Will Opportunity Scholarships Make the Grade? - An Examination of School Vouchers

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I. INTRODUCTION

School vouchers and private school choice have been coined the "civil rights movement of the 1990s," galvanizing a passionate political debate throughout society.¹ Not since school desegregation has there been a controversy of such great social impact, polarizing so many different interests. The political divide is stark: supporters believe that vouchers improve education and choice for all students, while opponents fear that vouchers will divert resources from public schools and funnel them to private schools.

¹ Dominick Cirelli Jr., Utilizing School Voucher Programs to Remedy School Financing Problems, 30 Akron L. Rev. 469, 469 (1997). See also David Wasson, With Vouchers Signed Into Law Options Begin, The Tampa Tribune, June 22, 1999, at 1 (quoting Florida Senator Tom Lee who acknowledged the tense political debate over vouchers and would have preferred that vouchers were introduced as a pilot project: "I called it on the [Senate] floor the abortion issue of education, because everyone has strong feelings about the subject.").
political parties. While twenty states have introduced voucher bills, only a handful have been enacted. Additionally, although politicians herald the importance of vouchers, "when offered the opportunity to vote on voucher-like programs, the public has consistently rejected them."3

On June 21, 1999, Florida Governor Jeb Bush sent legal ripples through the voucher debate by signing into law one of the most disputed educational reform packages in Florida's history, entitled the Bush/Brogan A+ Plan for Education. The very next day, outraged civil rights groups, public education advocates, educators, parents of children attending public schools, and school board members filed a lawsuit challenging the constitutionality of the Florida voucher program. The bulk of this controversy originates over the legislation, which contains an unprecedented statewide school voucher plan.

Governor Bush's voucher plan is the nation's most far-reaching and contentious voucher experiment. Florida is the largest state in the nation thus far to enact a form of voucher legislation. The voucher plan, named the Opportunity Scholarship Program ("OSP"), grants tuition subsidies for students in chronically failing public schools. It is the first statewide voucher program and the most expensive. Additionally, unlike other programs that base the receipt of vouchers on poverty levels, Florida bases its voucher plan solely on student performance. This law has received nationwide attention, placing the voucher debate, once again, into the limelight. Its enactment has not only electrified the debate throughout the State of Florida, but has ignited a controversy that continues to reverberate


3. Id. "Voters in 19 states have rejected voucher proposals in referendum ballots." Id. For example, in the November 1998 election, Colorado voters rejected a proposed amendment to the Colorado Constitution that approved a tuition tax credit allowing religious schools to receive public funds. Id. In fact, over the past 30 years, voters have only accepted one of the tuition voucher proposals. Id.


6. FAQ's, supra note 4.


8. FAQ's, supra note 4.

9. Id.

10. FAQ's, supra note 4; See generally Jo Becker, Groups File Suit to Kill Vouchers, ST. PETERSBERG TIMES, June 23, 1999, at B1 (discussing the impact of the Florida voucher program along with various other state programs).
throughout the entire nation. As the conflict over the scope and constitutionality of school vouchers continues to percolate throughout the nation, ultimately, the issue will have to be resolved by the Supreme Court of the United States.

The Bush/Brogan A+ Plan for Education allegedly "puts the educational needs of students over the bureaucratic needs of the system," guaranteeing Florida students a better quality education. Proponents of educational vouchers have launched an assault on the fundamental tenets of public education. They believe that vouchers would give parents greater control over their children's education, forcing the public school system to compete for students with nonpublic schools. In return, the competition would beget greater efficiency and quality in the public school system. Hence, school vouchers would become the antidote that would resuscitate American education.

Opponents of school voucher programs argue that it is deceptive to frame school vouchers in the language of free enterprise. They assert that vouchers are not a remedy, but rather a virus that will contaminate the public school system. Voucher opponents contend the OSP is inherently flawed because the problem with public schools is not efficiency in the marketplace, but rather the lack of state financial support. They maintain that school

13. See generally Milton Friedman, Reading, Writing & Vouchers, ST. PETERSBURG TIMES, February 21, 1999, at D5. Friedman is a Nobel Prize winning economist who argues school vouchers will maximize the quality of education by destroying the public schools' monopoly and increasing competition. Friedman maintains that public schools will only progress if forced to compete with private schools:

'O[pp]portunity scholarships' are so promising. They give parents a choice. The end result will be to strengthen, not weaken, the public school system, just as the competition from Sprint and MCI forced AT&T to serve its customers better and foreign producers of automobiles forced General Motors, Ford and Chrysler to improve the quality and lower the cost of their cars.

Id.
16. As Rabbi A. James Rudin, from the American Jewish Congress expressed: "Financially strong and educationally sound public education is imperative to prevent America from becoming 'balkanized' according to race, ethnicity, religion, creed or culture." A. James Rudin, Florida's School Voucher Plan Doesn't Solve Education Woes, THE STUART NEWS/PORT ST. LUCIE NEWS (Stuart, FL), July 17, 1999, at D8.
vouchers purport a dangerous proposition; a proposition that will result in the unnecessary expansion of private schools, while simultaneously leading to the decay of the public school as an educational institution. 17 Thus, the voucher program will become a national disgrace, creating the “impoverishment of public schools and the establishment of a two-tiered educational system.”18

There is also great skepticism that private school choice will create enhanced educational opportunities and true empowerment for lower income parents.19 Voucher students have not shown any discernable academic improvement over their public school peers.20 In fact, public schools often provide a curriculum as equally competent and challenging as private schools, resulting in the same level of student achievement.21

Aside from significant public policy concerns, opponents maintain that choice proposals, by their very nature, violate the Establishment Clause.22 The majority of private elementary and secondary schools in America are undeniably religiously affiliated, with religious schools accounting for more than ninety-five percent of all private school enrollments.23 Many religious schools have been termed “pervasively sectarian” by the courts, indicating that the educational curriculum includes religious indoctrination, worship, and general education from a religious-centered viewpoint.24 “Under traditional Establishment Clause jurisprudence, public assistance to sectarian schools is unconstitutional because such aid invariably advances the religious mission of the sponsoring institution, thereby violating the principle of government neutrality toward religion.”25

Additionally, the Bush/Brogan A+ Plan is completely inconsistent with the Florida Constitution. By forcing taxpayers to publicly fund religious education, the OSP explicitly violates Florida’s requirement of separation of church and state.26 The law also directly ignores the voters’ demand to make education a fundamental value, by preventing all students from receiving

17. Green, supra note 14, at 39.
18. Id.
19. Id.
20. Id.
22. Green, supra note 14, at 40.
23. Id. at 41.
25. Green, supra note 14, at 41.
26. FLA. CONST. art. I, § 3.
high quality public education.\textsuperscript{27} Finally, the OSP will use the state school fund for a purpose other than the "support and maintenance of free public schools" in express violation of the Florida Constitution.\textsuperscript{28}

This Comment will explore the conflict over school vouchers, specifically focusing on the statewide voucher plan proposed in the Bush/Brogan A+ Plan for Education. Part II will explain in detail the statutory requirements of the OSP. Parts III and IV will analyze the OSP under the United States and Florida Constitutions. Part V will highlight the consistent failures of voucher programs and compare the OSP to other plans throughout the country, focusing specifically on the lessons learned from the Milwaukee Parental Choice Program.\textsuperscript{29} This paper will ultimately conclude that the OSP is unconstitutional as well as detrimental to Florida citizens. While this Comment is concerned primarily with refuting the Florida law, its analysis is applicable to all voucher proposals. Consequently, the issues and solutions presented in this paper are not endemic to the State of Florida, but to any state considering a similar proposal.

