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SCHOOL CHOICE: CONSTITUTIONALITY AND POSSIBILITY IN GEORGIA

“Upon the subject of education, not presuming to dictate any plan or system respecting it, I can only say that I view it as the most important subject which we as a people can be engaged in.”¹ --Abraham Lincoln

INTRODUCTION

On September 13, 2006, Fayette County officials announced the arrest of two women on felony charges, punishable by five years in prison.² Their crime—falsifying school enrollment forms in order to get their children out of Clayton County schools and into Fayette County schools.³ Other Georgia parents have been caught fraudulently using a P.O. Box at Mail Boxes Etc. in the Lenox Marketplace shopping center in Buckhead in an attempt to get their children into Sarah Smith Elementary School, which consistently ranks as one of the best in Georgia.⁴ In fact, the school thinks almost 10% of its students illegally live out of its district.⁵ With such desperate parents, Georgia legislators have followed a growing movement to provide publicly-funded school choice.⁶ However, reorganizing 100 years of educational service structured by residency has proven difficult—both politically and legally.⁷

1. ABRAHAM LINCOLN, *Address to the People of Sangamon County* (Mar. 9, 1832), in COMPLETE WORKS OF ABRAHAM LINCOLN 7 (John G. Nicolay & John Hay, eds., 1905).

2. Bridget Gutierrez, *Fayette Goes After Ineligible Students: 2 Adults Accused of Residency Fraud*, ATLANTA J.-CONST., Sept. 14, 2006, at 3B.

3. *Id.*

4. Paul Donsky, *Nobody's Home; Families Using Bogus Addresses Crowd Legitimate Kids Out of One of Atlanta's Top Public Schools*, ATLANTA J.-CONST., Mar. 13, 2003, at 1A.

5. *Id.*

6. See generally *Williams v. State*, 627 S.E.2d 891, 892 (Ga. App. 2006) (rejecting desperate parents' demand for tuition vouchers); Eric Wearne, *School Choice Promotes Education Excellence*, GEORGIA PUBLIC POLICY FOUNDATION, July 8, 2005, <http://www.gppf.org/article.asp?RT=5&p=pub/Education/Choice/educhoices050708.htm> (discussing school choice as a benefit for Georgia students).

7. See CLINT BOLICK, *VOUCHER WARS: WAGING THE LEGAL BATTLE OVER SCHOOL CHOICE* 1 (2003).

This Note examines the interplay between a publicly-funded school choice program in Georgia and controlling constitutional obligations and provides guidance for the inevitable expansion of school choice in Georgia.⁸ Part I of this Note serves as a brief overview of school choice.⁹ Part II addresses Georgia's constitutional guarantee to provide adequate public education.¹⁰ Part III examines constitutional issues dealing with the inclusion of sectarian schools in a choice program, and Part IV analyzes the constitutionality of excluding sectarian schools.¹¹

I. SCHOOL CHOICE IN A NUTSHELL

A. *What is School Choice?*

School choice programs, once known as vouchers, are government initiatives that allow "individual students and their parents to determine which school the student will attend"¹² School choice programs allocate "a specific sum of money that can be used for part or full payment for the student to attend that school" instead of enrollment restricted to residency.¹³

In 1955, Milton Friedman, a free-market economist, theorized a voucher system for public education.¹⁴ He proposed that education should not be the government's monopoly; however, a completely free market would be risky because education is a public commodity to which wealthy and poor alike should have access.¹⁵ Thus, the government would provide parents with funds to offset the cost of

8. In 2007, the Georgia General Assembly passed Senate Bill 10, the "Georgia Special Needs Scholarship Act," to provide for vouchers for special needs students. S. 10, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

9. *See infra* Part I.

10. *See infra* Part II.

11. *See infra* Parts III–IV.

12. RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS, AND DISCRIMINATION LITIGATION, 1 EDUC. LAW § 1:30 (2006).

13. *Id.*

14. *See generally* Milton Friedman, *The Role of Government in Education*, ECONOMICS AND THE PUBLIC INTEREST 123–44 (Robert A. Solo ed., 1955).

15. *See id.*

education.¹⁶ This system would force schools to compete for student enrollment, causing schools to either cater to students' needs and excel or to lose enrollment and the corresponding funding until forced out of business.¹⁷ In short, vouchers through competition and choice would create more successful and innovative schools than a bureaucratic government monopoly could.¹⁸

For example, the American Legislative Exchange Council, a non-partisan collaboration for creating legislation based on "belief in limited government, free markets, federalism, and individual liberty," has drafted a model school choice plan.¹⁹ This model school choice plan entails four elements: who receives scholarships, where scholarships can be used, what is required of schools receiving students using scholarships, and how scholarships are distributed.²⁰ Scholarships may be prioritized for low-income families, allotting the maximum amount of funding for students below the poverty line and graduating payments as families have more money.²¹ Other programs have based eligibility on the current public school's failure to make Adequate Yearly Progress under No Child Left Behind, especially since that statute authorizes school choice.²² Students may use the money at adjacent public schools outside of the resident's district or participating private schools;²³ parents often choose sectarian private schools. Schools receiving the funds must abide by anti-discrimination laws, demonstrate certain educational achievements (including student-mastery, attendance, and parental involvement),

16. *See id.*

17. *See id.*

18. *See id.*

19. Am. Legislative Exch. Council, History <http://www.alec.org/AM/Template.cfm?Section=History&Template=/CM/HTMLDisplay.cfm&ContentID=3786> (last visited June 9, 2008).

20. *See* AM. LEGISLATIVE EXCH. COUNCIL, PARENTAL CHOICE SCHOLARSHIP PROGRAM ACT § 3, http://www.allianceforschoolchoice.org/_DOCs/Parental_Choice_Scholarship_Program_Act.pdf (last visited Dec. 16, 2007).

21. *Id.* § 3.

22. U.S. Department of Education, School Choice in NCLB, <http://www.ed.gov/admins/comm/choice/choice03/edlite-index.html> (last visited June 9, 2008).

23. *See* AM. LEGISLATIVE EXCH. COUNCIL, PARENTAL CHOICE SCHOLARSHIP PROGRAM ACT § 2, http://www.allianceforschoolchoice.org/_DOCs/Parental_Choice_Scholarship_Program_Act.pdf (last visited Dec. 16, 2007).

and exhibit fiscal soundness.²⁴ Finally, if sectarian schools enroll students using choice scholarships, the funds must be distributed to the parents, who endorse the check to the sectarian school, in order to comply with the Establishment Clause.²⁵

In 1989, Wisconsin passed the first publicly-funded school choice legislation.²⁶ In Milwaukee, inner-city parents banded behind Polly Williams, Democratic State Legislator and former campaign director for Jesse Jackson.²⁷ Polly Williams “rejected the idea that inner-city kids should be bused to the suburbs in search of better schools.”²⁸ Williams believed that if the government was unable to provide decent schools within the city it should allow private institutes to do so.²⁹

Since Milwaukee passed its legislation, other publicly-funded school choice programs have been passed in Maine, Vermont, Ohio, Florida, Colorado, Utah, and Washington, D.C.³⁰

B. The Politics of School Choice

1. The Players

Grass-root movements started by parents have primarily driven the movement for publicly-funded school choice, especially urban minority parents.³¹ They are joined by a few school choice interest

24. *Id.* § 4.

25. *See* *Zelman v. Simmons-Harris*, 536 U.S. 639, 646–62 (2002).

26. *See* WIS. STAT. § 119.23 (2008); INST. FOR JUSTICE, NATIONAL SCHOOL CHOICE TIMELINE, http://ij.org/pdf_folder/school_choice/enrollment_timeline.pdf (last visited Nov. 1, 2007).

27. TERRY M. MOE, SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC 33–35 (2001).

28. *Id.* at 33.

29. *Id.*

30. COLO. REV. STAT. §§ 22-56-101 to -110 (2006) (repealed); D.C. CODE §§ 38-1851.01 to .11 (2006); FLA. STAT. § 1002.38 (2006); ME. REV. STAT. ANN. tit. 20, §§ 2951, 5203–5204 (2005); OHIO REV. CODE ANN. §§ 3313.974–.979 (2006); UTAH CODE ANN. § 53A-1a-701 to 709 (2007); VT. STAT. ANN. tit. 16, § 821–827 (2006).

31. *See* Black Alliance for Educational Options, Parental Choice Options, http://www.baeo.org/programs?program_id=5 (last visited Dec. 16, 2007); Hispanic Council for Reform and Educational Options, What is School Choice?, http://www.hcreo.org/section/what_is_school_choice (last visited Dec. 16, 2007).

groups.³² Some larger social justice organizations have also fought for choice.³³ Private religious schools established prior to the allowance of school choice promote choice because it increases enrollment.³⁴ Politically, the Libertarian Party supports school choice as policy, and Republicans, when appealing to a broader constituency also support choice.³⁵

Teacher unions form the first line of opposition to choice.³⁶ Joining the unions in opposing publicly-funded school choice are civil interest groups worried that choice will lead to free-market abuse.³⁷ Politically, the Democratic Party typically votes against publicly-funded school choice proposals; however, their position may be changing³⁸

32. See Milton & Rose D. Friedman Found., About the Friedman Foundation, <http://www.friedmanfoundation.org/friedman/about/> (last visited Sept. 15, 2007); Alliance for School Choice, <http://www.allianceforschoolchoice.org/home.aspx> (last visited Sept. 15, 2007); School Choice Wisconsin, Accurate Information About School Choice, <http://www.schoolchoicewi.org/index.cfm> (last visited Sept. 15, 2007).

