

CREDIT CRISIS TO EDUCATION EMERGENCY: THE CONSTITUTIONALITY OF MODEL STUDENT VOUCHER PROGRAMS UNDER THE INDIANA CONSTITUTION

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INTRODUCTION

Recently, educational reform and student vouchers have produced many headlines.¹ This Article considers whether model student voucher programs that provide state funds to parents for use at a public or private school of their choice will survive scrutiny under both the Indiana Constitution and the United States Constitution. Ultimately, this Article concludes that such a program offends neither constitution for several reasons. First, a model voucher program does not offend article I, sections 4 and 6 of the Indiana Constitution because the voucher funds do not amount to a subsidy or “donation to the church.”² Second, a model voucher program does not offend the Indiana Constitution because the program is consistent with the historical purposes behind the changes made in Indiana’s 1851 Constitution. Finally, this Article concludes that, where state funds flow to religious institutions from neutral, generally applicable programs, the First Amendment’s Establishment Clause is not violated if the funds are directed by the independent, private decisions of third parties. Therefore, a model voucher program is unobjectionable from a constitutional standpoint.

In offering these observations and suggestions on the constitutionality of school voucher programs in Indiana, this Article does not express an opinion on the wisdom of voucher programs or other plans that use state funds to send students to private schools. In fact, one could argue that, because part of the mission of public schools is a perceived³ overall democratizing effect, voucher

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1. See, e.g., Kim Cobb, *School Vouchers Continue in Ohio Amid Uncertainty: High Court Response Could Spell Life or Death for Cleveland’s Plan*, HOUSTON CHRON., Mar. 25, 2001, available at 2001 WL 3008283; Marjorie Coeyman, *Two Takes on Whether School Vouchers are Constitutional*, CHRISTIAN SCI. MONITOR, Apr. 10, 2001, available at 2001 WL 3734707; Juliet Eilperin & Dana Milbank, *House Panel Votes to Kill Private School Vouchers*, WASH. POST, May 3, 2001, at A1; Robert A. Jordan, *Bush Gets the Message: School Vouchers are a ‘Poison Pill,’* BOSTON GLOBE, Apr. 22, 2001, available at 2001 WL 3930117; Neil Weinberg, *Grass Roots: Heavy-handed Voucher Campaigns Tend to Bomb at the Ballot Box; There’s a Better Way*, FORBES, Mar. 5, 2001 at 116.

2. State *ex rel.* Johnson v. Boyd, 28 N.E.2d 256 (Ind. 1940).

3. To a great extent, the democratizing effect is largely illusory. America’s schools are still

programs that remove students from the public schools and place them in private schools could well be considered an imprudent venture. Additionally, this Article does not suggest that voucher programs are either the only solution or the best solution to the many problems facing national and state education programs.⁴ Whether voucher programs are the solution to America's perceived educational crisis does not determine whether such a program can survive constitutional scrutiny.

In order to consider thoroughly the question of a model voucher program's constitutionality under both the Indiana and federal Constitutions, this Article is divided into three parts. In Part I, this Article provides background considerations and a framework for examining programs that provide state funds to parents who use them at the school of their choice, including religious schools. In Part II, this Article examines federal jurisprudence on state funding of religious schools. This section concludes that model voucher programs, through

highly segregated along racial, ethnic, economic, and social lines. See GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996); JAMES T. PATTERSON & WILLIAM W. FREEHLING, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001); Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It*, 49 DUKE L. J. 493 (1999); Wendy Parker, *The Future of School Desegregation*, 94 NW. L. REV. 1157 (2000).

4. For a discussion suggesting that voucher programs may not solve all problems facing the education system, see SAMUEL C. CARTER, *NO EXCUSES: LESSONS FROM 21 HIGH-PERFORMING, HIGH-POVERTY SCHOOLS* (2000). Carter identifies seven traits high-performing schools have: principals are free to make decisions and implement programs; schools use measurable goals to establish a culture of achievement; experienced teachers bring out the best in a faculty through teacher evaluations and other methods; rigorous and regular testing leads to continuous achievement and principals take responsibility for the results; achievement is linked to and made the key to discipline; principals and teachers work with parents to make the home a center of learning (lack of parental and community involvement is often the first cause of poor performance); and greater effort expended by school personnel, students, and teachers, through longer hours, longer school years, and summer school, creates more capable students. It is difficult to argue that such a comprehensive scheme would not have some effect and, at any rate, the solution to the education crisis is unlikely to be a one-pronged effort such as vouchers. While whole-sale reform, along the lines identified by Carter, addresses many systemic problems, vouchers only allow people to opt-out of public schools (a major victory in some places). *But see* JAY P. GREEN, *AN EVALUATION OF THE FLORIDA A-PLUS ACCOUNTABILITY AND SCHOOL CHOICE PROGRAM*, PROGRAM ON EDUCATION POLICY AND GOVERNANCE AT HARVARD UNIVERSITY (2001) (finding that schools faced with competition from vouchers improved); WILLIAM G. HOWELL ET AL., *TEST-SCORE EFFECTS OF SCHOOL VOUCHERS IN DAYTON, OHIO, NEW YORK CITY, AND WASHINGTON, D.C.: EVIDENCE FROM RANDOMIZED FIELD TRIALS*, PROGRAM ON EDUCATION POLICY AND GOVERNANCE AT HARVARD UNIVERSITY (2000) (finding statistically significant gains in student test scores); PAUL E. PETERSON, ET AL., *AN EVALUATION OF THE CLEVELAND VOUCHER PROGRAM AFTER TWO YEARS*, PROGRAM ON EDUCATION POLICY AND GOVERNANCE AT HARVARD UNIVERSITY (1998) (“[T]he gains witnessed [at the schools studied] suggest that [the Cleveland Scholarship Program] as a whole probably has helped improve student test scores.”).

which state funds flow to religious institutions via neutral, generally applicable programs, do not offend the First Amendment's Establishment Clause if the funds are directed by the independent, private decisions of third parties.

In Part III, this Article examines the same question under the Indiana Constitution. This Part first considers the historical background of Indiana's 1816 and 1851 constitutions, because the Indiana Supreme Court has frequently turned to history to inform its interpretations of the Indiana Constitution. This section concludes that the impetus behind the relevant changes in the 1851 Constitution were principally three-fold. First, the 1851 changes were a reaction to the failure of Indiana's voluntary, private, and local school system. Second, the changes were a reaction to Indiana's fiscal collapse and the desire to establish a general school system in a less-expensive fashion. Finally, the changes reflected a desire to do away with special and local legislation, which was perceived as one of the causes of Indiana's fiscal problems. A model voucher program conflicts with none of these constitutional purposes.

Part III next considers Indiana's jurisprudence on article I, sections 4 and 6. This Part concludes that the limited jurisprudence interpreting these provisions has construed them to prohibit only payments made to religious institutions when such payments amount to a "donation to the church" and are not payment for services rendered. As such, sections 4 and 6 work together, as an establishment clause, to prohibit the payment of state funds to religious institutions, when the payment amounts to a gift or subsidy that promotes the institution's religious mission. For two reasons, a model voucher program does not offend sections 4 and 6 under this test. First, the payments have a limited range of uses and may only be used by parents to obtain educational services. Second, private choice forms a barrier between the state and any funds that support an institution's religious mission. Under a model voucher program, any funds that flow to religious schools do so only because individual parents and schools chose to participate in the program. Therefore, the funds are not a state subsidy to promote religion.

I. BACKGROUND AND FRAMEWORK

By way of background for consideration of model voucher programs under the Indiana and Federal Constitutions, this Part considers three major concepts. First, this section provides a summary of three concerns that the First Amendment's Establishment Clause is often thought to address. Second, this section provides an overview of neutrality, which is an important consideration in many Establishment Clause cases. Finally, this section explains what a "model voucher program" actually is.

The First Amendment's Establishment Clause has been interpreted to have three principal components that set forth the ideal of neutrality between church and state. First, the government should not establish a state religion.⁵ Second,

5. See U.S. CONST. amends. I and XIV.

the government should not promote one existing religion or sect over another.⁶ Finally, the state should not favor non-religion over religion, or vice versa.⁷ These three components each speak to the problems inherent in state action that is not neutral in its stance towards religion. James Madison explicitly addressed these problems in 1785 in his *Memorial and Remonstrance*:

Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish, with the same ease any particular sect of Christians, in exclusion of all other Sects? [sic] that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?⁸

The solution, Madison suggested, was “that equality [in government action] . . . ought to be the basis of every law”⁹ Equality, or neutrality, plainly accords with the three goals of the First Amendment’s Establishment Clause. Nevertheless, neutrality as a test or touchstone continues to be problematic.

Neutrality is an often invoked but little understood concept. The term can be either nebulous or precise, useless or useful.¹⁰ This Article attempts no formal explication of the term, but uses it often, though, for a limited purpose. Neutral government action and neutrality in general, in this Article, mean that similarly situated people are treated equally. Thus, the government does not make distinctions based on impermissible criteria such as race, ethnicity, religion, or gender. A phrase used often in this Article is “neutral, generally applicable program.” With respect to education, a program is generally applicable when it applies to all school children, or all children that meet certain criteria. Such a program is neutral when the criteria used to categorize or separate individuals are not one of the aforementioned invidious criteria, which suggest impermissible government action. In this respect, neutrality is actually a brake on power,

6. See *Larson v. Valente*, 456 U.S. 228, 255 (1982) (holding that Minnesota’s Charitable Solicitations Act, which provided that only those religious organizations that received more than half of their total contributions from members or affiliated organizations were exempt from the registration and reporting requirements of the Act, was unconstitutional as “precisely the sort of official denominational preference that the Framers of the First Amendment forbade”).

7. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (“That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.”). *Accord Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.”).

8. James Madison, *To the Honorable the General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance*, in 5 THE FOUNDERS CONSTITUTION 82 (2000).

9. *Id.*

10. See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 878-79 (2000) (Souter, J., dissenting). See also *infra* note 75 and accompanying text.

because it tends to prevent laws that target either groups or individuals.

This Article also makes repeated references to a “model voucher program.” Such a program works like those adopted by Wisconsin¹¹ and Ohio.¹² The program provides funds (typically \$2000 to \$5500) to the parents of children in public schools. The program is generally applicable and neutral in its selection criteria for eligible families and schools. The funds are made payable to the parents, who must restrictively endorse them to the school of their choice. Hence, the funds do not flow directly to the school. A model voucher program generally contains an opt-out provision¹³ for parents who do not want their children to be forced to attend religious activities at the school.¹⁴ In Indiana, the funds for a model voucher program would necessarily come from a source other than the Common School fund, because article VIII, section 3 of the Indiana Constitution requires that all income of the Common School fund “shall be inviolably appropriated to the support of Common Schools, and to no other purpose whatever.”¹⁵ With this framework and background established, this Article turns to state funding of religious schools under the First Amendment.

II. FEDERAL JURISPRUDENCE: THE ESTABLISHMENT CLAUSE

A. *Evolution of Establishment Clause Jurisprudence with Respect to Public Aid for Religious Schools*

The key to most cases dealing with state aid to religious schools is, of course, the U.S. Supreme Court’s interpretation of the Establishment Clause. The First Amendment’s Establishment and Free Exercise Clauses provide that “Congress shall make no law respecting an establishment of religion, or prohibiting the free

11. See *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998).

12. See *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999); *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834 (N.D. Ohio 1999), *aff’d*, *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000), *petition for cert. granted*, 70 U.S.L.W. 3232 (U.S. Sept. 25, 2001) (No. 00-1751).

13. Wisconsin’s opt-out provision “prohibit[ed] a private school from requiring ‘a student attending the private school under this section to participate in any religious activity if the pupil’s parent or guardian submits to the teacher or the private school’s principal a written request that the pupil be exempt from such activities.’” *Jackson*, 578 N.W.2d at 609 (quoting WIS. STAT. 27 § 4008e (1995)).

14. It is very likely that a religious activities opt-out provision is not necessary for a voucher program to survive constitutional scrutiny. Even without a provision that formally allows parents to have their children opt out of religious activities in school, a voucher program allows parents, children, and schools to opt out at several levels. First, parents can choose not to send their children to a religious school and can instead send them to another private or public school. Second, parents can choose not to participate in the voucher program at all and continue to send their children to public schools. Finally, a religious school can choose to forego participation in the voucher program.

