

# A Case for the Constitutionality of School Choice

By Catherine Thomas-Hoskins

*School-choice programs involve the capacity of parents to select among public, private non-sectarian, and religious schools for education of their children, without being greatly penalized financially. To opponents of school choice, such a policy violates the First Amendment prohibition of government establishment of a religion. This essay reviews major U.S. Supreme Court (and some state supreme court) cases on public education as impacted by the doctrine of separation of church and state. The author concludes that effective school choice programs can be designed that are compatible with the major court precedents. Key considerations include the intent of the program, its practical effects, who holds the choice, the degree of governmental "entanglement" with religion, and religious freedom.*

## INTRODUCTION

The question of the constitutionality of school choice programs is central to understanding the contemporary debate over this proposed educational reform. This essay reviews the cases that form the basis for interpreting the legal concepts of separation of church and state, and argues that school choice programs can be designed in a manner that will meet the demands of the Constitution.

School choice is a program that is gaining momentum across the nation, even though the idea has been supported since at least the 1950s by people such as Milton Friedman (Leube 1987, 102). The reason a free-market economist would support school choice or vouchers, is that it allows the parents to choose which schools their children attend whether public, private nonsectarian, or parochial. Parental choice is accomplished by the government giving parents a capped amount of money, which they use at the school of their choice. The amount of money is decided by the state average of per-pupil public spending. Utah for instance, currently spends \$3,835 per pupil (Rees and Youself 1999). A parent would be given either a tax credit or a check for that same amount. The parent would receive the tax credit at the end of the year. The check, on the other hand, would be sent to the school of the parents' choice.

School choice is an unusual educational reform for a couple of reasons. First, it is supported by a wide political spectrum. To conservatives, school choice and vouchers are

an increase in privatization and a downsizing of governmental influence. To liberals, such devices are an attempt to lessen the educational gap between the rich and poor in America. They also allow the educational options of children to increase while spending the same amount of previously allocated governmental money per student.

Although school-choice programs attract support from across the ideological spectrum, these programs also raise contentious constitutional issues. At the heart of the constitutional debate is the question of whether in practice they are a violation of the establishment clause of the First Amendment, which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Opponents of school-choice plans argue that if tax dollars are given to religious schools, this policy amounts to an "establishment" of religion by the state. In order to avoid a violation of the establishment clause, one policy approach would be to prohibit funding for any religious schools. But, this policy presents a second constitutional dilemma. If religious schools were excluded from the schools that parents can choose, are the parents' First Amendment rights under the free exercise clause then being violated? In this essay the author seeks to clarify the constitutional standing of school choice plans, by carefully examining the Supreme Court's decisions with regard to schools and the issue of separation of church and state.

On November 10, 1998, the Supreme Court refused to grant certiorari in the case of *Jackson v. Benson*, which dealt with the constitutionality of the Milwaukee Parental Choice Program (MPCP), and by so doing left intact the decision of the Wisconsin Supreme Court. The Wisconsin Supreme Court had decided that the MPCP did not violate the state

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nor federal Constitution by allowing tax dollars to be used to pay for private and religious education of the students in the area. Both proponents and opponents agree that the U. S. Supreme Court decisions over the years have dramatically affected the possibility of school choice, and that Court will ultimately decide the fate of the school-choice programs with its future decisions.

After the decision of the U.S. Supreme Court regarding the MPCP was published, newspapers across the country had articles about the possible ramifications of the decision. In the *Wall Street Journal* Clint Bolick of the U. S. Department of Justice, who was one of the attorneys for the MPCP, is cited as arguing that this decision negates the possibility that the school choice program would be a constitutional violation, and was quoted directly as saying, “In addition to winning an important legal battle over the nation’s first choice program, this ruling diminishes the credibility of those who would argue that school choice poses possible constitutional problems” (1998, A22). The same day Clint Bolick’s comments were printed in the *Wall Street Journal*, an article in *Washington Times*, quoted Bob Chase of the National Education Association. “We had hoped the Court would review this case. Every day, the voucher plan does more damage to the Milwaukee public schools and the city’s taxpayers are paying the tab. This year alone, the Milwaukee public schools will lose \$25 million in tax payer dollars to the coffers of private and religious schools” (Asch 1998, A1). Mr. Chase, like many opponents of school choice, believes that if money is taken away from the public schools, the end result will be detrimental, even though the individual class sizes will be smaller and the total amount of dollars spent per individual student higher.<sup>1</sup>