33. See Inst. for Justice, School Choice, <http://www.ij.org/schoolchoice/index.html> (last visited Sept. 15, 2007); Thomas B. Fordham Inst., Charters & Choice, <http://www.edexcellence.net/institute/topic/topic.cfm?topic=Charters%20%26%20Choice> (last visited Sept. 15, 2007); The Heritage Found., Choices in Education, <http://www.heritage.org/research/education/schoolchoice/schoolchoice.cfm> (last visited Sept. 15, 2007); Manhattan Inst. for Pol'y Res., Education Reform, <http://www.manhattan-institute.org/html/cci.htm> (last visited Sept. 15, 2007).

34. Cf. Nat'l Catholic Educ. Ass'n, School Choice, <http://www.ncea.org/public/SchoolChoiceInitiatives.asp> (last visited Nov. 1, 2007) (supporting "the concept of full and fair parental choice in education . . .").

35. See Libertarian Party of Utah, Platform on the Libertarian Party of Utah, <http://www.lputah.org/platform> (last visited Nov. 15, 2007) (describing party position as affirming "the right of parents to educate their children in whatever environment they prefer . . ."); The Libertarian Party, Georgia LP Offers Online Petition Urging More Choice in Education, http://www.lp.org/lpnews/printer_732.shtml (last visited Sept. 15, 2007); John Kramer, *Latest School Choice Challenge Offers Little New in Substantive Arguments*, INST. FOR JUSTICE, Nov. 11, 1999, http://www.ij.org/schoolchoice/illinois/11_11_99pr.html.

36. See Nat'l Educ. Ass'n, Vouchers, <http://www.nea.org/vouchers/index.html> (last visited Sept. 15, 2007); American Federation of Teachers, The Many Names of School Vouchers (Mar. 2001), <http://www.aft.org/topics/vouchers/index.htm>.

37. See *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 933 (Colo. 2004); *Bush v. Holmes*, 919 So.2d 392, 396 (Fla. 2006); Caroline Frederickson & Terri Ann Schroeder, *ACLU Letter to Congress Regarding the America's Opportunity Scholarship for Kids Act*, July 27, 2006, <http://www.aclu.org/religion/gen/26320leg20060727.html>. See generally Albert J. Menendez & Edd Doerr, *That Wall*, LIBERTY, Sept.–Oct. 1999, http://www.arlinc.org/articles/article_thatwall.html (discussing historical support for the separation of church and state).

38. See Ron Matus, *Democrats Warm to Vouchers*, ST. PETERSBURG TIMES, May 12, 2008, at 1B.

2. *The Politics*

First, opponents of publicly-funded school choice argue that it would drain public schools.³⁹ Were such a program implemented, public schools would lose funding, making it even harder for every student to receive an education.⁴⁰ Furthermore, the brightest students would be lured to the private sector, leaving under-funded public schools with the most challenging students.⁴¹

Proponents of school choice counter that the threat of losing students and funds is exactly what would motivate schools to excel.⁴² Additionally, public schools would only lose funds in proportion to the number of students who leave; thus, public schools are still funded according to their actual enrollment.⁴³ Proponents ask why any school would expect to receive funds for students enrolled elsewhere.⁴⁴

Second, opponents argue school choice would create social inequality.⁴⁵ The socially advantaged, as a result of better behavior and better test scores, would be accepted at better private schools, while the underprivileged toil in inadequate public schools.⁴⁶

Proponents, however, worry that the current system causes such inequality because only the upper-class can afford private schools.⁴⁷ Publicly-funded school choice would provide everyone with the options that only the wealthy currently have.⁴⁸

Third, opponents worry that school choice and a free-market system would revive the race academies of the 1950s and 1960s.⁴⁹ In other words, choice would provide an avenue for segregation.⁵⁰

39. MOE, *supra* note 27, at 27–30.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *See id.*

45. MOE, *supra* note 27, at 27–30.

46. *See id.*

47. *Id.*

48. *Id.*

49. *See id.* *See generally* Allen v. Wright, 468 U.S. 737, 744 (1984).

50. MOE, *supra* note 27, at 27–30.

Proponents first note that the current system, drawn by housing lines influenced by Jim Crow laws, is not very integrated, and school choice offers an opportunity for desegregation in a manner the current system does not offer.⁵¹ Under school choice, voluntary desegregation would result from students and parents seeking the best possible education.⁵² Furthermore, if issues regarding racial discrimination within individual schools became a problem, specific legislation like admission lotteries, where schools admit students on a random basis, or Title VII or Title IX, could provide suitable remedies.⁵³

Fourth, opponents theorize that choice would undermine the democratic control which expresses society's values.⁵⁴ For example, parents who believe in Creationism could have their children enrolled in a school teaching only Creationism, and those students would never hear of Darwin.⁵⁵ Thus, these students would never be exposed to the full range of American education.⁵⁶

Proponents concede that school choice could undermine democratic control, but only if the government was completely eliminated from education.⁵⁷ School choice theorists do promote some government influence, such as graduation requirements to ensure schools, through the democratic process, represent the people and their ideals.⁵⁸ In other words, school choice proponents recognize the fragmentation of society that could result from like-minded teaching like-minded, so to ensure that some level of commonality exists, minimum educational standards would have to be governmentally imposed.

51. See Gary Orfield, *Housing and the Justification of School Segregation*, 143 U. PA. L. REV. 1397, 1404 (1995) ("The school segregation that exists in any given community is likely to reflect some complex combination of current discrimination in schools and housing . . ."); see also MOE, *supra* note 27, at 27–30.

52. See MOE, *supra* note 27, at 27–30.

53. See *id.*

54. *Id.*

55. See *id.*

56. *Id.*

57. See *id.*

58. See Moe, *supra* note 27, at 27–30.

Fifth, opponents think publicly-funded school choice is a front for advancing religion.⁵⁹ In other words, school choice will “violate the ‘separation of church and state.’”⁶⁰

Parts III and IV of this Note explore this issue in depth, but in short, the United States Supreme Court has held spending voucher money at private sectarian schools does not violate the separation of church and state clause.⁶¹ Proponents, in fact, push further to say that not only is school choice permissible, but is mandatory under the free exercise clause.⁶²

Sixth, opponents worry that parents may make educational decisions for the wrong reasons, such as athletics, social motivations, or geographical preferences.⁶³ Proponents counter that parents are likely to know their child’s educational needs better than the school system, which assigns schools by address.⁶⁴

With such polarized debate, opponents will almost certainly challenge in court any legislatively-passed publicly-funded school choice program.⁶⁵ In order to survive such a challenge, the law creating the program must be constitutionally sound.⁶⁶

59. *See id.*

60. *Id.* at 28.

61. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002).

62. *Anderson v. Town of Durham*, 895 A.2d 944, 947 (Me. 2006).

63. *Moe*, *supra* note 27, at 27–30.

64. *See id.* at 30.

65. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002); *Eulitt v. Maine Dep’t of Educ.*, 386 F.3d 344, 346 (1st Cir. 2004); *Strout v. Albanese*, 178 F.3d 57, 59 (1st Cir. 1999); *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 944 (Colo. 2004); *Bush v. Holmes*, 919 So.2d 392, 412 (Fla. 2006); *Anderson v. Town of Durham*, 895 A.2d 944, 947 (Me. 2006); *Bagley v. Raymond Sch. Dep’t*, 728 A.2d 127, 130 (Me. 1999); *Davis v. Grover*, 480 N.W.2d 460, 477 (Wis. 1992); *Jackson v. Benson*, 578 N.W.2d 602, 607 (Wis. 1998).

66. *See, e.g., D.C. CODE* § 38-1851.01 (2006) (only unchallenged school choice program).

II. WOULD PUBLICLY-FUNDED SCHOOL CHOICE VIOLATE GEORGIA'S CONSTITUTIONAL GUARANTEE TO PROVIDE AN ADEQUATE EDUCATION?

Many states have constitutional guarantees to education because education is a fundamental interest.⁶⁷ Such state guarantees often lead to challenges that publicly-funded school choice programs violate those provisions.⁶⁸

A. *School Choice and Constitutional Guarantees to Education in Other States*

1. *Wisconsin*

The Wisconsin Constitution states: "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein"⁶⁹

Founded in 1989, The Milwaukee Parental Choice Program (MPCP) provided Milwaukee students living in households with an income 1.75 times the poverty line or less with publicly-funded school choice.⁷⁰ Up to 1% of Milwaukee City Public School students may choose to have the district's cost of education per pupil spent at any non-sectarian private school in Milwaukee subject to the following limitations: the private school must meet health and safety codes, the school must abide by anti-discrimination laws, and the school must not have more than 49% of students receiving MPCP funds.⁷¹ As MPCP pitted public schools against private ones for state

67. See, e.g., GA. CONST. art. VIII § 1, para. 1.

68. Compare *Davis*, 480 N.W.2d at 477 and *Jackson*, 578 N.W.2d at 632 (upholding school choice under a constitutional right to education challenge), with *Owens*, 92 P.3d at 944 and *Bush*, 919 So.2d at 412 (striking down school choice programs for violating education rights guaranteed by state constitutions).