\section*{II. Bush/Brogan A+ Plan for Education: Opportunity Scholarships}

\subsection*{A. Statutory Requirements}

The OSP was enacted as a part of the larger Bush/Brogan A+ Plan for Education.\textsuperscript{30} Beginning in the 1999–2000 school year, qualifying Florida residents in Pensacola will have an opportunity to choose from three educational alternatives for their children: public schools, private schools, and parochial schools.\textsuperscript{31} The purpose of the voucher program is to provide an enhanced opportunity for students to gain the knowledge and skills necessary for postsecondary education, a technical education, or a vocation.\textsuperscript{32} Governor Bush contends that increasing public school accountability will ensure that students are "no longer trapped in chronically failing schools."\textsuperscript{33} However, opponents of the OSP avidly claim that the plan is too simplistic, educationally unsound, fiscally irresponsible, and

\begin{thebibliography}{9}
\bibitem{27} FLA. CONST. art. IX, § 1.
\bibitem{28} FLA. CONST. art. I, § 6.
\bibitem{30} Bush, \textit{supra} note 4, at A26.
\bibitem{31} Id.
\bibitem{32} FLA. STAT. § 229.0537(1) (1999).
\bibitem{33} Bush, \textit{supra} note 4, at A26.
\end{thebibliography}
unconstitutional. Voucher opponents believe the program will subsidize and facilitate impoverishment of Florida’s public school system, while establishing a second and third rate educational system.

Under the Bush/Brogan A+ Plan for Education, each public school will receive a grade of A through F, based upon the schools performance on standardized tests. In order to receive a voucher, a child must fall within one of two categories. The first category permits a parent to be eligible for a voucher, when during the previous school year, the child attended a public school that for the second year in a four-year period has been designated a “failing” school, pursuant to the school performance grading system. The second category permits the parent of a child who has been newly assigned to a designated public school, “[to] request and receive from the state an opportunity scholarship for the child to enroll in and attend a private school...”

Students at schools that fall under the first category will have three options if they wish to transfer to another school. First, students may attend a designated higher performing public school within their school district. Second, such students may attend any public school in an adjacent school district that has available space. Third, students may attend any Florida private school, including a sectarian or nonsectarian school, which

35. Green, supra note 14, at 39.
36. FLA. STAT. § 229.0537 (1999). The public school grade will be based on student performance on the Florida Writes Test and the FCAT or the Florida Comprehensive Assessment Test, which tests students skills in reading, math, writing and, ultimately science. Diane Rado, Grading Florida’s Schools, ST. PETERSBURG TIMES, June 25, 1999, at A1. This method of determining whether a school is successful raises the question of whether standardized tests are truly indicative of a school’s academic performance. There are many factors that determine a school’s fitness. This type of grading scale will force schools to focus solely on performing successfully on standardized tests, rather than attempting to provide a well rounded education that will prepare students to be assimilated into society.
38. Id.
39. Id.
40. Id. § 229.0537(1), (4).
41. Id. § 229.0537(3)(a)(2). In order for a student to attend a different public school within the district, that school must be designated as a school performing higher than that in which the student is currently enrolled or to which the student has been assigned, but not less than performance grade category “C”. FLA. STAT. § 229.0537(3)(a)(2) (1999).
42. FLA. STAT. § 229.0537(3)(b) (1999). The school in the adjacent school district must also be designated a higher-performing school. Id.
agrees to admit the student and to comply with the requirements set forth in the OSP.43

Once a student receives an OSP voucher, the student may continue to attend a private school at public expense, at least until he or she finishes middle school.44 The student may remain at the private school, regardless of any change in the "grade" assigned to the student's public school in the interim.45 Unless the student has chosen to attend a private school that does not offer a high school education, the student will remain eligible for an OSP voucher throughout high school.46 The student can continue to receive an Opportunity Scholarship, even if the school to which he or she would have been assigned has never been designated a failing school.47

OSP vouchers will be in a "calculated amount" determined by a formula, which is roughly equivalent to the public funds that would be spent on the student's education in a public school.48 The expenditure could range from $3000 to $25,000, depending on what extra services the student needs.49 As a condition of participation in the OSP, private schools are required to accept the OSP voucher as full payment of the tuition and fees of OSP students.50

43. Id. § 229.0537(4)(a), (k). The private schools are not graded on a scale of A through F. They have different accountability measures. Critics contend that this practice is unfair and does not guarantee that students will get a better education. See Jon East, A Voucher Plan Full of Holes (visited July 28, 1999) <http:llwww.sptimes.com/News/32899/PerspectivelA_.voucher_plan_full_o.html>.
44. FAQ's, supra note 4.
45. FLA. STAT. § 229.0537(2) (1999). See also Holmes, supra note 5.
46. § 229.0537(2).
47. Id.
48. Id. § 229.0537(6)(a)(1). This section provides:
The maximum opportunity scholarship granted for an eligible student shall be a calculated amount equivalent to the base student allocation multiplied by the appropriate cost factor for the educational program that would have been provided for the student in the district school to which he or she was assigned, multiplied by the district cost differential. In addition, the calculated amount shall include the per-student share of instructional materials funding, technology funding, and other categorical funds as provided for this purpose in the General Appropriations Act. The amount of the opportunity scholarship shall be the calculated amount or the amount of the private school's tuition and fees, whichever is less.
Id.
49. FAQ's, supra note 4.
50. § 229.0537(4)(l). However, this section does not prohibit a participating private school from raising the tuition and fees it charges to OSP students to a level that permits the school to capture the full "calculated amount." Id. See also FAQ's, supra note 4.
The Department of Education is required, for each student receiving an OSP voucher, to transfer the "calculated amount" from each school district to a separate account. The Opportunity Scholarship will then be disbursed in quarterly disbursements to the parents or guardians of participating students. Such disbursements will be in the form of warrants made out in the name of the participating student's parent or guardian. However, the disbursement will be sent only to the chosen private school and must be exclusively endorsed by the parent or guardian.

Under the OSP, private schools must also agree not to "compel" any OSP student "to profess a specific ideological belief, to pray, or to worship." Participating private schools must determine "on an entirely random and religious-neutral basis, without regard to the student's past academic history" whether a student will be admitted into the school. The private school will maintain discretion over who can attend the institution and is not required to accept all students. Additionally, private schools must comply with the prohibitions against discrimination on the basis of race, color, or national origin set forth in Title 42 of the United States Code, Section 2000d.

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51. Id. § 229.0537(6)(b)(3). The "calculated amount" is withdrawn from the public school districts account even if it exceeds the amount of tuition actually paid under the OSP. Id.
52. Id.
54. Id. This section provides, however, that the Department is to mail the check directly to the student's private school, rather than to the parent or guardian, and it directs that "the parent or guardian shall restrictively endorse the warrant to the private school." Hence, the effect is that the financial aid is not going to the student as primary beneficiary, rather directly to the religious school.
55. Id. § 229.0537(4)(j). Although the OSP forbids private schools from "compelling" students "to profess a specific ideological belief, to pray, or to worship," the OSP does not bar participating private schools from compelling OSP students to participate in other religious activities, such as, religious training and instructions. Nor are such schools prohibited from requiring the passive attendance of OSP students at worship services and prayers. See Holmes, supra note 5.
56. § 229.0537(4)(e). This section also provides that a private school may give preference in accepting applications to siblings of students who have already been accepted on a random religious-neutral basis. Id. Although the OSP requires that participating private schools admit OSP students on a "religious-neutral basis," it does not prohibit such schools from discriminating on the basis of religion in the admission of other students or in the employment of faculty and staff. See Holmes, supra note 5.
B. **Legal Challenges to the Opportunity Scholarship Program**

Governor Bush contends that the statewide voucher program is a renaissance in educational reform that will revitalize Florida's public educational system. To the contrary, if the OSP is implemented, "children of the poorest and least empowered [socioeconomic classes] will be abandoned to residue schools that function as mere warehouses." Vouchers will only serve to drain energy and resources from an already struggling public school system.

Florida's first statewide performance grades were rather disconcerting: 185 schools received an A; 317 earned a B; 1215 earned a C; 600 received a D; and 78 received an F. Ironically, one of the schools earning a D was the Liberty City charter school that Bush created before he became Governor. As drafted, the OSP has the potential to increasingly expand, putting an exorbitant burden on taxpayers. Florida's public schools are in a state of emergency and the OSP does not present any real solutions, but only further aggravates the educational crisis.