The constitutional issues involved with school-choice programs have been discussed for close to a hundred years. The best way to trace the development of constitutional theory on school vouchers is by following the Supreme Court decisions that laid the groundwork for the *Jackson v. Benson* decision.

## THE CONSTITUTIONAL ISSUES SURROUNDING SCHOOL CHOICE

### EVOLUTION OF CASES

Arguments over the constitutionality of school vouchers began with the decision in *Pierce v. Society of Sisters* (1925). In *Pierce* two schools challenged Oregon’s law of compulsory public education for all students under the age of 16. In *Pierce* the Court held that under the Fourteenth Amendment’s due process clause, parents had the constitutional right to choose whether their children attended a public, private non-sectarian, or religious school. Justice James C. McReynolds when offering the opinion for the Court agreed that the parents’ rights were being violated. “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its chil-

dren by forcing them to accept instruction from public teachers only” (*Pierce v. Society of Sisters* 1925, 535). In *Pierce* the Supreme Court re-affirmed the constitutionality of mandatory attendance until a certain age, and officially recognized parochial education as equal to that of a public education. This action is significant to school choice because it established the doctrine that on an educational level the schools are equal, and the only reason a parochial school should not receive government funding is due to the establishment clause. But while the Supreme Court subsequently made decisions regarding public reimbursement of private and parochial educational schools for the costs, it vacillated as to the constitutionality of such expenditures.

The next significant case addressed the issue of public funds for secular and non-secular education in *Cochran v. Louisiana State Board of Education* (1930). In *Cochran* the state of Louisiana had passed a law that provided secular textbooks to all children regardless of their enrollment in public, private secular, or parochial schools. The majority of the population in the area was Catholic, and the majority of the private schools were also Catholic. The plaintiffs argued this law was a violation of the establishment clause, because any public funds given to a religious institution were promoting religion.

The defendants in *Cochran* argued that the question of the violation was not as important an issue as the general child benefit, which the Supreme Court eventually upheld as part of its reason for decision. The child-benefit theory states that the purpose of the government program was to help all children, and the detriment to children attending religious schools without the public funds would be greater than the slight benefit that any particular religion would gain. The Court determined that “the appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them.... The schools, however, are not the beneficiaries of these appropriations.... The school children and the state alone are the beneficiaries” (*Cochran v. Louisiana* 1930, 374-75). The intent of the legislation was to help the general public and not to promote one religion over another. Therefore, one can draw from this that school vouchers can be constitutional if the intent of the government program is to promote the general welfare of the children, and not one denomination over another, and if it also has a secular purpose.

After *Cochran*, the Supreme Court upheld (5-4) a sim-

<sup>1</sup> “About \$7.1 million went to the Milwaukee private school program in the 1996-97 school year, when 1,650 students participated and payments were about \$4,400 per student. The union said the money should have been used in the public schools to reduce class size and implement a new learning program. This argument ignored the fact that the district received about \$7,500 for each of the students and sent the private schools only \$4,400—giving the district an extra \$3,100 for each of the children it no longer had to educate. Thus the public schools had more money per remaining student.” Dorman E. Cordell, *Brief Analysis* 264, April 29, 1998, National Center for Policy Analysis and CEO America.

ilar law in *Everson v. Board of Education of the Township of Ewing* (1947). The case arose after the New Jersey Legislature created a law that allowed the parents to receive reimbursement for the cost of bus fares, in transporting their children to school whether public, private or parochial. The plaintiffs challenging the law argued that any reimbursement other than to public schools would violate the Constitution. The opposing arguments presented in *Everson* are also used by the opponents of school choice to show why the program is unconstitutional.