69. WIS. CONST. art. X, § 3.

70. WIS. STAT. § 119.23 (1989).

71. See *id.*

funding, it was twice challenged as violating Wisconsin's constitutional guarantee to a uniform education.⁷²

a. Davis v. Grover

In *Davis v. Grover*, the Wisconsin court recognized that the state constitution requires school districts to apply uniform instruction.⁷³ Based on the explicit definition of "private school" in Wis. Stat. 115.001(3r), the court concluded that private school participants in MPCP did not form a district, but rather remained autonomous.⁷⁴ The court reasoned that "the mere appropriation of public monies to a private school [does not] transform[] that school into a public school."⁷⁵ Thus, according to the *Davis* court, Wisconsin's uniformity clause is not applicable to private schools in Wisconsin participating in MPCP.⁷⁶

Nonetheless, the court stated that the uniformity clause establishes "minimal educational opportunities for the children of Wisconsin" and does not prevent the legislature from doing "more than that which is constitutionally mandated."⁷⁷ Ultimately, the court held that MPCP does not deprive students of their constitutional guarantee to uniform education as they could withdraw from MPCP to enroll in public school at any time.⁷⁸ Instead, the MPCP offers more than the constitutional minimum.⁷⁹

The dissent in *Davis* worried that the majority did not fully explore the constitutional issue.⁸⁰ First, the uniformity clause does not just grant authority to the legislature but "*compels*" it to create a specific system of district schools that are uniform across the state.⁸¹ Under

72. See *Davis*, 480 N.W.2d at 473; *Jackson*, 578 N.W.2d at 607.

73. *Davis*, 480 N.W. 2d at 473.

74. *Id.* at 473–74.

75. *Id.* at 474.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Davis*, 480 N.W. 2d at 474.

80. *Id.* at 481 n.1 (Abrahamson, J., dissenting).

81. *Id.* at 481.

the majority's reasoning, the State could disband the public school system and finance individuals' private education, which would shirk a fundamental state responsibility.⁸² The dissent noted that the idea that uniform public education could be used "as the means to strengthen democracy" and provide for a "unifying force for the citizens of diverse heritages" dates back to the constitutional debates of 1848.⁸³ Second, MPCP takes tax money earmarked for education to create a program in direct competition with public schools, thus not supplementing and improving the public school, as the majority claims.⁸⁴

b. Jackson v. Benson

After MPCP was substantially expanded in 1995 to include sectarian schools and to allow the possibility for a private school to be completely financed through public funds it was again challenged in *Jackson v. Benson*.⁸⁵ Relying on *Davis*, the court held that receiving public funds does not transform a private school into a public one; thus, the private participating schools do not have to be uniform.⁸⁶ Also, the court definitively held "art. X, § 3 provides not a ceiling but a floor upon which the legislature can build additional opportunities for school children in Wisconsin"⁸⁷

2. Colorado

The Colorado Constitution states: "The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the

82. *Id.*

83. *Id.* at 483.

84. *See id.* at 482; The majority/dissent debate on this point generally reflects the policy debate at large, and it hinges on the idea that if school choice can benefit public schools it is constitutional, and conversely if school choice weakens public schools it is unconstitutional.

85. *Jackson v. Benson*, 578 N.W.2d 602, 607 (Wis. 1998).

86. *Id.* at 627–28.

87. *Id.* at 628.

district. Said directors shall have control of instruction in the public schools of their respective districts.”⁸⁸

In 2003, Colorado created the Colorado Opportunity Contract Pilot Program (Pilot Program).⁸⁹ The Pilot Program was designed to meet “the educational needs of high-poverty, low-achieving children”⁹⁰ Students were eligible if they lived in a participating district for the previous year, qualified for free or reduced lunch, and performed at an “unsatisfactory” rate on any section of state standardized tests.⁹¹ The Pilot Program was also limited to 1% of a school district’s enrollment in the first year of its enactment.⁹² The student’s school district provided 75% of the school district’s per pupil operating revenue for children in grades one through eight who enrolled in a nonpublic school and 85% for high school students who enrolled in a nonpublic school.⁹³ The student could use the money at any nonpublic school that abided by health and safety laws, followed multiple anti-discrimination laws, and administered state-wide assessments.⁹⁴

Eight parents and the Colorado Association of School Boards challenged the program for “interfer[ing] with the local school districts’ discretion to allocate their funding, and therefore violat[ing] the Colorado Constitution.”⁹⁵

The Colorado Supreme Court declared that the Pilot Program violated this provision in *Owens v. Colorado Congress of Parents, Teachers and Students*.⁹⁶ After examining the history of the constitutional provision and 100 years of case law, the court held that article IX, section 15 of the Colorado Constitution empowered “the

88. COLO. CONST. art. IX, § 15.

89. COLO. REV. STAT. § 22-56-101 to -110 (2003). The statute was held unconstitutional by the Colorado Supreme Court on June 28, 2004 in *Owens v. Colorado Congress of Parents, Teachers & Students*, 92 P.3d 933 (Colo.), and repealed in 2006.

90. COLO. REV. STAT. § 22-56-102 (2003).

91. COLO. REV. STAT. § 22-56-104(2) (2003).

92. COLO. REV. STAT. § 22-56-104(5)(a)(I) (2003).

93. COLO. REV. STAT. § 22-56-108(2)(b) (2003).

94. COLO. REV. STAT. § 20-56-106 (2003).

95. *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 935 (Colo. 2004).

96. *Id.* at 944.

electors in each school district . . . with control over instruction through the creation of local school boards which would represent the will of their electorate.”⁹⁷ Furthermore, “[t]he Pilot Program violate[d] [those] principles by requiring the school districts to pay funds . . . [and] [b]y denying local districts discretion to allocate their locally-raised funds”⁹⁸

In concluding, the court dismissed school-choice proponents’ argument-of-necessity that the failure of public schools should empower the general assembly to take corrective action.⁹⁹ The court declared that the general assembly could “either . . . amend the constitution or enact [constitutional] legislation”¹⁰⁰

The dissent in *Owens* countered, “[s]chool districts—with or without the Pilot Program— are not ultimately responsible for the instruction that students receive at nonpublic schools.”¹⁰¹ Ultimately, local school boards retain complete control of their public schools with the Pilot Program in place.¹⁰² The dissent argued that holding otherwise requires misplaced reliance on precedent because the constitution’s language does not invalidate the Pilot Program.¹⁰³

3. *Florida*

The Florida Constitution states:

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

97. *Id.* at 943–44.

98. *Id.* at 943.

99. *Id.* at 943–44.

100. *Id.* at 944.

101. *Owens*, 92 P.3d at 950 (Kourlis, J., dissenting).

102. *See id.*

103. *Id.* at 951.

of free public schools that allows students to obtain a high quality education¹⁰⁴

In 1999, Florida created the Opportunity Scholarship Program (OSP).¹⁰⁵ The legislature found “a student should not be compelled, against the wishes of the student’s parent, to remain in a school found by the state to be failing for 2 years in a 4-year period.”¹⁰⁶ Any student attending or assigned to attend a school designated as failing two years in a four-year period is eligible for the scholarship.¹⁰⁷ The student may use the scholarship as full payment at any public school or a private school which demonstrates fiscal soundness, complies with local health and safety laws, follows multiple anti-discrimination requirements (although sectarian schools are included such schools cannot compel worship service attendance), and is accredited.¹⁰⁸

A group of concerned citizens challenged the statute as violating their constitutional guarantee to a “uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education.”¹⁰⁹

The *Bush* court recognized that Florida imposed the “maximum duty . . . to provide for [uniform, quality] education”¹¹⁰ The court explained that lesser provisions in other states may only require free public schools, a minimum standard of quality, or requirements with some execution specifics, but Florida explicitly mandated its educational requirements.¹¹¹ As revised in 1998, article IX, section 1(a), declares that education is a “fundamental value” and a “paramount duty” as well as specifying that “[a]dequate [education] shall be made by law for a uniform, efficient, safe, secure, and high

104. FLA. CONST. art. IX, § 1(a).

105. See FLA. STAT. § 1002.38 (2006); *Bush v. Holmes*, 919 So.2d 392, 400 n.3 (Fla. 2006).

106. FLA. STAT. § 1002.38 (2006).

107. *Id.*

108. *Id.*

109. *Bush*, 919 So.2d at 397–98 (quoting FLA. CONST. art. IX, § 1(a)).

110. *Id.* at 404.

