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ABSTRACT

An examination of the constitutionality of education vouchers is presented in this paper. It discusses Minnesota's relevant constitutional provisions, constitutional challenges to education vouchers in other states, and federal constitutional provisions that are implicated in these discussions. In Minnesota, various challenges have been raised regarding the use of public money to support parochial schools. In Massachusetts a proposed bill to offer $100 in annual financial assistance to every elementary and secondary school student violated that state's constitution, which precludes the use of public money for the purpose of aiding nonpublic schools. The state of Washington, in 1973, struck down the state's newly enacted voucher program that provided assistance to needy and disadvantaged students in grades 1 through 12 attending public and private schools. Wisconsin's voucher program withstood constitutional challenges and continues to operate. The general principle underlying the religion clauses in the U.S. Constitution is that the country will tolerate neither governmentally established religion nor government interferences with religion. Recent Supreme Court decisions, however, have emphasized the government's responsibility to also accommodate religion. Laws must clearly state that government assistance is rendered to students or families, and not to institutions. (RJM)

HOUSE RESEARCH

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Information Brief

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# The Constitutionality of Education Vouchers under State and Federal Law

This information brief examines the constitutionality of education vouchers under state and federal law. The brief discusses (1) Minnesota's relevant constitutional provisions, (2) constitutional challenges to education vouchers in other states, and (3) federal constitutional provisions that are implicated in this discussion. A chart at the end shows U.S. Supreme Court decisions on permissible and impermissible forms of public aid to nonpublic schools.

Many states are looking at education vouchers and asking whether a market solution can improve the quality of public education. The answer in part lies in how government and religion will interact and whether states' constitutions or the religion clauses in the U.S. Constitution will permit education voucher plans to include religious schools.

## Minnesota's Constitutional Provisions

The Minnesota Constitution in article 1, section 16, states,"...[N]or shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries." Article 13, section 2, states, "In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught." To date, there is no Minnesota case that specifically discusses the permissibility of using public funds to provide education vouchers to elementary and secondary students attending public or nonpublic school. However, the Minnesota Supreme Court has permitted publicly funded transportation for parochial school children along with transportation for other school children.

In 1970, the Minnesota Supreme Court in *Americans United v. Independent School District No. 622*[1] upheld a state statute authorizing the use of public funds to transport students to sectarian schools, finding that the statute served a legitimate secular purpose in promoting the safety and welfare of students required to attend school under the state's compulsory attendance law. The state court found the most troublesome issue in the case to be whether the statute violated article 13, section 2, of the state constitution, which prohibits the state from using public money to support parochial schools. The Minnesota court noted the significance of the U.S. Supreme Court holding in *Everson v. Board of Education*[2] that publicly financed transportation for parochial school children as part of a program for all school-age children did not violate the federal constitution. It also noted that *Everson* was simply persuasive with respect to constructing the state constitution. *Everson* was decided by a divided court and the impact of *Everson* was further diluted by the differences in language between the federal and state constitutions, especially in light of the more specific and restrictive limitations in the state constitution.

The state court examined state cases[3] in which similar bussing provisions were struck down because transportation was held to be a direct benefit to parochial schools in violation of states' constitutional prohibitions against using public money to benefit religious institutions. The court also examined state cases[4] in which similar bussing provisions were sustained because students in parochial schools under compulsory attendance laws were found to be the real beneficiaries of public funds. Bussing was equated with providing public services like sewers, roads, and sidewalks, and parochial schools assumed a burden the general public would otherwise bear. The court then discussed the difficulty of drawing a line between legislation that provides funds for the general welfare and legislation designed to support religious institutions. It concluded that the Minnesota statute was a safety measure that entitled school children attending any schools to the same rights and privileges relating to transportation, and that any benefit to sectarian schools was purely incidental and inconsequential.

The court refused to offer an opinion as to whether direct health and safety aid to parochial school students in the form of medical, dental, and nursing services "stands on a different footing from subsidies which go to the heart of the learning process." It offered the caveat that "the limitations contained in the Minnesota Constitution are substantially more restrictive than those imposed by the U.S. Const. Amend. I." Finally, the court, as constituted in 1970, judged that the contested bussing statute brought the state "to the verge of unconstitutionality."