15. IND. CONST. art. VIII, § 3.

exercise thereof”¹⁶ Whether or not the Supreme Court’s decisions directly govern a particular case, they substantially inform a court’s thinking and will, thus, ultimately control many cases. The most relevant of these decisions are *Lemon v. Kurtzman*,¹⁷ *Committee for Public Education & Religious Liberty v. Nyquist*,¹⁸ *Mueller v. Allen*,¹⁹ *Witters v. Washington Department of Services for the Blind*,²⁰ *Zobrest v. Catalina Foothills School District*,²¹ *Agostini v. Felton*,²² and *Mitchell v. Helms*.²³ These cases²⁴ show that the principle of neutrality towards religion has had a fitful, though steadily evolving existence.²⁵ The principle that the Court has come to embrace is that “government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.”²⁶ The Supreme Court has also repeatedly emphasized the role of private choice in its considerations of the constitutionality of the payment of state funds to religious institutions, observing that, where government aid “goes to a religious institution . . . ‘only as a result of the genuinely independent and private choices

16. U.S. CONST. amend. 1. In interpreting these words, the Supreme Court has readily admitted that “candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area” *Tilton v. Richardson*, 403 U.S. 672, 678 (1971).

17. 403 U.S. 602 (1971).

18. 413 U.S. 756 (1973).

19. 463 U.S. 388 (1983).

20. 474 U.S. 481 (1986).

21. 509 U.S. 1 (1993).

22. 521 U.S. 203 (1997).

23. 530 U.S. 793 (2000).

24. *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), is another important case. In *Rosenberger*, the Court considered whether the University of Virginia could properly deny reimbursement of printing expenses to a Christian student newspaper. The University argued that its interest in preventing a violation of the Establishment Clause justified any infringement on the organization’s free speech rights. The Court first held that the University’s denial of the group’s reimbursement request amounted to viewpoint discrimination, noting that “[h]aving offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints.” *Id.* at 835. The Court next determined that such discrimination was not justified in order to avoid a violation of the Establishment Clause. The Court held that when benefits flow to a religious organization via a neutral program such as this, “there is no real likelihood that the speech in question is being either endorsed or coerced by the State.” *Id.* at 841-42. *Rosenberger* is important because it suggests that direct payments, where the principal or primary effect is not to advance religion, do not offend the Establishment Clause. *See id.* at 840-843. Benefits that flow to religion for other purposes, the Court observed, are distinguishable from “a general public assessment designed and effected to provide financial support for a church.” *Id.* at 841.

25. All of the cases, except *Witters* and *Rosenberger*, involved parochial schools.

26. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

of individuals' a government cannot, or cannot easily, grant favors that might lead to a religious establishment."²⁷ A position that required complete separation would, as the Court suggested in *Everson*, not be neutral and would conflict with another Establishment Clause concern: that the state not promote religion over non-religion or vice-versa.²⁸ In such an event, churches could not receive police or fire protection or have their trash collected, much less receive the eventual benefits of a model voucher program.²⁹

The first case, *Lemon v. Kurtzman*,³⁰ dealt with challenges to Rhode Island and Pennsylvania laws that provided state funds to supplement teacher salaries. The state assistance was paid directly to teachers and directly to schools, respectively.³¹ In this case, the Court set out the widely used *Lemon* test. The Court held that, in order to not offend the First Amendment's Establishment Clause, a law must have a secular legislative purpose; the law's principal or primary effect must be one that neither advances nor inhibits religion; and the law must not foster excessive government entanglement with religion.³² The laws in question were found infirm because they fostered excessive government entanglement by requiring that the government oversee programs and even audit schools to ensure that funds did not support religious worship.³³ The reasons for the Court's holding are important, because later cases often turn on the fact that the programs in question make direct payments to religious schools. In *Lemon*, the Pennsylvania program, which made direct payments to religious schools, was struck down on entanglement grounds rather than because the principal or primary effect of the direct payments was to advance religion.³⁴ In fact, the majority's sole paragraph of the opinion devoted to the direct payments made by Pennsylvania suggests that directness was important to the analysis largely because it might foster greater entanglement.³⁵ *Lemon* thus suggests that, in the absence of entanglement issues, which are generally missing from later cases,³⁶ direct payments may not be a problem.

In 1973, the Supreme Court decided *Committee for Public Education & Religious Liberty v. Nyquist*,³⁷ which presents a somewhat analogous factual

27. *Mitchell*, 530 U.S. at 810 (quoting *Agostini v. Felton*, 521 U.S. 203, 226 (1997)).

28. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

29. *Id.* at 17-18.

30. 403 U.S. 602 (1971).

31. *See id.* at 607, 609.

32. *Id.* at 612.

33. *Id.* at 619. The Court was also concerned with the "divisive political potential of these programs." *Id.* at 622. However, the Court has subsequently discarded this concern as a determinative factor. *See Agostini v. Felton*, 521 U.S. 203, 233-234 (1997).

34. *Lemon*, 403 U.S. at 621.

35. *Id.*

36. *See, e.g., Agostini*, 521 U.S. at 233-34 (noting the changes in the Court's entanglement jurisprudence).

37. 413 U.S. 756 (1976).

setting to current voucher plans.³⁸ In *Nyquist*, the law in question was designed to aid private schools and provided for direct state aid for repair and maintenance of private schools, a tuition reimbursement plan for low-income parents, and a tax deduction for persons earning less than \$25,000 whose children attended private schools.³⁹ The Court took a hardline towards the New York law, holding that its unmistakable effect was to advance religion, and that it was, therefore, void.⁴⁰ Inexplicably, as discussed by now Chief Justice Rehnquist in his dissent, the Court concluded that while tax-exempt status for churches was allowable, despite its obvious and direct benefit to churches, the aid given to parents, which was not required to be spent on education, and the available tax deduction, were improper.⁴¹ Similarly, Chief Justice Burger noted in his dissent that the majority also seemed swayed by the fact that the vast majority of program participants were utilizing religious schools (which were overwhelmingly Roman Catholic).⁴²

Mueller v. Allen,⁴³ decided by the Court a decade after *Nyquist*, marks a turning point in Establishment Clause jurisprudence. *Mueller*, brought by Minnesota taxpayers, challenged the constitutionality of a state law that allowed parents to deduct actual expenses for their children's tuition, textbooks, and transportation expenses between \$500 and \$700 for grades kindergarten through six and grades seven through twelve, respectively.⁴⁴ The Court held that the program had a secular purpose and would not foster excessive state entanglement with religion.⁴⁵ The Court introduced several new factors for analysis under the second prong of the *Lemon* test, holding that the program did not have the

38. *See id.* at 763-66.

39. *Id.*

40. *Id.* at 793. The majority, in holding that the aid, tuition reimbursement, and tax-credit violated the First Amendment, seems to have disregarded the formerly used, more rigorous, "principal or primary effect" test, which referred to the "inevitable and unmistakable effects" of the programs. The majority responds to this complaint in footnote 39 of the opinion and construes earlier cases to require the Court strike down even arrangements where it was a "mere possibility" that state funds would be used to advance religion. *Id.* (citing *Tilton v. Richards*, 403 U.S. 672, 683 (1971)). Moreover, the majority observed that "we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present case from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Id.* at 793 n.38. The Court thus reserved the question of whether a voucher-type program violated the Establishment Clause; this fact significantly undercuts the reasoning of the Sixth Circuit Court of Appeals in *Simmons-Harris v. Zelman*. *See infra* Part II.B.

41. *Nyquist*, 413 U.S. at 808-09 (Rehnquist, J., dissenting).

42. *Id.* at 804-05 (Burger, C.J., dissenting). An important side issue to the application of state funds for sectarian schools is the long history of anti-Catholic sentiment that has found expression in court decisions and other official government action. *See id.*; *see also infra* Part III (discussing the Blaine Amendment).

43. 463 U.S. 388 (1983).

44. *Id.* at 390-92.

45. *Id.* at 403.

primary effect of advancing religion because it was one of many deductions, was available to all parents for educational expenses, and provided aid to religious schools only as a result of the decisions of individual parents.⁴⁶ The Court observed that the Establishment Clause's historic purposes "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."⁴⁷ In *Witters v. Washington Department of Services for the Blind*,⁴⁸ Justice Powell further described the importance of *Mueller*, stating that:

Mueller makes the answer clear: state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, . . . because any aid to religion results from the private choices of individual beneficiaries.⁴⁹

Such neutral programs satisfy the Establishment Clause's general concerns that the government not establish a state religion, not prefer one existing sect or religion over another, and not promote religion over non-religion (or vice-versa). Excluding religious institutions from such programs would disadvantage them and would amount to preference of non-religion. The *Mueller* holding, therefore, best reconciles the many competing interests.

Witters involved an appeal from an order of the Washington Commission for the Blind that denied Witters vocational rehabilitation assistance.⁵⁰ The First Amendment was implicated because Witters was studying at a private Christian college and sought to become a pastor. Although the order was upheld on various grounds during the state appeals process, the Supreme Court reversed, finding no constitutional barrier to the provision of funds to an individual who might use such funds to attend a religious college.⁵¹ The fact that the funds were channeled through individuals and were made available under a neutral, generally applicable program was again a key factor to the Court's analysis. The Court noted that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."⁵² It was thus irrelevant whether the aid advanced religion, since the choice to support religious education was made by individuals and not by the state. Therefore, the second prong of the *Lemon* test was satisfied, as was the requirement of a secular purpose. The Court declined to address the factor of entanglement, as it had not been raised in the lower courts.

46. *Id.* at 396, 397, 399.

47. *Id.* at 400.

48. 474 U.S. 481 (1986).

49. *Id.* at 490-91 (Powell, J., concurring).

50. *See id.* at 483.

51. *Id.* at 486-87.

52. *Id.* at 488.

In 1993, the Supreme Court decided *Zobrest v. Catalina Foothills School District*,⁵³ which involved a suit by the parents of a deaf child against the school district after it refused to provide a sign-language interpreter, as required under federal and state law,⁵⁴ to accompany their child to classes at a parochial school.⁵⁵ The Court held that there was no First Amendment bar to providing the interpreter since the aid was provided under neutral programs that provide benefits to a wide range of citizens without reference to religion.⁵⁶ Referring to its prior decisions, the Court noted that such programs are not readily subject to First Amendment challenges merely because a religious school may also receive some benefit.⁵⁷ *Zobrest* thus begins to clarify or delineate the contours of the Supreme Court's recent First Amendment jurisprudence. As in *Mueller* and *Witters*, the program at issue was a general one that provided neutral benefits without regard to the public, private, religious, or secular nature of the school. Since the program allowed parents to choose their child's school, the interpreter would be present in any particular school solely as a result of the parents' choices, especially because the statute provided no state incentive to choose a religious school.⁵⁸ The mere fact that a public employee would be present in a religious school was not a bar because the child was the primary beneficiary of the employee's presence, and an interpreter, unlike a teacher, neither adds to nor subtracts from the school's program. Any religious message simply flows through the interpreter without any state support or interference.⁵⁹

Agostini v. Felton,⁶⁰ a 1997 case involving state funding for religious schools, is particularly important in that *Agostini* overruled two earlier decisions concerning the controversy.⁶¹ *Agostini* involved an attempt to lift an injunction that prevented New York City from sending public school teachers into parochial schools to provide remedial education to disadvantaged children. The injunction was originally issued after the Court's ruling in *Aguilar v. Felton* that the program involved excessive entanglement of church and state and impermissibly advanced religion.⁶² In *Agostini*, the Court overruled *Aguilar* noting that, since the injunction was originally granted, its Establishment Clause jurisprudence had taken a significantly different course.⁶³ The Court recognized that neither administrative cooperation between church and state nor potential political

53. 509 U.S. 1 (1993).

54. See Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (1994); ARIZ. REV. STAT. § 15-761 (1991 & Supp. 2000).

55. *Zobrest*, 509 U.S. at 3-4.

56. *Id.* at 10.

57. *Id.* at 8.

58. *Id.* at 10.

59. *Id.* at 13.

60. 521 U.S. 203 (1997).

61. *Agostini* overruled *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985). See *Agostini*, 521 U.S. at 235.

