁷Ibid.

¹⁸George Gallup, "Majority Supports School Vouchers," Minneapolis Tribune (September 18, 1983), p. 23.

stated that there was a feeling on the part of some parents and politicians that state educational systems have become uncontrollable and unresponsive to changing needs.¹⁹ "Over the years, we'd established an educational bureaucracy which was inaccessible to parents," said Lanie Kawamura, Deputy Director of the Minnesota State Planning Office and an aide to Governor Rudy Perpich. "The major consumers of education couldn't get their concerns heard."²⁰

Parents' concerns that they lack control of their children's education have been demonstrated dramatically by the religious right. The National Center for Educational Statistics reported that while the number of children in Catholic Schools decreased since 1965 by approximately two million, enrollment in other church-related private schools (primarily those supported by Christian fundamentalists) more than doubled from approximately 280,000 to more than 580,000 from 1978-79 to 1980-81.²¹ Coinciding with the increase in enrollment in church related schools are some developments on the national scene favoring more parental choice.

Research done by the National Education Association in August, 1987, showed that 13 states have either introduced or

¹⁹Ellen Hoffman, "Educational Choice-Debate Has Shifted From Washington to the State Capitals," National Journal (October 19, 1985), p. 23.

²⁰Ibid.

²¹Ibid.

passed legislation on tax credits for school expenses or vouchers for American public elementary and secondary schools.²² More recent actions by the states have increased this number. Chapter three covers the more recent statistics. The end result of this sentiment is a multi-faceted, shifting political scene that includes conservative religious forces fighting for "no strings attached" tax support of private schools and parents who want more control over their children's education but continue to support the public school system.

Legal confrontations will likely result if the Bush administration or succeeding administrations, responding to the conservative views, pursue the voucher plan. At present there is some action to proceed at the national level, particularly with Choice plans. If and when the times comes, the battlefield will be on the constitutionality of the use of tax dollars to support private church-related schools. Several key court cases may provide a better understanding of future legislation's chances of passing constitutional muster.

One fear of the voucher system among public school educators is that it will destroy the entire educational system as it is known today. Public school boards can envision the vast array of problems associated with student

²²Research on Legislation Related to Vouchers or Tax Credits, National Education Association, Division of Research, Summer, 1987.

transfers, transportation problems, closing some schools, overcrowding in others, and moving teachers from school to school.

This study is significant for school board member and school administrators in that it provides a comprehensive analysis of the legal aspects of potential public funded voucher legislation applicable to religious elementary and secondary schools. The study offers historical perspective and legal guidelines predicated upon an analysis of federal and state legislation and Supreme Court decisions--i.e., tax credits and tuition fees--regarding constitutionality of voucher legislation.

1.5 Methods, Procedures, and Sources of Information

The basic research technique of this historical study involved examination and analysis of available references concerning the legal aspects of public tax funds being used to finance parochial schools especially related to a voucher concept. In order to determine if a need existed for such research, a search was made of important topics. Journal articles related to the topic were located through use of such sources as Reader's Guide to Periodical Literature, Education Index, and the Index to Legal Periodicals.

Federal and state court cases related to the topic were located through the use of the Corpus Juris Secundum, American Jurisprudence, the American Digest System, and the National

Reporter System. All Supreme Court cases related to school finance were found in the Supreme Court Reporter and/or U.S. Reporter and are placed in categories corresponding to the issues noted from the general literature review.

The study develops the early history of school funding as it applies to church-state relations. It also addresses recent efforts to use public tax dollars to benefit private schools as well as study of twentieth century leaders in the pro-voucher movement. Opposing views were also studied. In addition the study focuses on four major developments related to the increased interest in vouchers--(1) Vermont's experiences, (2) the Alum Rock Experiment, (3) the Coleman II Report, and (4) the Minnesota Tuition Tax law. A careful look at former President Ronald Reagan's administration's views on voucher and tax credits is also included in the study.

Fifteen Supreme Court cases which speak to issues related to the voucher concept are studied in Chapter Two. In Chapter Three current legislation on vouchers and/or tuition tax credits are analyzed. Included in Chapter three are federal government legal staff analyses of the various proposals by the Reagan administration. After careful analysis of the above material, the study narrows to a comprehensive look at key Supreme Court cases which are most important to the conclusions which are drawn from the study.

In Chapter Four seven key Supreme Court cases are studied and divided into six major areas for study. They are (1)

statistics which reveal the numbers of teachers and students benefitting from aid to sectarian schools; (2) public vs. private schools; (3) political divisiveness; (4) entanglement; (5) indirect benefits to sectarian schools; and (6) constitutional considerations. Major conclusions and recommendations for further study came from analysis of these seven key cases.

Table I provides a chart showing six major headings and the court cases from which they are covered.

Table I

	Lemon/ Kurtzman	Sloan/ Lemon	Nyquist	Levitt	Regan	Mueller	G. Rapids/ Ball
Numbers Affected By State Laws	X	X	X	X	X	X	X
Public v. Private Schools	X	X	X				
Political Divisiveness	X		X			X	X
Excessive Entanglement	X		X		X	X	
Indirect Benefits	X		X		X	X	
Other Constitutional Considerations	X	X	X	X	X	X	

1.6 Coverage and Organization of Issues Involved

The remainder of the study is divided into four major parts. Chapter two contains a review of literature related to the history of vouchers and other tax related court cases in public schools. Included will be a summary of present practices, proposed legislation, and some philosophical basis for the voucher system.

Chapter three is a short chapter dealing with current legislative enactments at the state level as well as the recent efforts at the federal level to introduce legislation on vouchers.

Chapter four contains a narrative of major legal issues relating to vouchers and tax credits. Further, Chapter four presents cases which relate to the voucher issues which lay groundwork for the most recent legislation. Chapter four also contains a review and analysis of major cases which influence current thinking on the legal ramifications of educational vouchers and tax credits.

Chapter five contains a summary of the findings obtained from review of the literature and from analysis of selected court cases. The questions asked in the introductory part of the study are reviewed and answered in this concluding chapter.

Conclusions will be drawn as to the factors which would

be included in a challenge to the Supreme Court involving use of public funds for use by private schools in the form of vouchers. Recommendations for further study will be made.

Review of the Literature

2.0 Introduction

In order for a voucher proposal to become a reality two legislative imperatives must occur: (1) a legislative body, either state or federal, must enact voucher legislation, and (2) the legislative process must also fund the voucher process at public expense. An historical analysis of funding American education reveals an ingenious variety of school finance schemes from property tax, sales tax, fishing tax, lotteries, occupational tax, liquor license tax, state income taxes, and federal grants. This chapter focuses on (1) an historical analysis of school funding; (2) philosophical ideas of voucher leaders; (3) present political and legislative scenarios; and (4) early Supreme Court school finance decisions.

Specifically, the story begins with funding for the 1647 "Old Deluder Satan Act," by the Massachusetts Bay Colony, the first public education funding act. In 1647 the general court passed the act, which from the language of its preamble is known as "the old deluder Satan" law, and which required all towns of fifty families to maintain an elementary school, and towns of one hundred families to provide a secondary school to train boys for college. The law set a fine for failure to comply. Some towns found it cheaper to pay the fine than to

maintain the school.²³

History reveals a move away from early funding for schools. Just as religion was a primary reason for establishing early publicly supported schools, religion played a major part in moving away from public funding for private schools. As Catholics became more numerous and took greater interest in getting their share of public funds for their schools, they were met by numerous Protestants who opposed public funding for private schools. In the 1840's, New York state was the scene for a bitter battle over funding for parochial schools. The issue of public funding for religious schools was never any more prevalent in the minds of the people than it was at this period.²⁴ The Catholics wanted funding, but what they got was public schools allegedly devoid of sectarianism.²⁵

For years Americans operated on a basically simple structure of separation of church and state. The establishment clause ensured governmental neutrality in matters of religion. Justice Black in Everson v. Board of Education stated that "No tax in any amount can be levied to

²³ Harry G. Good and James D. Teller, A History of American Education (New York, Macmillan, 1973), p. 37-38.

²⁴ Ibid.

²⁵ Vincent P. Lannie, Public Money and Parochial Education (Cleveland, Press of Case Western Reserve University, 1968), p. 247.

support any religious activities or institutions, whatever they may be called."²⁶

Seemingly, contradictory to Everson was the Supreme Court's ruling on the constitutionality of Minnesota's law of tax deductions in Mueller.²⁷

Vouchers will fit into much of the ideology developed through the years about funding for schools. Thus, the need to develop the story in more detail is in order.

2.1 Historical Perspective

As indicated earlier, the Puritans established public education systems financed with public tax monies that were pervasively religious. This shall be called point A for reference purposes.

Strikingly similar is the Reagan administration's use of vouchers for Chapter I programs and other possible uses. In August 1986, Representative Paul Henry (Republican-Michigan) and six colleagues unveiled a Children's Option for Intensive Compensatory Education Act of 1986 (CHOICE). The "CHOICE" plan, which has not yet passed Congress, was considered among some Washington observers as a more moderate Grand Old Party response to President Reagan's educational voucher proposal

²⁶Everson v. Board of Education, 330 U.S. 1, 15-16 (1947).

²⁷Mueller v. Allen, 103 Supreme Court 3062 (1983).

introduced in Congress in 1985.

Possessing a few features of the Puritan philosophy is Minnesota's tax credit plan which provides relief for parents sending children to private schools, the majority of which are religious schools. A legal analysis of the voucher system revolves around the Minnesota law, and in particular, the legal interpretation of that law in court as witnessed by Mueller, a case which ruled in favor of Minnesota's laws allowing tax deductions to citizens for school expenses, including tuition paid to non-public schools. The Mueller decision results in public money for private schools.²⁸ This shall be called point B.

How has this country moved from point A to point B which appear somewhat similar? Certainly our country has not always been at these two points in its approach to funding schools. What has happened in the United States to move it away from point A and then back again to a similar view?

In the 365 plus years after the Puritans stated their view, the ebb and flow of American church-state history, especially public financial support for religious elementary and secondary schools, has been present in American political and religious life.

²⁸Ibid.

New York had created their Board of Regents, had made a state appropriation for schools before 1800, and had established the first American state superintendency of common schools in 1812. Other states followed this example. Pennsylvania (1834), Ohio (1837), Massachusetts (1837), and about the same time Michigan and Kentucky were laying firm foundations for their future systems.²⁹

A decision in 1869 by the Supreme Court of Massachusetts declared that to be public, a school must be "under the order and superintendence of the public;" and that this is for the case when the trustees have to be chosen from the membership of certain churches.³⁰ Changes in the growth of the private school sector seemed to occur in response to public school treatment of religious values, which have gone through three overlapping stages. First, there was an evangelical Protestant period, beginning with the development of U.S. public education and lasting well into the 19th century. Next, came a relatively brief period of nondenominational religious emphasis, an emphasis that never completely permeated American public education before it was over taken by the third, and current, era of secular education. Nondenominationalism still persists in some areas,

²⁹ Ibid., p. 127.

³⁰ Ibid., p. 135.

particularly in the Bible Belt, where political leaders sometimes continue to call for nondenominational prayer at the start of the school day for the posting of such religious material as the ten commandments.

To take a quick look at this Catholic-Protestant difference of opinion would serve well at this point, because it focused very clearly on the idea to which this study addresses itself, the spending of public tax dollars for private schools. Throughout American history, the Catholics have had the largest number of private schools and naturally have had great interest in gaining public tax support for their schools.

The rise of Roman Catholic schools can be traced to widespread misgivings of Catholics over the proselytizing and Protestant slant that marked the public schools in the 19th century. To take just one example of this bias, more than 120 million McGuffey Readers, containing a strong Protestant orientation, were sold between 1839 and 1920. Other textbooks were openly anti-Catholic; *The New England Primer* is a famous example. In addition, waves of Roman Catholic immigrants who landed on U.S. shores throughout the 19th century were greeted by pervasive class and race bias. (Within 50 years, Catholics went from a tiny minority to the single largest religious group in the nation.)

The newcomers were not likely customers for a new private

school movement. Mostly Irish and German, with some Slavs, Italians, and others, they were too poor to leave the vicinity of Ellis Island, and many settled in New York City, where they lived in overcrowded, unsanitary conditions. They migrated north, south, and west only after gaining some small economic base.

The nation's compulsory education laws were in place by the time of the immigration to New York City and the secondary migration to other parts of the country. Laws designed to enlighten poor Protestant immigrants were not applied to the newcomers. Although poor and poorly educated, Catholic immigrants quickly perceived bias on the part of the authorities at any given point in history. Thus the working class and Catholics (often the same people) led the opposition to the development of public education. The New York Workingmen's Party opposed the establishment of public schools, while Catholics developed their own schools. In 1844 the bitterness of this debate in Philadelphia led to the famous riot over which version of the Bible should be used in the public school system.

Catholic leaders attached the Protestant nature of the public schools not only for the sake of Catholic children in those schools, but also as an argument for state aid to the new Catholic schools. The political efforts to stop or alter the development of public education failed; the private

education efforts endured (though without governmental financial support). By mid-century, Catholic schools were growing as fast as public schools. In 1884 the Third Plenary Council of Baltimore declared its goal: "Every Catholic child in a Catholic School." From the middle of the 19th century until the mid-1920's, well over 90% of the children in private schools were in Roman Catholic Schools.³¹

By 1840 church-state separation had occurred in every state in the Union. And because of the Protestant-Catholic schisms, church-state separation was becoming an important philosophical issue among educational leaders. The secularization of the public schools moved in two distinct directions--(1) the curricular, and (2) school finance.³²

Horace Mann insisted that the only religious instruction in public schools should be limited to teaching that offended no conscience. He also maintained that in public schools religious instruction should give to all so much religious instruction as is compatible with the rights of others and with the genius of our government.³³

William T. Harris pointed out the specifics of the two when he said that the principle of religious instruction is

³¹Ibid.

³²Nannie, Public Money and Parochial Education, p. 12.

³³Ibid, p. 10.

authority, and that secular instruction is demonstration and verification. He felt that the two principles should not be brought into the same school, but separated as widely as possible.³⁴

A stronger voice for separation of church-state/public v. private funding was President U.S. Grant. In 1876, reflecting on past conflicts and suggesting future national church-state policy, he insisted that no money be appropriated to religious schools.

Encourage free schools and resolve that not one dollar of the money appropriated to their support shall be appropriated to the support of any sectarian school; that neither the state or nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child in the land the opportunity of a good common-school education, unmixed with sectarian, pagan, or atheistical dogma.³⁵

With the election of President Nixon, America began to move in a more conservative direction. And that new conservative political environment was conducive to the emergence of the voucher and tax credit issues.

Leading the way have been the new right fundamentalists who have developed much political clout.

³⁴ Ibid.

³⁵ Andrew M. Greeley and Peter H. Rossi, The Education of Catholic Americans (Chicago: Aldine Publishing Co., 1966), p. 2.

2.2 Leaders in the Voucher Movement

George R. La Noue stated that few concepts have ever raised simultaneously as many hopes and fears about the future of American education as has the idea of educational vouchers. He also stated that some advocate vouchers that would be highly regulated to avoid discrimination and inequality, whereas others urge unregulated vouchers that would encourage the maximum variety of educational alternatives.³⁶

One of the first proponents of a voucher system was Father Virgil C. Blum. Father Blum, a Jesuit priest and professor of political science at Marquette University, founded Citizens for Educational Freedom that became a powerful voucher lobby in some states. Writing in Freedom of Choice in Education (1958) Father Blum detailed both precedent and process for an unregulated voucher. The precedent was identical to the G.I. Bill—money grants—"payments for tuition and fees in the schools of their choice." Father Blum rejected the idea that governmental control followed the dollar—"freedom cannot long survive when government tells him what to think."³⁷

³⁶George R. La Noue, Educational Vouchers: Concepts and Controversies, (New York: Teachers College Press, 1972), p. I.

³⁷Virgil C. Blum., S.J., Freedom of Choice in Education (New York, Macmillan, 1955).

In oversimplification Blum stated that the plan raises no constitutional questions. The voucher plan provides that government make direct money grants in the form of vouchers or certificates to parents or guardians of all children attending approved independent schools. Under this plan government could also give vouchers to college students for tuition. The plan is identical in principle with federal money grants to veterans for the payment of tuition and fees in the schools of their choice, the well known--G.I. Bill.