111. See *id.* at 404–05.

quality system of free public [education]”¹¹² The Supreme Court of Florida held “OSP violates this provision by devoting the state’s resources to the education of children . . . through means other than a system of free public schools.”¹¹³ Furthermore, the court concluded that OSP undermines “high quality” education by reducing public education funding.¹¹⁴ Finally, the “uniform” mandate is subverted because private schools are not regulated as public schools.¹¹⁵

Though the legislature’s discretion is the standard limit on legislative power, it cannot exceed an explicit constitutional restriction.¹¹⁶ In deciding the legislature exceeded such restrictions, the court found the omission of constitutional language in the legislative findings to be “crucial.”¹¹⁷ The court used the maxim “*expressio unius est exclusio alterius*,’ or ‘the expression of one thing implies the exclusion of another’” in reaching its decision.¹¹⁸ Because the Florida Constitution mandates a system of free public education, it implicitly excludes other options, like OSP.¹¹⁹

Finally, the court distinguished *Davis v. Grover* by showing that the Wisconsin Constitution article X does not contain “paramount duty” language.¹²⁰ Wisconsin’s Constitution merely required public schools be free and as uniform “as possible,” which gives the state freedom to enact different programs.¹²¹ Florida’s Constitution, on the other hand, mandates a series of specific requirements, which as stated above, exclude innovations such as OSP.¹²² In essence, different states have provided citizens with different degrees of

112. *Id.* at 403 (citing FLA. CONST. art. IX, § 1(a)) (emphasis removed).

113. *Id.* at 407.

114. *Id.* at 409 (internal quotation marks omitted).

115. *Bush*, 919 So.2d at 409 (holding private schools are not controlled or regulated by the legislature, which means curriculum and teachers are not subject to the same standards as public schools) (internal quotation marks omitted).

116. *Id.* at 406.

117. *Id.*

118. *Id.* at 407 (emphasis added).

119. *Id.*

120. *Id.* at 407 n.10.

121. WISC. CONST. art. X, §3.

122. *Bush*, 919 So.2d at 407.

protection for education, and Florida's Constitution is more restrictive than other states.¹²³

The dissent countered that the plain meaning of the state constitution should have been the sole instrument of interpretation, stating:

The clear purpose behind article IX is to ensure that every child in Florida has the opportunity to receive a high-quality education and to ensure access to such an education by requiring the Legislature to make adequate provision for a uniform system of free public schools. There is absolutely no evidence before this Court that this mandate is not being fulfilled.¹²⁴

The dissent further opined that if Florida wanted to prevent public monies from funding private education, it could have explicitly prohibited it as the constitutions of Mississippi, South Carolina, Alaska, California, Hawaii, Kansas, Michigan, Nebraska, New Mexico and Wyoming do.¹²⁵

B. Georgia's Constitutional Guarantee to Adequate Education and School Choice

1. Comparisons to Wisconsin, Colorado, and Florida

The Georgia Constitution states:

The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia. Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation. The

123. *Id.*

124. *Bush*, 919 So.2d at 425 (Bell, J., dissenting).

125. *Id.* at 416 n.17 (MISS. CONST. art. 8, § 208; S.C. CONST. art. XI, § 4; ALA. CONST. art. VII, § 1; CAL. CONST. art. IX, § 8; HAW. CONST. art. 10, § 1; KAN. CONST. art. 6, § 6(C); MICH. CONST. art. VII, § 2; NEB. CONST. art. VII, § 11; N.M. CONST. art. VII, § 2; WYO. CONST. art. VII, § 4).

expense of other public education shall be provided for in such manner and in such amount as may be provided by law.¹²⁶

School choice opponents could claim that by financing private education the state shirks its “primary obligation” to provide adequate public education by relinquishing control to the private schools.¹²⁷ As the dissent in *Davis* noted, the “Adequate Education” guarantee of Georgia’s constitution creates an obligation, not just a grant of authority.¹²⁸ More specifically, by taking funds from public schools the state undermines its own obligation to provide education.¹²⁹

Opponents could further challenge the program by showing that Georgia’s constitution explicitly guarantees that education be “adequate[.], . . . free[.], . . . and . . . provided for by taxation.”¹³⁰ If the program deviates from those constitutional guarantees it would be invalid.¹³¹ For example, opponents of school choice could claim that the creation of a voucher program is an implicit admission that the current system is inadequate. Similarly, under this Georgia specific hypothetical, opponents could claim that education is no longer free. Though the government gives the parents money for education, the funds technically would become the parents, at least in order to comply with the Zelman straw-man requirements, and the parents then have to spend the money for schooling, which could violate the Georgia constitution.

Proponents could first argue that Georgia Constitution article VIII, section 1, paragraph 1, would not apply because, like in *Davis* and

126. GA. CONST. art. VIII, § I para. I.

127. See *id.* (providing that the state has the primary obligation to provide adequate public education); *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 936 (Colo. 2004) (accepting plaintiffs’ argument that the “Pilot Program violates the local [constitutional] control requirements because it directs the school districts to turn over . . . locally-raised funds to nonpublic schools over . . . [which they have] no control”).

128. Cf. GA. CONST. art. VIII § I para. I; *Davis v. Grover*, 480 N.W.2d 460, 481 n.2 (Wis. 1992) (Abrahamson, J., dissenting) (citing *Outagamie County v. Zuehlke*, 161 N.W. 6 (Wis. 1917)).

129. *Owens*, 92 P.3d at 936.

130. Cf. GA. CONST. art. VIII, § I para. I; FLA. CONST. art. IX, § 1(a).

131. See *Bush v. Holmes*, 919 So.2d 392, 412 (Fla. 2006).

Jackson, private schools are their own entities independent of public school.¹³² In fact, Georgia, just like Wisconsin, has a statutory definition of private schools imposing certain requirements on private schools.¹³³

If the school choice program were constrained by the adequate education provision, proponents could further argue school choice would not deny any student an adequate, free, tax- funded education because the child would choose to leave a public school, and the public schools would still be ready, willing, and able to accept a returning student.¹³⁴ This argument is plausible because Georgia has a less specific educational constitutional mandate.¹³⁵ For example, Georgia only requires that education be free and adequate, whereas Florida requires a uniform, efficient, safe, secure, and high quality system of free public schools.¹³⁶ Therefore, the Georgia legislature has greater discretion in implementing public education, which could include school choice.¹³⁷

As Georgia's guarantee is "adequate" education, the argument-of-necessity that school choice is needed because public schools are failing, as used in *Owens*, could work.¹³⁸ Theoretically, if the General Assembly found certain public school districts to be inadequate, failing to act would be unconstitutional and the legislature may actually be required to offer school choice in addition to other statutory options.¹³⁹

132. See *Davis*, 480 N.W.2d at 474 (holding "[m]ere appropriation of public monies to a private school [does not] transform[] that school in to a public school"); *Jackson v. Benson*, 578 N.W.2d 602, 621-23 (Wis. 1998) (holding the choice program valid using similar reasoning).

133. Cf. WIS. STAT. §§ 118.165, 118.167 (2004); O.C.G.A. § 20-2-690(b) (2005).

134. See *Davis*, 480 N.W.2d at 474; *Jackson*, 578 N.W.2d at 628.

135. Compare FLA. CONST. art. IX, § 1(a) with GA. CONST. art. VIII, § 1 para. I.

136. *Id.*

137. See *id.*

138. See *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 938 (Colo. 2004).

139. See O.C.G.A. § 20-14-41 (2006) (establishing procedures for handling failing schools, including replacing public schools with charter schools).

2. *Relevant Georgia Material*

In 1981, the Georgia Supreme Court addressed the General Assembly's authority to alter education under Georgia Constitution article VIII, section 1, paragraph 1 in *McDaniel v. Thomas*.¹⁴⁰ In *McDaniel*, a group of parents brought a claim "alleging that the existing system of financing public education . . . deprive[d] the children . . . of an 'adequate education' in contravention of Art. VIII, Sec. I, Par. I."¹⁴¹ The financing system allowed local school districts to contribute additional funds to education through local property tax, and as some school districts received more taxes, a disparity arose.¹⁴²

The court rejected the plaintiffs' claim that the state failed to provide an adequate education.¹⁴³ The court reasoned that the constitution obligates imposing a tax for the maintenance of public education and that the education must be adequate, but there is not an express obligation to provide equal educational opportunities.¹⁴⁴ "[T]he 'adequate education' provisions of the constitution do not restrict local school districts from doing what they can to improve educational opportunities within the district, nor do they require the state to equalize educational opportunities between districts."¹⁴⁵ Under the *McDaniel* court's reasoning, a publicly-funded school choice program would not have to be uniform, as the constitution establishes a floor, not a ceiling, leaving the legislature to enact programs providing a non-uniform, but better than adequate education.¹⁴⁶

Furthermore, Georgia Constitution article VIII, section 5, paragraph vii states, "The General Assembly may provide by law for the creation of special schools in such areas as may require them and

140. *McDaniel v. Thomas*, 285 S.E.2d 156, 157 (Ga. 1981).

141. *Id.*

142. *Id.* at 160.

143. *Id.* at 165.

144. *Id.* at 166.

145. *Id.* at 164.