This unprecedented, broadsweeping legislation is merely a simplistic solution to educational reform that may help a small percentage of students in the short term. However, the long-term ramifications for the students who remain in their local schools will be devastating. Vouchers ignore the

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58. *Florida's Bad Grades, St. Petersburg Times*, June 27, 1999, (Editorials) at 2D.
61. Critics argue that the Liberty City Charter School, co-founded by Bush, should illustrate that implementing more school choice and withdrawing governmental control is not the solution to improving the public educational system. David Clark, spokesman for the FTP-NEA, the state's largest teachers union stated:

'It's very ironic that in this world, where everyone is more closely scrutinized and we're all struggling to meet higher standards, that this school that was set up as a model of how it should be done is a failure. It's only evidence of what we've said all along - educating children is a difficult thing to do.'

62. See infra note 162.
63. Leon Russell, President of the Florida NAACP, noted:

It is understood that Florida schools are already under-funded. Overcrowded classrooms and lack of adequate textbooks and the use of portables for classroom space are rampant [in every district in the state] . . . . A reduction in the overall budget of a school will lead to an overall reduction in the number of teachers and the inability of the school to obtain materials [and
fundamental reasons behind school failure. opportunity scholarships will create a mass exodus to private schools, while draining public schools of their funding. The cure lies in reducing class size and increasing school funding, not in profit driven short cuts. The next section of this Comment will address the OSP's legal shortcomings and illustrate how the OSP contradicts the United States Constitution and the Florida Constitution.

III. CONSTITUTIONAL ANALYSIS

A. Establishment Clause Jurisprudence

The First Amendment of the Constitution clearly states: “Congress shall make no law respecting an establishment of religion.” Since 1947, the United States Supreme Court and lower courts have closely scrutinized programs that either directly or indirectly involved government aid to religious schools. While recognizing that religious schools make a vital supplies and purchase equipment. Students who remain in these schools will be doomed to second and third-class education.

Linda Kleindist, Opponents Challenge New Voucher Law, SUN-SENTNEL (Fort Lauderdale), June 23, 1999, at 6B.

64. FAQ’s, supra note 4.
65. Id.
66. University of Wisconsin-Milwaukee Professor Alex Monar reviewed voucher program data throughout the country and concluded that a student’s participation in a voucher program does not necessarily ensure that the student’s performance will improve. However, he did emphasize, “[t]here is no longer any argument about whether or not reducing class size in the primary grades increases student achievement. The research is quite clear: It does.” School Vouchers: The Emerging Track Record, (visited Aug. 4, 1999) <http://www.weac.org/resource/1998-99/april99/vouchertrack.htm> [hereinafter “Emerging Track Record”].

The amount of failing schools can be attributed to a lack of public commitment, not to lack of competition. For example, Florida schools also rank 26th out of the 50 states in per-student funding, spending less than the national average. Salaries for teachers lag behind the national average. Children in at least 24 school districts are not supplied with their own textbooks. Additionally, class sizes are extremely large. In 27,433 kindergarten through third grade classrooms in Florida, 22,172 still have more than 20 students. Diane Rado, The High Cost of Vouchers, ST. PETERSBURG TIMES, Feb. 21, 1999, at 1D.

67. U.S. CONST. amend I. The Establishment Clause of the First Amendment to the United States Constitution is made applicable to the states by the Fourteenth Amendment and prohibits any state from enacting a law “respecting an establishment of religion.” U.S. CONST. amend. XIV.

68. See Everson v. Board of Educ., 330 U.S. 1, 2, 17,18 (1947). In holding that the First Amendment did not prohibit a state from reimbursing parents of parochial school children for school bus fares, Justice Black noted that the Founders believed that any form of religious assessment, regardless of size, offended the Establishment Clause, as well as notions of religious
contribution to the overall quality of education, the Supreme Court has consistently limited religious school’s role in public education because they exist “primarily as arms of religious ministries.”

Generally speaking, programs that use public funds to support or aid religious-based education have been deemed unconstitutional. Courts are sensitive towards the relationship between government and religion in the education of our children. In limited circumstances, however, the Supreme Court has validated programs that provide direct aid to religious schools when subsidies are created for nonsectarian uses, such as granting funds for bus transportation to all students. Establishment Clause jurisprudence, especially when dealing with the realm of school aid, lacks a bright line stance, resulting in convoluted, controversial decisions.

Due to the ambiguities over the application of the Establishment Clause, conflict over its scope is one of the main disputes in the OSP. Proponents maintain the program is religion neutral in its benefits by allowing Florida students to be liberated from chronically failing public schools. Opponents claim that the Florida voucher program is simply a diversion that actually directly funds religious institutions, expressly violating the separation of church and state. Although the constitutionality of a school voucher program has never been addressed by the United States Supreme Court, the Court has acknowledged the confusion in discerning its opinions. "We have acknowledged before, and we do so again here, that the wall of separation that must be maintained...is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”

69. Green, supra note 14, at 46. See also Robert F. Drinan, RELIGION, THE COURTS, AND PUBLIC POLICY 39 (1963) (quoting Everson, 330 U.S. at 23–24). In his dissent in Everson, Justice Jackson expounded on the importance of keeping schools and religion separate stating, “Our public school...is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion.”

70. Green, supra note 14, at n.27.

71. Id. at 39 (citing Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 383 (1985). The author further noted that “[t]he government’s activities in this area can have a magnified impact on impressionable young minds, and the occasional rivalry of parallel public and private school systems offers an all-too-ready opportunity for divisive rifts along religious lines in the body politic.”


73. The Court has acknowledged the confusion in discerning its opinions. “We have acknowledged before, and we do so again here, that the wall of separation that must be maintained...is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”

74. Holmes, supra note 5.

75. Id.
Supreme Court, legal precedent suggests that such programs would violate the United States Constitution.

Any analysis of the Establishment Clause should begin with the legal precedent established in *Lemon v. Kurtzman*.\(^76\) In *Lemon*, the Court set forth a three-part test for determining when an Establishment Clause violation has occurred.\(^77\) Despite the Court's reliance on the three-pronged test, Chief Justice Warren Burger, author of the majority opinion, warned that the Establishment Clause should still be examined "with consideration of the cumulative criteria developed by the Court over many years."\(^78\) The *Lemon* test has been deemed only a "helpful signpost" in dealing with Establishment Clause challenges.\(^79\) Nevertheless, *Lemon* has not been overturned and continues to be controlling authority when examining Establishment Clause challenges.\(^80\)

Under *Lemon*, all three prongs of the test must be met for a challenged statute to survive constitutional scrutiny.\(^81\) First, the statute must have a secular purpose.\(^82\) Second, the statute must have a principal or primary effect that neither inhibits or advances religion.\(^83\) Finally, the statute must not further excessive government entanglement with religion.\(^84\)

1. Secular Legislative Purpose

The fact that religious or parochial schools participate in voucher programs will not likely violate the first prong of the Lemon test. The Court will typically uphold a statute if any valid secular purpose for it can be

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77. *Lemon*, 403 U.S. at 612.

78. *Id.* at 612.


80. The application of the Establishment Clause is one of the most ambiguous and confusing constitutional principles. See, e.g., *Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet*, 512 U.S. 687, 750–51 (1994) (Scalia, J. dissenting) ("[The Court has created a] convenient relationship with *Lemon*, which it cites only when useful . . . . The problem with (and the allure of) *Lemon* has not be that it is 'rigid,' but rather that in many applications it has been utterly meaningless, validating whatever result the court would desire."). *Id.*


82. *Id.* at 612.

83. *Id.*

84. *Id.* at 613.
discerned. 85 Legislation intended to improve Florida's educational system most likely would be designated a "secular purpose." 86 The intent to improve student learning and the quality of education received by all children, including those who attend religious schools, would be sufficient to satisfy the first prong. 87 However, the fact that Governor Bush has a legitimate purpose in enacting the OSP does not necessarily mean the legislation will be upheld.