A further argument that Blum made is that he posed this question, "Does government have the right to control the private stores and shops at which the needy, aged, the parents of dependent children, and the needy blind purchase with government subsidies, food, clothing, shelter, and other essentials of life?" This is the logic of those who object to the voucher or tax credit plan on the grounds that a government subsidy for the individual child or student is a subsidy of the school attended and that such a subsidy would involve government control of independent schools.

Blum also argued that when the government paid cash for groceries, it did not subsidize the store, but rather as in other welfare legislation, the subsidy was made directly to the individual citizen exercising complete freedom of

choice.³⁸ This thinking will surface again in Mueller.

Another featured spokesman for vouchers was Milton Friedman, known as a laissez faire economist who expressed the classic virtues of the marketplace. He was critical of government redistributing economic resources and providing services such as social security, parks, libraries, and schools. He insisted that denationalizing schools would provide greater opportunity for parents and children.

Specifically, Friedman maintained that governments could require a basic level of school financing by giving parents vouchers redeemable for a specified maximum sum per child per year if spent on approved educational services. Parents would then be free to spend this sum and any additional sum they themselves provided on purchasing educational services from an "approved" institution of their choice. The educational services could be rendered by private enterprises operated for a profit, or by non-profit institutions. The role of government would be limited to insuring that the schools met certain minimum standards, such as the inclusion of a minimum common content in their programs, much as the government inspects restaurants to insure that they maintain sanitary standards.³⁹

³⁸George R. La Noue, Educational Vouchers: Concepts and Controversies (New York, Teachers College Press, 1972), pp. 26-27.

³⁹Milton Friedman, Capitalism and Freedom (Chicago: University of Chicago Press), pp. 86-88.

Friedman advocated the open market concept for schooling, stating that,

If present public expenditures on schooling were made available to parents regardless of where they send their children, a wide variety of schools would spring up to meet the demand. Parents could express their views about schools directly by withdrawing their children from one school and sending them to another, to a much greater extent than is now possible. In general, they can now take this step only at considerable cost--by sending their children to a private school or by changing their residence. For the rest, they can express their views only through cumbrous political channels. Here, as in other fields, competitive enterprise is likely to be far more efficient in meeting consumer demand than either nationalized enterprises or enterprises run to serve other purposes. The final result may therefore be that parochial schools would decline rather than grow in importance.⁴⁰

Another proponent of vouchers, though in a different style, was Christopher Jencks, who proposed a regulated voucher system. The rationale behind the Jencks' regulated voucher plan was that it provided great diversity and choice within public education and that it would attract entrepreneurs to compete with the public sector.

Specifically, Jencks' voucher plan is based on the following declarations:

(1) A regulated voucher system must contain safeguards for disadvantaged students. An unregulated voucher system which does not contain these safeguards would be worse

⁴⁰Ibid, p. 61.

than no voucher system at all.

(2) One common objection to a voucher system is that many parents are too ignorant to make intelligent choices among schools. Giving parents a choice will, according to this argument, simply set in motion an educational equivalent of Gresham's Law, in which hucksterism and mediocre schooling bring out high quality institutions. This argument seems especially plausible to those who envisage the entry of large numbers of profit-oriented firms into the educational marketplace. The argument is not, however, supported by much evidence. Existing private schools are sometimes mere diploma mills, but on the average claims about them seem more and more misleading, because the quality of the services they offer no lower than in public schools. And while some private schools are run by hucksters interested only in profit, this is the exception rather than the rule. There is no obvious reason to suppose that vouchers would change all this.

(3) Vouchers would not destroy public schools. If you look at the educational choices made by wealthy parents who can already afford whatever schooling they want for their children, you find that most still prefer their local public schools if these are at all adequate.⁴¹

On the west coast John E. Coons, Stephen D. Sugarman, and William H. Clune, III, in Reslicing the School Pie also

⁴¹La Noue, Educational Vouchers: Concepts and Controversies, pp. 54-55.

recommended a regulated voucher system.⁴² They advocated true choice to all families--including the poor. The concept embodies (1) the family as an embryonic school system; (2) the parents' choice among schools with established tuition fees; (3) the school tuition cost would fit the family tax rate; (4) the tax rate would also be predicated on family income with the idea of equalizing for all families the economic sacrifice required to attend any school at a given spending level. The author rejected the local property tax for financing schools and sought an "equalization of aid to poor school districts plus opportunities for family choice in school selection."⁴³

Eli Ginsberg in a 1971 paper criticized the economic assumptions underlying the voucher proposal.⁴⁴ After an analysis of economic circumstances involving large sums of money, Ginsberg insisted "The voucher system is a gimmick." Ginsberg maintained the voucher system only "pretends" to offer solutions to segregated schools and ineffective education for the poor and disadvantaged". The reality of the voucher plan, suggested Ginsberg, is that there is nothing new in addressing the perplexing question of improving

⁴²John E. Coons, Stephen D. Sugarman, and William H. Clune, III, "Reslicing the School Pie," Teachers College Record, Vol. 72, No. 4 (May, 1971), pp. 485-493.

⁴³Ibid.

⁴⁴Eli Ginsberg, "The Economics of the Voucher System," Teachers College Record, Vol. 72, No. 3 (February, 1971), pp. 373-382.

performance of the ghetto school by simply introducing large sums of capital other than creating more non-public schools.⁴⁵

Thomas A. Shannon, Executive Director of the American School Boards Association, at the 1973 San Francisco meeting, addressed the voucher issue. After a careful analysis of the voucher issue predicated on both need and competition, Shannon rejected arguments for vouchers, insisting that: (1) to suggest that student enrollment decline could be halted by indirect state subsidy was not only the height of arrogance but also is simply not supported by fact, and (2) the competition theory is a castle in the sand.⁴⁶

What we in the public school system of our nation must do in the days and years ahead is present constructive opposition to those who would build a private school complex at public expense. In our democratic society, the public schools must be responsible to the people. If anything is needed, it is more education and opportunity for citizens to participate meaningfully in the government of the public schools thorough the elective process. The underlying strength of the public school system as an American institution is that the schools are governed by persons accountable to the public. Our efforts should be directed at increasing this strength and not towards lessening it by diverting public funds to finance private endeavors in education.⁴⁷

As already indicated, the voucher concept was a low

⁴⁵Ibid.

⁴⁶Thomas A. Shannon, "Should Legislation Enacted to Aid Non-Public School Through the Use of Tax Credits or Vouchers: A Case of Opposition," Current Trends in School Law, (Topeka: National Organization of Legal Problems of Education, 1974), p. 4.

⁴⁷Ibid.

priority during President Ford's administration and was non-existent in President Carter's administration. During President Carter's administration about the only major proponent of vouchers was Senator Patrick Moynihan. In an article, "The Federal Government and the Ruin of Private Education," Senator Moynihan insisted that private education would stagnate and perhaps disappear without federal support.⁴⁸

No cast of characters would be complete in a voucher scenario without former Secretary of Education William Bennett who has long favored a voucher system financed through Chapter I funds.

On November 13, 1985, the Secretary Bennett unveiled proposed legislation to convert the Chapter I education program for disadvantaged school children, at least in part, into a voucher program. Entitled the "Equity and Choice Act of 1985," the proposal would permit the parents of children eligible to participate in Chapter I programs, at their option, to receive a voucher worth a proportionate share of Chapter I funds and to use that voucher to purchase educational services from public or private schools other than the schools in whose attendance area the children lived. In introducing the proposal, Secretary Bennett said the voucher plan would give parents of disadvantaged school children, "the

⁴⁸Patrick Moynihan, "The Federal Government and the Ruin of Private Education," (Harper's Magazine, 1977).

opportunity to choose the best available education for their children and encourage competition among all schools."⁴⁹

The political front brought criticism and opposition ranged far and wide on capital hill. Apparently the issue was not whether the voucher plan would stand constitutionality, but rather would the Reagan administration have the political will to proceed with its plans. As of this writing there has been no additional major movement.

In a report from Education Week, it was noted that Undersecretary of Education Gary L. Bauer said that as of the first week in June 1986, the administration's Chapter I voucher plan was being taken off the table and thoroughly reevaluated. This proposal, Secretary Bennett's major legislative priority, was doomed to failure by a negative Congress. In explaining why the voucher plan was to be reevaluated Secretary Bennett stated, "We wish to hear from a broad spectrum of the American public in developing our recommendations to the Congress on how some \$4 billion of taxpayers money should be spent."⁵⁰

Bennett's decision to withdraw the voucher plan was due in part to poor support in Congress, including fellow

⁴⁹David M. Ackerman, "Analysis of the Constitutionality of the Administration's Chapter I Voucher Proposal Under the Establishment Clause of the First Amendment," From the Library of Congress, (December 4, 1985), p. 1.

⁵⁰James Hertlig, "Education Voucher Bill Withdrawn, Under Review, Officials Says," Education Week, Vol. V., No. 39, (June 11, 1986), p. 11.

Republicans. Prior to Bennett's action a group of moderate Republicans, led by Representative Paul B. Henry of Michigan, developed a counter proposal which placed more specific limits on the uses of Chapter I vouchers, particularly in private schools--and would include new civil-rights provisions.

The group's bill would seek to correct at least two major flaws in Secretary Bennett's plan. Among its major problems according to the group's analysis, The Equity and Choice Act (TEACH) forbids a student to remain in his or her school while using the voucher for compensatory services elsewhere--foreclosing, rather than creating, options for disadvantaged students.

Also Representative Henry said in early February 1986, that the bill's civil-rights provisions for non-public schools were unsatisfactory. For example, under TEACH, private schools that received vouchers would be not considered recipients of federal aid and were thus not subject to the range of federal civil-rights statutes.⁵¹

George R. La Noue analyzes the voucher system from the perspective that vouchers could mean the end of public schools. He noted a key point very pertinent to this study in a paragraph citing the beginning of court presence in education regulations:

⁵¹ James Hertling, "Rejecting Bennett Voucher Bill, House G.O.P. Goes Own Way," Education Week, Vol. V., No. 22 (February, 12, 1986), p. 12.

Before the 1940's the legal distinction between public and private schools make little functional difference. The Supreme Court studiously avoided becoming involved in what were considered local education matters. But in 1943, in a dramatic reversal of an earlier opinion, the court decided that public school authorities could not force children of Jehovah's Witnesses to salute the flag. The modern era of judicial educational policy making had begun.⁵²

La Noue's key points are that the great American industries with whom the open market feature of the voucher system is compared--Lockheed, Penn Central, and others, are no great models of success. And especially in the medical industry where Medicaid vouchers are in place, there is no track record of success in improving the overall health of older Americans. His point is that marketplace analogies do not fit well to the educational world. Competition in the private school sector does not correspond to market theory.

He concluded by saying that those who advocate vouchers do not seem to fully recognize the true nature of the voucher constituency. He listed the major benefactors as the southern Protestants and northern Catholics--the far right and the far left. Aid to private schools would bring the two together, a savvy political move for the Republicans. He mentioned a great danger in that once united, that coalition might be able to bring about the kind of unregulated, noncompensatory, constitution-free vouchers that would lead to a social

⁵²La Noue, Educational Vouchers: Concepts and Controversies, p. 132.

disaster.⁵³

2.3 Recent Scenario

America's experience with vouchers has a limited history. In order to provide a complete analysis this study will examine (1) Vermont's experience with a modified, unnamed voucher system, (2) The Alum Rock Experiment, (3) The Coleman II Report, and (4) The Minnesota tuition tax credits legislative enactments and other states' experiences. Vermont has for years had school districts which pay part or all of tuition costs for students to go to school outside their home district, even in other states. This assistance is offered in the form of tuition vouchers. Students in almost 100 Vermont towns have quietly received education vouchers from their local school districts, just as their parents and grandparents did before them.⁵⁴

Vermont school administrators and school board members never use the word vouchers to describe this process. Moreover, standard procedure is to ignore the issue. Long before vouchers became an emerging American political issue many Vermont communities had already educated their children with financing similar to the voucher concept.

As the idea of universal taxpayer supported education

⁵³Ibid, p. 143.

⁵⁴John McClaughry, "Who Says Vouchers Wouldn't Work" Reason (January, 1984), p. 24.

took hold in the first part of the 19th century, local academies were prevalent in Vermont. The future of these academies was in question. Should the local school district finance a new public high school, thus dooming the local private academy? Or should the district simply pay tuition to the private academy?⁵⁵

Since the prominent civic leaders of most Vermont communities had themselves graduated from local private academies, they usually exerted their influence supporting the academies instead of building a new high school. Taxpayers also were adverse to the idea of a new high school, since it was obviously cheaper to pay tuition to an academy.⁵⁶

In 1984 Vermont had 246 towns, and 95 of them had no public high school. State law authorizes school boards of these towns to designate a high school and to pay the full tuition for any local student to attend it. If a district does not designate a high school, it must pay a student's tuition, equal to the average Vermont high school tuition to any approved high school in or out of state. If tuition at the chosen high school exceeds the average amount of Vermont tuition, the school district may choose to pay the full amount, but this is rarely done due to taxpayer pressure.⁵⁷

⁵⁵Ibid., p. 25.

⁵⁶Ibid.

⁵⁷Ibid.

Even if the local district designates the local private academy as the town's high school, it may still be possible for parents to enroll their children elsewhere with voucher support. Several districts choose this option.

There is an important limitation on this voucher system. Payment can be made only to nonsectarian private schools approved by Vermont's Department of Education. This immediately leaves out the state's three Catholic high schools. The department maintains a list of approved schools, which includes most of the established private schools in New England. When parents elect to send a child to a school on the state department of education list, the state department of education will investigate.⁵⁸

To this point in 1989, Vermont has not had to deal with the church-state question of public monies for private religious schools.

In 1972 the Office of Economic Opportunity selected Alum Rock School District in San Jose, California for a voucher experiment. Alum Rock School District is comprised primarily of low-middle class and lower class families. This area had one of the lowest assessed property valuations per student in the state. A three-year demonstration project was established in 1972.⁵⁹

⁵⁸Ibid, p. 26.

⁵⁹Ibid, p. 30.

The project included six of the district's 24 public schools. Under the plan, 22 "mini-schools" were formed at the six participating schools. Eleven of the mini-schools emphasized general basic academic skills, while various others emphasized reading, math, science, fine arts, cross cultural learning, and learning basic academic skills through practical, everyday activities.

In the spring, each school would plan its programs for the next year, and descriptions were sent to parents along with voucher forms. For each child, parents indicated on the voucher form their first three choices of the programs and of schools where the program was being offered. Each student had a spot guaranteed at his or her neighborhood school. When there were not enough spaces in a school to accommodate all the applicants from outside the neighborhood, the available spaces were rationed out by lottery.

To create a greater incentive for mini-schools to teach disadvantaged children, the voucher amount for students on free lunch or reduced lunch programs was 30 percent higher.

On the whole the Alum Rock Experiment proved to be a fiasco. A Rand Corporation study in 1974 found that in every voucher school, in all grades but one, students fell behind in achievement while Alum Rock's students in non-voucher schools held their own.⁶⁰

⁶⁰Ibid.

The Alum Rock project was hardly a test of the voucher idea. From the start, the experiment's design was far removed from an authentic voucher plan. For one thing, private schools were effectively excluded, so a free market place did not exist. They were technically eligible for vouchers, but had to comply with a host of district regulations concerning teacher certification, curriculum standards, student discipline, and more. No private school ever received a voucher student.

Also the mini-schools' admission and expulsion procedures were heavily regulated, so they had none of the freedom that private schools had to enforce strict educational and conduct requirements. Moreover, schools were given enrollment ceilings, limiting the number of vouchers "good" schools could accept.

The Alum Rock Experiment concluded in 1975 apparently with little or no influence. Not another school district within the county followed Alum Rock's example.⁶¹

As dismayed voucher advocates examined the results of Alum Rock, many were worried that this experience with vouchers would be taken to reflect on vouchers generally. Certainly, voucher opponents seized the opportunity to discredit vouchers. Voucher arch enemy Albert Shanker, spoke in the aftermath, calling the experiment a washout.

⁶¹Ibid, p. 31.

But Shanker and company were not entirely successful in burying the voucher concept. An infrastructure of intellectual and academic support for vouchers continued through the 70's and into the 80's. The idea was kept alive partly by the efforts of the Education Voucher Institute, a think tank in Ann Arbor, Michigan, whose executive director was University of Michigan professor William Coats.⁶² This institute is not in existence as of this writing.