62. See *Aguilar*, 473 U.S. at 414.

63. *Agostini*, 521 U.S. at 233-35.

divisiveness were proper considerations under the *Lemon* excessive entanglement test.⁶⁴ Further, after *Zobrest*, the third reason for originally granting the injunction, that the program would require pervasive monitoring by public authorities to insure that public employees did not inculcate religion and create excessive entanglement, was no longer valid. In *Zobrest*, after all, the Court refused to assume that public employees would inculcate religion by their mere presence in a religious school.⁶⁵

The most recent, and perhaps most important, legal chapter for voucher programs in the Supreme Court's Establishment Clause jurisprudence is *Mitchell v. Helms*.⁶⁶ In *Mitchell*, the Court considered a federal program that "distributes funds to state and local governmental agencies, which in turn lend educational materials and equipment to public and private schools"⁶⁷ The key to *Mitchell* is not necessarily the majority's opinion. Rather, the key lies in Justice O'Connor's concurring opinion, to which the plurality alluded when it held that the program in question

satisfies both the first and second primary criteria of *Agostini*. It therefore does not have the effect of advancing religion. For the same reason, Chapter 2 also "cannot reasonably be viewed as an endorsement of religion. . . ." Accordingly, we hold that Chapter 2 is not a law respecting an establishment of religion.⁶⁸

Justice O'Connor's endorsement inquiry, if not part of the current *Lemon* test, is at least on the minds of a majority of the Court.⁶⁹

Justice O'Connor's concurrence is important as not only a more nuanced opinion than the plurality's, but also as a useful indicator of the Court's future course. Justice O'Connor's opinion begins to delineate the boundaries of the current Court's Establishment Clause jurisprudence. The four votes attached to the plurality opinion, which encouraged a more expansive view of the Clause, probably do not represent where the real power lies. Rather, the fifth vote, either Justice O'Connor or Justice Breyer, will likely decide future cases. Despite the plurality's focus on diversion and neutrality,⁷⁰ it seems unlikely that the Court will abandon the *Lemon* test, as revised in *Agostini*.⁷¹ What is more important for the issues surrounding school choice and voucher programs is Justice

64. *Id.*

65. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993).

66. 530 U.S. 793 (2000).

67. *Id.* at 801.

68. *Id.* at 835 (internal citation omitted).

69. *See, e.g., Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093 (2001).

70. *Agostini v. Felton*, 521 U.S. 203, 230-35 (1997).

71. In *Lamb's Chapel v. Center Moriches Union Free School District*, Justice Scalia, in his concurrence, likened the disappearance and reappearance of the *Lemon* test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . ." 508 U.S. 384, 398 (1993) (Scalia, J., concurring). One suspects the *Lemon* test will be back.

O'Connor's discussion of divertability and direct funding.⁷² Justice O'Connor notes that the issue is not really whether the funding moves directly between the government and the religious entity, but rather whether the funding moves as a result of private choices.⁷³ This discussion is crucial to complete understanding of the Supreme Court's Establishment Clause jurisprudence as a whole, and Justice O'Connor's views in particular.

Justice O'Connor wrote separately to explain her disagreement with the plurality's focus on neutrality and apparent approval of the actual diversion of public funds for religious use. Justice O'Connor wrote that while neutrality is always a factor to be considered, it is not an element of the inquiry.⁷⁴ Writing for the dissent, Justice Souter agreed and usefully noted some of the problems inherent in using neutrality as a test.⁷⁵ Not only does neutrality mean different things to different people, but it has also meant different things to the Court at different times. "Neutrality" has been employed as a term to describe the requisite state of government equipoise between the forbidden encouragement and discouragement of religion; to characterize a benefit or aid as secular; and to indicate [government] evenhandedness in distributing . . . [aid]."⁷⁶ Even more enlightening is Justice O'Connor's discussion of divertability. In her concurrence, Justice O'Connor criticized the plurality's apparent willingness to approve actual diversion so long as the program passed muster in other respects.⁷⁷

Justice O'Connor thought divertability was really a secondary factor for Establishment Clause claims. Diversion, it is true, has been approved by the Court.⁷⁸ Nonetheless, it has only been approved where aid flowed to a religious institution via a private party, that is, "only as a result of the genuinely independent and private choices of aid recipients."⁷⁹ It is private choice that satisfies the Establishment Clause's concerns about diversion, not the neutrality of a program. When aid flows to a religious institution via the private choices of individual actors, it is less like an impermissible direct state subsidy. Private choice is the hallmark of voucher programs and is crucial to their constitutionality. Justice O'Connor's language in this regard is particularly important, as it appears to speak directly to the constitutionality of voucher programs.

[W]hen the government provides aid directly to the student beneficiary,

72. See *Mitchell*, 530 U.S. at 840-41 (O'Connor, J., concurring).

73. See *id.* (O'Connor, J., concurring).

74. See *id.* at 838-39; see also *Good News*, 121 S. Ct. at 2104 (quoting *Rosenburger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995)) ("[W]e have held that 'a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion.'" (emphasis in original)).

75. See *Mitchell*, 530 U.S. at 878 (Souter, J., dissenting).

76. *Id.* (Souter, J., dissenting).

77. See *id.* at 839 (O'Connor, J., concurring).

78. See *id.* at 840-41 (O'Connor, J., concurring).

79. *Id.* at 841 (O'Connor, J., concurring) (internal quotes omitted).

that student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education. The fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student's private decision.⁸⁰

More importantly, the private choices distinction is crucial to Justice O'Connor's endorsement inquiry. Justice O'Connor wrote, "I believe the distinction between a per-capita school-aid program and a true private-choice program is significant for purposes of endorsement."⁸¹ Justice O'Connor's reasoning on this subject is worth quoting in toto.

In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools. In the former example, if the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement. Because the religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as *government* support for the advancement of religion. That the amount of aid received by the school is based on the school's enrollment does not separate the government from the endorsement of the religious message. The aid formula does not—and could not—indicate to a reasonable observer that the inculcation of religion is endorsed only by the individuals attending the religious school, who each affirmatively choose to direct the secular government aid to the school and its religious mission. No such choices have been made. In contrast, when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, "[n]o reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief." Rather, endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid.⁸²

Justice O'Connor's observations help to elucidate the boundaries of the Court's Establishment Clause jurisprudence, especially in reference to school aid issues.

The Supreme Court has thus moved toward a neutral attitude with respect to the relations between church and state. Justice Powell's concurrence in *Witters* reflects this stance and sums up the Court's stance. "[S]tate programs that are

80. *Id.* at 842 (O'Connor, J., concurring).

81. *Id.* (O'Connor, J., concurring).

82. *Id.* at 842-43 (O'Connor, J., concurring) (quoting *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (emphasis in original)).

wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries."⁸³ Although the Court has not explicitly considered the question, jurisprudence before *Mitchell* strongly suggests that a model voucher program will pass constitutional muster if the state funds flow to religious institutions via neutral, generally applicable programs and the funds are directed by the independent, private decisions of third parties. *Mitchell* only reinforces this perception.

The plurality's opinion in *Mitchell* serves to confirm suspicion that Justices Thomas, Scalia, and Kennedy, as well as Chief Justice Rehnquist, would approve a model voucher program. The larger question has always been with respect to Justice O'Connor's swing vote and whether a model voucher program would survive an endorsement inquiry. Justice O'Connor's concurring opinion in *Mitchell* answers this question. Her opinion makes it clear that a model voucher program would, in fact, pass the endorsement test. Hence, it seems likely Justice O'Connor, as well as Justice Breyer, who joined the concurring opinion, would approve a model voucher program should it come before the Court. One case that the Supreme Court will soon consider is addressed next.

B. *Simmons-Harris v. Zelman and the Future of School Vouchers under the First Amendment*

During its 2001 session, the Supreme Court will hear the case of *Simmons-Harris v. Zelman*⁸⁴ the latest chapter in the ongoing litigation surrounding the Ohio School Voucher Program. The Ohio School Voucher Program provided Cleveland students with up to \$2500 for use at private schools within the Cleveland school district and public schools in adjacent districts that chose to participate in the program.⁸⁵ The case was first litigated in the Ohio state courts where the Ohio Supreme Court held that the program violated neither the First Amendment nor the Ohio Constitution.⁸⁶ The parties then turned to the federal courts and, at the district court level, Judge Solomon Oliver found that the program violated the First Amendment's Establishment Clause.⁸⁷ The case was then appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed Judge Oliver's holding.⁸⁸

It is safe to say that most watchers of the *Simmons-Harris* case were fairly

83. *Witters*, 474 U.S. at 490-91 (Powell, J., concurring).

84. 234 F.3d 945 (6th Cir. 2000), *petition for cert. granted*, 69 U.S.L.W. 3763 (U.S. Sept. 25, 2001) (No. 00-1751).

85. See OHIO REV. CODE ANN. § 3313.976 (Anderson 2000).

86. See *Simmons-Harris v. Goff*, 711 N.E.2d 203, 207 (Ohio 1999).

87. See *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 865 (N.D. Ohio 1999), *aff'd*, 234 F.3d 945 (6th Cir. 2000).

88. See *Simmons-Harris v. Zelman*, 234 F.3d 945, 963 (6th Cir. 2000), *petition for cert. granted*, 70 U.S.L.W. 3232 (U.S. Sept. 25, 2001) (No. 00-1751).

surprised with the Sixth Circuit's panel opinion, especially since it followed the Supreme Court's opinion in *Mitchell*. Judge Ryan's vociferous dissent only tended to heighten the surprise. The majority's conclusion, that the Cleveland Voucher Program violates the Establishment Clause, is surprising for three basic reasons.

Initially, the panel's conclusion that the Cleveland Voucher Program violates the Establishment Clause is surprising because of its analysis of *Mitchell v. Helms*, which itself gives rise to three points. First, the panel gave relatively little weight to *Mitchell*, the most recent case on this issue. Primarily, it thought that *Mitchell* merely stood for the fact that *Agostini's* version of the *Lemon* test was the proper analysis to employ. In fact, the panel seemed desirous of dismissing the case altogether, stating that *Mitchell* was decided by a "sharply divided plurality."⁸⁹ Second, notwithstanding its description of *Mitchell*, what is truly curious about the *Simmons-Harris* court's treatment of *Mitchell* is that it found Justice O'Connor's concurring opinion to be the Court's because it took the narrowest grounds.⁹⁰ Finally, even after attributing Justice O'Connor's opinion to that of the Court's, the Sixth Circuit proceeded to ignore the most important part of the concurring opinion, in which Justice O'Connor all but approved model voucher programs.⁹¹

Second, the panel's opinion is curious in that it found *Nyquist* to be the case governing its deliberations.⁹² It is of itself strange that the Sixth Circuit would find *Nyquist* still on point given the Supreme Court's own observation in *Agostini*, that "our Establishment Clause law has significant[ly] change[d]"⁹³ in the last decade. Thus, the panel's conclusion required a fair amount of dissociative reasoning because the Sixth Circuit first found that *Agostini's Lemon* test was the governing standard for school funding cases. It appears the panel thought it should apply *Agostini's* much-evolved standards, yet simultaneously rely upon *Nyquist's* rationale and facts. Further, *Nyquist* was factually distinct in one important respect. In *Nyquist*, the admitted purpose of the law was to aid private schools,⁹⁴ eighty-five percent of which were religious.⁹⁵ Whatever one thinks of the *Nyquist* decision, the facts are simply different in *Simmons-Harris*, where the purpose of the law is to help children escape failing public schools (and public schools in neighboring districts are free to participate).⁹⁶ *Nyquist*

89. *Id.* at 957.

90. *Id.*

91. See *Mitchell v. Helms*, 530 U.S. 793, 842-43 (2000); see also *supra* notes 77-82 and accompanying text.

92. See *Simmons-Harris*, 234 F.3d at 958.

93. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (internal quotes omitted).

94. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 763-64 (1973).

95. *Id.* at 768.

96. See *Simmons-Harris*, 234 F.3d at 948. Ohio's General Assembly adopted the program "in response to an order by the United States District Court that placed the Cleveland School District under the direct management and supervision of the State Superintendent of Public Instruction due to mismanagement by the local school board." *Id.*

simply does not govern voucher cases.

Finally, the panel's own reasoning is questionable. The panel essentially concluded that because the participating schools were overwhelmingly religious and the students who participate overwhelmingly choose religious schools, "the Ohio scholarship program is designed in a manner calculated to attract religious institutions and chooses the beneficiaries of aid by non-neutral criteria."⁹⁷ Just as Judge Oliver did at the district court level,⁹⁸ the Sixth Circuit concluded that because the result tips in favor of religious schools, the legislative program itself must have been designed to foster that outcome.⁹⁹ Such is not the case. Though the panel gave lip service to the Supreme Court's vitally important observation that individual choice is a barrier to government endorsement,¹⁰⁰ it concluded that "[t]he idea of parental choice as a determining factor which breaks a government-church nexus is inappropriate in the context of government limitation of the available choices to overwhelmingly sectarian private schools which can afford the tuition restrictions placed upon them and which have registered with the program."¹⁰¹ Neither of the court's points, that only religious schools can afford to accept vouchers or that only religious schools feel able to register, means that the individual choices do not form a barrier to the government-church nexus.