In 1993, the Minnesota Court of Appeals in *Minnesota Federation of Teachers v. Mammenga*[5] permitted public aid to a pervasively sectarian college under the state's Post-Secondary Enrollment Options Act (PSEO).[6] The court found that the benefits to Bethel College under PSEO were indirect and incidental and thus did not violate the state constitution. The court determined that PSEO was designed to benefit high school students by giving them an opportunity to take nonsectarian courses at participating colleges, the college had no control over the number of PSEO students electing to enroll at the college, the state reimbursed the college for less than half its actual costs, and the college separated the PSEO reimbursements from other funds to ensure that state benefits were used only for nonsectarian purposes. However, a

distinguishing factor may prohibit the state from providing indirect and incidental public aid to a pervasively sectarian school: the age of the students.[7] Young students are more likely to be vulnerable to state or student-initiated coercion and intimidation.[8] Younger children also may see state endorsement in what is otherwise a permissible accommodation of religion in school. Where impressionable school children are involved, the facial neutrality of an education program alone may be insufficient to overcome the state's constitutional prohibition against benefitting and supporting schools that teach distinctive religious doctrines.

## Constitutional Challenges in Other States

The state courts — Massachusetts, Washington, and Wisconsin included[9] — that have considered the issue of public funding of education vouchers have reached conflicting conclusions. Arguably, this is because states' constitutions are worded differently, voucher programs are designed differently, and judges have differing perspectives about the relationship between the state and religion.

### Massachusetts

In 1970, the Supreme Judicial Court of **Massachusetts**[10] advised the House of Representatives that a proposed bill that would authorize $100 in annual financial assistance to every elementary and secondary school student in public or private school would violate that section of the state constitution that precludes any appropriation of public money from being authorized for the purpose of aiding any nonpublic school. The bill anticipated that the state would deposit the allotment for public school students in the general fund of the student's city or town of residence. The allotment for private school students was to be in the form of a state voucher that parents would endorse over to the private school. The bill specifically precluded schools from using the allotment "to subsidize courses of religious doctrine or worship." The judges rejected the contentions of parents of private school students that they were entitled to a share of public tax funds and they were deprived of equal protection of the laws. In 1987, the same court advised the state senate that a proposed bill providing tax deductions for educational expenses modeled after the Minnesota statute upheld in *Mueller v. Allen*[11] (discussed below) would violate the state constitutional provision prohibiting grants to institutions or schools not publicly owned or under the exclusive control of public officers and agents.

### Washington

In 1973, the **Washington** State Supreme Court in *Weiss v. Bruno*[12] struck down the state's newly enacted voucher program that provided financial assistance to needy and disadvantaged students in grades one through 12 attending public and private schools. The year-round program made grant funds available to both public and private students. However, because only private school students paid tuition during the school year and had need of the funds, 91 percent of the funds went to Catholic schools. The court held that the program violated both the establishment clause of the First Amendment (discussed below) and the more stringent state constitutional provision

requiring that all schools maintained and supported by public funds be free from sectarian control or influence.

The court's opinion considered several questions often raised in discussions about educational vouchers.

- Does denying state aid to individuals impair their rights to exercise their religion? The court framed the question not in terms of whether a student may attend a private religious school, but whether the state may subsidize the student's attendance at that school. The court found no element of coercion that would deny a student the right to freely exercise the student's religion. The court held that the free exercise clause was not involved.

- Does awarding a money subsidy to parents lessen any state benefit to private sectarian schools? The court observed that a direct financial grant, which enables students to pay tuition and remain in private school, provides the school with significant support.

- Is a neutral state aid program made constitutional by treating all public and private students alike? The court ruled that state aid to sectarian schools, which violates the state's constitutional mandate that "all schools maintained or supported wholly or in part by public funds shall be forever free from sectarian control or influence," cannot be made permissible by combining it with state aid to public schools. In other words, using public funds to benefit private sectarian schools violates the state constitution, regardless of whether the benefit is indirect or incidental and regardless of whether schools other than sectarian schools also benefit.

The court did not discuss whether the state's voucher program violated that portion of the state constitution that prohibits public money from being appropriated for or applied to any religious worship, exercise, or instruction, or for support of any religious establishment.