A major effort by President Reagan and his administration was the use of the Coleman II study, commissioned by the National Center for Education Statistics, Washington. The report involved both public and private schools, and in general indicated that 10th and 12th graders in private schools fared better than students in public schools.

Most of the private schools studied were Catholic schools; only some 20 percent of the children attended other private schools. The number of schools included in the study was small (27), and the resulting sampling errors were so large that they gave rise to severe criticism at the annual meeting of the American Education Research Association in Los Angeles.⁶³

⁶²Ibid.

⁶³Torsten Husen, "Coleman II - Another Case of Politics and Professors," Change Vol. 13, No. 6 (September, 1981), p. 11.

Apparently the Reagan administration seized the opportunity to promote vouchers which in effect would promote more private schooling. Husen stated that Coleman felt the main point had been overlooked, namely his analysis of what constitutes "effective schools." Both the public and private sector demonstrate a consistent pattern of factors associated with good schools. These conclusions had been masked by the comparison between public and private schools where the differences were smaller than between effective and less effective schools.⁶⁴

Coleman has said that he never came out in favor of tuition tax credits, although he has recently taken a positive stance on vouchers. He has emphasized that the important finding of his survey is not that private schools tend to yield better results than public schools. The important point is that he has been able to identify certain factors which are associated with positive results in both private and public schools, such as homework, absence rate, class attendance, discipline and order.⁶⁵

If the Reagan administration had chosen a direction toward the use of public funded vouchers in the private sector, then the Coleman II study could have been used in supporting the decision.

⁶⁴Ibid, p. 12.

⁶⁵Ibid.

The Minnesota legislative enactment provides a possible analogy for comparing the voucher concept with Supreme Court approved state legislative mandates. From this experience comes a framework for future deliberations.

Minnesota, like every other state, provides citizens with free elementary and secondary schooling. In 1983 there were approximately 820,000 students enrolled in Minnesota schools. During the same year, approximately 91,000 elementary and secondary students attended some 500 privately supported schools located in Minnesota, and about 95 percent of these students attended schools considered to be sectarian.⁶⁶

Minnesota, by law originally enacted in 1955 and revised in 1976 and again in 1978, permits state tax payers to claim a deduction from gross income for certain expenses incurred in educating their children. The deduction is limited to actual expenses incurred for the tuition, textbooks, and transportation of dependents attending elementary or secondary schools. A deduction may not exceed \$500 per dependent in grades K-6 and \$700 per dependent in grades 7-12.⁶⁷

By taking this deduction, a taxpayer reduces his tax bill by a sum equal to the amount of tuition multiplied by his rate of tax. Although this tax benefit is available to any parents whose children attend schools which charge tuition, the vast

⁶⁶Mueller v. Allen, 103 Supreme Court 3062 (1983).

⁶⁷Ibid.

majority of the taxpayers who are eligible to receive and benefit are parents whose children attend religious schools. In the 1978-79 school year, 90,000 students were enrolled in nonpublic schools charging tuition; over 95 percent of those students attended sectarian schools. Although the statute also allows a deduction of the tuition expenses of children attending public schools, Minnesota public schools are generally prohibited from charging tuition. Public schools may assess tuition charges only for students accepted from outside the district. In the 1978-79 school year, only 79 public school students fell into this category. The parents of the remaining 815,000 students who attend public schools were ineligible to receive this tax benefit.

These taxpayers brought action against Minnesota's Commissioner of Revenue and parents who had taken tax deductions for expenses incurred in sending their children to parochial schools., challenging the constitutionality of the Minnesota statute allowing such deductions.⁶⁸ The Mueller case became a key for legal analysis of voucher issues concerning future legislative enactment in litigious developments.

Patterned after Minnesota's law, the state of Iowa passed a law which allowed parents to claim income-tax credits and deductions for tuition and other expenses at public and

⁶⁸Ibid.

private schools.

State lawmakers passed the measure in May 1987, in a move that escaped national attention at the time. Iowa became only the second state to adopt such a program. Parents will be allowed to claim income tax credits of five percent on the first \$1,000 spent per child for tuition and textbook fees in public or private schools. The Iowa planning agency estimated that the program could cost the state approximately \$3.2 million per year. Deductions are expected to disproportionately favor parents whose children are in private schools which account for ten percent of the state's 529,000 students.⁶⁹

Governor Tommy Thompson of Wisconsin has proposed a controversial plan to provide the parents of some of Milwaukee's most disadvantaged students with the means to send their children to any public, private, or sectarian school they choose.

The Governor's experimental "parental choice" plan, announced in October 1987, during the annual State of the State address, is similar to the proposal for compensatory education vouchers unsuccessfully pushed by the Reagan Administration two years ago. If Mr. Thompson's plan is adopted, Wisconsin would be the first state to test the

⁶⁹Tom Mirga, "Tuition Tax Credits are Challenged in Iowa," Education Week, Vol. VII, Number 8 (October 28, 1987, p.8.

concept on a broad basis, according to experts on parental choice.

The Governor called for a five year pilot project that would begin in 1989 and involve 1,000 poor youngsters in Milwaukee. Participating parents would be given payments from the state equal to the tuition of the schools they selected for their children. The state would deduct the amount of the payments from the state aid given to the city's public schools.

"Our main theme," said Jeffrey Bartzen, the Governor's education adviser, "is that we think poor parents should have a choice, and we don't feel they should have to send their kids somewhere they don't feel comfortable with."⁷⁰

State officials said the proposal targets Milwaukee, in part, because it is the state's largest and most criticized school system. Nearly 40 percent of the city's high school students fail to graduate, they point out, and many of the rest graduate with grade averages below C.

"The proposal is responding to the fact that many people in Milwaukee are extremely frustrated that the school system isn't responding well enough to their needs," said Barbara Notestein, a Democratic state representative from the city.⁷¹

⁷⁰Debra Viadero, "Wis. Governor Seeks Pilot Voucher-Style Plan," Education Week, Vol. VII, No. 19 (February 3, 1988), p. 8.

⁷¹Ibid.

"I have certain misgivings about the plan," she added, "but I do think it would be good for Milwaukee public schools to have a little competition."⁷²

Howard Fuller, a longtime critic of Milwaukee's schools and one of the architects of a plan to carve out a separate, mostly minority school district from the city system, welcomed the proposal. "It's giving poor parents the option that people with money already have, and that is voting with their feet and taking their resources with them," he said.⁷³

But the plan, which must be approved by the legislature, has also drawn sharp criticism from the state's largest teacher's union, some legislators, and officials of the Milwaukee district--which stands to lose millions of dollars in state aid if the proposal is adopted.

"We have some serious concern about any attempt to take money away from the public schools and giving it to private schools," said Hawthorne Faison, the city's acting school superintendent.⁷⁴

He said the loss of the funds would "degrade" the system, which he noted is already attempting to expand the range of choices available to parents through 51 "specialty" or magnet schools.

⁷²Ibid.

⁷³Ibid.

⁷⁴Ibid.

"Rather than solving the problems of a small number of minorities," said Morris Andrews, executive director of the Wisconsin Education Association, "why not require the school district to make the changes necessary to better the educational process for all students?"⁷⁵

Critics also question whether the plan would pass muster under either the federal or state constitutions. Wisconsin's constitution, in particular, contains strong prohibitions against providing state aid to private schools--particularly those affiliated with religious organizations.

The Reagan administration's proposal to amend and reauthorize the Education Consolidation and Improvement Act of 1981 represents a major federal legislative effort to improve the educational achievement of disadvantaged children, and to maintain the momentum of the education reform movement into the 1990's and beyond. Parental choices and vouchers are an integral part of the proposal. These proposals are based on the best available research, and are the result of extensive discussions with school people and state legislators throughout the country.⁷⁶

During the past two decades programs authorized by Title I of the ESEA have been the primary federal vehicle for

⁷⁵ Ibid.

⁷⁶ U.S. Department of Education Staff, "Overview of the Administrations's Proposals for the Reauthorization of Chapter I and Chapter II, The Education Consolidation and Improvement Act of 1981," (1981), p. 1.

helping schools with disadvantaged students. Congress has appropriated in excess of \$53 billion dollars for this purpose.

Department of Education staff research studies of Chapter I have shown that the program has had some success in improving student's achievement. However, the reports on Chapter I from the National Assessment and other research studies have also documented some weaknesses. Chapter I has been effective for students who were moderately disadvantaged, but it has not improved the relative achievement of the most disadvantaged portion of the school population. In addition, studies have found little or no gain for Chapter I participants in the higher grades. Thus, while Chapter I has had some success, in many cases the program seems not to be very effective for the neediest students, and show inconsistent effect. Further, the gains are not carried over into the higher grades.

Research has also shown that Chapter I services have not been as effectively targeted as they could be. About 60 percent of the students participating in Chapter I are not poor. Some students benefiting from Chapter I are neither educationally nor economically disadvantaged. In the 1981-82 school year, almost 40 percent of the districts receiving Chapter I funds had fewer than ten percent of their children in poverty. About half the nation's elementary schools with less than 20 percent of their students in poverty participate

in Chapter I.⁷⁷

One of the six major proposals of the administration is increasing choice. Under current law, school systems are required to provide equitable services to educationally disadvantaged children attending private schools. This has been a core principle of this program since 1965. In the wake of the Supreme Court's Aquilar v. Felton decision, however, which prohibits delivery of Chapter I services to eligible parochial school students on the premises of their schools, many eligible private school students are not receiving equitable services. Clearly the reauthorization must solve the problem of providing equitable services to both public and private school children as the law required.

The proposal is that compensatory education certificates would be issued to parents of children selected to participate in the Chapter I program and would be redeemable for compensatory education services at any public or private school that offers such services.⁷⁸

A philosophical debate is emerging as a result of the recent administration proposals, and that debate centers around support for private sectarian schools. R. Freeman Butts has a view that there must be a closer look at the

⁷⁷Ibid, p. 5.

⁷⁸Ibid, p. 13.

intentions of the framers of the Constitution. In one of his articles, Butts reported that there are people who interpret the framers' intentions as only to prohibit congress from establishing a single national church, but would permit aid to all religions on a non-preferential basis and would even permit the states to establish a single church if they wished.

There has been an increasingly vigorous campaign by conservative members of congress and the Reagan administration to appeal to the history of the "original intention."⁷⁹ Butts stated that the meaning of the establishment clause is as follows:

After the American Revolution seven of the fourteen states that comprised the Union in 1791 authorized establishments of religion by law. Not one state maintained a single preferential establishment of religion. An establishment of religion meant to those who framed and ratified the first amendment what it meant in those seven state, and in all seven it meant public support of religion on a non preferential basis. It was specifically this support on a non preferential basis that the establishment clause of the first amendment sought to forbid.⁸⁰

Butts also stated that acceptance of a narrow, accomodationist view of the history of the establishment clause must not be allowed to be turned into public policies that serve to increase public support for religious schools in any form: vouchers, tax credits, aid for extremes of

⁷⁹.Freeman Butts, "A History and Civics Lesson for All of Us," Education Leadership (May, 1987), p. 23.

⁸⁰Ibid.

"parental choice." ⁸¹

Kern Alexander wrote an analysis of the rationale behind the upsurge of religious demands for public tax dollars for religious schools. Why have the churches and parents of children in church related schools begun to assert so diligently for access to the public treasury if churches are as well off as it appears? The answer may lie in Adam Smith's Wealth of Nations.⁸²

Alexander's assertion, using Adam Smith's economic philosophy, is that improvements in manufacturing and commerce tend to destroy the temporal power of the church. He maintained that a church's power and influence are eroded as it becomes more involved in economics. As a church gradually has withdrawn its support from its own schools in favor of other investments, the increased costs of tuition and fees have settled directly on the parents. To continue to enjoy the privilege of the private school, these parents must now pay tuition in lieu of church support or seek state subsidy.⁸³

Recent Parochialism has been reported by Church and State. In California a Libertarian-initiated group, Californians for Quality Education, worked to place a proposal on the November 1988 ballot granting tax breaks to private school patrons.

⁸¹Ibid., p. 24.

⁸²Ibid.

⁸³Kern Alexander, "Adam Smith, Religion, and Tuition Tax Credits," Journal of Education Finance (Spring, 1983), p. 532.

The plan, called the "Quality Education Action," would give a \$100 income tax credit for tuition, textbooks and transportation costs. The amount would increase by \$200 each year until it amounted to 25 percent of the average annual cost per student in public schools--an estimated \$1,000. The California attorney general's office estimated that the measure would cost the state treasury some \$100 million in its first year and several \$100 million in subsequent years.

In addition to the California initiative, a town meeting in Epsom, New Hampshire passed a \$1,000 property tax credit for private school costs. Selectman Jack Kelleher, a Libertarian who once called for the abolition of public schools, was the primary sponsor of the move.

In another parochial development nearly 1,000 fundamentalist Protestants attended a March 8, 1988 legislative day program in Albany, New York sponsored by the new Association of Christian Schools. One item on their agenda was tuition tax credits.⁸⁴

2.4 Early Supreme Court Finance Decisions

From 1908 in Quick Bear v. Leupp,⁸⁵ the Supreme Court's first public aid to sectarian schools decision, to 1985 Grand

⁸⁴ Joseph L. Coon, "California, New Hampshire Libertarians Push Parochial," Church and State, Vol. 41, No. 5, May 1988, p. 7.

⁸⁵ Quick Bear v. Leupp, 210 U.S. 50 at 8, (1908)

Rapids,⁸⁶ the Supreme Court's most recent decision, the Court has presumably sought a "more encompassing construction of the Establishment Clause."

Prior to the 1970's, the Court developed two basic judicial church-state directions with respect to aid for religious elementary and secondary schools: 1) the child benefit theory, and in general an accomodationist stance where public tax support is concerned; and 2) the accommodationist philosophy is absent in on-campus curriculum decisions. Moreover, in religious curriculum decisions, the Court began to develop the famous tri-part test that emerged in Lemon I.⁸⁷

The Supreme Court involvement in education cases prior to the decade of the 70's unfolded in the following manner. The 1908 Quick Bear v. Leupp⁸⁸ case focused on using federal money for contracting with sectarian schools to provide an education for Indian children on reservations. The practice continued for many years. In 1894 opposition developed and Congress enacted legislation prohibiting sectarian education with the final appropriation in 1899.

Even though Commissioner of Indian Affairs, Frances E. Leupp, was effectively barred from using public funds for

⁸⁶Grand Rapids Schools District v. Ba., 105 S. Ct. 2111 (1971)

⁸⁷Lemon v. Kurtzman, and Dicenso v. Robinson, 91 S. Ct. 2111 (1971).

⁸⁸Quick Bear v. Leupp, 210 U.S. 50, 78 (1908).

sectarian education, he was nonetheless petitioned by Sioux Indians, Rosebud Agency, South Dakota, to provide a pro-rata share of an Indian trust fund to contract with the St. Frances Mission Roman Catholic School for an education for their children. The trust fund was established by Congress in an 1968 Treaty with the Sioux Indians and the requested pro-rata share existed for the specific purpose of "Support and maintenance of day and industrial schools, including erection and repairs of school buildings. . ." ⁸⁹ An injunction was sought on constitutional grounds by Rueben Quick Bear and Associates prohibiting using the funds on the basis that government "shall make no appropriation whatever for education in any sectarian schools." ⁹⁰ The District of Columbia Federal Court granted an injunction and Commissioner Frances Leupp appealed. The District of Columbia Appeals Court reversed and plaintiff Rueben Quick Bear and Associates appealed. The Supreme Court ruled: 1) the trust fund was private money, not public; 2) the Sioux Indians had requested a pro-rata share for sectarian school support; and 3) this request was in reality a free exercise of religion, constitutionally protected. Chief Justice Fuller concluded:

. . . it seems inconceivable that Congress shall have intended to prohibit them from receiving religious education at their own cost if they desire it; such an intent would be one to prohibit the free exercise of religion amongst the Indians, and such

⁸⁹Ibid.