146. *McDaniel*, 285 S.E.2d 156, at 164; *see also* *Davis v. Grover*, 480 N.W.2d 460, 474 (Wis. 1992) (holding that the choice program "merely reflects a legislative desire to do more than that which is constitutionally mandated.").

may provide for the participation of local boards of education in the establishment of such schools under such terms and conditions as it may provide”¹⁴⁷ Using a plain-meaning approach, this provision gives the legislature the authority to create “special schools” as needed, and participating private schools could be those special schools.¹⁴⁸ Furthermore, the state could make those decisions without local school board approval because the Georgia Constitution uses the permissive “may,” which implies that the State can exclude local school boards.¹⁴⁹ The permissive language in Georgia’s Constitution distinguishes it from Colorado’s Constitution, where the local school board is required to be involved in all schools.¹⁵⁰ In other words, the more fluid language of the Georgia constitution could enable the state to create a voucher system which bypasses the local school board, a feat the Colorado legislature could not do because of that state’s more restrictive constitution.¹⁵¹

C. Summary of the Limitations on School Choice Established by Georgia’s Constitution

More likely than not, a school choice program would not violate Georgia’s constitutional guarantee to an adequate education.¹⁵² Georgia’s constitution is distinguishable from Florida’s in that Georgia does not dictate as many specifics of how education is to be provided.¹⁵³ Georgia’s constitution is distinguishable from Colorado’s in that Georgia grants educational authority to the state and not to local districts.¹⁵⁴ Ultimately, Georgia’s constitution parallels Wisconsin’s, as they both provide base, “floor”

147. GA. CONST. art. VIII, § 5, para. vii.

148. *See id.*

149. *See id.*

150. *Compare* GA. CONST. art. VIII, § 5, para. vii, *with* COLO. CONST. art. IX, § 15 (stating that “[t]he general assembly shall, by law, provide for organization of school districts . . . in which shall be established a board of education”) (emphasis added).

151. *Compare* GA. CONST. art. VIII, § 5, para. vii, *with* COLO. CONST. art. IX, § 15.

152. *See supra* Part II.B.

153. *See id.*

154. *See id.*

requirements, which the legislature can exceed.¹⁵⁵ Case law, statutes, and other constitutional provisions grant legislative freedom to provide school choice.¹⁵⁶

III. CAN GEORGIA INCLUDE SECTARIAN PRIVATE SCHOOLS IN A PUBLICLY-FUNDED SCHOOL CHOICE PROGRAM?

*A. Federal Considerations: "Congress shall make no law respecting an establishment of religion"*¹⁵⁷

The United States Supreme Court in *Zelman v. Simmons-Harris* held that a publicly-funded school choice program can include religious schools provided the program is of "true private choice."¹⁵⁸

This holding regarding the Establishment Clause and school choice had a long history. The *Zelman* saga actually began in 1995 when a federal district court declared the existence of a "crisis of magnitude" stemming from the Cleveland school district's failure to meet any of the eighteen state standards for minimal performance.¹⁵⁹ Consequently, the court mandated state control of the school district.¹⁶⁰ The Ohio legislature then enacted the Pilot Project Scholarship Program (Program), which applied to any school district that is under state control as a result of a court order.¹⁶¹ Families with an income of 200% of the poverty line receive more scholarship money, but the scholarships are available to everyone in the district.¹⁶² Scholarships can be used at any public school in an adjacent district or any private school that is within the pilot project

155. *See id.*

156. *See id.*

157. U.S. CONST. amend. I.

158. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).

159. *Id.* at 644 (citing *Reed v. Rhodes*, 1 F. Supp. 2d 705 (N.D. Ohio 1998)).

160. *Reed*, 1 F. Supp. 2d at 710.

161. OHIO REV. CODE ANN. § 3313.975 (2006).

162. OHIO REV. CODE ANN. § 3313.978(B) (2006). For grades K–8, the scholarship amount is the lesser of \$3000 or the tuition at the alternative school, and for grades 8–12 the scholarship is the lesser of \$2700 or the tuition at the alternative school. *Id.* § 3313.976(A)(8)–(10). Families with incomes under 200% of the poverty line receive 95% of the scholarship, and families at or above the 200% mark receive 75% of the scholarship. *Id.* § 3313.978.

school district, abides by anti-discrimination laws, accepts the scholarship as full tuition, and has at least ten students in every class or twenty-five students enrolled in all the classes offered.¹⁶³ Grants to adjacent public schools are paid directly to the public school, but grants to private schools are mailed to the parents, who must restrictively endorse the check to the private school.¹⁶⁴

A group of Ohio taxpayers sought “to enjoin the reenacted program on the ground that it violated the Establishment Clause of the United States Constitution.”¹⁶⁵ The Court first examined precedent: “*Mueller, Witters, and Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.”¹⁶⁶ The Court then recognized the program was truly neutral because students could freely choose from among public (magnet, charter, and adjacent districts), non-sectarian, and sectarian private schools.¹⁶⁷

Though *Zelman* is the only true authority for analysis, Washington D.C.’s unchallenged program is indicative of how school choice programs must be constructed to comply with the Establishment Clause.¹⁶⁸ In 2004, Washington D.C. passed the D.C. Opportunity

163. OHIO REV. CODE ANN. § 3313.976 (2006).

164. OHIO REV. CODE ANN. § 3313.979 (2006).

165. *Zelman v. Simmons-Harris*, 536 U.S. 639, 648 (2002).

166. *Id.* at 652; *see also Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (stating 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 . . .” when it affirmed a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools); *Witters v. Washington Dep’t. of Servs. for the Blind*, 474 U.S. 481, 489 (1986) (reasoning that state approval is not manifested through allowing individual choice when it allowed a vocational scholarship to fund a student’s religious education); *Mueller v. Allen*, 463 U.S. 388, 402 (1983) (rejecting an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses, including sectarian private school tuition).

167. *Zelman*, 536 U.S. at 653.

168. *See D.C. CODE ANN.* § 38-1851.01 (2006).

Scholarship Program for its school district.¹⁶⁹ The statute commissioned an independent organization to administer the program, which gives students up to \$7500 to use at any private school.¹⁷⁰ The law explicitly states that these funds are a benefit to the student and not the receiving school, and that language re-emphasizes how *Zelman* mandates the straw-man distribution to parents, so that the government is not directly benefiting religious organizations.¹⁷¹ Last year, the program spent \$12 million at 54 private schools.¹⁷² The program has not been legally challenged in court.

Georgia, like Washington D.C., could base the constitutionality of its school choice program on *Zelman*, which established the appropriate jurisprudence when the Supreme Court held that Ohio's school choice program included without violating the Federal Establishment Clause by allocating the aid "on the basis of neutral secular criteria."¹⁷³ Thus, *Zelman* provides the blueprints for how to build Constitutional school choice programs; Washington D.C. has enacted a program following that jurisprudence, and Georgia should look to these two examples for how to abide by federal constitutional limitations on school choice.

B. State Restrictions on State Monies and Sectarian Education: The Blaine Amendment

1. History of Blaine Amendments

In 1875, James Blaine, former Speaker of the House of Representatives and presidential hopeful, proposed an amendment to

169. D.C. CODE ANN. §§ 38-1851.01-.11 (2006); see also INST. FOR JUSTICE, NATIONAL SCHOOL CHOICE TIMELINE: VICTORIES FUEL MOMENTUM FOR EDUCATIONAL OPPORTUNITY (May 2005), http://ij.org/pdf_folder/school_choice/enrollment_timeline.pdf.

170. D.C. CODE ANN. § 38-1851.06 (2006).

171. D.C. CODE ANN. § 38-1851.07(e) (2006).

172. Valarie Strauss, *Fate of D.C. Voucher Program Darkens*, WASH. POST, June 9, 2008, at B1.

173. *Zelman*, 536 U.S. at 653-54.

the United States Constitution.¹⁷⁴ His amendment was designed to restrict government influence in religious issues within the states.¹⁷⁵ Because the First Amendment had yet to be interpreted to apply to the states through the Fourteenth Amendment, Blaine's proposal would have been innovative in limiting such faith-government interplay.¹⁷⁶ More specifically, Blaine's amendment would prohibit states from funding religious schools.¹⁷⁷ The proposed amendment read as follows:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.¹⁷⁸

Though Blaine had a legitimate motive in structuring federalism, his amendment was also an attempt to win the presidential nomination by soliciting anti-catholic prejudices.¹⁷⁹ The social Protestant majority of 1875 resented Irish-Catholic immigrants, and by destroying Catholic schools through denying funding, Protestants thought they could force Catholics to assimilate into Protestant culture.¹⁸⁰ In essence, the amendment would have ensured that Catholics could not receive state funding for Catholic schools, and since they could not afford to pay taxes and create their own private

174. See Frank J. Conklin & James M. Vaché, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. PUGET SOUND L. REV. 411, 431–33 (1985); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J. L. & PUB. POL'Y 551, 556–57 (2003).

175. DeForrest, *supra* note 174, at 556–57.

176. *Id.*

177. *Id.*

178. Conklin & Vaché, *supra* note 174, at 431–32 (quoting H.R.J. Res. 1, 44th Cong., 4 CONG. REC. 205 (1875) (statement of Rep. Blaine)).