**Wisconsin**

Only **Wisconsin** has a voucher program that withstood constitutional challenges and continues to operate. In 1992, the Wisconsin Supreme Court in *Davis v. Grover*[13] upheld Milwaukee's publicly funded voucher program. The legal challenge was based on Wisconsin's constitutional prohibition against private or local bills, the establishment of uniform school districts and the public purpose doctrine, which requires that public funds be spent only for public purposes. Religion was not an issue in the case because only nonsectarian private schools were eligible to receive state vouchers.

In 1995, the state expanded the voucher program by making private sectarian schools eligible for state payments. The expanded program: limited eligibility to Milwaukee families with incomes at or below 175 percent of the federal poverty level; limited participation to 15 percent of students enrolled in the Milwaukee public schools; paid the lesser of tuition costs or the state's per pupil

state aid amount to participating private schools; made the state-issued tuition check payable to parents of participating students and mailed the checks to the private schools for parents to endorse and the schools to use for the student's expenses; and allowed students using vouchers to opt out of a school's religious program at their parents' request. Parents and others filed a lawsuit in state district court to block the expanded legislation. The court stayed the expanded program pending resolution of the constitutional issues[14] but left unaffected about 1,500 Milwaukee students enrolled in previously existing private school choice programs.

Relying on federal establishment clause decisions, in 1998 the Wisconsin Supreme Court in *Jackson v. Benson*[15] ruled that the amended Milwaukee Parental Choice Program (MPCP) did not violate the federal establishment clause or the Wisconsin Constitution. The decision allows low-income Milwaukee students to use publicly funded vouchers to attend private religious schools. The state supreme court concluded that the program: served the state's secular interest in providing educational opportunities to low-income children; avoided either advancing or inhibiting religion by basing student eligibility on neutral, secular criteria and selecting private schools to participate on a neutral, nonreligious basis; and avoided excessive state entanglement by foreclosing state involvement in matters affecting private religious schools' governance, curriculum, and daily operation. The case likely will be appealed to the U.S. Supreme Court.

## Federal Constitutional Provisions

The religion clauses of the First Amendment to the U.S. Constitution state that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The establishment clause forbids laws that establish religion and the free exercise clause forbids laws that prohibit the free exercise of religion. The general principle underlying the religion clauses is that the country will tolerate neither governmentally established religion nor governmental interferences with religion. The First Amendment is binding on the states through the 14th Amendment, which requires that people within a state receive equal protection of the laws.

Originally, courts believed that the religion clauses in the U.S. Constitution required state and federal government to remain strictly neutral in matters of religious theory, doctrine, and practice. More recently, courts have accepted that government accommodation of religion is a more appropriate posture than strict neutrality. In accommodating religion, or not accommodating it, government recognizes that there are necessary interrelationships between itself and religion: churches receive community police and fire protection; churches are exempt from state and federal property taxes; and government may not include religious prayer or instruction in public schools. To decide whether government accommodation of religion is required, permitted or prohibited, government and courts must reconcile the inevitable tension between the establishment clause and the free exercise clause and between separation of church and state and neutrality toward religion.

Alleged violations of the establishment clause, which prohibits Congress from establishing religion, are generally analyzed under a three-part test first announced by the U.S. Supreme Court

in 1971 in *Lemon v. Kurtzman.*[16] Under the test, a government action violates the establishment clause if it (1) has a **nonsecular purpose** or (2) exerts **nonsecular primary effects** or (3) creates **excessive church-state entanglement**. Although some Supreme Court justices have questioned the *Lemon* test and suggested alternative establishment clause tests, including a coercion test[17] and an endorsement test,[18] the *Lemon* test is still the applicable law.

**Secular Purpose**

Courts usually have little difficulty in finding an adequate secular purpose to satisfy the first part of the *Lemon* test. Arguably, using educational vouchers to make educational institutions more efficient is a sufficient purpose to satisfy the secular purpose test.

**Primary Effect**

Courts have more difficulty with the second part of the *Lemon* test that requires that the primary effect of a statute neither advance nor inhibit religion. Under the second part of the test, court decisions about whether government may provide services, materials, or privileges to nonpublic schools and their students under circumstances that require some degree of contact with religion may seem inconsistent. The U.S. Supreme Court has upheld some forms of nonpublic school aid and struck down others as the chart on page 9 indicates.