⁹⁰Ibid., p. 81.

would be the effect of the construction for which the complainants could contend.⁹¹

As landmark church-state decisions unfolded, Meyer v. Nebraska⁹² becomes supremely important. Even though the decision is barren of church-state controversy, the decision established the premise that states' compelling interest in education may not encroach on parent constitutional guarantees to direct their children's education.⁹³ The 1923 Frothingham v. Mellon⁹⁴ decision, another non-church-state decision, which stood for the next forty-five years, effectively precluded legal standing in federal courts to challenge federal money directed to religious elementary and secondary schools. Justice Sutherland maintained that:

His (the taxpayer's) interest in the moneys of the treasury--partly realized from taxation and partly from other sources--is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation of any payment out of the funds so remote, fluctuating, and uncertain that no basis is afforded for an appeal to the preventive powers of a court of equity.⁹⁵

In 1925 Pierce v. Society of Sisters⁹⁶ and companion case Pierce v. Hill Military Academy did address a major church-

⁹¹Ibid., p. 82.

⁹²Meyer v. Nebraska, 262 U.S. 390 (1923).

⁹³Ibid., p. 400.

⁹⁴Frothingham v. Mellon, 262 U.S. 447 (1923).

⁹⁵Ibid., p. 400

⁹⁶Pierce v. Society of Sisters, 268 U.S. 510.

state education issue--the Oregon law required that all children ages eight to sixteen years attend public schools.⁹⁷ The Supreme Court insisted, and predicated on Meyer, that parents have the right to determine where their children will attend schools. In affirming a lower court decision the Court concluded:

Under the doctrine of Meyer v. Nebraska . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.⁹⁸

So parents have a constitutional guarantee to determine placement of children in either public or nonpublic elementary schools.

In the 1930 Cochran v. Louisiana State Board of Education⁹⁹ decision the Supreme Court sustained a 1928 Louisiana Statute compelling the state school board to provide "school books for school children free of cost" to all children in the state, including children attending private schools.¹⁰⁰ The state insisted the legislation involved aid

⁹⁷Ibid., p. 530.

⁹⁸Ibid., p. 535.

⁹⁹Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930).

¹⁰⁰Ibid., p. 374.

to children, not to religious elementary and secondary schools. "The schools obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the state alone are the beneficiaries."¹⁰¹ Plaintiff Cochran protested on Fourteenth Amendment due process consideration that his property was taxed for private education purposes which amounted to taxation without due process.¹⁰² Chief Justice Hughes accepted the state rationale insisting that:

Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislature does not segregate private schools or their pupils, and its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common¹⁰³ interest is safeguarded. Judgment affirmed.

The Court created the "child benefit" theory. Justice Hughes, explained how the expenditure by the state for textbooks for private school students did not violate the establishment clause. He stated that the appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, and the school children of the state, not the private institutions receive benefits. So religious elementary and secondary schools may

¹⁰¹Ibid., p. 375.

¹⁰²Ibid., p. 374.

¹⁰³Ibid., 374.

receive textbooks at public expense under the child benefit theory.

The chronology of landmark Supreme Court church-state education cases includes another non-education decision. Cantwell v. Connecticut¹⁰⁴ is important because the Supreme Court insisted "the fundamental concept of liberty embodied in the Fourteenth Amendment embraces the liberties guaranteed by the First Amendment"--in effect the First Amendment religious clause is applicable to the states via the Fourteenth Amendment and the Supreme Court understood what it had been doing since 1868 ratification of the Fourteenth amendment.¹⁰⁵

The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.¹⁰⁶

The 1947 Everson v. Board of Education¹⁰⁷ decision did address the New Jersey legislative effort to provide transportation of children attending religious elementary and secondary schools. Acting in accordance with the state statute, a local board of education reimbursed parents of school children for the bus fares of students to and from

¹⁰⁴Cantwell v. Connecticut, 310 U.S. 296 (1940).

¹⁰⁵Ibid., p. 303.

¹⁰⁶Ibid.

¹⁰⁷Everson v. Board of Education, 330 U.S. 1 (1947).

school. While the statute excluded students of private schools operated for profit, it included children who attended private sectarian schools. In this case, a taxpayer challenged the constitutionality of such payments made to the parents of children attending these private, sectarian schools.

The Court held that a law authorizing reimbursement of the parents of school children for the bus fares of their children to and from private sectarian schools, when included in a general program of reimbursement for the bus fares of public school children, is constitutional. The Court's majority (the decision was five-four) maintained the New Jersey legislation had never made the slightest breach in the impregnable wall of separation of church and state. Moreover, the Court insisted the first amendment "requires state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."¹⁰⁸

In dissenting, Justice Jackson insisted the majority's judicial logic contradicted its decision. He likened the Court's judicial logic to Julia, who according to Bryon's reports, "While whispering, 'I will never consent, -- consented."¹⁰⁹ Justice Jackson also acknowledged the logic

¹⁰⁸Ibid., p. 18.

¹⁰⁹Ibid., p. 24.

upon which the child-benefit theory was predicated:

Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself.¹¹⁰

Justice Rutledge likewise chastened the Court's majority insisting the Court "Sustained public payment for small concessions to religious schools while it made wholly private in character the larger things without which small could have no meaning or use."¹¹¹ Finally Justice Rutledge maintained the Cochran decision paved the way for this decision and that the decision would create a rationale for a third--"Thus with time the most solid freedom steadily gives way before continuing corrosive decision."¹¹²

In McCollum v. Board of Education¹¹³ in 1948 the Court addressed the question of released time for on-campus religious instruction. School pupils choosing not to participate continued secular instruction. Plaintiff Vashti McCollum sought a court order forcing the school board to:

. . . Adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools. . and in all public school houses and buildings in said

¹¹⁰Ibid., p. 24.

¹¹¹Ibid., p. 51.

¹¹²Ibid., p. 29.

¹¹³McCollum v. Board of Education, 333 U.S. 203 (1948).

district when occupied by public schools.¹¹⁴

Plaintiff McCollum argued that tax funds were being used to support religion. The Illinois state courts denied relief, and Plaintiff McCollum appealed to the Supreme Court. Justice Hugo Black, writing the Court's majority opinion, insisted "This is beyond all question a utilization of the tax-established and tax supported public school system to aid religious groups to spread their faith."¹¹⁵ Justice Black once again expressed views announced by the majority and minority in Everson--even repeating Everson's first amendment definition. And then Justice Black acknowledged that:

. . .the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the Everson Case, the First Amendment has erected a wall between Church¹¹⁶ and State which must be kept high and impregnable.

In 1952 in Zorach v. Clausen¹¹⁷ the Court addressed the issue of released time for off-campus religious instruction. Plaintiff Zorach and friends insisted that public schools manipulated schedules to accommodate religious activities in violation of the first amendment. The Supreme Court rejected six to three the plaintiff(s)' arguments and sustained the New

¹¹⁴Ibid., p. 205.

¹¹⁵Ibid., p. 210.

¹¹⁶Ibid., p. 212.

¹¹⁷Zorach et al. v. Clausen, 343 U.S. 306 (1952).

York City released time for off-campus religious instruction program. The three dissenting justices insisted the program used "a secular institution to force religion" on school children. Justice Jackson maintained that school "serves as a temporary aid for a pupil who will not go to church. It takes more subtlety of mind than I possess to deny that this is governmental constraint in support of religion."¹¹⁸

In the 1962 Engel v. Vitale¹¹⁹ case the Supreme Court addressed the constitutionality of the New York State Board of Regent's mandated prayer--"Almighty God, we acknowledge our parents, teachers, and our country."¹²⁰ Plaintiff(s) insisted the prayer violated the first amendment religious establishment clause. They were unsuccessful in both the trial court and New York Court of Appeal but on certiorari the Supreme Court declared the Regent's prayer unconstitutional:

When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.¹²¹

Justice Douglas in a concurring opinion insisted:

The point for decision is whether the Government can constitutionally finance a religious exercise. . . I think it is an unconstitutional undertaking

¹¹⁸ Ibid., p. 324.

¹¹⁹ Engel et al. v. Vitale, 370 U.S.421 (1962).

¹²⁰ Ibid., p. 422.

¹²¹ Ibid., p. 431.

whatever form it takes.¹²²

The "finance" issue Justice Douglas alluded to accrued from classroom use and teacher time reciting the prayer--there are no other "finance" issues in the case. Moreover, Justice Douglas apparently realized the judicial dichotomy in Everson and recanted his majority support in Everson:

The Everson Case seems in retrospect to be out of line with the First Amendment. Its result is appealing as it allows aid to be given to needy children. Yet by the same token, public funds could be used to satisfy other needs of children of parochial schools--lunches, books, and tuition being obvious examples.¹²³

Thus the salient imperative of Engel is that official prescribed prayer, for use in public school classrooms with teachers leading the recitation and with children reciting will fail constitutional muster.

The 1963 Abington School District v. Schempp¹²⁴ case and its companion case Murray v. Curlett extended the Engel decision. At issue before the Court was a Pennsylvania statute (Schempp) requiring Bible reading without comment and the Lord's Prayer recited at the beginning of each school day. The Baltimore, Maryland Board of Commissioners (Murray) had as similar policy mandating scripture reading and reciting the

¹²²Ibid., p. 437.

¹²³Ibid., p. 443.

¹²⁴Abington School District v. Schempp, 374 U.S. 203 (1963).

Lord's Prayer. Plaintiff Schempp was successful in having the statute declared unconstitutional in Eastern District Federal Court and on appeal by the Abington Township School Board the Supreme Court sustained. However, Plaintiff Murray was successful--both the Maryland trial court and the Court of Appeals sustained the Commissioner's policy; however, on appeal the Supreme Court reversed.

Reviewing the past two decades of public education and judicial church-state history the Court insisted:

The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.¹²⁵

The Court insisted that allowing minor violations would breach the neutrality that is so important and could become a "raging torrent."¹²⁶

Justice Douglas, in a separate concurring opinion, maintained that ". . .through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates

¹²⁵Ibid., p. 222.

¹²⁶Ibid., p. 225.

the sensibilities of others."¹²⁷ Finally Justice Douglas said with respect to public financing of religious schools:

The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools. Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional, as I understand the Establishment Clause. Budgets for one activity may be technically separate from budgets for others. But the institution is an inseparable whole, a living organism, which is strengthened in proselytizing which it is strengthened in any department by contributions from other than its own members.

Such contributions may not be made by the State even in a minor degree without violating the Establishment Clause. It is not the amount of public funds expended, as this case illustrates, it is the use to which public funds are put that is controlling. For the First Amendment does not say that some forms of establishment are allowed; it says that "no law respecting an establishment of religion" shall be made. What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery.¹²⁸

The 1968 Board of Education v. Allen¹²⁹ addressed the Cochran question "apportioning state funds to school districts for the purchase of textbooks to be lent to parochial students."¹³⁰

A New York State law required local public school authorities to lend textbooks free of charge to both public

¹²⁷ *ibid.*, p. 226.

¹²⁸ *Ibid.*, pp. 229-230.

¹²⁹ *Board of Education V. Allen*, 392 U.S. 236 (1968).

¹³⁰ *Ibid.*, p. 240.

and private school students in grades seven through twelve. In this case, a local school board desiring to block the allocation of state funds for students of private, religious schools, challenged the constitutionality of the statute. The Court ruled in favor of the statute. Justice Hugo Black, one of three dissenting justices, (Justice Black who also voted with the majority Everson Court) maintained that:

It requires no prophet to foresee that one the argument used to support this law others could be upheld providing for state or federal government funds to buy property on which to erect religious school buildings or to erect the buildings themselves, to pay the salaries of the religious school teachers, and finally to have the sectarian religious groups cease to rely on voluntary contributions of members of their sects while waiting for the Government to pick up all the bills for the religious schools.¹³¹

Justice Douglas noted that initial textbook selections was by religious schools with local school board approval. Due to the fact that the school board is elected in New York, Justice Douglas insisted that "powerful religious-political pressures" will therefore be on the state agencies to provide books preferred by various groups.¹³² Finally Justice Douglas acknowledged that "the principle of separation of church and state, inherent in the Establishment Clause of the First Amendment, is violated by what we today approve."¹³³

¹³¹ Ibid., p. 253.

¹³² Ibid., p. 265.

¹³³ Ibid., p. 266.

The Allen decision reinforced the Courts' decisions in Cochran and Everson--the child benefit theory. Accommodationist means favorable acceptance of legislation apportioning state funds to purchase textbooks for religious elementary and secondary schools.

In 1968 Flast v. Cohen,¹³⁴ the Court addressed the important issue concerning plaintiff's standing to litigate the Elementary and Secondary Education Act of 1965, especially the purchase of textbooks and other materials for religious elementary and secondary schools. Relying on Frothingham¹³⁵ (1923) the District Court for the Southern District of New York insisted that Plaintiff Flast lacked proper standing.

In Frothingham the plaintiff was unsuccessful in challenging congressional action creating a maternity-care program, increasing the plaintiff's tax, because there is no federal statute or constitutional provision protecting citizens against tax increases--thus, no link between status and alleged infringement. Flast appealed and the Supreme Court reversed the lower court's decision, insisting that Flast has established a necessary connection between tax used to support religious schools and first amendment guarantee of religious freedom. The Court maintained:

Consequently, we hold that a taxpayer will have standing. . .to invoke federal judicial power when he alleges that congressional action under

¹³⁴Flast et al. v. Cohen, 392 U.S. 83 (1968).

¹³⁵Frothingham v. Mellon, 262 U.S. 447 (1923).

taxing and spending clause is in derogation of those constitutional provisions which operate to restrict¹³⁶ the exercise of the taxing and spending power.

The Court declined to provide judicial wisdom concerning federal expenditures for religious elementary and secondary schools. Thus, the decision was limited to plaintiff's constitutional right to assert such claim in federal courts. Justice Douglas gave a separate concurring the future of church-state and aid to religious schools. First, Justice Douglas acknowledged continuous efforts to stifle review of federal and state legislative efforts that aid religious schools. Second, he insisted, the Court should be readily available for citizens' redress in church-state cases--probably the only means of redress. Third, Justice Douglas recognized that the "mounting federal aid to sectarian schools is notorious and the subterfuges numerous."¹³⁷ Justice Douglas identified examples of subterfuges with the following:

Tuition grants to parents of students in church schools is considered by the clerics and their helpers to have possibilities. The idea here is that the parent receives the money, carries it down to the school, gives it to the priest. Since the money pauses a moment with the parent before going to the priest, it is argued that this evades the constitutional prohibition against government money for religion! This is a diaphanous trick which seeks to do indirectly what may not be done directly.

Another one is the "authority." The state may not

¹³⁶Flast et al. v. Cohen, 392 U.S. 83 (1968).

¹³⁷ibid., p. 113.

grant aid directly to church schools. But how about setting up an authority--like the Turnpike Authority? The state could give the money to the authority which, under one pretext or another could channel it into the church schools. Yet another favorite of those who covet sectarian subsidies is "child benefit." Government may not aid church schools, but it may aid the children in the schools. The trouble with this argument is that it proves too much. Anything that is done for a school would presumably be of some benefit to the children in it. Government could even build church school classrooms, under this theory, because it would benefit the children to have nice rooms to study in.¹³⁸

With Flast, citizens have constitutional standing to challenge federal legislation aiding religious elementary and secondary schools.

2.5 Conclusion

The Flast decision concluded the first seventy years of the 20th century concerning the Supreme Court's church-state and aid to religious elementary and secondary schools decisions. An analysis of decisions prior to the decade of the 70's indicates: 1) the "child-benefit" theory expressed in Cochran, Everson, and Allen is a viable constitutional route for legislatures seeking to aid religious elementary and secondary schools. 2) two parts of what would later become the Supreme Court tripartite test emerged during the decade of the 60's: a) there must be a secular legislative purpose; and b) the legislation must have a primary effect that neither advances or inhibits religion. Chief Justice Warren Burger

¹³⁸Ibid.

enunciated the third part of the tripartite test in the 1970 Walz v. Tax Commissioner of New York City¹³⁹ (this decision upheld New York's religious property tax exemption law by insisting the test is whether the statute fosters "excessive entanglement" between government and religious institutions).

There is no First Amendment religious violation where public funds are used under the child-benefit theory and for incidental administrative funds to administer off-campus released time religious activities as Zorach mandates. To the contrary, where public funds were used for religious activities such as on-campus public school and religious curriculum decisions the practice fails constitutional muster as first amendment religious advancement.