179. DeForrest, *supra* note 174, at 557, 565.

180. *Id.* at 564–65.

schools, Catholics would be forced into the primarily-Protestant public schools.¹⁸¹ Blaine's amendment was strategically marketed to the Protestant majority; however, the amendment fell short of being ratified in the Senate.¹⁸² Though defeated, the Blaine amendment was not destroyed, and by the 1890s nearly thirty states had amended their constitutions with Blaine-style amendments.¹⁸³

2. *Versions of Blaine Amendments*

Around thirty states still have a variation of Blaine's amendment in their constitutions.¹⁸⁴ The least restrictive of these amendments give states some freedom in working with religion, while the most restrictive bar any collaboration between state and denomination.¹⁸⁵ Blaine amendments falling in the middle provide an assortment of limitations and allowances.¹⁸⁶

The least restrictive Blaine amendments seek to keep primary and secondary education free of sectarianism by preventing state funds from directly supporting sectarian institutions.¹⁸⁷ These provisions do allow direct state aid to sectarian institutes of higher education (i.e., scholarships to private universities) and indirect aid to sectarian

181. *Id* (describing one encounter where "the Catholic bishop of New York advocated public funding of the parochial school system in that state. In response a mob burned down his house and state troops had to be called out to defend the bishop's cathedral from attack").

182. *Id.* at 565, 573.

183. *Id.* at 573.

184. ALA. CONST. art. XIV, § 263; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. IX, § 10; ARK. CONST. art. XIV, § 2; COLO. CONST. art. V, § 34; DEL. CONST. art. X, § 3; FLA. CONST. art. I, § 3, art. IX, § 6; GA. CONST. art. I, § 2, para. 7; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 5; IND. CONST. art. I, § 6; KY. CONST. §§ 186, 189; MASS. CONST. amend. XVIII, § 2; MICH. CONST. art. I, § 4, art. VIII, § 2; MINN. CONST. art. I, § 16, art. XIII, § 2; MISS. CONST. art. VIII, § 208; MO. CONST. art. I, § 7, art. IX, §§ 5, 8; NEB. CONST. art. VII, § 11; NEV. CONST. art. XI, § 2; N.J. CONST. art. VIII, § 4, para. 2; N.M. CONST. art. XII, § 3; N.Y. CONST. art. XI, § 3; N.C. CONST. art. V, § 12, art. IX, § 6; N.D. CONST. art. VIII, § 1; OKLA. CONST. art. II, § 5, art. XI, § 5; S.D. CONST. art. VIII, § 16; TEX. CONST. art. VII, § 5; VA. CONST. art. VIII, § 10; WASH. CONST. art. I, § 11, art. IX, § 4; WIS. CONST. art. X, § 6; WYO. CONST. art. VII, § 12.

185. DeForrest, *supra* note 174, at 577.

186. *Id.*

187. *Id.*

primary and secondary schools (i.e., school choice vouchers given to parents who may choose to use it at sectarian schools).¹⁸⁸

Moderate Blaine amendments typically bar funding sectarian schools directly but leave open the possibility of indirect funding through vouchers or tax credits.¹⁸⁹

Finally, the most restrictive Blaine amendments prevent both direct and indirect funding.¹⁹⁰ Some of these most restrictive amendments only target education, but others extend to any sectarian institute.¹⁹¹

3. *Impact of Blaine Amendments*

Blaine amendments have provided a cause of action against publicly-funded school choice programs twice.¹⁹²

a. *Jackson v. Benson*

In 1995, Wisconsin expanded the Milwaukee Parental Choice Program (MPCP) by removing the nonsectarian limitation; in conjunction, the state no longer paid schools directly but paid the parents or guardians, who then endorsed the check to the school.¹⁹³ Additionally, an opt-out provision was added to prohibit compulsory attendance at religious activities.¹⁹⁴

In *Jackson v. Benson*, the Wisconsin Supreme Court weighed the MPCP against Wisconsin Constitution article I, section 18 (Wisconsin's Blaine amendment), which states:

The right of every person to worship Almighty God according the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect, or support any place of

188. *See id.* at 577–78, nn.210–213 (discussing *Bush v. Homes*).

189. *Id.* at 578, 582.

190. *Id.* at 587.

191. *Id.*

192. *See Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998); *Bush v. Holmes*, 886 So.2d 340, 352 (Fla. App. 2004), *aff'd*, 919 So.2d 392 (Fla. 2006) (refusing to address specific issue of the Blaine amendment).

193. *Jackson*, 578 N.W.2d at 608–09.

194. *Id.* at 609.

worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference by given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.¹⁹⁵

The court first addressed the “benefits clause,” which provides, “nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.”¹⁹⁶ The court focused on whether the primary effect of MPCP was to benefit religious organizations, rendering the MPCP unconstitutional.¹⁹⁷ The court held MPCP was neutral towards religion because parents choose how to allocate funds.¹⁹⁸

Second, the court addressed the “compelled support” clause, which provides, “nor shall any person be compelled to attend, erect, or support any place of worship or to maintain any ministry, without consent.”¹⁹⁹ The plaintiffs argued that “since public funds eventually flow to religious institutions under the amended MPCP, taxpayers are compelled to support places of worship,” but the court rejected this argument as identical to the benefits clause.²⁰⁰ Furthermore, MPCP specifically ensures that no students will be forced to participate in any religious activity, which reiterates the individual, non-compelled nature of the program.²⁰¹

195. *Id.* at 620, n.20 (emphasis added).

196. *Id.* at 620 (quoting WIS. CONST. art. I, § 18).

197. *Id.* at 621.

198. *Id.*

199. *Jackson*, 578 N.W.2d at 622 (quoting WIS. CONST. art. I, § 18).

200. *Id.* at 622–23.

201. *Id.* at 623.

b. Bush v. Holmes

In *Bush v. Holmes*, the Florida Court of Appeals addressed the effect of the Florida Blaine amendment on a school choice program.²⁰² Florida's Blaine amendment states:

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.*²⁰³

Though the court found the first two sentences to be equivalent to the federal Establishment Clause, the third sentence (direct/indirect restriction) is "far stricter."²⁰⁴ This no-aid provision was enacted in the 1868 Florida Constitution during the "Blaine Amendment" movement; thus, its primary purpose "was to bar the use of public funds to support religious schools" in any manner.²⁰⁵ Thus, Florida's stricter standard is violated when sectarian institutions receive any benefit, such as an increase in student enrollment, notoriety, or financing, even when the straw-man of parental choice, deemed acceptable in *Zelman*, indirectly confers that benefit.²⁰⁶

C. Effect of Georgia's Blaine Amendment

Georgia's Blaine Amendment states, "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution."²⁰⁷

202. See generally *Bush v. Holmes*, 886 So.2d 340, 352 (Fla. App. 2004).

203. FLA. CONST. art. I, § 3 (emphasis added).

204. *Bush*, 886 So. 2d at 359–60.

205. *Id.* at 348–49.

206. *Id.* at 352–53.

207. GA. CONST. art. I, § II, para. vii.

Thus, Georgia's Blaine Amendment prevents including sectarian institutions in school choice.²⁰⁸ Governor Sonny Perdue, in his Faith and Family Services movement, recognized that "vouchers would still be constitutional in Georgia as long as they are not used in Parochial Schools."²⁰⁹

Furthermore, the Georgia Attorney General has long recognized the Blaine Amendment is "intended to have a stronger application than the First Amendment to the United States Constitution."²¹⁰ Also, the Georgia Attorney General issued an opinion advising that the Georgia Supreme Court would consider a contract for services between a public school and a nonpublic sectarian school unconstitutional.²¹¹

These conclusions could likely be based on the "direct or indirect" restriction of the Amendment.²¹² Florida's court of appeals found the state's Blaine Amendment to be the most restrictive, and the language of Georgia's amendment closely parallels Florida's.²¹³ Evidencing a similarly strict reading of Georgia's amendment, the Georgia Supreme Court issued an injunction against the city of LaGrange to stop the city from contracting out the care of its poor to the Salvation Army.²¹⁴ The court stated:

So when the City of LaGrange made the contract with the Salvation Army, by which the latter, a sectarian institution, assumed the care of the poor of that city although at actual cost, this was giving a great advantage and the most substantial aid to

208. *See id.*

209. GOVERNOR SONNY PERDUE, FAITH AND FAMILY SERVICES CONSTITUTIONAL AMENDMENT BRIEFING, http://gov.georgia.gov/vgn/images/portal/cit_79369762/92324782faith_services_amend.pdf (last visited June 2, 2008).

210. *Id.* at 12 (quoting Ga. Op. Att'y Gen. 349 (1960)).

211. Ga. Op. Att'y Gen. No. 69-125 (1969).

212. GA. CONST. art. I, § II, para. vii.

213. Compare FLA. CONST. art. I, § 3 (stating "[n]o 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") with GA. CONST. art. I, § II, para. vii (stating "[n]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution").