First, the monetary amount of the vouchers is wholly irrelevant to the question. In no case do vouchers cover the actual cost of tuition. For both religious and private schools, the cost of educating students exceeds the tuition payments made by the state. The choice to participate in such a program (and subsidize participating students from another source) is a wholly private one made by the individual schools. For instance, in Vermont, one parochial school's cost per child was \$5021, while the school charged, at most, \$3000 for tuition.¹⁰² For its part, the Town of Chittenden provided only approximately \$2600 per student.¹⁰³ In that case, as in Ohio, it was the school's choice to accept the funding and make up the costs elsewhere. To strike down such programs merely because religious schools have lower costs is to invent a perverse penalty for keeping costs down. It is also wholly disingenuous. The *Simmons-Harris* court, one suspects, would be equally unhappy with the situation were the religious school's costs significantly higher. It is simply the case that religious schools have decided that it is important, despite the costs, to provide educational services to underprivileged Cleveland students while the elite private schools have decided not to serve underprivileged students (either because of the cost or

97. *Id.* at 961.

98. *See Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 863 (N.D. Ohio 1999).

99. *See Simmons-Harris*, 234 F.3d at 960-61.

100. *See, e.g., Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986); discussion *supra* Part II.A.

101. *Simmons-Harris*, 234 F.3d at 960.

102. *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 543 (Vt.), *cert. denied*, 528 U.S. 1066 (1999). *Chittenden Town School District* is a tuition case and not a voucher case (as it is commonly misinterpreted to be), but the point holds.

103. *Id.*

for other reasons).

Second, to strike down a program because some schools have chosen to register and some have not is simply wrong-headed. Again, registration represents wholly private choices. There is nothing in the program that prevents schools from registering. It is simply that religious schools have decided to educate Cleveland's underprivileged students and elite private schools and other public schools¹⁰⁴ have chosen not to educate them.

Nevertheless, in one respect the *Simmons-Harris* panel opinion is on target. This is primarily because of language in *Agostini* that some courts have interpreted as urging the appellate courts not to guess on future cases. In *Agostini*, though the Supreme Court acknowledged a great deal of change in its Establishment Clause jurisprudence and therefore overruled earlier decisions in *Ball* and *Aguilar*, it warned,

[w]e do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."¹⁰⁵

Hence, at one level, the Sixth Circuit was correct to reserve the "new" question of whether vouchers are constitutional, given its inability to navigate effectively the Supreme Court's evolved Establishment Clause jurisprudence.

Nonetheless, the Sixth Circuit's decision was plainly erroneous. This Article's analysis of the Supreme Court's jurisprudence on the Establishment Clause demonstrates that where state funds flow to religious institutions via neutral, generally applicable programs, the First Amendment's Establishment Clause is not offended, particularly if the funds are directed by the independent, private decisions of third parties. In addition to ignoring the Supreme Court's more recent jurisprudence, the Sixth Circuit missed the Supreme Court's repeated admonition, first made in *Mueller*, that

[w]e 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

104. All a public school has to do to register is "notif[y] the state superintendent prior to the first day in March that the district intends to admit students from the pilot project district for the ensuing school year . . ." OHIO REV. CODE ANN. § 3313.976(C) (Anderson 1999).

105. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation omitted).

in determining the constitutionality of the statute permitting such relief.¹⁰⁶

The Supreme Court's determination to avoid making constitutional decisions based upon the number of people of a certain class who take advantage of neutral, generally applicable programs, clearly undercuts the Sixth Circuit's central thesis that, because most students chose religious schools, the program itself must be designed to foster that outcome. Based upon the Supreme Court's recent Establishment Clause jurisprudence, a model voucher program should pass constitutional muster if the state funds flow to religious institutions via neutral, generally applicable programs and if those funds are directed by the independent, private decisions of third parties. The Sixth Circuit's decision in *Simmons-Harris* ignores the Supreme Court's mature Establishment Clause jurisprudence and is thus erroneous.

III. VOUCHERS AND THE INDIANA STATE CONSTITUTION

The question of whether a model voucher program is constitutional under the Indiana State Constitution is a complicated one. As noted *supra*, this question is wholly separate from the question of whether a model voucher program is a desirable or well-reasoned solution to Indiana's educational woes. To reach this Article's conclusion that a model voucher program is constitutional under Indiana law, Part III considers four separate sources. First, this section examines whether Indiana will develop its own jurisprudence on state funding of religious schools or simply conclude that Indiana's constitution is coextensive with the federal Constitution. Next, this section reviews both Indiana's constitutional history and the history of the Blaine Amendment. Finally, this section investigates Indiana's own jurisprudence on state funding of religious organizations with the cases of *State ex rel. Johnson v. Boyd*¹⁰⁷ and *Center Township of Marion County v. Coe*.¹⁰⁸ We turn first to the question of which standard the Indiana Supreme Court will employ.

A. *Whether a State or Federal Standard*

Some courts, such as the Maine Supreme Judicial Court, have concluded that their constitutional provisions regarding the separation of church and state are coextensive with the First Amendment of the U.S. Constitution.¹⁰⁹ The Indiana

106. *Mueller v. Allen*, 463 U.S. 388, 401 (1983).

107. 28 N.E.2d 256 (Ind. 1940).

108. 572 N.E.2d 1350 (Ind. Ct. App. 1991).

109. *See Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 132 (Me. 1999); *see also* *Bd. of Educ. v. Bakalis*, 299 N.E.2d 737 (Ill. 1973). The Supreme Court of Illinois thought that article X, section 3 of the Illinois Constitution imposed identical restrictions to the First Amendment's Establishment Clause. Article X, section 3 provides:

Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund

Supreme Court is not such a court. In the last decade, the Indiana Supreme Court has developed a growing and independent body of jurisprudence based on the Indiana State Constitution. Hence, in *Collins v. Day*,¹¹⁰ the Indiana Supreme Court noted that while it occasionally looked to federal case law to address certain questions of state law, it was free to “form[] an independent standard for analyzing state constitutional claims.”¹¹¹ Indeed, in *Collins*, the Indiana Supreme Court determined that “claims alleging special privileges or immunities under Indiana section 23 should be given independent interpretation and application.”¹¹² This accords with Chief Justice Shepard’s observation that Indiana courts have often charted their own way when interpreting the Indiana State Constitution.¹¹³ The Indiana Supreme Court recently followed this practice in *City Chapel Evangelical Free, Inc. v. City of South Bend*.¹¹⁴

In *City Chapel*, the Indiana Supreme Court added to the sparse jurisprudence on article I, sections 4 and 6, and clarified that it would not conclude these provisions to be coextensive with the federal constitution. The court observed that

[w]hen Indiana’s present constitution was adopted in 1851, the framers who drafted it and the voters who ratified it did not copy or paraphrase the 1791 language of the federal First Amendment. Instead, they adopted seven separate and specific provisions, Sections 2 through 8 of Article I, relating to religion.¹¹⁵

The Indiana Supreme Court held that

the religious liberty provisions of the Indiana Constitution were not intended merely to mirror the federal First Amendment. *We reject the contention that the Indiana Constitution’s guarantees of religious protection should be equated with those of its federal counterpart and*

whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.

ILL. CONST., art. X, § 3.

110. 644 N.E.2d 72 (Ind. 1994).

111. *Id.* at 75.

112. *Id.*

113. See Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989). Justice Brennan introduced the idea that states might forge their own jurisprudence through their state bill of rights. See William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489 (1977); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

114. 744 N.E.2d 443 (Ind. 2001).

115. *Id.* at 445-46.

*that federal jurisprudence therefore governs the interpretation of our state guarantees.*¹¹⁶

The Indiana Supreme Court has thus clearly stated its determination to forge its own jurisprudence with respect to the Indiana Constitution in general and the religious liberty provisions in particular. Though in *City Chapel* the court did not set forth tests or substantive law regarding sections 4 and 6, it did provide insight into how it would develop such jurisprudence. One of the sources the court inevitably will return to, as it did in *City Chapel*,¹¹⁷ is the state's history and, specifically, the history of the 1851 Constitution.

B. History

A recitation of Indiana's constitutional history is not merely an esoteric exercise. The Indiana Supreme Court has frequently turned to history to inform its decisions on questions of constitutional law. In *Collins*, the court observed that "[p]roperly interpreting a particular provision of the Indiana Constitution involves a search for the common understanding of both those who framed it and those who ratified it."¹¹⁸ In *Bayh v. Sonnenburg*,¹¹⁹ the court explained the role of history further and noted that

in placing a construction upon a constitution or any clause or part thereof, a court should look to the history of the times and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy.¹²⁰

Finally, Chief Justice Shepard summed up the proper analysis of the Indiana State Constitution in *Price v. State*¹²¹ when he noted that "[i]nterpretation of the Indiana Constitution is controlled by the text itself, illuminated by history and by the purpose and structure of our constitution and the case law surrounding it."¹²² This is all the more true when there is relatively little jurisprudence on the subject. In the case of the constitutionality of voucher programs, not only are there no cases considering this specific issue, there are very few cases that interpret article I, sections 4 and 6 at all. This makes it extremely likely that the Indiana Supreme Court will turn to history when deciding whether vouchers are constitutional under article I, sections 4 and 6.

In one of its longest treatments of the religion clauses, the Indiana Supreme Court recently provided an illustration of the importance that history will play should the issue of student vouchers appear before it. In *City Chapel*, the Indiana

116. *Id.* at 446 (emphasis added).

117. *See id.* at 448.

118. *Collins v. Day*, 644 N.E.2d 72, 75-76 (Ind. 1994) (citation omitted).

119. 573 N.E.2d 398 (Ind. 1991).

120. *Id.* at 412 (quoting *State v. Gibson*, 36 Ind. 389, 391 (1871)).

121. 622 N.E.2d 954 (Ind. 1993).

122. *Id.* at 957 (citation omitted).

Supreme Court turned to history and in addition to examining the history of the 1851 Constitution, looked as far back as the eighteenth century to

conclude that the framers and ratifiers of the Indiana Constitution's religious liberty clauses did not intend to afford only narrow protection for a person's internal thoughts and private practices of religion and conscience. By protecting the right to worship according to the dictates of conscience and the rights freely to exercise religious opinion and to act in accord with personal conscience, Sections 2 and 3 advance core values that restrain government interference with the practice of religious worship, both in private and in community with other persons.¹²³

Though the court declined to delineate the boundaries of article I, sections 2 through 8, *City Chapel* provides persuasive evidence that the Indiana Supreme Court will turn to history to determine whether a model voucher program offends sections 4 and 6. Because the Indiana Supreme Court will consider Indiana's constitutional history, this Article now turns to the 1816 and 1851 Constitutions and an analysis of these documents.

1. *1816 Constitution.*—The 1816 Constitution is important primarily because of the changes that were made when the 1851 Constitution was adopted. The changes that are relevant to this Article are principally two-fold and concern the revision of article IX of the 1816 Constitution, concerning education, and the addition of article I, section 6 to the 1851 Constitution, concerning aid to religious institutions. The 1816 Constitution's provision regarding freedom of religion and the separation of church and state provided:

That all men have a natural and indefeasible right to worship Almighty God, according to the dictates of their own consciences: That no man shall be compelled to attend, erect, or support any place of Worship, or to maintain any ministry against his consent: That no human authority can, in any case whatever, control or interfere with the rights of conscience: And that no preference shall ever be given by law to any religious societies, or modes of worship; and no religious test shall be required as a qualification to any office of trust or profit.¹²⁴

In addition to this fairly typical provision,¹²⁵ the 1816 Constitution featured a unique provision concerning education. Article IX set out an unusually ambitious statement of Indiana's belief in the importance of education that

123. *City Chapel Evangelical Free, Inc. v. City of South Bend*, 744 N.E.2d 433, 450 (Ind. 2001).