By 1970 the table is was set for further legal debate on the use of public tax dollars for the direct benefit of sectarian schools. In the 1990's the Supreme Court could settle the legality of the issue. History has placed the issues clearly in the hands of the Court because America has not agreed on a workable philosophy. The next two chapters will deal with the legal aspects of the issues.

¹³⁹Walz v. Tax Commissioner of New York City, 38 U.S. W.W. 4347 (1970).

STATE AND FEDERAL EFFORTS INVOLVING
TUITION TAX CREDITS
OR VOUCHERS

3.0 Introduction

A challenge presented to the Supreme Court relative to aid to religious schools could come from laws which are related to vouchers or tuition tax credits. State tuition tax credits or state voucher systems could be challenged as well as a federally sponsored voucher proposal which provided vouchers for parents of children enrolled in Chapter I programs.

Several state laws which provide aid in some form for church related schools have been on the books for years and have apparently cleared the challenges which could have come. Table I shows a breakdown of the various types of aid for church schools in each state.

This chapter will examine two other types of assistance provided to religious schools directly or indirectly through vouchers and/or tuition tax credits including an analysis of federal efforts to provide vouchers through Chapter I.

3.1 Current State Legislation on Voucher or Tuition Tax Credits

A recent survey done by the National Education Association reveals a move in the direction of vouchers or tax

TABLE II
ALL STATES WITH RESPECTIVE TYPES OF ASSISTANCE
TO RELIGIOUS ELEMENTARY AND SECONDARY SCHOOLS:¹
1984

Types of Assistance	Transportation	Textbooks and/or Educational Media	Instructional Materials	Lunches	Health Services and/or Equal Basis Auxiliary Services	Shared Time	Driver Ed.	Other Direct Aid	Miscellaneous
States									
Alaska	X			X					X
Arizona					X			X	X
California	X	X	X	X			X		X
Colorado		X				X			
Connecticut	X	X	X	X	X		X	X	X
Delaware	X						X		
Florida							X		X
Hawaii					X		X		
Idaho							X		
Illinois	X			X		X	X		
Indiana	X								
Iowa	X	X	X	X	X	X	X		X
Kansas					X				
Kentucky	X					X			
Louisiana	X	X	X	X			X	X	X
Maine	X	X			X				
Maryland	X				X				
Massachusetts	X	X			X				
Michigan	X				X		X		
Minnesota	X	X			X	X	X		
Mississippi		X			X		X	X	
Missouri					X				
Montana	X								
Nebraska	X								
Nevada	X			X					X
New Hampshire	X	X	X	X	X	X			X
New Jersey	X	X	X	X	X				X
New Mexico		X							
New York	X	X			X			X	
North Carolina									
North Dakota	X								X
Ohio	X	X			X		X	X	X
Oregon	X		X				X		
Pennsylvania	X	X	X	X	X	X	X	X	
Rhode Island	X	X	X			X		X	
South Carolina								X	
South Dakota		X					X		
Utah							X		
Vermont							X	X	
Washington						X			
West Virginia	X	X				X			
Wisconsin	X						X		

¹Dr. Joe Bryson, Unpublished Manuscript to be published in 1990, The Burger Years, p. 20.

credits, although at this time it is not known exactly how far the movement will go.

There are only two states, Iowa and Minnesota, which have passed state laws providing tuition tax credits for parents of elementary and secondary students.¹⁴⁰ Four states presently have Choice Plans for selection of schools.¹⁴¹ Including all three categories 19 states have had legislation relative to vouchers, tax credits, or Choice Plans introduced.

Table II shows the 19 states and a listing (if any) of the status of the bills.¹⁴²

3.2 Analysis of Federal Efforts for Voucher/Tuition Tax Credit Legislation

As mentioned earlier, Secretary of Education William Bennett proposed the voucher concept as part of the Reagan Administration's educational goals. Specifically, on November 13, 1985 Secretary Bennett unveiled proposed legislation to convert the Chapter I education program for disadvantaged school children into a voucher program. Entitled the "Equity and Choice Act of 1985," the proposal

¹⁴⁰NEA Survey, NEA National Headquarters, Washington, D.C., Summer 1987.

¹⁴¹Peter Schmidt, "Open-Enrollment Option Is Approved in Nebraska," Education Week, May 31, 1989, p. 8.

¹⁴²NEA Survey, NEA National Headquarters, Washington, D.C., Summer, 1987 and Peter Schmidt, "Open Enrollment Option is Approved in Nebraska," Education Week, May 31, 1989, p. 8.

Table III

State Efforts Involving
Vouchers, Tuition Tax Credits, and Choice Plans

<u>State</u>	<u>Type of Legislation</u>	<u>Synopsis</u>	<u>Status</u>
Arizona	Voucher	Allows a student to attend any public school in the state as long as the student's attendance does not disturb the ethnic balance of his home district or the school district s/he wishes to attend.	Legislature failed to ratify in 1986; reintroduced in 1987, but did not receive committee consideration. Likely to be reintroduced when the legislature next convenes.
Arkansas	Parental Choice	Open enrollment--parents may choose a school outside their home district and have the child's educational paid by the state at the regular rate of funding for student's in the state.	Passed into law in the 1989 session.
California	Tax Credit	A.B. 346 would allow parents to deduct 50% of education costs up to \$1,000 per year per student.	Referred to Assembly Ways and Means Committee. It is a two-year bill.
Delaware	Tax Deduction	Taxpayers would be permitted to deduct up to \$500 from their federal taxes for educational expenses.	Referred to Revenue and Taxation Committee of Delaware Senate.
Illinois	Property Tax Refund	Senate Bill (S.B.) 1237 the Parental Property Tax Relief Act, would provide payments to taxpayers who have children in tuition charging elementary or secondary schools.	Referred to Executive Committee, but was not reported out before the end of session. May be considered during the "Emergency and Appropriations" session if approved by the Rules Committee.

Table III (cont.)

State Efforts Involving
Vouchers, Tuition Tax Credits, and Choice Plans

<u>State</u>	<u>Type of Legislation</u>	<u>Synopsis</u>	<u>Status</u>
Illinois (cont.)	Voucher	H.B. 2509 would establish a pilot program for the distribution of vouchers to disadvantaged parents for the purchase of educational services for their children from private service providers of the parents' choice.	Placed on Interim Study Calendar; may be considered during the next session if the committee to which H.B. 2509 was assigned conducts a public hearing on it before the legislature convenes.
Iowa	Tuition Tax Credit and Deduction	Parents may deduct up to \$1000 per child for expenses for tuition and textbooks at either public or state-accredited private schools. Parents who don't itemize would be eligible for a \$50 tax credit.	Approved by the Iowa State Legislature on May 10, 1987.
	Parental Choice	Open enrollment--Parents may choose a school outside their home district and have the child's education paid by the state at the regular rate of funding for students in the state.	Passed into law in the 1989 session.
Kansas	Tuition Tax Credit	Similar to Minnesota Legislation	Killed in House

Table III (cont.)

State Efforts Involving
Vouchers, Tuition Tax Credits, and Choice Plans

<u>State</u>	<u>Type of Legislation</u>	<u>Synopsis</u>	<u>Status</u>
Louisiana	Voucher	S.B. 643 would require the state to supply each student wishing to attend a non-public school with a voucher equal in value to the amount the state spends per student on public education.	Bill was not considered by committee before the session ended.
Massachusetts	Tuition Tax Credit	S.B. 142 Tuition to pay for students' tuition in public or private school.	Died in Committee
Minnesota	Tuition Tax Credit	Deduction for education expenses for elementary and secondary students (textbooks, tuition, fees, and transportation)	State law
	Parental Choice	Open enrollment--Parents may choose a school outside their home district and have child's education paid by state at regular rate of funding for students in the state.	Passed into law in the 1988 session.
Missouri	Vouchers	Several bills introduced	All killed

Table III (cont.)

State Efforts Involving
Vouchers, Tuition Tax Credits, and Choice Plans

<u>State</u>	<u>Type of Legislation</u>	<u>Synopsis</u>	<u>Status</u>
Nebraska	Tax Credit	L.B. 895 Tax deduction of up to \$1700 for education expenses public and private schools.	Pending next session.
	Voucher	L.B. 1230	Referred to appropriations
	Parental Choice	Open enrollment--Parents may choose a school outside their home district and have child's education paid by state at regular rate of funding for students in the state.	Passed into law in the 1989 session.
New Jersey	Tax Deduction	A. 447 provides for a deduction from gross income not to exceed \$1,000 for the actual expenses incurred for tuition, textbooks, and transportation for dependent children attending elementary or secondary schools.	Referred to the Education Committee; has not yet been considered by the Committee.
	Indirect Aid	A number of initiatives have been introduced that provide indirect aid to private schools by requiring school districts to provide nursing services to private schools or requiring the state to reimburse transportation costs to the private schools.	Referred to committees; none of the proposals have seen floor action.

Table III (cont.)

State Efforts Involving
Vouchers, Tuition Tax Credits, and Choice Plans

<u>State</u>	<u>Type of Legislation</u>	<u>Synopsis</u>	<u>Status</u>
New York	Tax Credit	S. 29 and A 5541 would provide a tax credit or modification reducing federal A.G.I. for qualified educational expenses in computing personal income tax.	Was reported from Senate Committee but not voted on by full Senate; Assembly bill has not moved from Committee.
North Carolina	Voucher	H.B. 1000 Voucher worth \$50 to parents to use as a reward for satisfaction with child's teacher. Money goes to teacher.	Killed in Education Committee.
	Parental Choice	H. 1256 To establish public schools of choice by election of local boards of education. To authorize a local school board to elect to permit students who reside in other school units to enroll in its schools and to authorize a local school board to elect to permit students who reside in the board's unit to enroll in any school in the unit.	In Education Committee
North Dakota	Tuition Tax Credit and Textbooks	H.G. 1347, Tax Credit plus cost of textbooks	Passed House, killed in Senate, close vote

Table III (cont.)

State Efforts Involving
Vouchers, Tuition Tax Credits, and Choice Plans

<u>State</u>	<u>Type of Legislation</u>	<u>Synopsis</u>	<u>Status</u>
Texas	Voucher	Would provide a voucher for disadvantaged students to be used in either public or private schools.	Was not acted upon before the session ended; will be reintroduced next session.
Utah	Tax Credit	B.S. 53 would provide a maximum of \$400 tax credit per student enrolled in a private school for tuition, textbooks, supplies, and transportation.	S.B. 53 was killed in the Senate Committee.
	Voucher	Referendum to provide vouchers to parents for educational expenses.	Voters defeated proposal in November general election.
Wisconsin	Tax Deduction	A.B. 476 would create an individualized income tax deduction for amounts paid for school expenses related to credit courses.	Referred to joint Survey on Tax Exemptions Committee.

would have permitted the parents of children eligible to participate in Chapter I programs, at their option, to receive a voucher worth a proportionate share of Chapter I funds and to use that voucher to purchase educational services from public or private schools other than the schools in whose attendance area the children lived. The program was introduced in the Senate as S.B. 51876 and in the House as H.R. 3821.¹⁴³

In his analysis of the voucher proposal, David Ackerman cited the well known Lemon tri-partite test as the key to constitutionality of the proposal. He concluded that neither the secular purpose nor non-entanglement aspects of the test appeared to pose obstacles to the voucher proposal. In its previous decisions in this area, the Supreme Court found acceptable a variety of legislative statements of purpose: "the furtherance of the educational opportunities available to the young;" the promotion of "pluralism and diversity among public and nonpublic schools;" the protection of the public school system from being inundated by children abandoning nonpublic schools because of cost; the assurance of the "full development of the intellectual capacities of children;" and the maintenance of private schools as a qualitative

¹⁴³David M. Ackerman, "Analysis of the Constitutionality of the Administration's Chapter I Voucher Proposal Under the Establishment of Religion Clause of the First Amendment," Congressional Research Service, Washington, D.C. 12-4-85, p. 1.

"benchmark" for the public schools. Ackerman stated that Chapter I programs for vouchers seem consistent with the purposes previously found constitutional by the Supreme Court.¹⁴⁴

Ackerman did not see the non-entanglement aspect of the test as posing a significant barrier. He stated that previous decisions made it clear that a program benefitting sectarian elementary and secondary schools cannot pass muster under this aspect of the tri-partite test if it involved public authorities in "a comprehensive, discriminating and continuing surveillance" of how the program operated. He saw no such administrative entanglement. The vouchers simply contain no restrictions as to use that would have to be closely monitored by public officials on the premises of sectarian schools.¹⁴⁵

More problematic is whether the voucher plan might run afoul of the primary effect aspect of the tri-partite test. In Nyquist and Lemon the Supreme Court held unconstitutional two state tuition grant programs benefitting parents of children attending private sectarian schools.¹⁴⁶

In Nyquist the wording was ". . .Insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to

¹⁴⁴Ibid., p. 3-4.

¹⁴⁵Ibid., p. 5.

¹⁴⁶Ibid.

aid and advance those religious institutions.¹⁴⁷ Closely related to the Nyquist wording is *Sloan v. Lemon* which stated, ". . . No matter how it is characterized its effect remains the same. The state has singled out a class of its citizens for a special economic benefit. . . at bottom its intended consequence is to preserve and support religion oriented institutions."¹⁴⁸

More encouraging to the administration's proposals was the Mueller decision in 1983 which upheld Minnesota's tuition tax credits as constitutional. A key statement by the Court was that "a program that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."¹⁴⁹

For that reason, Ackerman concluded that the administration's proposed Chapter I voucher plan did not appear likely to founder on the primary effect prong of the tri-partite test. Under the administration's proposal the vouchers would be available to a broad class of parents, including both those whose eligible children attend private schools and those whose children attend public schools.¹⁵⁰

¹⁴⁷Committee for Public Education v. Nyquist, 413 U.S. 756, (1973).

¹⁴⁸Sloan v. Lemon, 413 U.S. 825 (1973).

¹⁴⁹Mueller v. Allen, 463 U.S. 388, (1983).

¹⁵⁰Ackerman, *Analysis of the Constitutionality of the Administration's Chapter I Voucher Proposal Under the Establishment of Religion Clause of the First Amendment*, "Congressional Research Service, Washington, D.C. 12-4-85, p.

JoAnne Durako, Legislative Counsel for the United States Department of Justice, gave a somewhat more in-depth analysis. In citing the Mueller case, she pointed out that the Court declined to examine the precise economic consequences of the Minnesota tax deduction because some financial benefit was theoretically made available to all parents, whether their children were enrolled in public schools or private schools. Thus, the Court declined to go behind the "facially neutral" legislation to determine whether the tax benefit there at issue was primarily going to parents of parochial school students, and thereby having the "primary or principal effect of advancing religion."¹⁵¹

The Department of Justice does not believe that S. 1876 succumbs under the "more difficult but related question of whether it has the primary effect of advancing religion." In concluding that it does not, there are two significant features the legislation has in common with the tax deduction sanctioned by the Court in Mueller. Under S. 1876, the benefits flow directly to parents, not to schools. Therefore, like the benefits at issue in Mueller, it did not give rest to the "evils against which the Establishment Clause was

¹⁵¹JoAnne Durako, Department of Justice Analysis of Administration's Chapter I Voucher Proposal, Memorandum, May 9, 1986, p. 5.

designed to protect."¹⁵² The second important similarity between S. 1876 and the Minnesota tax deduction is that in both cases benefits are available to parents of public as well as private school children. The Department of Justice felt that these two similarities rendered S. 1876 more analogous to the scheme upheld in Mueller than to that invalidated in Nyquist insofar as the "primary effect" was concerned.¹⁵³

Insofar as the entanglement issue is concerned, the Department of Justice stated that it felt very confident that entanglement would not be a problem to the bill because it did not contain an administrative mechanism whereby state officials could review services received by children to ensure that a voucher will not be used for

instructional books and materials used in the teaching of religious tenets, doctrines or workshops and that S. 1876 bears no similarity to the aid scheme recently invalidated in Aquilar v. Felton, since it does not invite "pervasive monitoring" by public authorities in the sectarian schools.¹⁵⁴

The Department does not believe that the simple verification process approximates either the quantity or the quality of the review undertaken in Aquilar, which the Court noted as "ongoing and expressly designed to" monitor teachers and students in an attempt to guard against the infiltration

¹⁵²Ibid., p. 5, 6.

¹⁵³Ibid., p. 6.