214. *Bennett v. City of La Grange*, 112 S.E. 482, 484 (Ga. 1922).

the Salvation Army in the prosecution of its benevolent and religious purposes. The giving of loaves and fishes is a powerful instrumentality in the successful prosecution of the work of a sectarian institution. So we are of the opinion that the taking of money from the public treasury of the City of LaGrange, in payment to the Salvation Army for its care of the poor of that city, amounts to the taking of money from its treasury, directly and indirectly, in aid of this sectarian institution, in violation of this provision of the Constitution of Georgia.²¹⁵

Thus, as the Blaine Amendment presently stands, sectarian schools would be excluded from a school choice program; however, Governor Perdue has previously tried to revive his Faith and Family Services Amendment, which would equate the Blaine Amendment to federal establishment clause jurisprudence.²¹⁶ Especially telling of the effect Georgia's Blaine Amendment would have on School Choice is the fact that in 2005 the Amendment failed in the House, after passing in the Senate, because Democrats feared "[it] would tear down a constitutional barrier to religious school vouchers."²¹⁷

IV. CAN GEORGIA EXCLUDE SECTARIAN PRIVATE SCHOOLS IN A PUBLICLY-FUNDED SCHOOL CHOICE PROGRAM?

Maine has been the front line for adjudicating whether a state may exclude sectarian schools from publicly-funded choice programs without violating the United States Constitution.²¹⁸

215. *Id.* at 486–87.

216. Governor Sonny Perdue, *Faith and Family Services*, http://www.gov.state.ga.us/issues_gov/faith.shtml (last visited June 2, 2008).

217. Tom Baxter & Jim Galloway, *Faith-based, Part II: Down to Squeezing Blood from a Few Rocks*, ATLANTA J.-CONST., Mar. 8, 2005, at B4, available at <http://www.ajc.com/search/content/metro/insider/0305/030805.html>.

218. See, e.g., *Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004); *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999); *Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006), *cert. denied*, 127 S.Ct. 661 (2006); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me. 1999).

A. *School Choice in Maine*

In 1873, Maine passed the Free High School Act, a precursor to the present choice program.²¹⁹ Since then, Maine has allowed school districts to pay another school district or independent school to take its residents in lieu of opening and operating its own system.²²⁰ This practice of paying another school to take students is known as “tuitioning,” and offers a financially attractive alternative to school districts that have a small number of students.²²¹

Students may be tuitioned to public schools in other districts, private non-sectarian schools, or out-of-state schools if the district in which they reside does not operate a school, operates a school that has less than ten students, operates a school that offers insufficient courses (i.e., not enough foreign languages), or the students live too far from the school.²²²

The Maine tuitioning system included sectarian schools until 1980, when Richard S. Cohen, Attorney General of Maine, issued an opinion advising the legislature that allowing tuitioning at sectarian schools violated the Establishment Clause.²²³ Consequently, the legislature amended the tuitioning laws to exclude sectarian schools in 1981.²²⁴

219. CHRISTOPHER HAMMONS, FRIEDMAN FOUND., *SCHOOL CHOICE ISSUES IN DEPTH: THE EFFECTS OF TOWN TUITIONING IN VERMONT AND MAINE* 8 (2002), available at <http://www.friedmanfoundation.org/friedman/downloadFile.do?id=61>.

220. *Id.* at 5.

221. *Id.* at 9.

222. ME. REV. STAT. ANN. tit. 20-A, § 5203 (1993) (addressing elementary students’ right to attend schools in other administrative units); ME. REV. STAT. ANN. tit. 20-A, § 5204 (1993) (addressing secondary students’ right to attend schools in other administrative units).

223. Me. Op. Att’y. Gen. 80-2 (1980) (basing the opinion on *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1972), a decision invalidating a New York statute authorizing a tuition tax-break for parents and funds for maintenance and repairs at schools).

224. ME. REV. STAT. ANN. tit. 20-A, § 2951 (1993); see also *Bagley v. Raymond Sch. Dep’t*, 728 A.2d 127, 138 (Me. 1999).

B. Case Law from Maine

1. Bagley v. Raymond School Department

In 1999, five families alleged that their constitutional rights were infringed by a “tuition program that specifically exclude[d] religious schools”²²⁵ The Supreme Court of Maine answered the question “whether a tuition program that specifically excludes religious schools violates any of three constitutional provisions: the Establishment Clause of the First Amendment; the Free Exercise Clause of the First Amendment; or the Equal Protection Clause of the Fourteenth Amendment.”²²⁶

*a. Free Exercise Clause: “Congress shall make no law . . . prohibiting the free exercise [of religion . . .]”*²²⁷

The court assumed *arguendo* that there were material disputes as to whether Catholic schooling was a central religious belief, but rejected parents’ claims that the challenged regulation substantially burdened their exercise of religion.²²⁸ The court reasoned that a law which made a faith practice more expensive was not a substantial burden.²²⁹ The plaintiffs “were no more impaired in their efforts to seek a religious education for their sons than are parents of children in school districts that provide only a free nonreligious education in public schools.”²³⁰

225. *Bagley*, 728 A.2d at 131–32.

226. *Id.*

227. U.S. CONST. amend. I.

228. *Bagley*, 728 A.2d at 133–35.

229. *Id.* at 134 (citing *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995)).

230. *Id.* at 135.

*b. Establishment Clause: "Congress shall make no law respecting an establishment of religion. . . ."*²³¹

As the Establishment Clause prohibits government supported religion, "[i]t simply does not speak to government actions that fail to support religion;" thus, this claim was dismissed in *Bagley*.²³²

*c. Equal Protection: no state may deny "to any person within its jurisdiction the equal protection of the laws."*²³³

In addressing the issue of whether parents who wished to send their children to excluded religious schools could sustain an Equal Protection claim, the court held that the state could exclude religious schools, stating a the program without that exclusion would likely violate the Establishment Clause.²³⁴ Further, the majority felt that the level of scrutiny applied was irrelevant because the state interest of providing education was so compelling.²³⁵ Thus, the state was allowed to exclude sectarian schools.²³⁶

The dissent advocated that excluding sectarian schools is blatant discrimination, so strict scrutiny should apply.²³⁷ The dissent further reasoned that other tuitioning programs included religious schools and yet did not violate the Establishment Clause.²³⁸ Thus, since the program could have maximized school choice within the bounds of the Establishment Clause but did not, the dissent concluded that the program was not narrowly tailored and thus failed strict scrutiny review.²³⁹

231. U.S. CONST. amend. I.

232. *Bagley*, 728 A.2d at 136.

233. U.S. CONST. amend. XIV, § 1.

234. *Bagley*, 728 A.2d at 138.

235. *Id.*

236. *Id.* at 147.

237. *Id.* at 148 (Clifford, J., dissenting).

238. *Id.* at 150.

239. *Id.*

2. Strout v. Albanese

In 1999, the First Circuit was called to answer “whether Maine is constitutionally required to extend subsidies to sectarian schools.”²⁴⁰ “Plaintiffs-Appellants [were] the parents of students who [were] otherwise qualified to receive the [tuitioning] benefits . . . except that they [had] chosen to send their children to private sectarian schools.”²⁴¹

a. *Establishment Clause*

Plaintiffs argued that the Maine tuitioning program violated the Establishment Clause because it was hostile, rather than neutral, towards religion because it “exclude[d] otherwise eligible sectarian schools from the program based solely on the religious viewpoint presented by these schools.”²⁴² The court, however, held that the tuitioning laws complied with the Establishment Clause because there was no binding authority that “the direct payment of tuition by the state to a private sectarian school is constitutionally permissible.”²⁴³ While courts have permitted limited funds to flow to religious schools,²⁴⁴ the broad funding the plaintiffs sought was a “breach in the wall separating the State from secular establishments [and] is a

240. Strout v. Albanese, 178 F.3d 57, 60 (1st Cir. 1999).

241. *Id.* at 59.

242. *Id.* at 60.

243. *Id.* at 60–61.

244. See generally *Agostini v. Felton*, 521 U.S. 203 (1997) (upholding a program in which disadvantaged children received supplemental services on the premises of sectarian schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (holding that providing a deaf student with a government-paid sign language interpreter who accompanies the student to classes in a sectarian school does not violate the Establishment Clause); *Witters v. Washington Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986) (holding that the extension of aid to a blind student under a state vocational program by making direct payments to a student enrolled in a sectarian college does not violate the Establishment Clause); *Mueller v. Allen*, 463 U.S. 388 (1983) (holding that a state law allowing taxpayer-parents to deduct certain educational expenses in computing their state income tax does not violate the Establishment Clause even with regard to children attending sectarian schools); *Tilton v. Richardson*, 403 U.S. 672 (1971) (holding that a federal statute providing grants to universities for the construction of buildings and facilities may be applied to sectarian institutions); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968) (holding that the state may lend non-sectarian textbooks to parochial schools).

task best left for the Supreme Court. . . .”²⁴⁵ Furthermore, the court stated that “the Establishment Clause forbids the making of laws respecting the establishment of any religion” and has not been used as a negative prohibition . . . extending the right of a religiously affiliated group to secure state subsidies.”²⁴⁶

b. Free Exercise Clause

Plaintiffs also argued that they were not allowed to exercise their faith because the tuitioning program did not apply to sectarian schools; however, the court concluded that the Free Exercise Clause is not implicated because it is “written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.”²⁴⁷

If the Free Exercise Clause was implicated, the court concluded that plaintiffs’ claim would still fail for four reasons.²⁴⁸ “First, at least some of the parents in this litigation eschew *any* religious motivation for” attending sectarian schools.²⁴⁹ Second, the Free Exercise Clause inquiry asks “whether the government has placed a substantial burden on the observation of a *central belief or practice*,” and “education at a parochial school is not such a belief” mandated by the Roman Catholic Church.²⁵⁰ Third, the law “does not prevent attendance at a religious school,” but merely makes the parents bear that cost.²⁵¹ Fourth, the law was not anti-religion, but was complying with the Establishment Clause.²⁵²

245. *Strout*, 178 F.3d at 64.