2. OSP's Primary Effect Advances Religion

The OSP is going to have a more difficult time overcoming the standards set forth in the second prong. Calling for an examination of the effects of the statute, the Court balances certain broad concepts as neutrality and separation of church and state. 88 When evaluating this prong, the Court has outlined several factors that must be taken into consideration when determining if there has been an Establishment Clause violation. 89

In Committee for Public Education & Religious Liberty v. Nyquist, 90 the Court set forth the standards that should be used as a guideline in determining the constitutionality of school voucher programs. 91 The Court struck down a New York program that permitted parents of students that attended private schools to recover a portion of their private educational expenses from the state. 92 The program was solely limited to parents of

85. The Court is reluctant "to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." Mueller, 463 U.S. at 394-95.
86. See generally Douglas A. Edwards, Cleveland and Milwaukee's Free Market Solution for the "Pedantic Heap[s] of Sophistry and Nonsense" that Plague Public Education: Mistakes on Two Lakes, 30 AKRON L. REV. 687, n.70 (1997) (explaining the trend of the United States Supreme Court to uphold statutes if any secular purpose can be given).
89. Id. at 435.
90. 413 U.S. 756 (1973). In Nyquist, parents were entitled to subtract a designated amount from their adjusted state income tax for each tuition paid to a religious school. Id. at 764. See also Sloan v. Lemon, 413 U.S. 825, 832-35 (1973).
91. Nyquist, 413 U.S. at 773.
92. Id. at 798.
children attending private schools.\textsuperscript{93} Not surprisingly, an overwhelming majority of eligible children attended sectarian schools.\textsuperscript{94}

In its opinion, the Court reasoned that by allowing parents to recover a portion of their costs for sending their children to a religious school, the state was essentially seeking to relieve the financial burden of religious education.\textsuperscript{95} Justice Powell concluded that the primary effect was to financially support religious schools, thereby impermissibly advancing religion in violation of the Establishment Clause, stating:

\begin{quote}
[I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same.\textsuperscript{96}
\end{quote}

It was also imperative to the Court's rationale that the programs bestowed unrestricted benefits toward a religious education.\textsuperscript{97} The government failed to make any endeavor to maintain the separation between church and state.\textsuperscript{98} Since parents were given the sole discretion to apply the state aid toward any purpose, including refunding the tuition of sectarian education, there was no attempt to maintain a barrier between secular and religious education.\textsuperscript{99} The Supreme Court also focused on the fact that the aid was limited specifically to children enrolled in private school, and not available to the general public.\textsuperscript{100} Consequently, the program in Nyquist was distinguishable from other valid programs, including bus transportation and school textbooks, because the New York programs did not prescribe aid in a purely secular capacity.\textsuperscript{101}

Under a Nyquist analysis, Bush's Opportunity Scholarships have little chance of success. First, the OSP grants unrestricted aid to parents.\textsuperscript{102} The OSP places no restrictions on how participating private schools may utilize

\begin{itemize}
\item \textsuperscript{93} Green, \textit{supra} note 14, at 58 (citing Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 768 (1973)). "In New York, 85% of eligible children attend religious schools." \textit{Id.} n.104
\item \textsuperscript{94} \textit{Id.}
\item \textsuperscript{95} \textit{Nyquist}, 413 U.S. at 791.
\item \textsuperscript{96} \textit{Id.} at 786.
\item \textsuperscript{97} \textit{Id.} at 783.
\item \textsuperscript{98} \textit{Id.}
\item \textsuperscript{99} \textit{Id.}
\item \textsuperscript{100} \textit{Nyquist}, 413 U.S. at 783.
\item \textsuperscript{101} \textit{See} Everson v. Board of Educ., 330 U.S. 1 (1947).
\item \textsuperscript{102} \textit{FAQ's, supra} note 4.
\end{itemize}
the public funds that are paid to them.\textsuperscript{103} The OSP fails to guarantee that the vouchers will fund programs that are identifiably secular.\textsuperscript{104} Thus, sectarian schools are free to use these public funds for religious purposes, such as worship, prayer, and religious instruction, regardless of whether participation in such activities is voluntary or compelled.\textsuperscript{105}

Second, the OSP creates an incentive for parents to send their child to religious schools, hence removing the government from a position of neutrality towards religious education.\textsuperscript{106} In Escambia County, the first county to implement the program, four out of the five private schools that volunteered to participate in the OSP are Catholic schools.\textsuperscript{107} In Florida, the OSP vouchers that enable parents to send their children to religious schools would have the same "purpose and inevitable effect" of advancing religion in the same manner as the reimbursements in Nyquist.\textsuperscript{108} The OSP fails the second prong of the Lemon test by financially aiding the religious missions of the private schools, therefore, advancing religion.

Finally, the fact that the OSP requires a parent or guardian to endorse a check in order for the private school to receive funds, does not automatically qualify and exempt the aid as indirect.\textsuperscript{109} In fact, as currently drafted the parents never directly receive the money.\textsuperscript{110} Therefore, the voucher's financial benefit flows directly from the state to the private school. The Supreme Court has expressed concern with the substantive impact of private school aid.\textsuperscript{111} Even if the courts determine that the aid to the schools is merely indirect, the OSP still remains unconstitutional because the economic effect of direct and indirect assistance often is indistinguishable and because the "aid may have [the] effect [of a direct subsidy] even though it takes the form of aid to students or parents."\textsuperscript{112}

\textsuperscript{103} Id.

\textsuperscript{104} Id.

\textsuperscript{105} Public funds provided under the OSP could be used, for example, to pay the salaries of clergy and others who provide religious training and instruction, to purchase Bibles, religious textbooks, textbooks that present other subjects from a religious point of view, and other religious literature, to purchase and display crucifixes and other religious symbols, and to build and maintain chapels and other facilities used for religious worship. \textit{Holmes, supra} note 5.

\textsuperscript{106} Green, \textit{supra} note 14, at 39.


\textsuperscript{109} \textit{FAQ's, supra} note 4.

\textsuperscript{110} Id.


\textsuperscript{112} Id.
In *Mueller v. Allen*, the Court began to apply the Lemon test less stringently, as it upheld a statute which involved an income tax deduction for tuition, textbooks, transportation, and other expenses for students attending both public and private schools. The Court reasoned that because the deduction could be applied toward educational expenses incurred by all parents, it would be deemed constitutional. Moreover, Justice Rehnquist noted that, although distributing the aid to the religious schools through the parents minimized Establishment Clause controversy, it still had the basic effect of giving direct aid to the religious schools. The key point under these circumstances for Justice Rehnquist was that the aid only became available "as a result of numerous private choices of individual parents of school-age children." Nevertheless, Justice Rehnquist stopped short of overturning *Nyquist* on this point. Even though the private choice aspect was a "material consideration in Establishment Clause analysis," Rehnquist wrote that it was not the sole determinative factor. However, the Court appears to have erroneously overlooked the fact that the program primarily benefited the parents of students attending private schools, due to the fact that private school tuition was the major tax deduction. Regardless, the OSP will not be upheld just by the very virtue that the money is funneled from the parents to the sectarian schools.

In *Witters v. Washington Department of Services for the Blind*, the Court upheld, in limited circumstances, the use of state-funded scholarships for the disabled to pay bible college tuition. The Court reasoned that the scholarship was not skewed as benefiting religion because it was broad in nature. Additionally, the neutral aid could be applied towards an extensive range of vocational and career programs, where only a small

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114. *Id.*
115. The court found because the tax exemption was applied equally to parents of both, public and private schools, it did not impermissibly advance religion. *Id.* at 398.
116. *Id.* at 399.
117. *Id.*
120. *Id.* at 409 (Marshall, J., dissenting). "Of the total number of taxpayers who are eligible for the tuition deduction, approximately 96% send their children to religious schools." *Id.*
121. "At best, the funneling of aid through private individuals removes only the imprimatur of government approval; it has no effect on the issue of whether the religious institution has been advanced in an impermissible manner." *Green*, supra note 14, at 70.
123. *Id.* at 481.
124. *Id.*
handful were, in fact, sectarian. In determining if the scholarships met the requirements of the Establishment Clause, the Court focused on the effect of the program "as a whole." When looking at the OSP "as a whole," it primarily benefits the religious schools. Unlike the program in \textit{Witters}, the OSP creates a "financial incentive for students to undertake sectarian education" because most of the eligible private schools are religion centered. The effect of the OSP is to siphon tax dollars from public schools, while increasing funding for private religious schools.