¹⁵⁴Ibid., p. 7, 8.

of religious thought.¹⁵⁵ In other words, once an educational institution meets the minimal eligibility requirements for a parent's participation under the voucher proposal, it will operate largely autonomously without the necessity for the "frequent contact" between church and state that existed in Aquilar. Accordingly, the administration of the voucher proposal should not entail an impermissible entanglement of Church and State.¹⁵⁶

In summary the Department of Justice analysis concluded that the legislation should withstand constitutional scrutiny, although it did state that predicting the outcome of an Establishment Clause challenge to so-called "voucher bills" is a hazardous enterprise.¹⁵⁷ The reason for such a feeling of lack of certainty quite possibly could have come from Justice Rehnquist who wrote in Mueller:

It is not at all easy. . .to apply this Court's various decisions construing the Establishment Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools. Indeed, in many of these decisions we have expressly or implicitly acknowledged that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.¹⁵⁸

¹⁵⁵ Aquilar v. Felton, 105 S. Ct. at 3239 (1983).

¹⁵⁶ Durako, Department of Justice Analysis of Administration's Chapter I Voucher Proposal, Memorandum, May 9, 1986, p. 5.

¹⁵⁷ Ibid., p. 1.

¹⁵⁸ Mueller v. Allen, 463 U.S. 388, 393, (1983).

3.3 Conclusion

Based on an analysis of proposed legislation at the Federal and state levels, it appears that the voucher issue is on the American educational/political scene for the next several years.

Chapter four will address the legal issues that must be settled if vouchers or tax credits are to become an integral part of American education.

Chapter Four

The Supreme Court and the Legality of Using Tax Funds for Religious Elementary and Secondary Schools

4.0 Introduction

Should the Supreme Court be presented with a challenge to a state or federal law providing vouchers to parents for use in sectarian schools, certain constitutional factors would be included in the Court's decision. As of December 31, 1988, there had not been a voucher challenge to the Supreme Court, although the Court had decided numerous cases dealing with direct and indirect aid to private schools.

Chief Justice Burger stated in Lemon v. Kurtzman that the Court's decisions from Everson¹⁵⁷ to Allen¹⁵⁸ had permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were

¹⁵⁷Everson v. Board of Education, 67 S.Ct. 504 (1947).

¹⁵⁸Board of Education v. Allen, 88 S.Ct. 1923 (1968).

held not to offend the Establishment Clause as stated in Lemon v. Kurtzman. In addition Justice Burger cited Walz v. Tax Commission, which upheld state tax exemptions for real property owned by religious organizations and used for religious worship as another permissible practice.¹⁵⁹

Should voucher legislation (either state or federal) come before the Supreme Court, the Constitutional principles detailed in landmark cases listed below must be answered. Those Constitutional principles are previously raised in the tri-part test first raised in Lemon I:

- (1) A statute must have a secular purpose,
- (2) Its principle or primary effect must be one that neither advances nor inhibits religion, and
- (3) It must not foster excessive government entanglement with religion.

This chapter will analyze seven major cases which deal with state aid to sectarian schools. They are:

Lemon v. Kurtzman, 91 S.Ct. 2105 (1971)

Sloan v. Lemon, 413 U.S. 825 (1973)

Committee for Public Education and Religious Liberty v. Nyquist, 93 S.Ct. 2955 (1973)

Levitt v. Committee for Public Education and Religious Liberty, 93 S.Ct. 2814 (1973)

¹⁵⁹Lemon v. Kurtzman, 91 S.Ct., p. 2105.

Committee for Public Education and Religious Liberty v. Regan, 100 S.Ct. 840 (1980)

Mueller v. Allen, 103 S.Ct. 3062 (1983)

Grand Rapids School District v. Ball, 105 S.Ct. 3216 (1985)

The judicial philosophy of these cases will be analyzed to see the consistency between the cases of the 1970's and the cases of the 1980's, to determine when change occurred, and to record the modifications of the Court's judicial philosophy.

The Supreme Court has never developed a clear path and complete format concerning aid to sectarian schools. As Justice White, in Regan stated,

Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States--the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth--produces a single, more encompassing construction of the Establishment Clause.¹⁶⁰

The important guiding principles have come down in the

¹⁶⁰ Committee For Public Education and Religious Liberty v. Regan, 100 S. Ct., p. 840.

three tests of Lemon I: (1) secular purpose, (2) primary effect of non-advancement or inhibition of religion, and (3) excessive entanglement. A fourth major principle has evolved, that being a philosophy that a statute cannot foster political divisiveness among the people.

Justice Rehnquist echoes Justice White's analysis in Mueller by remarking, "It is easy enough to quote the few words constituting that Clause"--"Congress shall make no law respecting an establishment of religion." It is not at all easy, however, to apply this court's various decisions construing the Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools. Indeed, in many of these decisions we have expressly or implicitly acknowledged that 'we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.'"¹⁶¹

4.1 Summary of Cases

Lemon v. Kurtzman, 91 S.Ct. 2105 (1971)

In ruling on this case, the Supreme Court dealt with two state statutes of similar nature: Lemon v. Kurtzman 91 S. Ct. 2105 (1971) which involved a Pennsylvania Statute, and Robinson v. DiCenso 91 S.Ct. 2111 (1971), involving a Rhode Island statute. Rhode Island's 1969 Salary Supplement Act provided for a 15% salary supplement to be paid to teachers in nonpublic schools at which the average per-pupil expenditure on secular education was below the average in

¹⁶¹Mueller v. Allen, 103 S.Ct., p 3062.

public schools. Eligible teachers were to teach only courses offered in public schools, using only materials used in the public schools, and they had to agree not to teach courses in religion.

A three judge federal court found that about 250 teachers in Roman Catholic schools were the sole beneficiaries under the Act. The Federal Court found that the Act fostered "excessive entanglement" between government and religion, thus violating the Establishment Clause. The Federal Court reasoned that there was cause to require continuing state surveillance to ensure that the statutory restrictions were obeyed.

Pennsylvania's statute provided direct aid to nonpublic elementary and secondary schools in the form of reimbursement to those schools for teachers' salaries, textbooks, and instructional materials in connection with the teaching of specific secular subjects. The state's rationale was that educational goals could appropriately be fulfilled by government support of "those purely secular educational objectives achieved through nonpublic education services."¹⁶²

A school seeking reimbursement had to prescribe accounting procedures that identified the separate cost of the secular educational services. These accounts were subject to

¹⁶²Lemon v. Kurtzman, 91 S.Ct. 2105 (1971).

state audit.

A three judge federal United States District Court for the Eastern District of Pennsylvania dismissed the appeal by Alton J. Lemon who claimed the Act violated the Establishment Clause.

Both the Rhode Island and the Pennsylvania cases were heard by the Supreme Court, which declared both statutes unconstitutional. The Supreme Court, Chief Justice Burger, held that both statutes were unconstitutional under the religion clauses of the First Amendment, through promoting secular legislative purposes, since both involved excessive entanglement of state with church. The Rhode Island program, consisting of salary supplements paid to teachers of secular subjects in nonpublic schools, operated to the benefit of parochial schools constituting an integral part of the religious mission of the church. The recipient teachers were under religious control and discipline. The Court required comprehensive and continuing state surveillance to insure obedience to restrictions as to the courses which could be taught, and the materials which could be used.

The Pennsylvania program, involving reimbursement of nonpublic schools for teacher's salaries, textbooks, and instructional materials used in the teaching of specific secular subjects, provided direct aid to church schools and

an intimate and continuing relationship arising from the state's postaudit power to inspect and evaluate school's financial records to determine which expenditures were religious and which were secular. Both statutes posed the danger of divisive political activity and the possibility of progression leading toward the establishment of state churches and state religion.

Sloan v. Lemon 413 U.S. 825 (1973)

On June 28, 1971 the Supreme Court handed down Lemon v. Kurtzman, in which Pennsylvania's "Nonpublic Elementary and Secondary Act" was held unconstitutional as violative of the Establishment Clause. That law authorized the State to reimburse nonpublic, sectarian schools for their expenditures on teachers' salaries, textbooks, and instructional materials used in specified "secular" courses. The Court's ruling was based on the fact that the aid would foster "excessive entanglement" between government and religion.

On August 27, 1971, almost two months after the Lemon ruling, the Pennsylvania General Assembly promulgated a new aid law, entitled the "Parent Reimbursement Act for Nonpublic Education," providing funds to reimburse parents for a portion of tuition expenses incurred in sending their children to nonpublic schools. Shortly thereafter, a suit, challenging the enactment and seeking declarative and injunctive relief,

was filed in the U.S. District Court for the Eastern District of Pennsylvania. On April 6, 1972 the three-judge court ruled the act unconstitutional.

On appeal the Supreme Court also ruled the act unconstitutional because it could find no constitutionally significant difference between New York's program, which was ruled unconstitutional in Nyquist, and Pennsylvania's program. The Court said, "The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequences is to preserve and support religion-oriented institutions. According to the language of the court, this statute clearly violated the primary effect portion of the tri-part test.

Committee For Public Education and Religious Liberty v. Nyquist
413 U.S. 756 (1973)

Amendments to New York's Education and Tax Laws established three financial aid programs for nonpublic elementary and secondary schools. The first program provided for direct monetary grants to "qualifying" nonpublic schools to be used for "maintenance and repair" of facilities and equipment to ensure the students' "health, welfare, and

safety." Qualifying schools were nonpublic elementary and secondary schools serving a high concentration of pupils from low-income families. The annual grant was \$30 per pupil or \$40 if the facilities were more than 25 years old, and could not exceed 50% of the average per-pupil cost for equivalent services in the public schools.

The second program established a tuition reimbursement plan for parents of children attending nonpublic elementary or secondary schools. To qualify, on his state income tax a parent's annual taxable income had to be less than \$5,000. The reimbursement was \$50 per grade school child and \$100 per high school student, not to exceed 50% of tuition paid.

The third program was designed to give tax relief to parents failing to qualify for tuition reimbursement. Each eligible tax-payer parent was entitled to deduct on his state income tax a stipulated sum from his adjusted gross income for each child attending a nonpublic school. The amount of the deduction was unrelated to the amount of tuition actually paid and decreased as the amount of taxable income increased.

The District Court held that the maintenance and repair grants, and the tuition reimbursement grants were invalid, but that the income tax provisions did not violate the Establishment Clause. The case was appealed to the Supreme Court.

The Supreme Court, with Justice Powell delivering the opinion, upheld the district court in declaring the maintenance and repair grants and the tuition reimbursement grants unconstitutional. The Court reversed the lower court's decision to uphold the income tax deduction by declaring that this section of the law violated the Establishment Clause because it was not sufficiently restricted to assure that it would not have the impermissible effect of advancing the sectarian activities of religious schools.

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

The New York Legislature appropriated \$28 million to reimburse nonpublic schools in the State for "expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of public enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports. . ." Qualifying schools would have received annually \$27 per pupil in grades one through six, and \$45 in grades seven through twelve and would not be required to account for the monies received and how they were spent. A three-judge District Court found the Act

unconstitutional under the Establishment Clause. The Court held that the greatest portion of the funds were for the services of teachers in testing students and that testing is an integral part of the teaching process.

The Supreme Court ruled the Act unconstitutional, stating that the statute constituted an impermissible aid to religion contravening the Establishment Clause, since no attempt was made and no means were available to assure that internally prepared tests, which are "an integral part of the teaching process," are free of religious instruction and avoid inculcating students in the religious precepts of the sponsoring church. Once again another statute failed the tripart test.

Committee For Public Education and Religious Liberty v. Regan
444 U.S. 644, (1980)

After a New York statute that appropriated public funds to reimburse both church-sponsored and secular nonpublic schools for performing various services mandated by the state, including the administration, grading and reporting of the results of tests, both state-prepared and teacher-prepared tests, had been held to be violative of the Establishment Clause, the New York Legislature enacted a new statute directing payment to nonpublic schools of the costs incurred

by them in complying with certain state-mandated requirements, including requirements as to testing (pupil evaluation, achievement, and scholarship and college qualification tests) and as to reporting and record keeping. The new statute, unlike the earlier version, also provided a means by which state funds were audited, thus ensuring that only the actual costs incurred in providing the covered secular services were reimbursed out of state funds. The District Court upheld the new statute.

The Supreme Court ruled that the New York statute did not violate the First and Fourteenth Amendments. The Court's thinking was that the New York statute had a secular purpose of providing educational opportunity of a quality that would prepare New York citizens for the challenges of American life. There was no substantial risk that the examinations could be used for religious educational purposes and reimbursement for the costs of complying with state law had primarily a secular, rather than a religious purpose and effect.

Mueller v. Allen, 103 S.Ct. 3062 (1983)

A Minnesota statute allowed state taxpayers, in computing their state income tax, to deduct expenses incurred in providing "tuition, textbooks, and transportation" for their children attending an elementary or secondary school.

Petitioner Minnesota taxpayers brought suit in Federal District Court against respondent Minnesota Commissioner of Revenue and respondent parents who had taken the tax deduction for expenses incurred in sending their children to parochial schools. They claimed the statute provided financial assistance to sectarian institutions, thus violating the Establishment Clause. The District Court and the Court of Appeals both upheld the statute as constitutional, not having a primary effect of either advancing or inhibiting religion.

The Supreme Court held that the statute did not violate the Establishment Clause, but satisfied all elements of the "three part" test laid down in Lemon v. Kurtzman. The Court ruled that the tax deduction in question had the secular purpose of ensuring that the State's citizenry is well educated, as well as assuring the continued financial health of private schools. It also ruled that the deduction did not have the primary effect of advancing the sectarian aims of nonpublic schools because it was one of many deductions and it was available to all parents, whether their children attended public or private schools.

Grand Rapids School District v. Ball, 105 S.Ct. 3216, (1985)

Grand Rapids School District adopted two programs--Shared Time and Community Education--that provided classes to nonpublic school students at public expense in classrooms located in and leased from the nonpublic schools. The Shared Time program offered classes during the regular school day that were intended to supplement the "core curriculum" courses required by the state. The teachers were full-time employees of the public schools, but a "significant portion" of them had previously taught in nonpublic schools. The program offered classes at the conclusion of the regular school day in voluntary courses, some of which were not offered at public schools. Teachers were part-time public school employees who for the most part were otherwise employed full time by the same nonpublic school in which the after-school classes were offered.

The District Court and the Court of Appeals ruled that the programs violated the Establishment Clause and enjoined further operation of the programs.

The Supreme Court sustained the lower Court's decision that both programs did violate the Establishment Clause by having a "primary or principle effect of advancing religion." The challenged programs had the effect of impermissibly promoting religion in these ways. First, the state-paid teachers, influenced by the pervasively sectarian nature of

the religious schools in which they work, may subtly or overtly indoctrinate the students in religious tenets at public expense. Second, the symbolic union of church and state inherent in the provision of secular state-provided public instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public. Third, the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects.

4.2 Key Elements in the Major Supreme Court Rulings

Careful analysis of the language of the seven key Supreme Court cases reveals consistencies from case to case and some inconsistencies in the majority opinions. Most of the cases stick to the major language in Lemon v. Kurtzman until the Mueller majority opinion changes the thinking considerably. The language moves from a firm opinion supporting basically no aid to sectarian schools, except for transportation and books, to a more favorable opinion. The language of the minority dissents in several of the earlier cases moves to the language of the majority opinion in Mueller. The Mueller opinion is the case which makes the scenario for a voucher challenge more cloudy in view of the language of the earlier

decisions of the Court.

For purposes of this study the language of the seven cases can be broken into six major headings. They are: (1) Statistics which reveal the numbers of teachers and students benefitting from aid to sectarian schools; (2) Public vs. private schools; (3) Political divisiveness; (4) Entanglement; (5) Indirect benefits to sectarian schools; and (6) Constitutional considerations. The skeletal framework for these six major topics is the tri-part test which is the major point of reference for the rationale of most of the topics.