124. IND. CONST. of 1816, art. I, § 3.

125. See John D. Barnhart, *Sources of Indiana's First Constitution*, 39 IND. MAG. HIST. 55 (1943). This provision was borrowed from the Kentucky Constitution of 1792. See KEN. CONST. of 1792, art XII, § 3. Delaware, New Hampshire, Ohio, Pennsylvania, and Vermont also had similar provisions. See DEL. DECL. RIGHTS of 1776, § 2; N.H. CONST. of 1783, art. V; OHIO CONST. of 1802, art. VIII, § 3; PENN. DECL. RIGHTS of 1776, § 2; VT. CONST. of 1777, ch. I, § 3.

purported to establish a strong commitment to a general system of education.¹²⁶ Article IX, in relevant part, provided:

Sect. 1. Knowledge and learning generally diffused, through a community, being essential to the preservation of a free Government, and spreading the opportunities, and advantages of education through the various parts of the Country, being highly conducive to this end, it shall be the duty of the General Assembly to provide, by law, for the improvement of such lands as are, or hereafter may be granted, by the united States to this state, for the use of schools, and to apply any funds which may be raised from such lands, or from any other quarters to the accomplishment of the grand object for which they are or may be intended. But no lands granted for the use of schools or seminaries of learning shall be sold by authority of this state, prior to the year eighteen hundred and twenty; and the monies which may be raised out of the sale of any such lands, or otherwise obtained for the purposes aforesaid, shall be and remain a fund for the exclusive purpose of promoting the interest of Literature, and the sciences, and for the support of seminaries and public schools¹²⁷

Sect. 2. It shall be the duty of the General assembly, *as soon as circumstances will permit*, to provide, by law, for a general system of education, ascending in a regular gradation, from township schools to a state university, wherein tuition shall be gratis, and equally open to all.¹²⁸

Sect. 3. And for the Promotion of such salutary end, the money which shall be paid, as an equivalent, by persons exempt from militia duty except, in times of war, shall be exclusively, and in equal proportion, applied to the support of County seminaries; also all fines assessed for any breach of the penal laws, shall be applied to said seminaries, in the Counties wherein they shall be assessed.¹²⁹

These provisions raise three important issues. First, the provisions show that Indiana recognized early on the importance of education to the general well-being of society. However, as is apparent from the face of article IX, section 2, though the recognition was real, it was, to a certain extent, merely hortatory. By qualifying section 2 with the language “as soon as circumstances will permit,” the framers gave the General Assembly an opt-out provision, which meant that, effectively, no general system was established under the 1816 Constitution.

Second, these provisions make it clear that seminaries were a major

126. Borrowed in part from the Northwest Ordinance that governed the state prior to 1816. See *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, in CHARLES KETTLEBOROUGH, 1 CONSTITUTION MAKING IN INDIANA 26, 31-32 (1916).

127. IND. CONST. of 1816, art. IX, § 1.

128. IND. CONST. of 1816, art. IX, § 2 (emphasis added).

129. IND. CONST. of 1816, art. IX, § 3.

ingredient in Indiana's educational system. In fact, with no general system of schools established by the legislature, the seminaries and other local schools were *the* major ingredient in the state's education system. In its current usage, the word seminary refers to a school for the training of clergy or priests. However, this was not the meaning of the word in the 1816 Constitution. Rather, under the 1816 Constitution, the precise meaning of "seminaries" was "a school or place of education."¹³⁰ The resulting schools might be either religious or secular.

Third, article IX, section 3 makes it clear that these institutions were funded directly by the state through fines and other official sources of revenue. However, because the references to seminaries refer only to schools in general, and not to religious schools in particular, it is clear that article IX, section 3 was not a method for funneling state funds to religious organizations. Although some of the schools that were established under this system were religious, many were not.¹³¹

These three points are relevant primarily because they were either changed or dropped by the 1851 Constitution because the system did not work. Because article IX, section 2 created a loophole, requiring only that the General Assembly provide a general school system "as soon as circumstances will permit," Indiana never developed a general system of schools and quite a number of children went without any education. This was a point of contention for many citizens who were concerned about Indiana's future.¹³²

2. *Changes Instituted by the 1851 Constitution.*—The 1851 Constitution made several changes to the provisions regarding education and the separation of church and state. First, article I, section 3 of the 1816 Constitution was broken up into four separate sections which provide:

Section 2. All people shall be secured in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences.

Section 3. No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience.

Section 4. No preference shall be given, by law, to any creed, religious

130. See 3 BOUVIER'S LAW DICTIONARY 3041 (8th ed. 1914) ("Seminary. A place of education. Any school, academy, college, or university in which young persons are instructed in the several branches of learning which may qualify them for their future employments."); BLACK'S LAW DICTIONARY 1365 (7th ed. 1999) ("Seminary. 1. An educational institution, such as a college, academy, or other school."); 14 OXFORD ENGLISH DICTIONARY 956 (1991) ("seminary 4. A place of education, a school, college, university, or the like.").

131. See RICHARD G. BOONE, A HISTORY OF EDUCATION IN INDIANA, chs. 5-7 (Indiana Historical Society 1941) (1892) (examining and occasionally listing all the "seminaries" existing from time to time).

132. See discussion *infra* Part III.B.3.

society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.

Section 5. No religious test shall be required as a qualification for any office of trust or profit.¹³³

The Constitution also added a provision concerning the competence of witnesses, which provides that “[n]o person shall be rendered incompetent as a witness, in consequence of his opinions on matters of religion.”¹³⁴ For purposes of this Article, the addition of article I, section 6, which was borrowed from the Wisconsin and Michigan constitutions,¹³⁵ is by far the most important change. Section 6 provides that “[n]o money shall be drawn from the treasury, for the benefit of any religious or theological institution.”¹³⁶

With regard to education, article IX of the 1816 Constitution was rewritten to remove the loophole and place an affirmative duty upon the General Assembly “to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.”¹³⁷ The 1851 Constitution also provided for a common school fund “to be derived from the sale of County Seminaries, and the moneys and property heretofore held for such Seminaries”¹³⁸ The money from county fines and fees paid in lieu of militia service were, needless to say, no longer to go to the County Seminaries. In short, the 1851 Constitution abandoned the rather informal education system set out by the 1816 Constitution in favor of the “general and uniform system of Common Schools,” that, from the beginning, was Indiana’s objective.

3. *Historical Analysis.*—It would be tempting to conclude that the changes made regarding education and support of religious schools in the 1851 Constitution were the result of a strong aversion to the funding of such schools and a renewed understanding of what true separation of church and state required. This would be a mistake, however, and would reflect an imperfect understanding of both the 1816 Constitution and the societal changes that brought about the 1851 Constitution. First, as noted *supra*,¹³⁹ the 1816 Constitution’s reference to seminaries must be read to mean simply schools, as it was understood to mean at the time. Thus, the dismantling of the seminary system connotes no special view of the funding of religious schools. Second, the major changes made in the 1851 Constitution arose out of several crises that confronted Indiana at mid-century. The first, and best known crisis is attending

133. IND. CONST. art. I, §§ 2-5 (sections 2 and 4 were amended in 1984).

134. IND. CONST. art. I, § 7.

135. See JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION 964 (1851).

136. IND. CONST. art. I, § 6.

137. IND. CONST. art. VIII, § 1.

138. IND. CONST. art. VIII, § 2, cl. 5.

139. See *supra* note 130 and accompanying text.

failure of the Internal Improvements System of 1836. The second crisis was Indiana's failure to establish a system for general education, which meant that by mid-century, the majority of Indiana's children were receiving no education at all.¹⁴⁰

In the first instance, Indiana's Internal Improvement System of 1836 proved to be a large-scale disaster deemed "a catastrophic fiscal debacle,"¹⁴¹ that left the state bankrupt.¹⁴² In 1836, Indiana embarked on a series of internal improvements that it believed would help to develop its economy and allow it to participate in the Industrial Revolution. The majority of these improvements concerned transportation. By the 1830s Indianapolis was an "almost inaccessible village"¹⁴³ and the roads (such as they were) presented a real danger to anyone traveling on them.¹⁴⁴ Without a transportation system, many feared that Indiana would be left behind, unable to move its agricultural and manufactured goods to market. The Internal Improvement System of 1836 was, at its roots, an attempt to build such a system, consisting of roads, turnpikes, canals, and railroads. Indiana was quite optimistic that the funds for such a system could be raised through bonds and the sale of federal land grants. Indiana was also confident that the borrowed monies could be repaid through the revenue garnered from the turnpikes, canals, and railroads. It is enough to say that it failed miserably and, in hindsight, historians have described the plan as a "giddy speculative course."¹⁴⁵ By 1841, Indiana defaulted on some \$15.1 million in debt (\$3.6 million of which was never paid to the state) and the interest on its debts alone exceeded the state's annual income by several times; in fact, prior to the default, the state was forced to pay the interest on its debts by issuing more bonds.¹⁴⁶ The

140. DONALD F. CARMONY, *INDIANA, 1816-1850: THE PIONEER ERA* 379 (1998) (noting that the state treasurer concluded that "roughly 64 percent of [school age children] had been without 'any benefit of common school instruction' the preceding year"). See generally BOONE, *supra* note 131 (the first half of Boone's work is a catalog of horrors regarding the state of education in Indiana before 1851).

141. CARMONY, *supra* note 140, at 241.

142. See *Collins v. Day*, 644 N.E.2d 72, 76 (Ind. 1994).

The constitutional convention met in late 1850 and early 1851 against a backdrop of problems associated with states' efforts to develop their infrastructures and stimulate economic progress. Beginning in 1836, the State of Indiana had engaged in a general system of internal improvements, issuing bonds which were then sold in the market at a heavy discount, with the resulting money "squandered on various railroads and canals," none of which were completed.

Id. (quoting *Lafayette, Muncie & Bloomington R.R. v. Geiger*, 34 Ind. 185, 205 (1870)). Though the Erie-Wabash Canal was eventually completed it was a commercial failure; railroads were in the ascendancy by the time it became operative.

143. CARMONY, *supra* note 140, at 175.

144. *Id.*

145. RAY ALLEN BILLINGTON, *WESTWARD EXPANSION: A HISTORY OF THE AMERICAN FRONTIER* 343 (1949).

146. See CARMONY, *supra* note 140, at 226-29.

situation was so dire that, in early 1841, Rothschild & Sons petitioned President William Henry Harrison to help the state avoid default on its debts.¹⁴⁷ The Whig Party, which was in power when the plan was adopted, eventually admitted that "Indiana is a ruined state."¹⁴⁸ Not only was Indiana bankrupt, but few of the projects were either completed or ever became profitable.

Indiana's fiscal collapse was the major impetus behind the 1851 Constitution and its changes to the 1816 Constitution.¹⁴⁹ In some ways, it was also the cause of changes made to the 1816 Constitution's provisions on education. First, the state, bankrupt as it was, could hardly afford to make use of the admittedly inefficient and incomplete private school system. There was considerable thought in the years before 1851 that a common school system would be less expensive than the then existing system.¹⁵⁰ Moreover, the common schools would be free to all. Second, by the late 1840s there was a widespread disaffection with the specialized legislation and various privileges granted by the legislature.¹⁵¹ This disaffection extended to the county seminaries as well,¹⁵² which were often financed by the interest on loans and in some cases mismanaged; by 1851 they were fairly unpopular.¹⁵³ To a certain extent, the county seminaries fell by the same axe that cut out debt financing and special legislation from the 1816 Constitution as a whole.¹⁵⁴ This situation was

147. *See id.* at 229; *see also* NIALL FERGUSON, *THE HOUSE OF ROTHSCHILD: MONEY'S PROPHETS 1798-1848* 372-75 (1998).

148. CARMONY, *supra* note 140, at 230; *accord* Collins, 644 N.E.2d at 76 ("The bonds greatly depreciated in value, the state's credit 'was utterly ruined in the money market,' and the state abandoned the completion of the improvement projects in 1842." (quoting Lafayette, Muncie & Bloomington R.R. v. Geiger, 34 Ind. 185, 205 (1870))).

149. Even within the 1851 Constitution this is evident. For instance, article XIII has only one section, which limits debt to two percent of any political or municipal corporation's property value. IND. CONST. art. XIII, § 1.

150. *See* CARMONY, *supra* note 140, at 385.

151. *See* Collins, at 76-77 (noting that much of the debate during the convention focused on the state's fiscal collapse and the granting of privileges and monopolies). *See also* KETTLEBOROUGH, *supra* note 126, at lxxii (In 1848, "Governor Whitcomb called attention to the growing evils of local and special legislation, its injustice to individual interests, its expense to the treasury, and the undue consumption of time employed in the consideration of private legislation.").

152. *See* CARMONY, *supra* note 140, at 395; *see also* KETTLEBOROUGH, *supra* note 126, at cxlvi.