Moreover, voucher advocates wrongly rely on \textit{Witters}, because this case would not apply to elementary and secondary schools. Primary and secondary students tend to be more susceptible to religious indoctrination, while college students are not as impressionable. The Supreme Court has consistently noted the vulnerability of elementary and secondary students because "many of the citizens perceiving the governmental message are children in their formative years."

Furthermore, \textit{Witters} dealt solely with a college scholarship that was created for nonreligious purposes. The scholarship had existed for a long period of time and only one individual attempted to extend the scholarship to use public funding for religious schooling. The OSP, however, was designed exclusively for elementary and secondary education. It was designed to impact more than one individual; in fact, Governor Bush plans for it to be applicable to all Florida students. Additionally, the OSP was created as a way to primarily fund and advance religious education and morals, because most participating private schools in Florida are sectarian.

In \textit{Zobrest v. Catalina Foothills School District}, the Supreme Court held that providing funds to pay for a hearing impaired student attending a

125. Even though the grant recipient clearly would use the money to obtain religious education, the Court observed that the tuition grants were "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." \textit{Id.} at 487 (quoting Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 782-83 n.38 (1973)).
127. \textit{Id.}
129. Green, \textit{supra} note 14, at 50 (quoting Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 390 (1985)).
130. \textit{Witters}, 474 U.S. at 481.
131. \textit{Id.} at 488.
132. See Wasson, \textit{supra} note 107.
133. \textit{Id.}
134. \textit{Id.}
sectarian high school was constitutional. In this limited situation, Justice Rehnquist cited to *Mueller* and *Witters*, stating that the Court has "consistently held 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." The Court stressed that the handicapped child is the primary beneficiary, while the school receives only an incidental benefit. Accordingly, the OSP should be deemed unconstitutional because the private schools are the primary beneficiaries, while the students only receive an incidental benefit.

Finally, in *Agostini v. Felton*, the United States Supreme Court again challenged the stability of *Lemon v. Kurtzman*, allowing a federally funded program to provide remedial instruction by public school employees at religious schools. The Court's rationale was premised on the fact that no funds ever reached the "coffers of religious schools." Additionally, the Court maintained that a public employee, such as a teacher, would not abandon "assigned duties and instructions and embark on religious indoctrination" simply because the employee enters a parochial school classroom. However, it is important to note that, writing for the majority, Justice O'Connor still failed to create a new test for Establishment Clause cases; therefore, not overturning *Lemon*. Under the OSP, not only does money reach the "coffers of religious schools," but part of the employees qualification to work at the religious schools is to be a scholar in religious indoctrination. Therefore, the OSP is distinguishable from this holding because it is not neutral toward religion.

After the rulings in cases like *Mueller*, *Zobrest*, *Witters*, and *Agostini*, choice proponents immediately claimed constitutional victory for voucher programs. However, a close reading of each case indicates that

136. *Id.* at 13–14.
137. *Id.* at 8.
138. *Id.* at 12.
143. *Agostini*, 521 U.S. at 226.
144. *Id.* at 239.
the circumstances where the state was permitted to aid religious schools, are quite distinguishable from the OSP. Voucher proponents often erroneously cite to the rulings after the *Nyquist* decision to uphold the constitutionality of the voucher plan. It is true that since *Nyquist*, the Court has upheld neutral and indirect educational aid programs. However, "the Court has never upheld a program when it has been clearly foreseeable that it would substantially aid religious schools." Voucher proponents misinterpret the type of aid that is permissible under the Establishment Clause. Because *Nyquist* remains valid legal precedent, the OSP should be found unconstitutional.

3. Excessive Entanglement

Assuming arguendo, that the OSP satisfies the first two prongs of the *Lemon* test, it would still have to satisfy the requirements set forth in the third prong. This prong requires that the statute in question does not result in excessive government entanglement with religion. To access entanglement, the Court has looked to "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." Although the OSP may be able to satisfy the elements of this prong, if the Court emphasizes the statute's effect, the OSP will not be able to survive constitutional scrutiny.

There are two types of entanglement: administrative entanglement and political divisiveness. Administrative entanglement is created when a state involvement in the administration of a program. Under the form of entanglement referred to as political divisiveness, government action that promotes political fragmentation along religious lines may be held to be unconstitutional. See *Stick*, supra note 88, at 450–53. For purposes of the OSP, political divisiveness does not apply because it has been confined to cases where direct financial subsidies were paid to parochial schools or to teachers in parochial schools. *Id.* (citing *Mueller v. Allen*, 463 U.S. 388, 403 (1980)). Since the OSP creates a financial subsidy to parents, rather than religious schools, this factor is inapplicable. Arguably, the program is not exempt because it funnels the money through the parents, however, the prospect of political divisiveness has never alone warranted the invalidation of a state law. *Id.* See generally Committee for Pub. Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756, 778 (1973).


150. *Id.*


153. *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1970). Administrative entanglement refers to state involvement in the administration of a program. Under the form of entanglement referred to as political divisiveness, government action that promotes political fragmentation along religious lines may be held to be unconstitutional. See *Stick*, supra note 88, at 450–53. For purposes of the OSP, political divisiveness does not apply because it has been confined to cases where direct financial subsidies were paid to parochial schools or to teachers in parochial schools. *Id.* (citing *Mueller v. Allen*, 463 U.S. 388, 403 (1980)). Since the OSP creates a financial subsidy to parents, rather than religious schools, this factor is inapplicable. Arguably, the program is not exempt because it funnels the money through the parents, however, the prospect of political divisiveness has never alone warranted the invalidation of a state law. *Id.* See generally Committee for Pub. Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756, 778 (1973).
"comprehensive, discriminating, and continuing state surveillance" is required to guarantee that the government aid does not impermissibly advance religion. This type of excessive entanglement between church and state compromises the religious freedom of individuals who are not followers of that particular religious denomination. This government entanglement also infringes upon the religious liberty of the adherents to the denomination by imposing government regulations upon the sanctity of the religion.

In voucher plans that include sectarian institutions, administrative entanglement will be avoided when the program does not require distinctions between sectarian expenses and secular expenses, thereby surveillance and monitoring become unnecessary. Hence, there would not be any excessive administrative entanglement because the government is not forced to monitor whether the money is advancing religious initiatives. This program, however, as previously noted, would violate the effects prong of the *Lemon* test due to the lack of regulation.

Furthermore, because the very purpose of many religious schools is to provide an integrated secular and religious education, the Court has reasoned that the two functions may be "inextricably intertwined," such that they become inseparable. Religious and parochial schools have been considered "pervasively sectarian," meaning the primary reason for their existence is to function as "arms of religious ministries." As a general rule, religious schools teach from a limited viewpoint, often expressing conservative views regarding abortion, marriage, homosexuals, and theories of evolution. Hence, if Florida provides public support to religious schools, it is condemning OSP students to a one-sided education.

156. *Id.* (citing *Aguilar v. Felton*, 473 U.S. 402, 410 (1985)).
160. The Supreme Court has defined "pervasively sectarian" schools as those that: [I]nclude prayer and attendance at religious services as part of their curriculum, are run by churches or other organizations whose members must subscribe to particular religious tenets, have faculties and student bodies composed largely by adherents of the particular denomination, and give preference in attendance to children belonging to the denomination.

*Id.* at 47 n.48 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 657 (1971)).
162. *See id.* at 48.
Most of the private schools that participate in the OSP are pervasively sectarian. These pervasively sectarian schools will enroll an even larger proportion of the students who receive OSP vouchers. In Escambia County, twenty out of the twenty-five private schools are sectarian. These sectarian schools enroll over ninety-three percent of the private school pupils in Escambia County.