The state statute and the resolution, insofar as they authorized reimbursement to parents of children attending parochial schools, violate the Federal Constitution in these two respects, which to some extent, overlap. First. They authorize the State to take by taxation the private property of some and bestow it upon others, to be used for their own private purposes. This, it is alleged violates the due process clause of the Fourteenth Amendment. Second. The statute and the resolution forced inhabitant to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of State power to support church schools contrary to the prohibition of the First Amendment, which the Fourteenth Amendment [due process clause] made applicable to the states (*Everson v. Board of Education of the Township of Ewing* 1947, 5).

Justice Hugo L. Black writing for the Court majority, upheld the lower-court decision and stated that reimbursement for bus fares did not violate the due process clause. He told the proponents of the reimbursement program that they should argue that the exclusion of parochial schools parents would be denial of equal protection of the laws. Justice Black reasoned that it was a far greater threat to the Constitution to violate the equal protection clause and not allow parochial schools the same opportunity to compete in a for-profit arena, than to possibly help a parochial school financially. By extension of Justice Black's reasoning one can conclude that if today only public or private non-parochial schools are allowed to compete for children's vouchers, the government would then be a hindrance to parochial schools, instead of remaining neutral as was the intent of the Founders of the Constitution.

In addition to the other issues addressed, Justice Black reaffirmed the doctrine set forth in *Pierce* that students could attend religious schools as long as such schools met state requirements. Justice Black closed the majority opinion with a reaffirmation of the doctrine of separation of church and state. "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here" (*Everson v. Board of Education* 1947, 18). Justice Black helped to set a precedent of identifying and relying on the primary intent of the law. This mechanism of deciding whether a law violates the separation of church and state would reach its fruition in the later decision of *Lemon v. Kurtzman* (1971).

The supporters of school choice focus on Justice Black's upholding the right of parents to receive reimbursement for

their children's bus fare to a parochial school. Those opposing school choice focus on the "wall between church and state" that "must be kept high and impregnable." Both sides use the words of Justice Black to validate their position. The discussion concerning the wall between church and state has been argued since Thomas Jefferson first coined the phrase in his letter to the Danbury Baptists.

Two cases, *Illinois ex rel. McCollum v. Board of Education* and *Zorach v. Clauson*, addressed the issue of when religion could be taught to students during public school class time. It also helped to clarify an important issue concerning school choice. In *McCollum*, different religious leaders were asked to come and teach children. The children were then divided up into three basic groupings: Catholic, Protestant and Jewish. Students who did not want to attend the weekly religious lessons would attend a study hall. The Court held this violated the establishment clause, because the students had to be proactive in order to avoid religious instruction. A concurring opinion by Justice Felix Frankfurter, joined by Justices Robert H. Jackson, Wiley Rutledge, and Harold H. Burton, said significantly:

We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as "released time," present situations differing in aspects that may well be constitutionally crucial. Different forms which "released time" has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable. We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid "released time" program (*Illinois ex rel. McCollum v. Board of Education* 1948, 231).

The Supreme Court held that teaching students religious material on public ground and requiring students to take action if they were to avoid such was a clear violation of the establishment clause. The Court did leave the door open to other interpretations of "released time." In his concurring opinion Justice Frankfurter stated, "We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion'.... If nowhere else, in the relation between Church and State, 'good fences make good neighbors'" (*Illinois ex rel. McCollum v. Board of Education* 1948, 232). Clearly, the Supreme Court wanted to further cement the wall of separation between church and state.