153. *See* BOONE, *supra* note 131, at 38, 43-44.

154. An interesting corollary is provided by the Ohio Constitution. Like Indiana, Ohio drew much from the Northwest Ordinance that governed the territories before statehood. Indiana was not the only midwest state to experience spectacular internal improvement failures; Ohio, Illinois, and Michigan also participated in the frenzy. *See, e.g.*, 2 R. CARLYLE BULEY, *THE OLD NORTHWEST: PIONEER PERIOD, 1815-1840*, ch. 2 "Economic History" (1950). Perhaps in response to its own economic failure, but certainly in response to the overweening power of the legislature, the Ohio constitution was also rewritten in 1851. *See* Frederick Woodbridge, *A History of*

compounded by Indiana's other mid-century crisis.

Notwithstanding the precatory language in the 1816 Constitution, Indiana failed to institute a comprehensive and workable system for educating its children.¹⁵⁵ The situation was such that Caleb Mills,¹⁵⁶ a founder of Wabash College, concluded that Indiana residents

are the most ignorant of the *free States*, and are far below even some of the *Slave States*. *One-seventh part* of our adult population are unable to read the word of God, or write their names. Some of our counties are enveloped in an thicker intellectual darkness than shrouds *any State* in the Union.¹⁵⁷

The local system was quite haphazard, expensive, and altogether absent in some

Separation of Powers in Ohio: A Study in Administrative Law, 13 U. CIN. L. REV. 191, 218-20 (1939). The changes made to the Ohio Constitution included new provisions on the funding of sectarian schools. The changes were made in response to problems in Ohio similar to those experienced in Indiana. By mid-century, Ohio had little in the way of an educational system and many children went without instruction. Like Indiana, Ohio's education system was haphazard and disorganized.

The result was a mass of confused facts and conflicting legislation that as it multiplied left the legislators themselves in ignorance as to the exact law that applied in particular cases. Opportunities for carelessness and downright dishonesty in the local handling of the funds and the selling and leasing of the lands were afforded, and, as the records show, not all local officials were either careful or honest.

EDWARD ALANSON MILLER, *THE HISTORY OF EDUCATIONAL LEGISLATION IN OHIO FROM 1803-1850*, at 116 (1969). Ohio's article VI, § 2 is a response to similar problems with debt financing, specialized legislation, and a haphazard school system. Ohio's response, however, was more precise than Indiana's, providing that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state." OHIO CONST. art. VI, § 2. This phrasing, with its obvious concern about individual groups' gaining control of state funds, responded more precisely to the overarching worries of the citizens of the states, whose governments and private interests had directed them on a dangerous and speculative course, resulting in bankruptcy for many. It was also part of a reasoned reassessment, at mid-century, about the best way in which to educate the children of the state. By 1850, it was quite apparent to Ohio and Indiana residents that haphazard and voluntary systems would not get the job done.

155. See BOONE, *supra* note 131, at 22 ("From all this, however, came neither a system of schools nor any individual teaching of note.").

156. Richard Boone said that Professor Mills "did more for general education in Indiana than any other one man." *Id.* at 62.

157. CARMONY, *supra* note 140, at 387-88 (emphasis in original). According to the census of 1840, 14.3% of Indiana residents were illiterate (at the bottom of the list were Tennessee and North Carolina where illiteracy was 23.5% and twenty-seven percent respectively). However, there is reason to believe that the situation was worse in some segments of the population. If one considers the data from each county, Indiana's illiteracy rate for persons over twenty years of age was twenty-eight and more than forty percent in some parts of the state. BOONE, *supra* note 131, at 88-89.

places.¹⁵⁸ With this in mind, the 1851 Constitution mandated a common school system that would be free to all (of the white population) and available throughout the state.

Thus, it is not possible to ascribe the changes instituted by the 1851 Constitution to a desire to prohibit public funding of religious schools. The motivation behind the changes in the 1851 Constitution and Indiana's adoption of a common school system were principally three-fold and in no way preclude a model voucher system. First, the 1851 changes were a reaction to the failure of Indiana's voluntary, private, and local school system.¹⁵⁹ Second, they were a reaction to Indiana's fiscal collapse and a desire to accomplish more schooling in a less-expensive fashion. Finally, the changes were part of the larger desire to do away with special and local legislation in favor of generalized legislation.¹⁶⁰ A model voucher program offends none of these criteria.

One question remains. What is to be made of the addition of article I, section 6? As shown *infra*,¹⁶¹ article I, section 6 is an establishment clause provision that works in tandem with section 4 to prohibit the payment of public funds to religious organizations where those funds are used for religious purposes.

C. *Is Article I, Section 6 a Blaine Amendment?*

The Blaine Amendment has attracted considerable attention in the last several years.¹⁶² It is the subject of much thought and some misunderstanding. James G. Blaine and his proposed amendment to the U.S. Constitution are proper subjects of inquiry as part of any consideration of the constitutionality of a student voucher program. Nonetheless, with respect to Indiana, it must be immediately understood and articulated that article I, section 6 is not a Blaine amendment.¹⁶³ Indiana's 1851 Constitution was enacted nearly a quarter-century

158. See BOONE, *supra* note 131, at 42-49.

159. As noted *supra*, since the references to seminaries in the 1816 Constitution were to schools in general, the 1851 changes were not a rejection of funding for religious schools.

160. See *Collins v. Day*, 644 N.E.2d 72, 76-77 (Ind. 1994).

161. See discussion *infra* Part III.D.

162. See, e.g., Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992); Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 TEX. F. ON C.L. & C.R. 137 (1998); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657 (1998) [hereinafter Viteritti, *Blaine's Wake*]; Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113 (1996); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 140 (2000).

163. Though not Blaine-era provisions, whether article I, sections 4 and 6 were the product of the same anti-Catholic sentiment that gave rise to the Blaine Amendment, is a somewhat murky issue. The weight of the evidence suggests that the provisions were not the product of such sentiment. Nativism and the Know-Nothing Party came to Indiana after the 1851 Constitution was adopted and after the Whig Party's downfall in 1852. EMMA LOU THORNBROUGH, *INDIANA IN THE CIVIL WAR ERA: 1850-1880*, at 60-61 (reprint 1989) (1966). Specifically, L.C. Rudolph dates

before then Governor Rutherford B. Hayes of Ohio and Representative James G. Blaine began to publicly oppose the use of state funds to support Catholic schools in 1875.

Though the personal history of Blaine is an unusual one,¹⁶⁴ the history of his amendment is well understood. By 1850, Roman Catholics were the largest denomination in the United States¹⁶⁵ and, following the Civil War, they began to develop separate schools and to seek state funds for those schools.¹⁶⁶ In the early

Know Nothingism's arrival to shortly after Alessandro Gavazzi was invited to speak in Indianapolis in October 1853. L.C. RUDOLPH, *HOOSIER FAITHS: A HISTORY OF INDIANA'S CHURCHES AND RELIGIOUS GROUPS* 546 (1995). In any event, by 1854, the Know Nothing Party was a political force in the state. THORNBROUGH, *supra*, at 61. Though Nativism and the Know Nothing Party had no real claim for originality with their anti-immigrant and anti-Catholic sentiment, the message had little political appeal in the east until the late 1840s and several years later in Indiana (which is not to say there was no anti-Catholicism, especially in the east, before the 1840s as Ray Allen Billington conclusively demonstrates otherwise). The growth of nativism and the Know Nothing Party in Indiana coincided with the rapid growth of the Roman Catholic and immigrant populations in Indiana after 1850. *Id.* at 634. Tyler Anbinder concurs with this analysis, noting that by 1850, under six percent of Indiana's inhabitants were immigrants and says, "Indiana possessed few immigrants and even fewer Catholics. Nativism flourished there in part because the Indiana constitution permitted every resident to vote, including those who had not yet acquired American citizenship." TYLER ANBINDER, *NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS AND THE POLITICS OF THE 1850S*, at 71 (1992). Anbinder observes that in Indiana, the Know Nothings included other issues in their political agenda, such as temperance and abolition, making Hoosier Know Nothingism somewhat less virulent. Anbinder concludes that, "[i]n Indiana, Know Nothingism clearly became the focal point for issues other than nativism." *Id.* at 72. A related question is whether and to what extent the common school movement as a whole was an anti-Catholic attempt to reinforce Protestant values. *See, e.g.*, Richard W. Garnett, *Brown's Promise, Blaine's Legacy*, 17 *CONST. COMMENT.* 651 (2000) (book review). With respect to Indiana, it is important to note that the common school movement was driven largely by Protestant forces. Still, in Indiana, it was not simply Catholics that were absent from the debates. "Quakers; strict adherents to certain elements among the Presbyterians, Methodists, and Baptists; and others" were absent from the debates. CARMONY, *supra* note 140, at 378. In *Kotterman v. Killian*, 972 P.2d 606, 624-626 (Ariz. 1999), Arizona examined its own history and rejected the argument that its article II, section 12 was a Blaine Amendment, notwithstanding section 12's similarity to a provision in the Washington Constitution that was a Blaine Amendment. The court noted section 12's similarity to Indiana's article I, section 6. *See id.* at 625; *infra* note 177. For a discussion of anti-Catholicism and nativism, in general, see RAY ALLEN BILLINGTON, *THE PROTESTANT CRUSADE, 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM* (1938); JODY M. ROY, *NINETEENTH-CENTURY AMERICAN ANTI-CATHOLICISM AND THE CATHOLIC RESPONSE* (1997) (unpublished Ph.D. Dissertation, Indiana University) (on file with author).

164. A useful introduction to the life and career of James G. Blaine can be found in Oxford University Press' *American National Biography*. 2 *AMERICAN NATIONAL BIOGRAPHY* 902 (1999).

165. MICHAEL S. ARIENS & ROBERT A. DESTRO, *RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY* 165 (1996).

166. Green, *supra* note 162, at 43. Green notes that in 1871, *Harper's Weekly* reported that

1870s, Catholics began a high profile campaign challenging the Protestant orthodoxy then prevailing in most common school systems.¹⁶⁷ These efforts included attempts, some of which were successful, to remove the King James Bible from public schools and to obtain funds for parochial schools.¹⁶⁸ By 1875, the stage was set for a bitter fight over the fate of religion in the nation's schools. That year, the Republicans seized the issue and hoped to use it to their advantage during the upcoming election.¹⁶⁹ Governor Hayes first voiced the party's opposition to state funds for Catholic schools and President Ulysses S. Grant subsequently took up the cause. Representative James G. Blaine, deposed Speaker of the House and Republican presidential hopeful, eventually proposed the following amendment to the United States Constitution, hoping to enhance his prospects for winning the Republican nomination:¹⁷⁰

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.¹⁷¹

The amendment passed the House but a different version failed to earn the two-thirds majority needed in the Senate. By the time the amendment reached the Senate, Hayes had been selected as the Republican nominee and Blaine had been appointed a Senator from Maine. Having lost the presidential nomination for President, Blaine lost interest in the amendment and neither participated in the Senate debates nor voted on the amendment.¹⁷² Blaine was the Republican nominee for President in 1884 but lost New York to Grover Cleveland, by 1149

the Catholic Diocese of New York City had received \$700,000 and that, even after a state ban on the practice, the diocese received \$370,000 in 1875. *Id.*

167. *Id.* at 42-44.

168. *See id.* at 42-47.

169. *See* Marie Carolyn Klinkhamer, *The Blaine Amendment of 1875: Private Motives for Political Action*, 42 CATH. HIST. REV. 15, 19-21 (1957); Green, *supra* note 162, at 47-51; Kemerer, *supra* note 162, at 153-54. The Republicans were dogged by corruption in the White House (the Whiskey Ring) and recent electoral defeats. Following the 1874 election and the loss of a number of congressional seats, Blaine was deposed as the Speaker of the House of Representatives. Green, *supra* note 162, at 49.

170. *See* Klinkhamer, *supra* note 169, at 29-32. Klinkhamer argues that Blaine tried to walk a dangerous tightrope with the issue. She notes that Blaine had close family ties to Catholicism and tried to use the issue to convince both Catholics and Protestants alike that he was not Catholic, which would have ended his presidential ambitions. On one hand, Blaine wanted to convince Catholics that he was not a lapsed Catholic, which they would have viewed with some suspicion. On the other hand, Blaine needed to convince the Protestant majority that, notwithstanding his family ties, he had no Catholic tendencies.

171. 4 CONG. REC. 205 (Dec. 14, 1875).