4.2 A. Numbers Affected By State Laws Providing Aid to Sectarian Schools

Justice Douglas, in Lemon v. Kurtzman, set the tone which prevailed for years when he wrote "when taxpayers of many faiths are required to contribute money for the propagation of one faith, the Free Exercise Clause is infringed."¹⁶³ This philosophy was related directly to the numbers affected by the Rhode Island statute in the DiCenso part of Lemon. A three-judge court found that of the 25% of the State's elementary students who attended nonpublic schools about 95% attended Roman Catholic affiliated schools, and that about 250 teachers at Roman Catholic schools were the sole beneficiaries under

¹⁶³Lemon v. Kurtzman, supra note 1, p. 2118.

the act. The Court interpreted these numbers of people as an integral part of the religious mission of the Catholic Church and found that the Rhode Island statute was unconstitutional.¹⁶⁴

A key ingredient in the Court's decision to declare the second Pennsylvania statute unconstitutional by advancing religion was the number of students receiving the aid. In Sloan v. Lemon, the Court noted that more than 90% of the children attending nonpublic schools in Pennsylvania were enrolled in religious schools.¹⁶⁵

The philosophy of looking at who benefits from state aid to private schools held true to the Lemon majority opinions for several years until it was overturned in Mueller v. Allen. Justice Rehnquist in the majority opinion felt that the numbers of beneficiaries in Minnesota, which were similar to Pennsylvania's, was not an important factor in the Court's decision. In his majority opinion Justice Rehnquist noted the argument of the petitioners, who "contend that most parents of public school children incur no tuition expenses" and receive no benefits of the law and that 96% of the children in private schools in 1978-79 attended sectarian schools.¹⁶⁶

¹⁶⁴Ibid.

¹⁶⁵Sloan v. Lemon, 413 U.S. 825, p. 2985.

¹⁶⁶Mueller v. Allen, supra note 3, p. 3070.

Noteworthy language is written in this opinion and it reflects a philosophical change in the Court's opinion, although it was only a 5-4 majority. Justice Rehnquist stated,

We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled--under a facially neutral statute--should be of little importance in determining the constitutionality of the statute permitting such relief.¹⁶⁷

Related to the Court's philosophy on the numbers of beneficiaries is the value of private schools in competition with public schools. Justice Rehnquist's opinion speaks to this particular philosophy.

4.2. B. Public v. Private Schools

Over the years the Supreme Court has had to incorporate into its thinking the relative value of private schools to the United States as a society. Several of the state statutes in question were designed with the attitude that private schools

¹⁶⁷ Ibid.

were important and should be preserved.

In Lemon v. Kurtzman, the Pennsylvania argument in favor of providing aid to private schools was that the "private parochial school system takes about nine billion dollars a year off the back of the government."¹⁶⁸ Justice Douglas rejected that argument when he stated "as if that were enough to justify violating the Establishment Clause."¹⁶⁹

Similar reasoning to the Pennsylvania statute was brought forward by the State of New York in Committee For Public Education v. Nyquist. Expressing a dedication to the "vitality of our pluralistic society," the findings stated that a "healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences."¹⁷⁰ The state further argued that any "precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs,"¹⁷¹ and would seriously jeopardize quality education for all children. These arguments did not carry enough weight

¹⁶⁸Lemon v. Kurtzman, supra note 1, p. 2119.

¹⁶⁹Ibid.

¹⁷⁰Committee For Public Education and Religious Liberty v. Nyquist, 93 S. Ct. 2961 (1973).

¹⁷¹Ibid.

to persuade the Court to rule in favor of the New York statute.¹⁷²

A similar state argument was rejected by the Court in the Pennsylvania rationale in Sloan v. Lemon.¹⁷³ The Pennsylvania law, as prefaced by legislative findings, emphasized that parents who sent their children to nonpublic schools reduced the total cost of public education,

"inflation, plus sharply rising cost of education, now combine to place in jeopardy the ability of such parents fully to carry this burden"; if the State's 500,000 nonpublic school children were to transfer to the public schools, the annual operating costs to the State would be \$400 million, and the added capital costs would be one billion dollars, therefore "parents who maintain students in nonpublic schools provide a vital service: and deserve at least partial reimbursement for alleviating an otherwise "intolerable public burden."¹⁷⁴

A decade later the Court's majority spoke favorably toward the argument placing high value on sectarian schools and adding one key point in their favor--competition for public schools. In Mueller v. Allen the majority opinion, written by Justice Rehnquist stated

private educational institutions and parents paying for their children to attend these schools, make special contributions to the areas in which they

¹⁷²Committee for Public Education and Religious Liberty v. Nyquist, 93 S. Ct. 2955, p. 2961.

¹⁷³Sloan v. Lemon, 413 U.S. 825 (1973).

¹⁷⁴Sloan v. Lemon, supra note 6, p. 2985.

operate. . .Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools.¹⁷⁵

4.2. C. Political Divisiveness

In several of the key cases the Court expressed concern that public aid channelled to sectarian schools could lead to political divisiveness and political strife.

One concern was with state aid programs which required ongoing appropriations from year to year. In Lemon v. Kurtzman the Court cited the Rhode Island and the Pennsylvania programs as having a need for continuing annual appropriations and "the likelihood of larger and larger demands, presenting hazard of divisive political activity."¹⁷⁶ Continuing with the argument, Chief Justice Burger pointed out that it can be assumed that state assistance will entail considerable political activity. Justice Burger stated that "partisans of parochial schools, concerned with rising costs will inevitably champion their cause and promote political action to achieve their goals, while those who oppose state aid will respond as well."¹⁷⁷ Justice Burger's argument against state aid on the

¹⁷⁵Mueller v. Allen, supra note 3, p. 3070.

¹⁷⁶Lemon v. Kurtzman, 91 S.Ct. 2106 (1971).

¹⁷⁷Ibid.

grounds of political divisiveness was summed up when he stated, "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."¹⁷⁸

This type of concern was reinforced in 1973 in Committee for Public Elementary and Religious Liberty v. Nyquist. Justice Powell wrote language similar to Justice Burger when he stated,

one factor of recurring significance in this weighing process is the potentially divisive political effect of an aid program. As Mr. Justice Black's opinion in Everson v. Board of Education emphasizes, competition among religious sects for political and religious supremacy has occasioned considerable civil strife generated in large part by competing efforts to gain or maintain the support of government.¹⁷⁹

Justice Powell also cited Justice Harlan's comment that what was at stake was "preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point."¹⁸⁰

Another comprehensive statement about the dangers of governmental involvement in aid to sectarian schools was

¹⁷⁸ Lemon v. Kurtzman, supra note 1, p. 2106.

¹⁷⁹ Committee For Public Education and Religious Liberty v. Nyquist, supra note 10, p. 2977.

¹⁸⁰ Ibid.

addressed in Grand Rapids v. Ball. Justice William Brennan cautioned as to what was likely to happen when he wrote,

history teaches that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or a dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies.¹⁸¹

Justice Brennan, also in Grand Rapids¹⁸², summed up the major problem when he wrote that the importance of this issue relates to the primary effect test. He noted that the major concern was

whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.¹⁸³

Once again in Mueller v. Allen the majority thinking in previous Supreme Court cases was discarded for a philosophy which overturned previous philosophies. Justice Rehnquist, in comparing the concerns of previous courts with the concerns present in the Mueller case ruled out any problems in this area because "at this point in the twentieth century we are quite removed from the dangers that prompted the Framers to

¹⁸¹Grand Rapids v. Ball, 105 S.Ct., p. 3226.

¹⁸²Grand Rapids School District v. Ball, 105 S.Ct. 3216.

¹⁸³Ibid.

include the Establishment Clause in the Bill of Rights."¹⁸⁴

Justice Rehnquist used clarifying language to explain why he saw no danger of political divisiveness by stating,

the risk of significant religious or denomination control over our democratic processes--or even of deep political division along religious lines--is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this court.¹⁸⁵

The difference in perspective that Mueller brings to bear against the other key cases is very evident in Justice Rehnquist's above statement as he rules out any danger of political divisiveness. The question arises as to whether future Court's decisions will show concern for political divisiveness--its existence and its impact.

4.2. D. Excessive Government Entanglement

Entanglement, which is the third part of the tri-part test results when a particular law requires such continual monitoring by the government to bring about excessive governmental involvement to insure proper expenditure of the public aid called for in a law.

¹⁸⁴Mueller v. Allen, 103 S.Ct. 3062 (1983).

¹⁸⁵Mueller v. Allen, supra note 3, p. 3069.

Entanglement was a major concern to the Court in developing the tri-part test. In Lemon v. Kurtzman Chief Justice Burger, in ruling against the Pennsylvania statute of reimbursement of nonpublic schools for teachers salaries and materials for teaching secular subjects and Rhode Island's program of salary supplements for teachers of secular subjects in nonpublic schools, cited entanglement as a major reason. Justice Burger noted that both programs provided direct aid to church schools and that there would be intimate and continuing relationships arising from the state's post audit power to inspect and evaluate schools' financial records and to determine which expenditures were religious and which were secular. Justice Burger also noted that historically governmental control and surveillance measures tend to follow cash grant programs.¹⁸⁶

In Committee for Public Education and Religious Liberty v. Nyquist¹⁸⁷ the Court ruled as unconstitutional the New York statute of aid to nonpublic schools through maintenance and repair grants, tuition reimbursement, and tax relief, on the grounds that the statute advanced religion. Concerning excessive entanglement the Court maintained that, "apart from

¹⁸⁶Lemon v. Kurtzman, supra note 1, p. 2115.

¹⁸⁷Committee For Public Education and Religious Liberty v. Nyquist, 93 S.Ct. 2955 (1973).

any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion."¹⁸⁸

In Mueller v. Allen the Court took a different view of entanglement than in prior cases of public aid to nonpublic schools. Chief Justice Rehnquist stated in the majority opinion,

we have no difficulty in concluding that the Minnesota statute of tax deductions does not 'excessively entangle' the State in religion. The only plausible source of the 'comprehensive, discriminating, and continuing state surveillance,' necessary to run afoul of this standard would lie in the fact that state officials must determine whether particular textbooks qualify for a deduction. Making decisions such as this does not differ substantially from making the types of decisions¹⁸⁹ approved in earlier opinions of this Court.

By taking this approach the Mueller Court jettisoned some of the earlier Court's arguments concerning excessive entanglement. Justice Thurgood Marshall, in dissenting noted such when he stated, "What is of controlling significance is not the form but the 'substantive impact' of the financial aid." In effect insisted Justice Marshall, the impact would be the same as in the earlier statutes which did involve

¹⁸⁸Committee for Public Education and Religious Liberty v. Nyquist, supra note 10, p. 2976.

¹⁸⁹Mueller v. Allen, supra note 3, p. 3071.

excessive entanglement.

4.2. E. Indirect Benefits to Nonpublic Schools

When state aid is provided to sectarian schools for legally permissible items such as textbooks, does the state aid free the sectarian school to use the funds it would normally spend on the textbooks in areas which directly promote religious purposes? There is a presumption that it does, but is this fact enough to override the prevailing sentiment of the decisions made by the Court. This issue is addressed in Lemon, Regan, and Nyquist.

In Lemon v. Kurtzman the Court clearly spoke against aid which directly or indirectly assisted sectarian schools. Justice Burger wrote,

It matters not that the teacher receiving taxpayers' money only teaches religion a fraction of the time. Nor does it matter that he or she teaches no religion. The school is an organism living on one budget. What the taxpayers give for salaries of those who teach only the humanities or science without any trace of proselytizing enables the schools to use all of its own funds for religious training.¹⁹⁰

Justice Brennan in his concurring opinion wrote that,

activities outside the secular classroom would probably have a religious content and that support for religious education therefore necessarily resulted from the financial aid to the secular programs, since that aid generally strengthened the

¹⁹⁰ Lemon v. Kurtzman, supra note 1, p. 2125.

parochial schools and increased the number of their students.¹⁹¹

Another similar view was taken by the Court in Committee for Public Educational and Religious Liberty v. Nyquist concerning funds provided to sectarian schools for maintenance and repairs. Justice Powell in the majority opinion noted that the maintenance and repair statute did not restrict sectarian schools from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught. Justice Powell stated that "it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian schools."¹⁹²

In 1980, only nine years after the Court made its position clear on this issue, a change in thinking was written in Committee For Public Education and Religious Liberty v. Regan¹⁹³. Justice White wrote the majority opinion and clearly stated that relieving the sectarian school of a cost (grading state mandated tests) was of no great concern to the

¹⁹¹Ibid.

¹⁹²Committee for Public Education v. Nyquist, supra note 10, p. 2966.

¹⁹³Committee For Public Education and Religious Liberty v. Regan, 100 S.Ct. 840 (1980).

1980 court. He said, "The Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious schools."¹⁹⁴

In dissent, Justice Blackmun maintained that aid to sectarian schools even though for secular purposes, ran a great risk of furthering the religious mission of the school.¹⁹⁵

The majority opinion in Mueller v. Allen did not discuss indirect benefits although it clearly supported the private sectarian schools by stating, "They often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools."¹⁹⁶ However the minority opinion, written by Justice Marshall insisted that a tax deduction has the primary effect of advancing religion if it is provided to offset expenditures which are not restricted to the secular activities of parochial schools and "necessarily results in aid to the sectarian school enterprise as a whole."¹⁹⁷

¹⁹⁴Committee for Public Education and Religious Liberty v. Regan, supra note 2, p. 849.

¹⁹⁵Ibid.

¹⁹⁶Mueller v. Allen, supra note 3, p. 3070.

¹⁹⁷Ibid.

Should a state or the Federal Government enact a voucher system there would no doubt be direct and indirect benefits to sectarian schools, and the litigious arguments would resume in a challenge to the legislative enactment.

4.2. F. Constitutional Considerations

The landmark church-state cases included in this chapter cover in depth the intentions of the framers of the Constitution concerning the First Amendment separation of public aid to religious elementary and secondary schools.

Beginning with Lemon in 1971 the Court made clear what it meant by a law respecting an establishment of religion when Chief Justice Burger stated,

A given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." Burger went on to cite the three main evils which must be guarded against, "sponsorship, financial support, and active involvement of the sovereign in religious activity."¹⁹⁸

Also in Lemon the Court spoke clearly on the entanglement issue which violated the Constitution when it noted that the schools which benefitted from the Rhode Island and Pennsylvania statutes had such considerable religious activities that the legislatures were led to provide for

¹⁹⁸Lemon v. Kurtzman, supra note 1, p. 2118.

careful governmental controls and surveillance by state authorities in order to ensure that state aid supported only secular education.¹⁹⁹

The Lemon Court clearly recognized the value of private schools to the national welfare and it also used similar language in other church-state decisions but declined to relate their relative value to the constitutional considerations. "The merits and benefits of these schools, however, are not the issue before us in these cases (Lemon and DiCenso). The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. . .government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. . .lines must be drawn."²⁰⁰ However, in time the Court began to drift from the above imperative. Later in this chapter that drift will be discussed, especially in the area of the value of private schools to society.

Continuing with precise and clear language, the Court in the 1973 Sloan v. Lemon²⁰¹ case spoke to the bottom line, the final impact of state aid to sectarian schools. Justice Powell, in writing the majority opinion, stated that New York

¹⁹⁹Ibid, p. 2113.

²⁰⁰Ibid, p. 2117.

²⁰¹Sloan v. Lemon, 413 U.S. 825 (1973).

had singled out a class of its citizens for a special economic benefit. The Court noted that 96% of the benefitting children under the New York statute attended sectarian schools. Justice Powell went on to say,

at bottom its intended consequence is to preserve and support religion-oriented schools. We think it plain that this is quite unlike the sort of 'indirect' and 'incidental' benefits that flowed to sectarian schools from programs, aiding all parents by supplying bus transportation and secular textbooks.²⁰²

Note that the word "all" is a key word here and it became the focused word in Mueller.

In the 1973 Committee For Public Education and Religious Liberty v. Nyquist case the Court made several important statements regarding the constitutionality of state aid to sectarian institutions. In a major constitutional point, the Court set straight the definition of respecting, aiding and promoting religion when it concluded, "A law may be one respecting the establishment of religion even though its consequence is not to promote a state religion, and even though it does not aid one religion more than another but merely benefits all religions alike."²⁰³ It is interesting to see how this concept was treated in Mueller ten years

²⁰²Sloan v. Lemon, supra note 6, p. 2986.

²⁰³Committee for Public Education and Religious Liberty v. Nyquist supra note 10, p. 2855.

later. As will be shown in Mueller, the Court modified its earlier positions.

Another major element in the arena of sectarian benefits from state aid has to do with how the aid gets into the hands of the school. The 1973 Nyquist case spoke to this issue in precise language. First, Justice Powell, in the majority opinion mentioned that "some forms of aid may be channeled to the secular without providing direct aid to the sectarian. But the channel is a narrow one."²⁰⁴ In these situations the Court had to rule on how schools could keep the sectarian separated from the secular, and therefore the entanglement issue came into play.