In 1952 the Supreme Court upheld a different version of "released time." In *Zorach v. Clauson* the Supreme Court majority upheld a program of the Board of Education of New York City, which allowed students to be released from school to attend religious instruction. The instruction was given off campus in religious centers. The students had to bring a written request signed by their parents to receive the instruction. The churches then had to report on each student's attendance. According to the Court this case was different

for two reasons: First, the instruction was not given on school grounds, and second, the children had to actively seek the religious instruction. The children who did not actively seek such instruction would remain in class. (In *McCullum*, in contrast, students had to take an active role to avoid religious instruction.) Justice William O. Douglas for the majority discussed the difference between the two cases when he explained the reasons for the Court's decision. "In the *McCullum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here...the public schools do no more than accommodate their schedules to a program of outside religious instruction" (*Zorach v. Clauson* 1952, 315).

In *Zorach*, Justice Black dissented because he felt the decision of the Court did not uphold and reflect the previous decision of the Court in *McCullum*. Justice Black argued that the only difference between *McCullum* and *Zorach* was the location of the instruction.

I see no significant difference between the invalid Illinois system and that of New York here sustained. Except for the use of the school buildings in Illinois, there is no difference between the systems which I consider even worthy of mention... As we attempted to make categorically clear, the *McCullum* decision would have been the same if the religious classes had not been held in the school buildings (*Zorach v. Clauson* 1952, 316).

Justice Douglas for the Court majority reasoned that the key difference between the two cases, was the student's role in soliciting religious instruction, and that the role of the government was to merely assist the students. He indicated that the government's role was not to be hostile to religion, but to help the students. He also clarified that the separation of church and state is not something that prevents all interaction between the two. He gave examples of various reasons why students would need to be excused from school for religious reasons. For example a Catholic student needs to leave for a couple of hours on a Holy Day of Obligation, or a Jewish student to participate in a Bar Mitzvah or Yom Kippur. Justice Douglas asserted that all of these are valid reasons and an integral part of the United States, and the state should not try to circumvent the student's religious activities.

The nullification of this law would have wide and profound effects...Whether she [a teacher] does it [releases students from school for religious reasons] occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter...the act.

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary (*Zorach v. Clauson* 1952, 313).

*Zorach* affects school choice because, as with *Pierce v. Society of Sisters*, it illustrates that the government should not hinder

students from receiving a parochial education if that is what they desire. The intent of the establishment clause is to neither hinder nor promote religion.

### THE LEMON TEST

The most important decision regarding separation of church and state is *Lemon v. Kurtzman* (1971), which established a three-prong test to try to distinguish when government action does or does not violate the establishment clause. In 1969 Rhode Island approved the Salary Supplement Act, which provided a 15% salary supplement for teachers in nonpublic schools where the per-pupil expenditure on secular education was below the average in public schools. An eligible teacher could not teach any religious doctrine. The lower courts found this created an "excessive entanglement" between the state and religion, thereby violating the establishment clause. Pennsylvania had a similar program also violating the establishment clause (*Lemon v. Kurtzman* 1971). Chief Justice Warren E. Burger, writing the decision in *Lemon v. Kurtzman*, wrote:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster "an excessive government entanglement with religion..." (*Lemon v. Kurtzman* 1971, 612-13).

The three-prong test synthesized previous rulings. In *Cochran* the Court had established the principle that the program needed to have a secular legislative intent and therefore only made available books with secular content. In *Board of Education v. Allen* (1968, 343) the Court decided it was just as bad from a constitutional standpoint for the government to hinder a religion as to advance its practices. Finally in *Zorach* the Court concluded that as long as the program did not excessively entangle government and religion it would be deemed constitutional. These cases made possible the decision in *Lemon v. Kurtzman*. The *Lemon* test has guided subsequent rulings by clearly identifying when a program violated the Constitution. The programs are then able to examine their content before they are challenged and therefore prevent being overturned. The cases that follow lead the Court closer to affirming the constitutionality of school choice, beginning with *Mueller v. Allen* (1983).