An educational voucher plan that includes sectarian schools must meet the following criteria to be permissible under the second part of the *Lemon* test: any benefit to sectarian schools is remote, indirect, and incidental; the plan's secular impact is sufficiently separable from any religious impact; and the benefitted class is sufficiently broad. This primary effect standard is violated when government aid to religious institutions does not flow from the direct private choices of individuals but is the result of government action; or religious practices, such as nominally voluntary religious exercises, are inseparable from secular benefits; or a benefit that theoretically is available to everyone is, predictably, claimed principally by members of particular religions.

The Supreme Court is more likely to uphold an educational voucher plan where state aid is available to parents of public and nonpublic students alike, and there is no preference for private sectarian schools. In *Mueller v. Allen,*[19] the U.S. Supreme Court upheld Minnesota's plan to give tax deductions to parents for tuition and other costs they incurred in educating their children at nonprofit schools, public and nonpublic. The fact that public school students who paid tuition constituted only a small portion of those who benefitted from the deduction did not matter because state aid flowed through genuinely free, private decisions based on a neutral statute.[20] In contrast, in *Committee for Public Education v. Nyquist*[21] the Court struck down a tax relief program for parents of New York nonpublic school students where parochial school students composed most of the benefitted class. The Court found the benefits were tuition grants available only to parents of nonpublic school students and not a genuine tax deduction.

The *Mueller* holding is consistent with *Witters v. Washington Department of Services for the Blind,*[22] in which a blind person used a state vocational education voucher for the visually

handicapped to attend a private religious college for training as a pastor, missionary, or youth director. The state wanted to deny Witters the voucher because the voucher monies would have passed through him to a religious school. The Court ruled that "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." The Court found no empirical evidence to suggest that a significant portion of the state aid would flow to religious institutions; Witters was the only known beneficiary of the training program to attend a sectarian school. Interestingly, the Court in *Mueller* did not consider empirical evidence in upholding Minnesota's educational tax deduction statute, where over 90 percent of the benefits ultimately flowed to parents with children in religious institutions.

In *Zobrest v. Catalina Foothills School District*,[23] the Court ruled that the establishment clause did not bar a school district from providing a sign language interpreter under the Individuals with Disabilities Education Act (IDEA) to a deaf student attending classes at a Catholic high school. The Court observed that "When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is no way skewed towards religion,' . . . it follows that under our previous decisions the provision of that service does not offend the Establishment Clause." The Court found that the handicapped student, not the sectarian school, was the primary beneficiary of the sign language interpreter because the service did not relieve the school of education costs it would otherwise incur. There would be no problem under the establishment cause if the IDEA funds went directly to the student's parents who could use the funds to hire the interpreter themselves. *Zobrest* is the first U.S. Supreme Court case that permits a public employee to help deliver instruction in a sectarian school.

In *Rosenberger v. Rector and Visitors of the Univ. Of Virginia*,[24] the Court upheld the payment of public funds to an evangelical student organization for printing costs. The Court affirmed that government may not exclude religious groups from government benefits programs that are generally available to a broad class of constituents; to do so would convey a state-approved hostility toward religion.

In *Agostini v. Felton*,[25] the Court overruled its 12-year old decision in *Aguilar v. Felton*,[26] and part of a companion case, *School Dist. Of Grand Rapids v. Ball*,[27] by modifying the approach the Court uses to assess the primary effect of a publicly funded program under the *Lemon* test.[28] In overturning the legal presumptions in *Aguilar* and *Ball*, the Court evaluated the constitutionality of the New York City's Title I program[29] using the concept of neutrality: is aid allocated on the basis of neutral, secular criteria that neither favors nor disfavors religion and is it made available to both religious and secular beneficiaries on a nondiscriminatory basis? The Court concluded that the program did not result in government indoctrination, define its recipients by reference to religion, or create an excessive entanglement. The Court's emphasis on neutrality arguably loosens the restraints of the Establishment Clause on public aid benefitting sectarian schools and broadens the public aid that a state can provide to sectarian schools.[30]

The preceding decisions suggest that the Court might uphold an educational voucher plan that would allow parents to decide which public or private schools their children would attend. The plan would require a sufficiently broad class of beneficiary schools and aid would need to be channeled through parents and children rather than directly to schools.