In fact, most of the Escambia County schools are pervasively sectarian. For example, the "philosophy of education" of Little Flower School explains that:

[T]he school is committed to educating our students in accord with the educational mission of the Church. . . . We believe that the mission of Catholic education is the Christian formation of students. The young people in Little Flower School must experience the Gospel in order to proclaim it now and throughout their adult lives.

The Little Flower School illustrates how difficult it is to separate secular education from a religious school's mission.

Since four out of the five schools that have presently volunteered to accept OSP students are Catholic schools, the state is going to have to provide constant surveillance to guarantee that the opportunity scholarships are not advancing religion. Although the OSP does not violate the excessive entanglement prong, by not requiring the schools to be accountable for how they spend the public funds, the OSP violates the Establishment Clause.

96/voucher2.htm> [hereinafter WEAC]. Initiated by Horace Mann in the 1830s, public schools were viewed as an essential part of children's development. Id. Only through public schooling, would children from different ethnic, religious, and class backgrounds learn to live as responsible citizens in a democracy. Id. Accordingly, public schools provide children with opportunities and experiences that benefit society as a whole. Id.

A public school in Iowa creates approximately the same social experience for its pupils as a school in Massachusetts. This experience . . . has in the past been fairly successful in conveying a set of common values to many generations of young children. It is probably the only unifying and democratizing process that young people undergo in a highly diversified society with no compulsory military service.

Id. (quoting Martin Canroy, School Improvement: Is Private the Answer?, in DECENTRALIZATION AND SCHOOL IMPROVEMENT 167 (Jane Hannaway & Martin Canroy eds., 1993)).

164. FAQs, supra note 4.
165. Id.
166. Holmes, supra note 5, at 7.
because it will be unable to ensure that the funds are not being used for sectarian functions.

Additionally, even religious schools are wary of the intrusive nature of the OSP. They fear that by accepting state funds, they are going to, in return, have to accept state regulations. Accordingly, a 1998 United States Department of Education report, performed at the request of Congress, shows that private and religious schools are not likely to participate in voucher programs that would require them to meet accountability standards in key policy areas, “such as admissions, student testing, curriculum, and religious training.”

B. Analysis of the OSP Under the Florida Constitution

The OSP conflicts with several provisions of the Florida Constitution. Because the Florida Constitution is more stringent than the United States Constitution when protecting the separation of church and state, the OSP is not going to be able to withstand constitutional scrutiny. The OSP diminishes the high quality of education that is mandated by the Constitution and facilitates the widening of the educational gap between economic classes. Finally, the OSP puts too heavy a burden on the state school fund, as the Florida Constitution places strict requirements on how the funds can be allocated. In fact, the provisions of the Florida Constitution provide a basis to strike down the OSP, without even delving into federal constitutional questions.

1. Article I, Section 3 of the Florida Constitution

The Florida Constitution is unambiguous when it comes to the state’s independent discretion to spend public funds. The state cannot use public funds if it will infringe on an individual’s religious liberty and disturb the delicate balance of separation of church and state. Article I, section 3, clearly makes it unconstitutional to force Florida taxpayers to fund school voucher programs that include religious schools, stating:

167. Donna McCurdy, vice principal of West Florida Baptist Academy stated that “[m]ost Christian schools are worried that when you accept state funds you accept state regulations, and we don’t want to be locked into state regulations and state text books. The state’s saying there are no strings now, but down the road there could be strings.” Paul Wilborn, Voucher Program off to a Wary Start, ST. PETERSBURG TIMES, July 2, 1999, at 1A.

168. Emerging Track Record, supra note 66.

There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.  

The very premise of the OSP violates this provision because it distributes public funds directly to sectarian institutions, blanketed in the deceptive name of Opportunity Scholarships. The OSP is not revenue neutral because schools earn funds from the state based upon the size of their enrollment. When a child leaves to attend a religious institution, the public school will lose funds, while the private school gains the tuition.

Not only does the Florida Constitution explicitly forbid state aid from directly going to religious schools, but examination of legislative history indicates that the provision was intended to ban state aid to parochial schools. According to Jim Redman, a member of the 1968 constitutional revision commission, the topic of state aid to religious schools was fully debated at the time. Members of the commission specifically intended to prohibit vouchers from being used to support any religious schools.

It is also important to note that any examination into "the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language." Unless text suggests that specific words have been used in a technical sense, words and terms of the Florida Constitution should be interpreted in their most usual and obvious meaning. Moreover, less latitude is permitted when interpreting constitutional provisions than when interpreting statutes. This stringent rule of construction is based on the presumption that constitutional

170. FLA. CONST., art. I, § 3.
172. Id.
173. Jo Becker, Voucher Debate Entwined with a Century-old Fight, ST. PETERSBURG TIMES, July 6, 1999, at 4B.
174. Id.
175. Chiles v. Phelps, 714 So. 2d 453, 457 (Fla. 1998) (quoting Florida Soc'y of Ophthalmology v. Florida Optometric Ass'n, 489 So. 2d 1118, 1119 (Fla. 1986)).
176. Advisory Opinion to the Governor—1996 Amendment 5 (Everglades), 706 So. 2d 278, 282 (Fla. 1998) (citing City of Jacksonville v. Continental Can Co., 151 So. 488, 489–90 (Fla. 1933)).
provisions have been more carefully framed. The language of Article I, section 3 expressly forbids public funds from directly or indirectly aiding sectarian institutions. Therefore, the OSP is unable to constitutionally distribute funds to religious schools.

This provision has never been interpreted by Florida courts simply because until now, no legislature has deemed it proper. However, Florida case law dealing with aid to religious schools indicates that the OSP would be deemed unconstitutional. The Supreme Court of Florida has stated that legislation may provide indirect aid to religious interests in specific circumstances. Therefore, while a state cannot pass a law to aid one religion or all religions, state action to promote the general welfare of society, apart from any religious considerations is permissible. The OSP does not promote the general welfare of society because the OSP facilitates the balkanization of public schools, leaving them as the last refuge for students whom private schools deem undesirable. Vouchers harm society as a whole as they create an uneven playing field and institutionalize a two-tiered educational system.

Moreover, Florida courts have expressly stated that neither a public school system nor its property can be employed in permanent promotion of any particular religious sect or denomination. For example, the court held that distributing the Gideon Bibles through the public school system equals the annual promotion and endorsement of a particular religious sect. Because public school students are being given the opportunity to attend private religious schools with state funds, those students should not have to be subjected to religious indoctrination. Under the OSP, using state funds to aid sectarian institutions results in the endorsement of a particular religion.

Finally, the Florida Attorney General determined that a school board could provide instructional materials purchased solely with school district funds to private or sectarian schools for the benefit of the students without

178. Id.
179. FLA. CONST. art. I, § 3.
181. Id. at 307.
185. Id. at 185.
186. FAQ's, supra note 4.
violation of Article I, section 3 of the Florida Constitution. However, the opinion stressed that the public school property still could not be used "in a manner which would appear to place a stamp of approval upon a particular religious practice." Accordingly, the OSP does place "a stamp of approval" on religion because most private schools are overwhelmingly sectarian. The OSP is clearly entwined with religious worship and instruction, as OSP students will be forced to passively participate in religious ceremonies. The effect of including religious schools in the program is that the State of Florida instills religious ideology in Florida students. In conclusion, looking at the plain meaning of the statute, legislative history, and case law indicate that the OSP would violate this provision.