### RECENT INTERPRETATIONS

*Mueller v. Allen* represented an important shift regarding the government paying for religious education. A Minnesota law allowed taxpayers, when computing their income taxes, to deduct expenses incurred in providing, "tuition, textbooks, and transportation" for their children attending elementary or secondary school. Petitioners argued that this law violated the establishment clause by giving financial assistance to sec-



tarian institutions (*Mueller v. Allen* 1983). The District Court and the Court of Appeals both decided that the statute, on its face, is neutral and its application does not have a primary effect of either advancing or inhibiting religion. The Supreme Court upheld the lower courts' decisions and stated that this case satisfied all three prongs of the *Lemon* test. First, the tax deduction has a secular purpose of trying to help the state's citizenry. Second, the primary effect of the law does not advance nor inhibit religion; it is available for all the citizens in the state, and merely falls under the classification of tax deductions. Finally, the tax deduction does not create an excessive entanglement between church and state (*Mueller v. Allen* 1983, 394-404).

The state had already decided which textbooks were allowable under the tax deduction. All others were ineligible for the deduction and therefore limit the state reimbursements to only secular textbooks (*Mueller v. Allen* 1983).

Justice William H. Rehnquist for the Court when discussing the intent of the Framers of the Constitution in regard to the establishment clause stated, "the historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case" (*Mueller v. Allen* 1983, 400). The tax deductions included a variety of tuition reimbursements, such as for summer school, students who live outside the district, Montessori School tuition, and driver's education. The varied types of reimbursements preclude the tax benefit from being used only by parents who send their children to parochial and other private schools. Justice Rehnquist asserted that this case was different from *Lemon* and from *Wolman v. Walter* (1977) because of the private choices of individual parents.

In *Wolman* the Court had partially upheld and partially negated an Ohio program giving various types of governmental funding to private schools, a majority sectarian. The Court held the Constitution allowed parochial schools to be reimbursed for the costs of administering federally mandated tests. The state could also supply diagnostic tests and give textbook loans. However, the loan of instructional materials as well as funding for field trips even though entirely secular, did involve excessive entanglement of church and state (*Wolman v. Walter* 1977, 238-55).

The intent of the tax in *Mueller v. Allen* (1983) is neutral, and therefore what the parents do after that point is irrelevant. This case set the guidelines for school choice. As long as the intent of the program is religiously neutral, and is a benefit for a large portion of citizens, whether the parents decide to have their children educated publicly, privately in a non-sectarian school, or religiously is irrelevant to the actual law.

The second case that directly relates to the school choice movement is that of *Witters v. Washington* (1986). Larry Witters applied unsuccessfully to the State of Washington Commission for the Blind for vocational rehabilitation assis-

tance, pursuant to a Washington statute that was designed to offer vocational rehabilitation to people with disabilities. Witters, who had a progressively degenerative eye condition, was studying at a Christian college with the intent to become a pastor, missionary, or youth advisor. The state Supreme Court had decided that such state aid to Witters, given his aims, was a violation of the federal Constitution's establishment clause. The U.S. Supreme Court reversed and remanded the case (1986, 485-90). The justification given was very similar to the grounds used in *Mueller*. It is interesting to note that Justice Thurgood Marshall wrote the opinion for the Court in *Witters*, but in the case of *Mueller* had dissented.

In giving the decision, Justice Marshall stated that the intent of the assistance program provided under the Washington statute was neutral, and it was only through the judgment of the petitioner that funds would go to a religious school. *Mueller* and *Witters* both create precedents that validate the constitutionality of school-choice programs, by virtue of the fact that the parents, not the government, decide whether a religious program will receive the public money. The purpose of school choice, and the programs in *Mueller* and *Witters*, is to increase the quality of education for all students and not to promote or hinder religion. It is also important that the parents are given the funds, and then given the choice as to which school their child would attend. Therefore the parents direct the flow of funds not the state.