172. Green, *supra* note 162, at 67-68.

votes, after offending the citizens of New York, especially the Irish-Americans, when he failed to object to a speaker who referred to the Democratic Party as the party of “Rum, Romanism, and Rebellion.”¹⁷³

Though the Blaine Amendment was never adopted at the federal level, it was adopted by a number of states, and was even mandated by Congress for some new states.¹⁷⁴ Though some thirty states adopted some version of the amendment, Indiana did not follow suit.¹⁷⁵ As noted, Indiana adopted its article I, section 6 in 1851, nearly a quarter century before the Blaine Amendment was proposed.

That Indiana’s article I, section 6 is not a Blaine Amendment is important in two respects. First, unlike the Blaine Amendment, Indiana’s article I, section 6 was not “a remnant of nineteenth-century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had a particular disdain for Catholics.”¹⁷⁶ Nor was section 6 “a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing ‘Catholic menace.’”¹⁷⁷ Were section 6 such a provision, it would likely violate the Fourteenth Amendment’s Equal Protection Clause by classifying on the basis of religion.¹⁷⁸

173. See ANSON PHELPS STOKES, 2 CHURCH AND STATE IN THE UNITED STATES 417 (1950).

174. Viteritti, *Blaine’s Wake*, *supra* note 162, at 672-73.

175. The exact number (twenty-nine to thirty-three) is a matter of some disagreement. See Heytens, *supra* note 162, at 664 n.32 (explaining the differing opinions and incorrectly listing Indiana as one of the thirty-two states adopting the Blaine Amendment).

176. Viteritti, *Blaine’s Wake*, *supra* note 162, at 659; see also Heytens, *supra* note 162, at 140 (Blaine Amendments are “an artifact of the religious tensions that plagued the United States during the later third of the nineteenth century.”).

177. *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz. 1999). The Arizona Supreme Court’s description of the Blaine Amendment is particularly important because the court held that Arizona’s article II, section 12 and article IX, section 10 were not Blaine Amendments and did not prohibit a tax credit for givers of gifts to organizations that grant scholarships to children who wish to “attend any qualified school of their parents’ choice,” including religious schools. ARIZ. REV. STAT. § 43-1089.E.3 (1989). This holding is important here because the *Kotterman* court thought that Indiana’s article I, section 6 was similar to its own article II, section 12, lending support to the conclusion that article I, section 6 is not a Blaine Amendment.

178. See Garnett, *supra* note 163, at 667-70; Heytens, *supra* note 162, at 140-61; Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J. L. ETHICS & PUB. POL’Y 341 (1999). Equal Protection violations often appear as Free Exercise violations; in fact, the claims overlap and “[a] court considers these claims as one constitutional inquiry.” *Columbia Union College v. Clarke*, 159 F.3d 151, 156 n.1 (4th Cir. 1998). See also *Brown v. Borough of Mahaffey*, 35 F.3d 846, 850 (3d Cir. 1994) (noting that Free Exercise and Equal Protection claims were the same except that a plaintiff raising an Equal Protection claim must also show that he or she “received different treatment from other similarly situated individuals or groups.”); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1529-30 (11th Cir. 1993) (observing the overlap between Free Speech, Free Exercise, and Establishment Clause claims). In

A long line of cases establishes the proposition that the government may not discriminate on the basis of religion. Thus, in *Employment Division v. Smith*,¹⁷⁹ the Court observed that “[t]he government may not . . . impose special disabilities on the basis of religious views or religious status.”¹⁸⁰ Later, in *Church of Lukumi Babalu Aye v. City of Hialeah*,¹⁸¹ the Court noted that, “[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or prohibits conduct because it is undertaken for religious reasons.”¹⁸² The Court has maintained this stance at the intersection of religion and free speech and has repeatedly held that the government may not discriminate based on the religious content of the speech. Most recently, in *Good News Club v. Milford Central School*,¹⁸³ the Court reiterated its holdings in *Widmar v. Vincent*,¹⁸⁴ *Lamb’s Chapel v. Center Moriches Union Free School District*,¹⁸⁵ and *Rosenberger v. Rector and Visitors of the University of Virginia*¹⁸⁶ saying, “we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination. . . .”¹⁸⁷ As Eugene Volokh has usefully demonstrated, the same can be said for the Court’s Establishment Clause jurisprudence in which the “language of evenhandedness” pervades its opinions.¹⁸⁸ Hence, the requirement that the principal or primary effect of government action neither advance nor inhibit religion is merely another way of saying the government may not discriminate in favor of, or against, religion.

Second, because section 6 is not a Blaine Amendment, it is both possible and likely that its purposes are larger.¹⁸⁹ Unlike the Blaine Amendment, which only speaks to the payment of state funds to religious schools, section 6 is, on its face, broader. Thus, section 6 was both a reasoned reaction to the crises confronting Indiana at mid-century and a more general Establishment Clause provision. In

Peter v. Wedl, 155 F.3d 992 (8th Cir. 1998), the Eighth Circuit explicitly found an Equal Protection violation based on a Minnesota law that prohibited schools from providing disability services at a private religious school, where those services were available at public schools and other private schools. The court held that the law “violated the plaintiffs’ rights to free exercise of religion, free speech, and equal protection” *Id.* at 997.

179. 494 U.S. 872 (1990).

180. *Id.* at 877.

181. 508 U.S. 520 (1993).

182. *Id.* at 532.

183. 121 S. Ct. 2093 (2001).

184. 454 U.S. 263 (1981).

185. 508 U.S. 384 (1993).

186. 515 U.S. 819 (1995).

187. *Good News Club*, 121 S. Ct. at 2100 n.2.

188. Volokh, *supra* note 178, at 365.

189. In fact, during the debates in Congress, the Blaine Amendment was criticized as a narrowly drawn provision that would only prevent states from giving money to parochial schools but would not prevent states from subsidizing the Catholic Church in other ways. See Klinkhamer, *supra* note 169, at 42-46.

light of the Indiana Supreme Court's jurisprudence on sections 4 and 6,¹⁹⁰ these provisions prohibit only the payment of public funds to religious organizations, where those funds are a gift or subsidy to support an organization's religious activities. Thus, sections 4 and 6 work in tandem as an Establishment Clause, concerned with the capture of state funds by religious groups where those funds amount to either gifts or subsidies to advance the group's religious mission.

D. Indiana's Jurisprudence on Article I, Sections 4 and 6

The limited case law on sections 4 and 6 consists primarily of *State ex rel. Johnson v. Boyd*¹⁹¹ and *Center Township of Marion County v. Coe*.¹⁹² These two cases show both that sections 4 and 6 prohibit only the payment of public funds to religious organizations, where those funds are used for religious purposes, and that they work in tandem as an Establishment Clause.

1. *State ex rel. Johnson v. Boyd*.—*Boyd*, together with *Coe*, must be considered as part of a discussion of the constitutionality of a voucher program under the Indiana Constitution. In *Boyd*, taxpayers in Vincennes, Indiana, sued the city's treasurer, alleging that public funds had been expended to support several parochial schools from 1933 to 1937. The taxpayers argued that this practice violated article I, sections 4 and 6, and that the funds must be returned. *Boyd* arose after the Roman Catholic parish in Vincennes determined that, beginning in the fall of 1933, it would no longer be able to operate several parochial schools in the city.¹⁹³ The parish asked the city to prepare accommodations for the 800 students who would no longer be able to attend these schools. The school district determined that "the children formerly attending such schools could not . . . be properly cared for in the school buildings owned by the School City . . ."¹⁹⁴ Having reached that conclusion, the school district found it both "adviseable [sic] and necessary to take over and make a part of the public schools and the school system of this school city the St. Francis Xavier School, St. John School, and Sacred Heart School . . ."¹⁹⁵

In furtherance of this policy, the school district directed that the course of study in the schools conform to that used in the city's public schools, the buildings and equipment in these schools would be used by the city, and that "no sectarian instruction shall be permitted during school hours in said schools."¹⁹⁶ To staff the schools, the Superintendent relied on recommendations from several Catholic colleges and, based upon those recommendations, staffed the schools with the "Sisters and Brothers [of] various Catholic orders."¹⁹⁷ These teachers

190. See discussion *infra*, Part III.D.

191. 28 N.E.2d 256 (Ind. 1940).

192. 572 N.E.2d 1350 (Ind. Ct. App. 1991).

193. *Boyd*, 28 N.E.2d at 260.

194. *Id.* at 261.

195. *Id.*

196. *Id.*

197. *Id.*

were all licensed to teach in Indiana and they taught the course of study prescribed by the city. Though the city used the buildings and equipment owned by the parish, it did not pay for the use of these items. Nor did the city pay for heat, lights, water, fuel, or janitorial service for the buildings. The schools each retained various accessories, usually found in a parochial school, such as pictures of Jesus, the Holy Family, and Holy Water founts. In addition, the teachers wore the garb of the orders to which they belonged, which included crucifixes and rosaries where appropriate. Finally, on the grounds of each school was a Catholic Church that the students in each school voluntarily attended prior to each school day. The students attending these schools were exempted from attending the city school that based on geography, they normally would have attended; instead, they were allowed to attend the Catholic schools that they previously had attended.¹⁹⁸

The *Boyd* court found that article I, sections 4 and 6 forced them to inquire into whether the city's arrangement amounted to a vehicle for making indirect donations to the church.¹⁹⁹ In developing its test, the court made it fairly clear that these sections are essentially Establishment Clause provisions. Based on this conclusion, the court's analysis focused on whether the schools in question remained, in fact, parochial schools. The Indiana Supreme Court held that the city's practice of operating the schools was not a donation because the schools were in fact public. The court noted that the school district employed

teachers who were regularly licensed to teach school agreeable with the laws of the State of Indiana and with such teachers established schools in the school plants formerly occupied by said parochial schools. These teachers taught the course of study prescribed by the State Board of Education. No sectarian instruction was permitted in said schools during school hours. The schools were visited occasionally by the superintendent of the Vincennes City Schools and frequently by the Director of Instruction in the elementary grades of said city schools. The teachers were paid their salaries from public funds by the treasurer of the school city. In view of these findings it can not [sic] be said that the primary facts found by the court necessarily lead to the conclusion that the schools in question during this period were not public schools or that the salaries paid amounted to contributions made indirectly to parochial schools or to the church.²⁰⁰

The court ultimately found that the situation presented no problem under article I, sections 4 and 6; it was not constitutionally suspect for the school district to make use of the parochial school facilities.²⁰¹ Nor did the Catholic Church's gratis provision of the buildings and furniture make the operation a private, religious one. The court noted that, "[s]ince the teachers in said schools were

198. *Id.* at 262.

199. *See id.* at 264.

200. *Id.*

201. *Id.* at 264-65.

employed by the Board of School Trustees, teaching the course prescribed for the public schools, such teachers were the employees of the school city and their possession of said premises was the possession of the school city.”²⁰² Quite simply, there was no chance of money being drawn from the treasury for the benefit of a religious institution because the schools in question were, in fact, public.

It is safe to say that *Boyd* was a fairly unusual case.²⁰³ Perhaps one key to the court’s decision was its characterization of the situation confronting the Vincennes school district. It is not unusual for courts to permit actions during emergencies that would not otherwise hold.²⁰⁴ The *Boyd* court repeatedly characterized the situation facing the school district as an emergency. Hence, in the court’s analysis, the school district adopted a reasoned approach to deal with an emergency that threatened its ability to comply with Indiana law. The school district had an affirmative statutory obligation that required it to “employ teachers, establish and locate conveniently a sufficient number of schools for the education of children therein, and build, or otherwise provide, suitable houses, furniture, apparatus and other articles and educational appliances necessary for the thorough organization and efficient management of said schools.”²⁰⁵ Charged with such a duty, the Indiana Supreme Court thought the Board of Trustees “faced . . . an emergency to provide school facilities for more than 800 additional school children. In the opinion of the trustees they could not be properly cared for in the buildings owned by the school city.”²⁰⁶ Whether or not *Boyd* would survive today, the case remains important because of what it reveals about the contours of article I, sections 4 and 6.

Boyd reveals two particularly relevant things about sections 4 and 6. First, *Boyd* shows that section 6 is not a Blaine Amendment. Were it a Blaine Amendment, the *Boyd* court could not have held that sections 4 and 6 prohibit only donations to religious organizations; as previously discussed, a Blaine Amendment prohibits *all* payments to religious schools.²⁰⁷

202. *Id.* at 265.