2. Article IX, Section 1 of the Florida Constitution

In November 1998, Florida passed a referendum that went into effect in January 1999, establishing education as a fundamental value. Recognizing the inherent inequalities in the educational system, Florida voters wanted to bridge the education gap and provide higher quality education for all children. The constitutional amendment evidences the dedication of Florida citizenry to make education the state's highest priority, declaring:

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

The OSP completely contradicts the desires of Florida voters. The OSP blatantly ignores the state's paramount duty to make adequate provisions for the education of all children residing within its borders by providing

188. Id. (citing Brown v. Orange County Bd. of Pub. Instruction, 128 So. 2d 181 (Fla. 2d Dist. Ct. App. 1960)). The opinion also emphasized that the program must promote the general welfare of society, be available to both public and private schools, and not relate to religious worship or instruction. Id.
189. Id.
190. Id.
191. FLA. CONST. art. IX, § 1.
vouchers to only a limited amount of students. While some students reap the
benefits, others are abandoned and destined to a low quality education.

For example, there is no guarantee that a student who is eligible for an
OSP will in fact receive a voucher. Since only five private schools in
Escambia county agreed to honor state vouchers, officials were forced to
hold a lottery to determine which kids would be accepted. While 800
elementary students were eligible, only ninety-one expressed interest. Out
of the ninety-one students that expressed interest to attend a private school,
there were only a mere sixty private school slots available. As Senate
Democratic Leader Buddy Dyer notes, "[the voucher bill] will only help a
select few while it will leave thousands of students behind."

Moreover, there is no evidence that indicates private school students
will necessarily receive a better education. In Milwaukee, an evaluation
shows no achievement differences between voucher students and comparable
Milwaukee Public School students. In fact, subsequent research has
shown that differences in public and private school achievement levels are
insignificant and primarily attributable to factors such as differences in
student backgrounds.

The OSP is further flawed because private schools will not be subjected
to the same grading scale as public schools. Therefore, they are not going
to be as accountable as public schools. Parents may be disillusioned that
private schools provide a better education. However, there is great danger
that an OSP student may attend a private school that would receive a failing
grade, resulting in the student receiving an inferior quality education.

Additionally, in contrast to public schools, which must accept and teach
all students, private schools may discriminate on many bases, including
mental or physical disability, IQ scores, achievement scores, income and
sexual orientation. Private schools also may refuse to admit children in need
of special services, such as remedial education. Therefore, the OSP does
not facilitate uniform education for all students, but instead creates a level of
hierarchy that is governed by the religious schools.

193. Id.
194. Id.
195. Id.
196. Kennedy, supra note 34.
197. WEAC, supra note 163.
198. Id.
199. See supra note 36 and accompanying text.
200. Id.
201. Id.
202. Id.
203. Id.
Finally, the OSP is going to drain funds from public schools, the very institutions the plan is intended to improve. Even at a conservative estimate of an annual $3000 per student for up to 156,000 students, for a total of roughly $500 million, the OSP will put a heavy burden on Florida taxpayers. Vouchers would further limit the already tight financing that causes districts to use outdated textbooks, computers, and increase class sizes. As one critic notes, “[f]unds allocated to pay for vouchers inevitably come out of the overall public school budget. In a time of shrinking state revenues and substantial cuts in federal education assistance, it makes little sense to expropriate precious resources from the public schools and give them to private schools.” The OSP will only continue to perpetuate the dehabilitation of impoverished public schools, while continuing to elevate private school education.

Governor Bush should look to the failures of other voucher programs, in order to prevent the same mistakes from occurring in Florida’s public education system. For example, in the 1998–99 school year, about 6000 Milwaukee students received vouchers worth about $5000 each, for a total cost of about twenty-nine million dollars. This created a net loss of twenty-two million dollars to the public schools. As the OSP continues to mushroom, the Florida public school system will be subjected to the same funding epidemic as other more limited voucher programs, forcing schools to function on depleted funds and resources.

3. Article IX, Section 6 of the Florida Constitution

Finally, Article IX, section 6, sets forth the limitations on appropriations of state school funds stating, “[t]he income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools.” The OSP unconstitutionally calls for the use of state school funds to be used for more than just the support and maintenance of free public schools. Since the plan does not limit how long a student can participate in the OSP, the state may end up completely financing a student’s entire private school education. Instead of focusing on improving and investing in the public

204. FAQs, supra note 4.
205. Cirelli, supra note 1, at 494.
206. Emerging Track Record, supra note 66.
207. Id.
208. Id.
210. Holmes, supra note 5.
211. See id.
school the student was originally assigned to, the OSP focuses more energy and finances into keeping the student enrolled at a private institution.

IV. COMPARING VOUCHER PROGRAMS THROUGHOUT THE COUNTRY TO THE OPPORTUNITY SCHOLARSHIP PROGRAM

When the Supreme Court recently refused to resolve the national debate over the constitutionality of voucher programs, voucher advocates proclaimed victory for voucher legislation.\(^{212}\) The Court declined to hear a challenge over the Supreme Court of Wisconsin's decision to uphold the MPCP, one of the few publicly funded school voucher programs in the nation to allow participation by religious schools.\(^{213}\) Voucher supporters' excitement, however, is premature and relatively unfounded since the Court did not validate vouchers.\(^{214}\) While voucher proponents, including Governor Bush, have galvanized their political efforts to promote school choice, they should instead focus on the consistent failures and disappointments that have resulted from the application of such programs.

A. The Milwaukee Parental Choice Program v. The Opportunity Scholarship Program

While the OSP and the MPCP may have some similarities, there are some inherent differences in their statutory construction. Regardless, the MPCP is indicative of the failure of the voucher concept.\(^{215}\) The MPCP was initially limited in purpose and scope.\(^{216}\) The program was created to help prevent city schools from failing its poorest students.\(^{217}\) To qualify, parents must live below the established poverty level.\(^{218}\) In the first year, only six schools and 300 former public school students participated.\(^{219}\) Each student gets about $4900 for use at private and parochial schools. Although the MPCP started as limited in its application, the program's enrollment has mushroomed well beyond initial expectations, causing havoc in the Milwaukee public school system.\(^{220}\)

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212. See generally Establishment Clause, supra note 149.
214. Jackson, 578 N.W.2d at 602.
215. See Cirelli, supra note 1, at 486.
216. Id.
217. Id.
218. Id. at 486.
219. Id.
220. FAQs, supra note 4.
In comparison, the OSP was designed to prevent Florida’s students from being trapped in failing schools.221 At its creation, the OSP was applicable to 800 students.222 Under the OSP, to be eligible for a voucher, parents’ income is irrelevant.223 Each student gets approximately $3500 for use at private and parochial schools.224 However, by the 2000 school year, 169 public schools could potentially be labeled failed schools. Another 1000 could be considered dangerously close to failing.225 The lessons learned from the failures of the MPCP foreshadow the imminent collapse of Florida’s public school system.

Although some claim that vouchers have revitalized the Milwaukee school system, it has not been the answer for which most educators and politicians have been looking for. Many former supporters are extremely disappointed over the results of the voucher program. Annette Polly Williams, the democratic Wisconsin assemblywoman who sponsored the nation’s first publicly funded private school voucher system, is irate over the results of the MPCP.226 She is furious over the business community’s attempts to exploit the vouchers, by expanding the program to include the wealthiest parents: “We wanted parental choice. They’re talking about school choice. And when you’re talking about school choice, you’re not talking about parents selecting schools, you’re talking about schools selecting parents.”227

Moreover, as the MPCP has expanded, many participants have suffered greatly. Funding for public schools has deteriorated,228 meanwhile, several voucher schools have been forced to shut down and are under investigation for misappropriation of funds.229 There is a desperate need for more regulation and accountability of voucher programs, yet, many schools in

221. Id.
222. Id.
223. Id.
224. See id.
225. FAQ’s, supra note 4.
227. Id.
228. In Milwaukee, statistics indicate that in the 1996–97 school year, voucher school received about $1000 more per student than comparable public schools. Emerging Track Record, supra note 66.
229. Five voucher schools have been forced to shut their doors. Two of the voucher schools owe back wages to employees. For example, both Exito Education Center and Milwaukee Preparatory School closed after officials were notified that the schools had been overpaid under the voucher program and owed the state money: Exito $88,008, and Milwaukee Prep $111,843. The Exito closure forced parents of 61 students to find mid year alternatives for their children; Milwaukee Prep’s closure stranded another 111 children. Eric Gunn, The Inside Story: Vouchers (visited Aug. 4, 1999) <http://www.weac.org/news/sept96/vouchers.htm>.
Milwaukee have campaigned against any legislation ensuring more accountability.\textsuperscript{230}

Florida legislators should not make the same mistakes as the MPCP. The OSP is more expansive than the MPCP, therefore, it has the ability to do more damage to the public school system. Since there is no evidence that the voucher programs will be the remedy Florida’s ailing schools need, legislators should explore other options, treating vouchers as their last resort. It defies common sense to set forth the proposition that by draining public funding from demoralized and underfunded public schools, that these schools will in return be more inspired and better equipped to meet the challenges of modern education.