A third case that affects the question of school choice is *Zobrest v. Catalina* (1993). The petitioners argued that under the federal Individuals with Disabilities Education Act (IDEA), the parallel Arizona statutes, and the free exercise clause, the state was required to pay for a sign language interpreter for James Zobrest, a child who was deaf, at the Catholic high school that he was attending. During elementary school James had attended a public school and the state had paid for an interpreter. The U.S. Supreme Court held that the IDEA should pay for an interpreter even at a parochial school (*Zobrest v. Catalina* 1993). This decision has ramifications for the future of school choice. In the opinion the Court held that this case satisfied the *Lemon* test. When addressing the specifics of the three-prong test, the Court (Chief Justice Rehnquist) put the most weight on the issue of the primary effect and intent of the law and stated, "because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking." Here, the child is the "primary beneficiary," and the school receives only an "incidental benefit." In addition, an interpreter, "unlike a teacher or guidance counselor," is going to "neither add to nor subtract from..." the sectarian school's environment, but will merely "accurately interpret whatever material is presented to the class as a whole" (*Zobrest v. Catalina* 1993, 10-14).

This statement identifies two key reasons why one can conclude that school vouchers are not a violation of the Constitution. First, the intent of the government's funding is

to improve the quality of the child's education, and not to promote nor hinder religion. Second, it is only when the parents actively solicit another school that the funding may be used for a religious education. These two features are key, because the parents are the agent of action in choosing a private or religious education over the one offered by the state school. It is also important to note that this case is similar to Cochran, because in both cases the children received the benefit, not the sectarian school. *Zobrest* like the decision in *Zorach v. Clauson* focused on the importance of choice and action by the parents. If direct action had not been taken by the parents the students would have remained in public schooling.

In addition to the similarities between school choice and *Zobrest* there appears to be one critical difference. In the case of the interpreter, the private school can derive no benefit to the school, curriculum, other students, or the promotion of religious instruction, while in school-choice since the government cannot ask for records of how and where the money was spent, the school is able to spend the money on the curriculum or other students. This issue has already been addressed and resolved with the other cases. First, the intent of the legislature was to benefit the child. Second, the child is the beneficiary, and the funds that the school would receive are only incidental. Third, there is no financial advantage for the parents to choose a parochial school over a public. When the issue of cost is removed from the parent's list of factors, the primary issue remaining is personal preference.

*Jackson v. Benson* (1998) was the first official school choice case to reach the U.S. Supreme Court. The Supreme Court (119 S. Ct. 466 (1998)) refused to review the lower court's decision, and therefore left standing the decision of the Wisconsin Supreme Court upholding school choice. The denial of certiorari left room for a lot of discussion as to the possible outcome of the next case on school choice. In *Benson* the school choice program is formally called the Milwaukee Parental Choice Program and was created to allow students living below the poverty line the opportunity to choose their school. There are three basic requirements for a student to be eligible for school choice under this program: (1) the child must be enrolled in school from kindergarten through twelfth grade; (2) the family's income must not exceed 1.75 times the federal poverty level; and (3) the child must have attended a public or private school in Milwaukee the previous year. Justice Donald W. Steinmetz for the majority of the Wisconsin Supreme Court wrote (1998, 610-19) that the MPCP does not violate the establishment clause, because it does not excessively entangle the state, nor promote nor hinder religion, and finally has a secular purpose. So, using the *Lemon* test, the Wisconsin Supreme Court found no constitutional violation with the governmental program.

In addition to Wisconsin, Vermont, Arizona, and Ohio all have school choice programs that have been upheld by their respective state courts. For example, in Arizona the legislature approved a state tax deduction for donations given to

any school tuition organization, similar to federal government tax deductions relating to charities. The deduction could not exceed five hundred dollars. The majority of people who claimed this deduction were parents whose children attended religious and other private schools. In *Kotterman v. Killian* (1999), Chief Justice Zlaket for the majority of the Arizona Supreme Court maintained that *Mueller* was most similar to the Arizona case because it offered a tax credit to the general public. Chief Justice Zlaket used the *Lemon* three-prong test to justify the constitutionality and finally cited *Jackson v. Benson* as another reason to affirm, especially since the measures involved gave direct aid to the parents. Zlaket illustrated the importance of parental choice by explaining that under the Milwaukee program the "check was sent directly to the school but was made out to the parents, who endorsed it over to the educational institution.... The Wisconsin court held that the program was permissible under both the federal and state constitutions..." (*Kotterman v. Killian* 1999, 614). Chief Justice Zlaket also used the child benefit theory and told how the plan would give more options to many parents, especially low income.