In Justice Blackmun's dissent in Committee For Public Education and Religious Liberty v. Regan²⁰⁵ he followed suit with this line of thinking by concluding that financial aid to a religious school, even though for secular purposes, runs a great risk of furthering the religious mission of the school as a whole because the religious mission pervades the functioning of the school. Further Justice Blackmun stated, "Even though earmarked for secular purposes, when it flows to an institution in which religion is so pervasive that a

²⁰⁴Ibid., p. 2967.

²⁰⁵Committee for Public Education and Religious Liberty v. Regan, 100 S.Ct. 840 (1980).

substantial portion of its functions are subsumed in the religious mission; state aid has the impermissible primary effect of advancing religion."²⁰⁶

The 1973 Levitt v. Committee for Public Education and Religious Liberty had a similar statement to this effect when Justice Burger wrote that the aid provided to sectarian schools for expenses in testing students was, ". . .an impermissible aid to religion, this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities."²⁰⁷

In the decade of the 1970's some states were seeking Constitutionally permissible methods to assist religious schools. One legislative method was by channeling funds directly to parents. The 1973 Nyquist opinion said that the states could not get around the constitution in this manner. Justice Powell raised this key question in the following manner, "The controlling question here, then is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary

²⁰⁶Committee for Public Education and Religious Liberty v. Regan, supra note 2, p. 853.

²⁰⁷Levitt v. Committee for Public Education and Religious Liberty, 93 S.Ct., p. 2819.

result."²⁰⁸ Justice Powell answered his question by stating that this was only one among many factors to be considered and that channeling through parents was not the way to beat the law. Justice Powell wrote "By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religious oriented schools."²⁰⁹ The Court maintained that the New York law was really designed to promote religious schools. Justice Powell was even more specific in a concluding statement on methods of channeling funds when he wrote, "the money involved represents a charge made upon the state for the purpose of religious education."²¹⁰

Again the Mueller decision will show that channelling funds through all parents clearly changed the direction of the Nyquist decision.

The Mueller decision considered previous decisions regarding state aid to religious schools in a somewhat different light. In analyzing Mueller v. Allen, it is evident that several of the earlier Courts' thinking, philosophy, and

²⁰⁸Committee for Public Education and Religious Liberty v. Nyquist, supra note 10, p.2969.

²⁰⁹Committee for Public Education and Religious Liberty v. Nyquist, supra note 10, p. 2969.

²¹⁰Ibid.

interpretation of the law have been modified in favor of a more permissive approach to aid to sectarian schools. Considerable attention is paid this case because of its magnitude and the nature of the changes initiated as the result of the Court sustaining the constitutionality of Minnesota's tuition tax credit law.

To begin with Justice Rehnquist, who wrote the Court's majority opinion, maintained that it was not easy to apply the Supreme Court's various decisions concerning the Establishment Clause to state laws aiding sectarian schools with public funds. Justice Rehnquist stated, "We can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."²¹¹

The clear task of the Court was to decide whether Minnesota's tax deduction bore greater resemblance to those types of assistance to parochial schools that had been approved in the past, or did it bear greater resemblance to those situations the Court had struck down. The Court concluded that Minnesota's law bore less resemblance to the arrangement struck down in Nyquist than it did to programs upheld in prior decisions such as Epperson v. Arkansas, 393 U.S. 97 (1968); School System of Abington Township v. Schempp, 83 S.Ct. 1560 (1963); and Walz v. Tax Commission of

²¹¹Mueller v. Allen, supra note 3, p. 3062.

City of New York, 397 U.S. 664 (1970). The Court did apply the tri-part test to the Minnesota law, but not in the sense that the test had been applied in earlier cases involving aid to religious schools. The tri-part test was the measuring rod against which all the other cases in this study are based. However, in Mueller, the tri-part test was "no more than a helpful signpost."²¹²

The Court spoke favorably of private sectarian schools and wove a judicial philosophy different from earlier Court decisions that no matter how valuable a service a sectarian school rendered to society, that was not the issue. The 1983 Court stated clearly a favorable opinion of the value of sectarian schools when it said, "such schools relieve public schools of a great burden--to the benefit of all taxpayers."²¹³ In addition the Court went on to say, "their sectarian purposes have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools."²¹⁴ The rationale behind these statements was that the State had a legitimate interest in facilitating education for children within its boundaries,

²¹²Ibid., p. 3066.

²¹³Ibid., p. 3067.

²¹⁴Ibid.

"whatever school their parents have chosen for them."²¹⁵ It must be noted at this point that earlier arguments concerning violations of the Establishment Clause were not mentioned in the Court's opinion, while the alternative approach was stressed.

In discussing the "primary effect" prong, the Court swiftly stated the law did not violate this prong because it had several significant features. First this tax deduction was only one among many tax deductions for Minnesota's citizens. Most important, according to Justice Rehnquist was that the deduction was available to all parents including those whose children attended public schools. The Court related this thinking to Allen and Everson (books and busses) where the beneficiaries included all school children.²¹⁶

As mentioned in analyses of earlier cases, the Court did not favor channeling public aid through parents and on to the sectarian schools. However, in Mueller the Court clearly stated, "by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objectives."²¹⁷ The Court did note the recent cases which invalidated state aid to

²¹⁵Ibid.

²¹⁶Ibid.

²¹⁷Ibid., p. 3069.

parochial schools through parent channels, but it went on to say in this case where aid to sectarian schools was a result of decisions of individual parents, no state approval had been conferred on any particular religion or religion in general.²¹⁸

It is noteworthy at this point to see how the Court could justify the above statement in view of the fact that 96% of those benefitting from the law sent their children to sectarian schools. The Court stated, "We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled--under a facially neutral statute--should be of little importance in determining the constitutionality of the statute permitting such relief." Adding strength to this rationale was a statement by the Court which said that sectarian schools provide wholesome competition with our public schools.²¹⁹

In responding to earlier cases which cautioned against the political divisiveness of state aid to sectarian schools,

²¹⁸Ibid.

²¹⁹Ibid.

the Court took a different view from the sentiment of the earlier cases. The Court wanted to view this case from the perspective of finding what was at stake in preventing the kind and degree of governmental involvement in religious life that was apt to lead to strife and strain a political system to the breaking point. The specific response to this concern was, "at this point in the twentieth century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights." As mentioned earlier, the Court felt that the danger of political division along religious line was remote.²²⁰

The Mueller decision was a 5-4 majority declaring Minnesota law as constitutional. Justice Marshall wrote the dissenting opinion and was joined by Justices Brennan, Blackmun, and Stevens. Justice Marshall maintained the aid provided by Minnesota was unmistakably aimed at providing desired financial support for nonpublic, sectarian schools, thereby being totally impermissible.²²¹

He also viewed that channeling of the aid through the parents was impermissible because it was not subject to restrictions which would guarantee the separation between secular and sectarian functions. To Justice Marshall aid to

²²⁰Ibid, p. 3073.

²²¹Ibid., p 3074.

the parents made no difference because, "What is of controlling significance is not the form but the substantive impact of the financial aid."²²² The end result was, in his view, "little more than a subsidy of tuition masquerading as a subsidy of general educational expenses."²²³

Justice Marshall's concluding statement summarizes the basic difference in Mueller and the other landmark cases presented in this study. Justice Marshall wrote,

For the first time, the court has upheld financial support for religious schools without any reason at all to assume that the support will be restricted to the secular functions of those schools and will not be used to support religious instruction. This result is flatly at odds with the fundamental principle that a state may provide no²²⁴ financial support whatsoever to promote religion.

4.3 Summary

The rhetoric in the seven key cases analyzed in this study brings out the fundamental principles upon which public funds for religious elementary and secondary schools are predicated. The Court guidelines establish what is allowable state aid to sectarian schools in areas which are clearly nonsectarian in nature, such as textbooks and transportation.

²²²Mueller v. Allen, 103 S.Ct. 3074 (1983).

²²³Ibid., p 3978.

²²⁴Ibid.

The judicial philosophy also establishes the fundamental principle upon which all cases are measured, that being the tri-part test.

The landmark cases have focused on the numbers of those benefiting, the value of sectarian schools, political divisiveness, entanglement, indirect benefits and other serious constitutional considerations. These cases followed a basic pattern of allowing no aid to sectarian schools if either part of the "three part" test failed constitutional muster. This concept developed in Lemon I held true until the 1983 Mueller decision. The Court in Mueller re-formed its judicial philosophy spelling out what was permissible aid. The Minnesota legislature satisfied constitutional muster because all parents benefitted from the aid. The delimiting factor was that children must attend tuition-charging schools. In light of the fact that the majority of public school children pay no tuition fees the children who benefit from the Minnesota legislation were children enrolled in religious elementary and secondary schools.

If either State or Federal Governments enact voucher legislation and that legislative enactment is challenged in Federal Courts and in the Supreme Court, the judicial philosophy enunciated in Mueller might become the case law standard to match future judicial decisions against.

Chapter Five

Summary, Conclusions, and Recommendations

For over 340 years public financial support for religious and secondary schools has been ever present in American political and religious life. Public tax monies, tax credits, and other types of public fund assistance for non-public schools was part of the American settlers' European religious heritage. However, educational vouchers, as such, were never part of either European religious heritage or early American history.

The American version of public funding for public schools began in 1647 when the "Old Deluder Satan Act" was enacted by the General Court of Massachusetts. Even though the act was for public schools, it was a public funding act for pervasively religious schools--Protestant schools. In time, especially the time period from 1815-1850 America addressed the issue of public funds for religious elementary and secondary schools. The battle, fought along religious ideological grounds, was often bitter. But, America moved toward church-state separation with no public funds for religious elementary and secondary schools.

In the late 1950's voucher advocates began appearing on the American scene. Many voucher advocates suggested that a "free market place"--providing competition with the public

schools was the best method to improve American education. Other voucher advocates expressed a "free choice" using vouchers to provide their children with the best possible education. Other voucher advocates developed and established a religious ideological basis for public funded assistance.

Table II indicates 44 states assist religious elementary and secondary schools with some type of public aid. As of this writing only two states, Iowa and Minnesota, have enacted legislation providing tuition tax credits for parents with children attending religious elementary and secondary schools.

The purpose of this study was to describe the extent to which a public funded voucher legislative enactment could be challenged and litigated and the constitutional reasons for litigation. Predicated upon Supreme Court tax credit and other school finance decisions, especially the 1983 Mueller decision as an analogy, this study developed a scenario spelling out constitutional elements, i.e., voucher legislative properties versus constitutionality of voucher legislation that must be resolved before a voucher legislative enactment satisfies constitutional muster.

5.0 Summary

Using the Supreme Court's 1983 Mueller decision as the landmark case, several key questions were presented in Chapter one that formed a pragmatic loom against which the issue could be analyzed.

The first question posed in Chapter one was: "What are the major legal issues regarding public funded vouchers for elementary and secondary school students?"

The relationship of a voucher funding system to the interpretation of the Establishment Clause of the United States Constitution is critical. The Establishment Clause clearly states that neither a state nor the Federal Government can pass laws which aid religions or prefer one religion over another.

The Establishment Clause, in relation to a voucher funding system, is explained in the Supreme Court's tri-part test. For voucher legislation to pass constitutional muster it must have the following properties.

- A. The legislation must have a secular purpose
- B. The legislation must have a primary effect that neither advances nor inhibits religion, and
- C. The legislation must not foster excessive government entanglement.

The second question listed was: "What are the issues and factors likely to be included in a challenge to the Supreme Court involving public funds for use in a voucher system?"

The beneficiaries will certainly be a major factor. Any voucher system will provide funds for parents to send children to private religious schools. Many Supreme Court decisions reveal that a great majority of the beneficiaries of public funds are those people with children in sectarian schools.

Transportation and textbooks have been declared constitutional because the child benefits from these services. The major factor to be determined is whether or not a class of people are singled out for economic benefit resulting in advancing religion.

Another issue that emerged in the Mueller decision was the Court's thinking relative to private sectarian schools as healthy competition for public schools. Seven state statutes that have been challenged were designed with the attitude that none of those statutes acknowledge religious advancement and/or competition in the marketplace. Moreover, several Supreme Court decisions acknowledge the contribution that religious elementary and secondary schools have made to American education. Justice William Rehnquist in Mueller suggested the public schools needed a "T.V.A. yardstick" for competition.

The Supreme Court in Lemon I raised the issue of political divisiveness. Yet, no legislative enactment has been overturned on the sole issue of political divisiveness. However, as Table II indicates, annual appropriations continue to grow as requests and demands from the private sector increase. In the landmark Mueller decision political divisiveness was never a serious issue.

Another major constitutional consideration concerning either federal or state legislative enactment concerning aid to religious elementary and secondary schools is the singling

out of a special class of American citizens for special treatment--public funds. The Court often analyzed sectarian numbers involved. This was true in Lemon I and Lemon III and other cases. However, in Mueller the Court rejected the qualitative data because the statute used the adjective "all", meaning all parents, therefore the qualitative data was meaningless. In future decisions the Supreme Court should address the issue whether the language of a statute--in Mueller the adjective "all"--or the effect of the statute--qualitative data--is the imperative question answering part two and three of the tri-part test.

The third question in Chapter one was: " Which of the legal principles established by the landmark Supreme Court decisions with language which can be related to public funded vouchers for elementary and secondary students are applicable to state legislative enactments?"

Using Mueller as the imperative Supreme Court decision, for any legislative enactment relative to public funded vouchers, either federal or state, to pass constitutional muster--satisfying the tri-part test--the legislative enactment must have the following properties.

- A. The statute must include the adjective "all"--as in all parents with children in school.
- B. The statute may contain a limitation as expressed in the Minnesota legislation--i.e., tuition charging schools.

Thus, legislative enactments using the Minnesota Statute as a model must contain a provision for "all" parents with a limiting factor of "tuition charging" schools. Such a legislative enactment may satisfy all three parts of the tripart test.

The fourth question in Chapter one was: "What specific trends can be determined from analysis of landmark cases related to voucher issues?"

(1) There appears to be a more permissive attitude on the part of the Supreme Court toward aid to sectarian schools.

(2) Because of the appearance of a more permissive attitude of the Supreme Court, there are more state (see Table II) legislative enactments channeling public funds to religious elementary and secondary schools.

(3) Because of the Supreme Court's decision in Mueller, there appears to be developing a serious mandate for "choice" of school either public or private with potential for public funding of the private sector.

5.1 Conclusions

Based upon an analysis of the data the following conclusions are presented:

(1) There appears to be a more permissive attitude on behalf of the Supreme Court toward public funding of religious elementary and secondary schools.

(2) The Supreme Court's Mueller decision makes possible

the public funding of two school systems--one public and one private.

(3) As the result of Mueller, many states have and/or are attempting voucher and/or tuition tax credit legislation.

(4) As the result of Mueller, competition between the "private" and "public" sector has received greater attention.

(5) As the result of Mueller, for any voucher and tax credit legislative enactment to pass constitutional muster, satisfying the tri-part test, the statute must contain the adjective "all" as in all parents with children in schools.

(6) Even though in Mueller the Court raised the issue of the tri-part test in resolving constitutional issues, the tri-part test is still the constitutional standard against which to measure all legislative enactment, seeking to publicly fund religious elementary and secondary schools.

(7) As the result of Mueller, the use of qualitative data in singling out a special class of American citizens for public funding is in question.

(8) As the result of Mueller, and the emergence of pro-choice environment in America, there is likely to be an impact on American public education.

(9) The lack of consistency of Mueller with previous Supreme Court decisions, i.e. Lemon I and III, Nyquist, Levitt, Regan, Sloan, Grand Rapids, and other decisions suggests that Mueller is the landmark decision addressing a new constitutional standard.

5.2 Recommendations for Further Study

Predicated upon an analysis of the Mueller decision the recommendations for future study are presented.

1. Analysis of the costs involved with voucher/tuition tax credits should be studied for schools of choice.
2. Analysis of major benefactors of the various legislation over a period of years to see if anyone other than parents of student in private schools actually do benefit from voucher type legislation.
3. A study of the influence of the administration in power or the general public on the Supreme Court when there is a major landmark decision before the Court.

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