B. \textit{Trends in Voucher Legislation Throughout the Country}

While the MPCP is still standing, other voucher programs have not been able to withstand constitutional muster. Courts throughout the country have recognized that vouchers make for bad public policy and are detrimental to the evolution of society. The OSP should be condemned to the same fate, as courts should be watchful of the warnings of other jurisdictions. This comment strongly suggests that both state and federal courts should adopt the same legal reasoning as the courts in Maine and Vermont.

On May 27, 1999, the United States Court of Appeals for the First District upheld a Maine law that bars the state from paying students’ tuition at religious schools.\textsuperscript{231} The ruling was extremely important to voucher opponents, as it was the highest federal court to rule on the school issue thus far. Under the disputed Maine law, the state would pay grants directly to qualified private educational institutions to subsidize their schooling for families who reside in communities that do not have public secondary schools.\textsuperscript{232} The subsidy was only granted if the institutions were “non-sectarian” in nature.\textsuperscript{233}

The landmark decision stated that there is no binding precedent for the proposition that direct payment of tuition by the state to a private sectarian school is constitutionally permissible.\textsuperscript{234} Moreover, the court warned that history indicates entanglement of church and state is “oppressive to religious freedom.”\textsuperscript{235} The court stated in absolute terms that it is impermissible to have

\begin{itemize}
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{231} \textit{Strout v. Albanese}, 178 F.3d 57 (1st Cir. 1999), \textit{cert. denied}, 120 S. Ct. 329 (1999).
\item \textsuperscript{232} \textit{Id.} at 59.
\item \textsuperscript{233} \textit{Id.}
\item \textsuperscript{234} \textit{Id.} at 61 n.5 (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973)).
\item \textsuperscript{235} \textit{Id.} at 61.
\end{itemize}
broad sponsorship of religious schools. In failing to warrant that state aid be used specifically for "secular, neutral, and nonideological purposes," the statute granted invalid direct aid. The court noted the confusion over distinguishing direct and indirect aid and relied on the reasoning in Nyquist, stating:

This dichotomy between direct and indirect aid is a recurring theme throughout Establishment Clause litigation. Although not all cases fit neatly within this formula, and this somewhat tenuous distinction has been the subject of considerable criticism by academia, it is the closest thing that we have to a workable bright line rule, or that perhaps is possible.

The court concluded its Establishment Clause argument by stating that government aid should not be extended to parents who send their children to religious institutions because it would create a "breach in the wall separating the State from secular establishments." Moreover, the court called upon the Supreme Court to determine the scope of direct aid to religious institutions. Until the Supreme Court resolves the issue, voucher programs should follow the same reasoning and be deemed unconstitutional. Accordingly, the OSP does not meet the constitutional requirements as it imposes direct benefits to religious schools.

The Supreme Court of Vermont was called upon to consider the constitutional implications of Vermont statutes authorizing school districts "to provide high school education to their students by paying tuition for nonpublic schools selected by their parents." The controversy arose over a parochial high school where the secular and sectarian aspects of its educational program were intertwined. The court held that the tuition scheme transgressed the Vermont Constitution because when it reimbursed

236. Strout, 178 F.3d at 61.
237. Id. at 62.
238. Id.
239. Id. at 64.
240. Id.
241. Chittenden Town Sch. v. Vermont Dep't of Educ., 738 A.2d 539, 541 (Vt. 1999). Similar to the OSP, the statute provided that parents could chose sectarian or non-sectarian schools. Id. at 541.
242. Id. at 542. The Mount Saint Joseph Academy statement of philosophy depicted that the curriculum included not only traditional scholastics, but moral and religious education, stating, "[w]e believe that learning occurs in an atmosphere where faith and community are emphasized and overtly practiced." Id.
tuition for sectarian schools, the school district failed to instill adequate safeguards against the use of such funds for religious worship.\footnote{Id. at 562.}

Additionally, the court left the question of whether “unfettered parental choice between the public funding source and the educational provider will eliminate any First Amendment objection to the flow of public money to sectarian education” to the United States Supreme Court.\footnote{Chittenden Town Sch., 738 A.2d at 563.} The court found for the purpose of the Vermont Constitution, parental choice only disguised the fact that the true choice was in the hands of the private schools.\footnote{Id.}

Moreover, in dicta, the court noted that it found the reasoning in \textbf{Jackson v. Benson}, the controversial Wisconsin Supreme Court ruling that upheld a voucher program, unpersuasive.\footnote{Id. at 559.}

Analogously, the OSP fails to put limitations on how sectarian schools can distribute and use public funds and therefore should be deemed unconstitutional. The OSP falsely leads parents to believe that they are empowered to choose what school their children will attend. The reality is that the OSP grants religious schools the discretion to choose what students they deem worthy to attend.

\textbf{V. CONCLUSION}

The Bush/Brogan A+ Plan for Education will not make the grade. Opportunity Scholarships are a cruel hoax that give false hope to the nation’s most disenfranchised. It is important that legislatures and the courts are not enticed by the promises of free enterprise. American children have the right to a high quality education that makes them competitive in the marketplace, not victims of it. Public education should not be couched in language like “survival of the fittest.” The marketplace has failed before, and this time we have much more to lose—our future. If the OSP is implemented, the grim realities of voucher programs will come to the surface very quickly. This is going to be a turning point in Florida’s educational system and the courts should look to the disappointments that have occurred in other states, to protect Florida from the same fate. The future of Florida’s public school system is of great public importance. It is imperative that the constitutionality and scope of voucher programs be addressed by the Supreme Court. Florida’s unprecedented voucher program would be an ideal test case to put the voucher debate to rest. Until then, Florida students will be condemned to a second-rate education.
VI. ADDENDUM

Five months after Florida enacted the first statewide voucher plan, the OSP is consistently failing to make the grade. In a recent poll, voters emphatically opposed the implementation of a voucher program in Florida public schools. As one voter proclaimed, "[o]ur taxes are paying for public school, and if you want something other than public school, then you should pay for it." Perhaps more disconcerting is the mass exodus of teachers fleeing the state's lowest performing schools; paradoxically, the very schools the OSP intended to save. One administrator notes, "[t]here appears to be some panic around the A+ Plan, and we're having a difficult time recruiting teachers, and we're having a difficult time holding onto teachers." The problem arises over the reality that few educators want to teach in a school that has already been labeled a failure? The failure of the OSP, should provide the impetus for the Supreme Court to deliver a decisive ruling regarding school choice programs. Only when the Supreme Court rises to the occasion and decides to take a final stand on this explosive issue, will students be freed from the inferior education provided by voucher programs.

Kelly Cohen

247. Analisa Nazareno, Poll: A Public Vote Would Put an End to Tuition Vouchers, MIAMI HERALD (Broward), Nov. 8, 1999, at 6B. The poll, conducted by the Washington, D.C., research firm Schroth & Associates from October 28–31, found that 55 percent of voters oppose vouchers, with a mere 38 percent supporting the concept. Id.

248. Id.

249. Daniel de Vise, A+ Plan Prompts Teacher Exodus, MIAMI HERALD (Broward), Nov. 5, 1999, at 1B.

250. Id.

251. Id. For example, 11 teachers transferred out of one failing school just a week before classes began. At a different school, a group of 22 teaching candidates diminished to two as soon as teachers found out the school had been branded with a D. Id.