Basic education is compulsory for children in Arizona, ...but until now low-income parents may have been coerced into accepting public education. These citizens have had few choices and little control over the nature and quality of their children's schooling because they have been unable to afford a private education that may be more compatible with their own values and beliefs (*Kotterman v. Killian* 1999, 615).

The Arizona case is similar enough to *Jackson and Mueller* that it seems highly likely that the U.S. Supreme Court would uphold the decision.

Many supporters of school choice argue that the issue of constitutionality will be played out not on the federal level, but on the state level. The supporters' arguments stem from the fact that some states have more clearly defined constitutional provisions on the question of church and state than do other states, because of the Blaine amendment. The Blaine amendment was proposed in 1875 by Congressman James Blaine of Maine. Blaine argued that money should not be given by the states nor federal government to parochial schools. The Blaine amendment reflected a growing sense spreading across the nation that Protestant indoctrination was occurring in the schools. A specific example was the use of the King James Bible in the teaching of students. Catholics and Jews were upset that this was the only version of the Bible used for teaching the students. The Blaine amendment fell 4 votes short of a majority to pass in Congress, but by 1890, 29 states had adopted Blaine-type provisions into their constitutions. Later, some candidates for statehood were required by Congress to adopt the language of the Blaine amendment in order to gain statehood including: North Dakota, South Dakota, Montana, Washington, and New Mexico (Viteritti 1998, 418).

Joseph P. Viteritti argues that even if state constitutions are stricter, the rights granted in the due process clause of the

Fourteenth Amendment, and the establishment clause of the First Amendment, would supersede the stringent state constitutions. In addition, all of the above-mentioned cases say the state can neither advance nor hinder religion. If parochial schools are not allowed to participate in various governmental programs, because they are religious, their due process and free exercise rights would be violated.

By imposing more rigid rules of separation to exclude religious institutions from government-financed choice programs, state courts may be treading on the First Amendment rights of parents who seek to have their children educated in schools that reflect their own religious values—rights specifically protected under the free exercise clause (Viteritti 1998, 410).

### CONCLUSION: THE POLICY IMPLICATIONS FOR SCHOOL CHOICE

The history of Supreme Court decisions regarding separation of church and state, as well as recent interpretations, point in a direction of continued constitutional acceptance by the states and the U.S. Supreme Court so long as school-choice programs continue to use the mechanisms established as constitutional. The program would need to exemplify the three prongs of the *Lemon* test: It must have a secular purpose, the main effect can neither advance nor harm religion, and it cannot create an excessive entanglement between the government and religion. In addition to the *Lemon* test the holdings in *Cochran*, *Everson* and *Mueller* would also need to be applied. The programs in all three of these cases were offered to a broad base of children and not a specific group. The other issue of the state constitutions to date has not been a barrier. Even though the state supreme courts are the final arbitrators as to the meanings of their constitutions, if they violate the federal Constitution then in court the federal case would prevail. The primary intent of school choice as was stated in *Kotterman* is to give parents, especially low-income parents, more choices for the children's education and parochial schools are one of those options. As Justice Lewis Powell stated in the Court's opinion in *Wolman*, parochial schools fulfill a need in society and they help lessen the tax burden for public schools. "The state has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them" (*Wolman v. Walter* 1977, 262). Therefore as long as school choice programs use U.S. Supreme Court cases as an outline, they will continue to spread and be a viable alternative for parents.

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