246. *Id.*

247. *Id.* at 65 (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

248. *Id.* at 65.

249. *Id.*

250. *Strout*, 178 F.3d at 65.

251. *Id.*

252. *Id.*

c. *Equal Protection Clause*

Plaintiffs additionally argued that they were discriminated against on the basis of religion; however, the state's compelling interest in avoiding an Establishment Clause violation passed a strict scrutiny analysis.²⁵³ The court reasoned that "[t]he state cannot be in the business of directly supporting religious schools."²⁵⁴

3. *Eulitt v. Maine Department of Education*

After the Supreme Court in *Zelman* ruled that including sectarian schools in a publicly-funded school choice program was within bounds of the Establishment Clause, parents again challenged Maine's sectarian exclusion in *Eulitt v. Maine Department of Education*.²⁵⁵

In deciding *Eulitt*, the First Circuit Court of Appeals examined whether the state's action constituted impermissible religious animus by "impos[ing] . . . civil . . . sanction on religious practice, deny[ing] participation in the political affairs of the community, or require[ing] individuals to choose between religious beliefs and government benefits."²⁵⁶ The court ruled that Maine's tuitioning program had no such blatant animus; furthermore, "state entities, in choosing how to provide education, may act upon their legitimate concerns about excessive entanglement with religion, even though the *Establishment Clause* may not require them to do so."²⁵⁷ Ultimately, the court stated that "[t]he fact that the state cannot interfere with a parent's fundamental right to choose religious education for his or her child does not mean that the state must fund that choice."²⁵⁸ Thus in *Eulitt* there was no Free Exercise or Equal Protection violation.²⁵⁹

253. *Id.* at 64.

254. *Id.*

255. *Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344, 347–48 (1st Cir. 2004).

256. *Id.* at 355 (citing *Locke v. Davey*, 540 U.S. 712 (2004)).

257. *Id.* (emphasis added).

258. *Id.* at 354.

259. *Id.* at 356.

4. *Anderson v. Town of Durham*

In 2003, the Maine Legislature voted not to amend the tuitioning program and include sectarian schools; thus, the plaintiffs in *Anderson v. Town of Durham* brought suit in state court.²⁶⁰ The court stated that “the issue was *not* whether a particular program in which state funds are used to benefit religious schools violates the constitution, but whether a ‘tuition program that specifically *excludes* religious schools’ does so.”²⁶¹

a. Free Exercise Clause

The plaintiffs in *Anderson* relied on *Bagley*’s willingness to adopt strict scrutiny when the exclusion of sectarian schools is motivated by hostility towards religion.²⁶² The *Anderson* court, however, refused to infer hostility from the legislature’s exclusion of sectarian schools.²⁶³ In fact, like *Bagley*, the court did not apply any level of scrutiny because the plaintiffs failed to show a burden on religion, as secular education was not proscribed by their faith, nor were they punished for adhering to their faith.²⁶⁴ The court noted that “states have some leeway to choose not to fund religious education even if a choice to fund religious education indirectly might not violate the Establishment Clause.”²⁶⁵

b. Equal Protection Clause

The *Anderson* court first looked the holdings of the *Bagley* and *Strout* cases, which “suggested that if the religious school exclusion were based on an erroneous understanding of the Establishment Clause, the statute could violate Equal Protection.”²⁶⁶ The court when

260. *Anderson v. Town of Durham*, 895 A.2d 944, 949 (Me. 2006), *cert. denied*, 127 S.Ct. 661 (2006).

261. *Id.* at 951 (quoting *Bagley v. Raymond Sch. Dep’t*, 728 A.2d 127, 132 (1999)).

262. *Id.* at 958–59.

263. *Id.* at 959.

264. *Id.*

265. *Id.*

266. *Anderson*, 895 A.2d at 959.

on to note, however, that “when performing the equal protection analysis in religious school funding cases, strict scrutiny applies only to the claim that the parents’ fundamental right to the free exercise of religion is implicated; all other claims of religious discrimination are subject to rational basis scrutiny.”²⁶⁷ The court concluded that the case presented no free exercise violation, and therefore applied rational basis scrutiny.²⁶⁸ The court then held that “the [s]tate has supplied a reasonably conceivable set of facts that establish a rational relationship between the statute and a legitimate government interest in avoiding excessive entanglements with religion.”²⁶⁹

C. Prediction of Constitutionality of Excluding Sectarian Schools from School Choice

Though Maine and the First Circuit frequently and consistently conclude that excluding sectarian schools is within the play in the joints²⁷⁰ of the Free Exercise and Establishment Clause, the question seemed ripe for final adjudication as the United States Supreme Court contemplated granting certiorari in *Anderson* for a second time on November 21, 2006.²⁷¹

The *Anderson* petitioners requested certiorari to resolve the issue of whether or not Maine could exclude religious schools based on a misinterpretation of the Establishment Clause.²⁷² In an amici curiae brief in support of the petitioners, the Alliance for School Choice and other interest groups explained that as the school choice movement grows states must know the constitutional limits and requirements

267. *Id.* at 959–60.

268. *Id.* at 960.

269. *Id.* at 959, 961.

270. “Play in the joints” is a term coined by the courts to explain the freedom that states have to balance the tension between the Free Exercise and Establishment Clauses, which when taken to their respective extremes are completely contradictory.

271. *Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006), *appeal docketed*, United States Supreme Court Docket, <http://www.supremecourtus.gov/docket/06-132.htm> (last visited October 11, 2007); *see, e.g.*, *Eulitt v. Maine Dep’t of Educ.*, 386 F.3d 344 (1st Cir. 2004); *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999); *Bagley v. Raymond Sch. Dep’t*, 728 A.2d 127 (Me. 1999).

272. Brief for the Alliance Petitioners, *Anderson v. Town of Durham*, 895 A.2d 944 (2006) (No. 06-132), 2006 WL 2127707 at *i.

imposed upon the model, making this decision critical to the nation's education.²⁷³ In fact, Texas and Alabama also filed amici curiae in support for granting certiorari.²⁷⁴

However, the Supreme Court denied the petitioners' request for certiorari.²⁷⁵ Therefore, Georgia, as dictated by the Blaine Amendment, can exclude sectarian schools.²⁷⁶ This exclusion would stunt school choice in Georgia as the majority of private schools are sectarian.²⁷⁷ However, with no law from the Eleventh Circuit, a Georgia school choice program excluding sectarian schools could be challenged with a different result than *Anderson*. If the Eleventh Circuit held that states are constitutionally obligated to include sectarian schools, Georgia's Blaine Amendment becomes moot.²⁷⁸

CONCLUSION

In short, Georgia should be able to constitutionally create a publicly-funded school choice program.²⁷⁹ Such a program could include sectarian schools under the Federal Establishment Clause if the sectarian school merely receives an indirect benefit; however, the Georgia Blaine Amendment is far stricter and would prevent indirect aid as well.²⁸⁰ Based on *Anderson*, Georgia will be able to exclude sectarian schools, as mandated by the State Constitution, without offending the Free Exercise or Equal Protection Clauses.²⁸¹ Thus, a

273. See generally Brief for the Alliance for School Choice et al. as Amici Curiae in Support of Petitioners, *Anderson v. Town of Durham*, 895 A.2d 944 (2006) (No. 06-132), 2006 WL 2519580.

274. See generally Brief of Texas and Alabama as Amici Curiae on Behalf of Petitioners, *Anderson v. Town of Durham*, 895 A.2d 944 (2006) (No. 06-132), 2006 WL 2519578.

275. *Anderson v. Town of Durham*, 127 S.Ct. 661 (2006).

276. Compare *supra* Part III.C.3 with *Anderson v. Town of Durham*, 895 A.2d 944, 949 (Me. 2006).

277. See generally *Atlanta Business Chronicle*, *Atlanta's 100 Largest Private Schools*, in 2006-2007 BOOK OF LISTS 130, 132-40 (Eighty of Atlanta's 100 largest private schools are sectarian).

278. Petition for Writ of Certiorari, *Anderson*, 895 A.2d 944 (No. 06-132); *Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006), *appeal docketed*, No. 06-132 (U.S. July 27, 2006), available at <http://www.supremecourtus.gov/docket/06-132.htm>.

279. See *supra* Part II.

280. See *supra* Part III.

281. See *supra* Part IV.

religious-free school choice program seems to offer the greatest possibility and constitutionality available in Georgia.

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