### Excessive Entanglement

If a government program satisfies the first two parts of the *Lemon* test, courts will examine whether the program creates excessive church-state entanglement in the form of administrative entanglement, which refers to state involvement in the administration of a program, or political divisiveness, which refers to government action that promotes political fragmentation along religious lines. Administrative entanglement, which may occur under a voucher plan, arises when government inspectors must follow government aid to ensure that the aid is expended only for secular purposes.[31] There are several factors to consider in determining the extent of the government's entanglement, including whether: the aid is a one-time grant or continuing aid;[32] the recipient organizations are partly or pervasively sectarian;[33] aid is in the form of salary subsidies for parochial school teachers or public school teachers who teach secular subjects to parochial school students[34] or mechanical aids such as textbooks or public health services;[35] and student tests are prepared by parochial school teachers or the state.[36] Several Supreme Court justices have criticized the administrative entanglement test because state aid must be both supervised to avoid religious effects and unsupervised to avoid excessive entanglement.[37] How a voucher plan is structured determines the extent of state involvement in administering the plan and whether that involvement amounts to excessive entanglement.

## Conclusion

Arguably, if government creates a competitive market for schools then educational voucher programs that include private sectarian schools are more likely to be effective because the large numbers of such schools offer families additional choices and might improve public education by increasing competition with private schools. However, including private sectarian schools in voucher programs may violate states' constitutions or the religion clauses of the U.S. Constitution. Past constitutional decisions suggest several principles. If government supplies or lends equipment or material, it must be to the religious school students and their parents and not the school. If government supplies teaching or administrative services, the personnel who supply the services must not be subject to the control of the religious school. If government provides state payments for students to attend a religious school, the aid must flow to the students and parents and not the school and the students and parents must be allowed to make individual choices about which school to attend. And finally, if government funds aid programs that benefit religious schools, the age of the students involved is important because young students are thought to be more likely to see state aid as a symbol of government endorsement of religion.

# U.S. Supreme Court Decisions on Aid to Non-Public Schools

| Approved Programs | Disapproved Programs |
|---|---|
| Permits states to **supply bus transportation** to children attending religious school. *Everson v. Board of Transportation* (1947)<br><br>Permits states to **lend secular textbooks**, without charge to students in grades 7 to 12 attending religious school. *Board of Education v. Allen* (1968)<br><br>Permits the federal government to **provide one-time construction grants** to sectarian colleges and universities for constructing buildings for secular use. *Tilton v. Richardson* (1971)<br><br>Permits states to **lend secular textbooks, supply standardized scoring and testing services, and provide diagnostic services on nonpublic school grounds** to students attending religious school. *Wolman v. Walter* (1977)<br><br>Permits states to **allow tax deductions** to parents **for tuition, textbook, and transportation expenses** they incur in educating their children **at public and nonpublic** nonprofit **schools**. *Mueller v. Allen* (1983)<br><br>Permits states to **provide state vocational education vouchers** to visually handicapped students **to obtain vocational training at a religious college**. *Witters v. Washington Department of Services for the Blind* (1986)<br><br>Permits school districts to **provide a sign language interpreter** under the Individuals with Disabilities Education Act **to a deaf student at a religious school**. *Zobrest v. Catalina Foothills School District* (1993)<br><br>Permits states to **provide secular printing services** on a neutral basis **to university students espousing religious viewpoints**. *Rosenberg v. The Rector and Visitors of the University of Virginia* (1995)<br><br>Permits states to **provide remedial teaching and counseling services on religious school grounds**. *Agostini v. Felton* (1997) | Prohibits states from **paying salary supplements to religious school teachers or reimbursing religious schools for teacher salaries**, even if the money is used to provide secular education. *Lemon v. Kurtzman* (1971); *School Dist. of Grand Rapids v. Ball* (1985)<br><br>Prohibits states from **offering direct money grants to maintain and repair religious schools, unrestricted partial tuition grants to parents of low-income students attending private religious schools, or income tax benefits to parents of students attending private school.** *Committee for Public Education v. Nyquist* (1973)<br><br>Prohibits states from **providing bus transportation for** religious school **field trips.** *Wolman v. Walter* (1977)<br><br>Prohibits states from **loaning instructional materials and equipment** for instructional use to students attending religious schools or to their parents. *Wolman v. Walter* (1977)*<br><br>* Called into question by *Agostini v. Felton* |

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## Endnotes

1. 179 N.W.2d 146 (1970). The Wisconsin Supreme Court in *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 115 N.W.2d 761 (1962), addressed a similar challenge to a state statute providing transportation for all pupils residing in a school district two or more miles from the nearest public school regardless of whether they attended public or private schools. The Wisconsin Supreme Court rejected a legislative declaration and determined that the purpose of the school bus law in its "realistic operation" was to benefit the private schools rather than promote children's safety.