203. At least one former Indiana Supreme Court Justice has opined that such an arrangement would not pass muster today. See Remarks of Associate Justice Jon D. Krahulik (ret.) in *Ind. State Const. Law*, Jan. 18, 2000 (on file with author).

204. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment of Japanese-American civilians, stating that

[c]ompulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger).

Id. at 219-20.

205. *Boyd*, 28 N.E.2d at 264 (citing provisions now codified at IND. CODE § 20-2-9-1(a) (1998)).

206. *Id.*

207. See discussion *supra* Part III.C.

Second, the *Boyd* court interpreted sections 4 and 6 together and did not distinguish between the two provisions when deciding the case and formulating the test that would govern state funding of religious schools. By doing so, the *Boyd* court made it clear that sections 4 and 6 work together and are, at their core, an Establishment Clause. The *Boyd* court noted that it would uphold the City of Vincennes' arrangement, unless the facts showed that the payments made by the city were made to "parochial schools" and were "an indirect payment or donation to the church."²⁰⁸ The court's words are best understood to prohibit the payment of public funds to religious organizations, where those funds are used for religious purposes. This two-part requirement is key. The *Boyd* court held that merely making payments to a religious entity was not prohibited by the Indiana Constitution. Such payments are only prohibited under sections 4 and 6 when they amount to a "donation to the church," that is, where the payments are not for services rendered but are donations or subsidies to promote the church's religious mission.²⁰⁹ It is also clear from the *Boyd* court's analysis that a violation can be either direct or indirect.

In *County Department of Public Welfare of Allen County v. Potthoff*,²¹⁰ the Indiana Supreme Court reaffirmed its holding in *Boyd* that section 6 works with section 4 as an Establishment Clause. In *Potthoff*, the court observed that article I, section 6 prevented gifts to religious and theological institutions.²¹¹ The Indiana Supreme Court's *Boyd* analysis has been followed in other cases, including *Center Township of Marion County v. Coe*.²¹²

2. *Center Township of Marion County v. Coe*.—*Coe* was a class-action suit brought on behalf of homeless persons in Indianapolis. The suit alleged that the Marion County Trustee failed to fulfill its statutory obligation to provide shelter for homeless persons. Additionally, the plaintiffs alleged that the Trustee had attempted to fulfill its obligation in a way that violated the First Amendment to the United States Constitution and article I, sections 4 and 6 of the Indiana

208. *Boyd*, 28 N.E.2d. at 263.

209. *Accord* *K.R. v. Anderson Cmty. Sch. Corp.*, 887 F. Supp. 1217, 1228 (S.D. Ind. 1995) *rev'd* on other grounds, 125 F.3d 1017 (7th Cir. 1997) (holding that providing support for a disabled student attending a parochial school would not violate article I, section 6, because "the school corporation is not being asked to pay St. Mary's directly to provide religious or general educational services.").

210. 44 N.E.2d 494 (Ind. 1942).

211. *Id.* at 496. The only other treatment of this issue misidentifies the relevant test. See Jennifer L. Smith, Note, *Educational Vouchers in Indiana? – Considering the Federal and State Constitutional Issues*, 34 VAL. U. L. REV. 275 (1999). Smith argues that, for a voucher program to survive under section 6, funds would have to be given directly to students and the students could not be required to attend religious activities. *Id.* at 330. This analysis fails to consider the actual requirements of section 6; the provision is offended only by the payment of state funds, directly or indirectly, where such payments amount to a gift, subsidy, or donation to a religious entity, including, but not limited to, sectarian schools. Moreover, Smith omits any significant analysis of relevant Indiana history.

212. 572 N.E.2d 1350 (Ind. Ct. App. 1991).

Constitution.²¹³ In *Coe*, the Trustee attempted to fulfill at least part of its obligation by using religious missions as homeless shelters. These missions, however, required homeless persons to attend religious services as a condition of shelter.

In *Coe*, there was little question that the Trustee's practice violated the First Amendment. The court of appeals noted that

[t]he Trustee cannot avoid its constitutional responsibilities by contracting with private organizations to supply the relief the Trustee is obligated by statute to provide to the Appellees. The Appellees had a statutory right to shelter and the Trustee's action compelled many of them to attend religious services as a condition of exercising that right.²¹⁴

It was a basic point of law, the court thought, that "a person cannot be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."²¹⁵

With regard to the Indiana Constitution, the court thought it "patently" clear that the Trustee's practice violated article I, section 4, because it compelled persons to attend a place of worship against their consent in order to receive entitlement benefits.²¹⁶ The court looked to *Boyd* to determine whether the Trustee's practice violated article I, section 6. Unlike *Boyd*, where the government entity closely monitored the schools to ensure that no religious instruction took place, "the Trustee exercise[d] no control over the missions and ma[de] no effort to separate the missions' sectarian purpose from the statutory benefit to the Appellees."²¹⁷ In *Coe*, the court held that "the payment of public funds to religious missions which they use for religious purposes violates Article I, Section 6 of the Indiana Constitution."²¹⁸ The Trustee's actions violated *Boyd's* two-part test because the funds paid were used to support religious activities that homeless persons were compelled to attend. The *Coe* court was careful to note that nothing in either the Indiana or the United States Constitution prohibited "the use of religious missions as vendors of shelter services if the missions do not condition the receipt of shelter on attendance at religious services."²¹⁹

Thus, *Coe* reinforces two relevant points about sections 4 and 6. First, *Coe* makes it readily apparent that section 6 is not a narrowly drawn Blaine Amendment. If it were, it would apply only to school funding and would be immaterial to cases such as *Coe* that deal with funds provided to other religious entities. Second, as part of an Establishment Clause, section 6 works in tandem with section 4 to impose typical requirements upon the payment of public funds

213. *Id.* at 1352.

214. *Id.* at 1360.

215. *Id.* (citing *Thomas v. Review Bd. of Ind.*, 450 U.S. 707, 716 (1981)).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

to religious entities. Thus, in *Coe*, article I, sections 4 and 6 prohibited the payment of public funds to religious organizations, where those funds were actually used for religious purposes.

E. Constitutionality of a Model Voucher Program

With respect to article I, sections 4 and 6 of the Indiana Constitution, the Indiana Supreme Court has developed a two-part test to assess the constitutionality of any state action that involves the payment of public funds to religious institutions. A third aspect of such an assessment is the consideration of any historical factors bearing upon the analysis. With regard to the third prong, as discussed previously,²²⁰ it is not possible to ascribe the changes instituted by the 1851 Constitution to a desire to prevent the public funding of religious schools. These changes, which find expression in article I, section 6, do not, therefore, impugn a model voucher program.

Rather, the changes in the 1851 Constitution and Indiana's adoption of a common school system were, as discussed earlier,²²¹ principally a three-fold reaction to Indiana's unenviable position during the mid-nineteenth century. First, the changes were a response to the failure of Indiana's voluntary, private, local school system. Second, the changes were a reaction to Indiana's fiscal collapse and a desire to accomplish more schooling in a less-expensive fashion. Finally, the changes were part of the larger desire to do away with special and local legislation in favor of generalized legislation. A model voucher program offends none of these criteria.

The Indiana Supreme Court's jurisprudence, Indiana history, and the text of article I, sections 4 and 6 make it clear that the sections work in tandem as an Establishment Clause, designed to prevent the capture of state funds by religious groups, where those funds amount to a gift, subsidy, or donation to advance the group's religious mission. For a model voucher program to violate sections 4 and 6, the funds, made payable to the parents of children attending a religious school, would have to amount to a subsidy that supported the school's religious mission. For two related reasons, vouchers are not such a subsidy.

First, a model voucher program contains an opt-out provision, which allows children, on a parent's written request, not to attend religious activities at religious schools.²²² Under a model voucher program, participating students are not forced to choose religious schools nor are they forced to attend religious activities at religious schools. If students using vouchers attend religious activities, they do so only by individual, private choice.

Second, it does not violate the Indiana Constitution for public funds to flow to religious institutions, when those funds are directed to the religious institution

220. See discussion *supra*, Part III.B.3.

221. See discussion *supra*, Part III.B.3.

222. See, e.g., *Jackson v. Benson*, 578 N.W.2d 602, 609 (Wis. 1998) (opt-out provision from religious activities in voucher program passed constitutional muster under Wisconsin law); *supra* note 14.

by private individuals and are made available under general, neutral programs. In *Jackson v. Benson*, the Wisconsin Supreme Court considered a challenge to the Milwaukee Voucher Program, under article I, section 18 of the Wisconsin Constitution,²²³ from which the drafters of the 1851 Indiana Constitution borrowed in writing article I, section 6.²²⁴ The Wisconsin Supreme Court found that

funds may be placed at the disposal of third parties so long as the program on its face is neutral between sectarian and nonsectarian alternatives and the transmission of funds is guided by the independent decision of third parties and that public funds generally may be provided to sectarian educational institutions so long as steps are taken not to subsidize religious functions.²²⁵

This view accords with the long line of U.S. Supreme Court jurisprudence.²²⁶ It would be an extreme departure from generally settled law for the Indiana Supreme Court to find that where individuals direct public funds to religious institutions by their own private choices, where the funds flow from a neutral, generally applicable program, these actions violate article I, sections 4 and 6. Such a conclusion would have far-reaching consequences, drawing into the fray both state employees who choose to direct a portion of their paychecks to a religious entity,²²⁷ and long-standing state scholarship and financial aid programs (GI Bill and Pell Grants) given to institutions of higher education.²²⁸ Such a decision would also call into question Medicare and Medicaid programs that have long reimbursed religiously affiliated health-care providers.²²⁹

223. Article I, section 18 of the Wisconsin Constitution provides:

The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; *nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent*; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; *nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.*

WISC. CONST. art. I, § 18 (emphasis added).

224. See JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION 964 (1851).

225. *Jackson*, 578 N.W.2d at 621 (citations omitted).

226. See discussion in *supra* Part II.A.

227. See *Agostini v. Felton*, 521 U.S. 203, 226 (1997).

228. See *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 486-87 (1986); *Tilton v. Richardson*, 403 U.S. 672 (1971).

229. Provisions of the Medicare and Medicaid acts, for instance, allow patients at "religious nonmedical health care institutions" (e.g., Christian Scientist sanatoria) to receive government benefits, which are, of course, paid directly to the health care institutions for treatment at these institutions. See *Children's Healthcare Is a Legal Duty, Inc. v. Min de Parle*, 212 F.3d 1084 (8th Cir.) (holding that these provisions do not violate the First Amendment's Establishment Clause),

Thus, a model voucher program does not violate article I, sections 4 and 6 of the Indiana Constitution because the built-in opt-out provision provides protection against state funds supporting religious activities. Further, because the funds are used at religious schools only as the result of individual choices, the funds are not a direct state subsidy of any sect's religious mission.

CONCLUSION

This Article has examined the constitutionality under the Indiana Constitution of a model student voucher program. Such a program is constitutional for three reasons. First, the Indiana Supreme Court's jurisprudence, Indiana history, and the text of article I, sections 4 and 6 make it clear that these sections work in tandem, as an Establishment Clause, to prevent the capture of state funds by religious groups, where those funds amount to a gift, subsidy, or donation to advance the group's religious mission. Under a model voucher program, state funds that may reach religious groups are not a gift, subsidy, or donation. Second, because the funds are not used for religious purposes, they do not amount to a "donation to the church" and are not subsidies to promote a religious mission. Further, private choice forms a barrier between the state and the use of any funds to support an institution's religious mission. Under a model voucher program, any funds that flow to religious schools do so only because individual families and schools chose to participate in the program. Finally, a model voucher program does not offend the Indiana Constitution because it is consistent with the historical purposes behind the changes made in the 1851 Constitution. Additionally, where state funds flow to religious institutions from neutral, generally applicable programs, the First Amendment's Establishment Clause is not violated if the funds are directed by independent, private decisions of third parties. In summary, a model voucher program in Indiana will survive scrutiny under both the Indiana and United States Constitutions.

cert. denied, 121 S. Ct. 1483 (2000); *see also* *Bradfield v. Roberts*, 175 U.S. 291 (1899) (approving payments of federal funds to hospital run by the Catholic Church); *Craig v. Mercy Hosp.-Street Mem'l*, 45 So. 2d 809 (Miss. 1950) (approving payments of state and federal funds to hospital run by Catholic Church under state and federal constitutions). *But see* *Bd. of County Comm'rs of Twin Falls County v. Idaho Health Facilities*, 531 P.2d 588 (Idaho 1975) (holding that the issuance of bonds, in favor of hospitals run by religious organizations, would violate state constitution).