2. 330 U.S. 1 (1947).

3. The Delaware Supreme Court in *State ex rel. Traub v. Brown*, 36 Del. 181, 172 A. 835 (1934), held that a similar bussing statute violated Delaware's constitutional prohibition against using educational funds to aid any sectarian, church, or denominational school. The Delaware court concluded that free transportation "helps build up, strengthen, and make successful the schools as organizations."

   The New York Court of Appeals followed with *Judd v. Board of Education*, 278 N.Y. 200, 15 N.E.2d 576 (1938), which became a leading case on public bussing of parochial school students. The New York Constitution prohibited using public money to aid any school in which any denominational tenet or doctrine was taught. The majority of judges rejected the argument that by transporting parochial school students, the state aided the students and not the school. They believed that free transportation encouraged attendance. The dissenting judges argued that the bussing statute merely implemented the state's compulsory attendance laws. The state constitution was later amended to permit the state to bus parochial school students and *Judd* was expressly overruled.

   The supreme courts of Washington in *Visser v. Nooksack Valley School District No. 506*, 33 Wash. 2d 699, 207 P.2d 198 (1949), Alaska in *Matthews v. Quinton*, 362 P.2d 932 (1961), cert. denied 368 U.S. 517, Wisconsin in *State ex rel. Reynolds v. Nusbaum*, 17 Wis.2d 148, 115 N.W.2d 761 (1962), and Hawaii in *Spears v. Honda*, 51 Hawaii 1, 449 P.2d 130 (1968), also held unconstitutional similar bussing statutes.

4. The Minnesota court cited appellate court decisions in Maryland, California, Kentucky, Connecticut, New York, Pennsylvania, Michigan, West Virginia, and New Jersey authorizing the use of public funds for bussing parochial school students.

5. 500 N.W.2d 136 (Minn. Ct. App. 1993).

6. Under PSEO, students in 11th or 12th grade may apply to enroll in a course or program provided by a post-secondary institution. Students may elect to receive secondary or post-secondary credit for successfully completing a course under the PSEO law. See Minn. Stat. § 123.3514.

7. The U.S. Supreme Court gave weight to students' ages in *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985). The Court determined that a program using public funds to pay for teaching state-required subjects at parochial schools "may provide a crucial symbolic link between government and religion, thereby enlisting — at least in the eyes of impressionable youngsters — the powers of government to the support of the religious denomination operating the school. . . . The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice."

8. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985) (distinguishing presidential proclamations from school prayers in that proclamations are received in a non-coercive setting and are directed at adults not readily susceptible to unwilling religious indoctrination); *Marsh v. Chambers*, 463 U.S. 783 (1983) (adult claiming injury by the legislative chaplain is presumably not susceptible to religious indoctrination or peer pressure); *Widmar v. Vincent*, 454 U.S. 263 (1981) (university students are less impressionable than younger students).

9. See also *Opinion of the Justices*, 136 N.H. 357, 616A.2d 478 (N.H. 1992); *Campbell v. Manchester Board of School Directors*, 161 Vt. 441, 641A.2d 352 (Vt. 1994); *Asociación de Maestros de Puerto Rico v. Torres*, 1994 WL 780744 (Puerto Rico). A voucher case is currently before the Ohio Supreme Court challenging a Cleveland voucher program similar to the Wisconsin program upheld by the Wisconsin Supreme Court. Other cases are pending including in Arizona, Maine, Ohio, and Vermont.

10. *Opinion of the Justices to the House of Representatives*, 357 Mass. 846, 259 N.E.2d 564 (Mass. 1970).

11. 463 U.S. 388 (1983).

12. 82 Wash.2d 199, 509 P.2d 973 (1973).

13. 166 Wis.2d 501, 480 N.W.2d 460 (1992).

14. Case No. 95CV1982, which plaintiffs filed in the circuit court in Dane County, Wisconsin, asked the court for a preliminary injunction to maintain the status quo of the Milwaukee Parental Choice Program (MPCP) pending resolution of plaintiffs' constitutional claims. Plaintiffs wanted to stop the Superintendent of Public Instruction and the Department of Public Instruction from implementing the expanded choice program that no longer prohibits religious elementary and secondary schools from participating in the program. The Wisconsin Supreme Court issued an injunction.

15. (97-0270).

16. 403 U.S. 602 (1971).

17. In *Lee v. Weisman*, 505 U.S. 577 (1992), the U.S. Supreme Court held that a nonsectarian prayer at public school graduation ceremony violated the establishment clause by coercing students to participate in the prayer. The majority opinion defined coercion to include social and psychological pressure. The dissent defined coercion as that which is supported by the force of law. The case did not overrule the *Lemon* test.

18. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), Justice O'Connor suggested modifying the *Lemon* test to say that the establishment clause is violated when government endorses or disapproves of a religion.

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

20. For more information on Minnesota's tuition tax credits and deductions, see House Research Information Brief, Income Tax Deductions and Credits for Public and Nonpublic Education in Minnesota, revised December 1997.

21. 413 U.S. 756 (1973).

22. 474 U.S. 481 (1986).

23. 509 U.S. 1 (1993).

24. 515 U.S. 819 (1995).

25. 117 U.S. 1997 (1997).

26. 473 U.S. 402 (1985). In 1978, federal taxpayers sued the New York City Board of Education, claiming that the board's Title I program violated the federal Establishment Clause by creating excessive entanglement between church and state in administering Title I benefits. The U.S. Supreme Court in *Aguilar v. Felton* found the program unconstitutional and directed the federal district court to permanently enjoin the board from using Title I funds to provide teaching and counseling services on the premises of New York City's sectarian schools. To comply with the injunction, the board provided Title

I services to parochial school students at public school sites, at leased sites, and in vans converted into classrooms parked near the sectarian school. The board also offered "on premises" computer-aided instruction that did not require the physical presence of public employees.

In overturning *Aguilar*, the Court abandoned the presumptions that:

- a public school teacher who enters a parochial school classroom will depart from his or her assigned duties and instructions and embark on religious indoctrination;
- a perceptible, even dispositive, difference exists in the symbolic union between government and religion for a student who receives remedial instruction in a parochial school classroom and one who receives the instruction in a van parked at the school's curbside; and
- instructional programs that make aid available to eligible recipients relieve sectarian schools of costs they would otherwise incur.

27. 473 U.S. 373 (1985). In 1985, in *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, a companion case to *Aguilar*, the U.S. Supreme Court ruled impermissible the Shared Time program of the Grand Rapids school district. The program allowed public school teachers, using public school materials, to provide parochial school students on parochial school premises with remedial and enrichment instruction in subjects that were not part of the private schools' core curriculum. The Court found that the presence of public school teachers on parochial school grounds created a substantial risk of state sponsored indoctrination and a perception of a symbolic union between church and state that would convey a message of government endorsement of religion. The Court also found that the program impermissibly financed religious indoctrination by subsidizing "the primary religious mission of the institutions affected."

28. The *Agostini* Court used a modified *Lemon* test to determine whether New York's Title I program violated the federal Establishment Clause. The Court used the first two components of the *Lemon* test — secular purpose and primary effect — and eliminated excessive entanglement as a separate criterion by making that component a part of the primary effect test instead.

29. Title I of the Elementary and Secondary Education Act of 1965 channels federal funds through the states to local education agencies (LEAs) to provide remedial education, guidance, and job counseling services to economically disadvantaged public and nonpublic students who are failing or at risk of failing the state's student performance standards.

30. The Court held that a publicly funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is permissible when public employees give instruction on the premises of sectarian schools under a program with appropriate safeguards such as those present in the Title I program. The Court held that the "carefully constrained [Title I] program also cannot reasonably be viewed as an endorsement of religion."

31. See *Aguilar v. Felton*, 473 U.S. 402 (1985).

32. See *Tilton v. Richardson*, 403 U.S. 672 (1971).

33. See *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976).

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

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

36. See *Committee for Public Education v. Regan*, 444 U.S. 646 (1980).

37. *Aguilar v. Felton*, 473 U.S. 402 (1985) (Rehnquist, J., dissenting).

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