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### THE ESTABLISHMENT CLAUSE AND SCHOOL VOUCHERS: PRIVATE CHOICE AND PROPOSITION 174

CYNTHIA BRIGHT\*

[The concern] that [voucher programs including religious schools subsidize religion is] a Red Herring. . . . The Supreme Court has made it almost unquestionable that they would support a scholarship program where the support is given to the parents. Then, if the parents choose a religious school, that's their First Amendment right.<sup>1</sup>

*Bret Schundler, Mayor of Jersey City, New Jersey*

Until the last decade, the Supreme Court has vigilantly guarded religious liberty through its Establishment Clause jurisprudence in the area of religious aid to education.<sup>2</sup> Only in the last decade has a reversal of this trend emerged, with the Court allowing greater government involvement in and aid to religion and religious education. Two recent Supreme Court cases in particular highlight this trend against the background of religion clauses cases. This trend has spawned an increasing number of school voucher programs, which often include religious schools.<sup>3</sup> The recent popularity of

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\* J.D., Georgetown University Law Center. The author thanks Christopher M. Kelly for his helpful comments on earlier drafts of this article.

1. Jay Romano, *Plan for School Vouchers Seemed to Pick up Steam*, N.Y. TIMES, Jan. 2, 1994, § 13NJ, at 1. Contrary to the implications of Mayor Schundler's statement, the constitutional right of a parent to choose religious education for his or her children is a fundamental liberty right found in the Due Process Clause of the Fourteenth Amendment, not of the First Amendment. See *Pierce v. Society of Sisters*, 286 U.S. 510 (1925).

2. The trend to guard religious liberty through the separation of church and state has proceeded through a long history starting with *Everson v. Bd. of Educ.* and proceeding up to *Grand Rapids Sch. Dist. v. Ball*. E.g., *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (applying the Establishment Clause to the states through the Fourteenth Amendment); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding unconstitutional programs that gave aid to the "secular" side of religious education); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (finding unconstitutional state-funded programs that gave direct cash grants to religious schools and gave tuition reimbursements to parents); *Meek v. Pittenger*, 421 U.S. 349 (1975) (finding unconstitutional state-funded remedial education services that included loaning public school equipment, materials, and teacher for use in religious school); *Aguilar v. Felton*, 473 U.S. 402 (1985) (finding unconstitutional the state loaning of public school teachers to religious school); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (holding unconstitutional a timeshare program funding public school teachers work in religious schools).

3. See *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481 (1986) and *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993). *Witters* and *Zobrest* built on the principles that lay dormant in *Mueller v. Allen*, 463 U.S. 388 (1983). See *infra* notes 140-171 and accompanying text.

Stephen Carter's book, *The Culture of Disbelief*, trades on a parallel sentiment growing in the populace at large.<sup>4</sup> Newt Gingrich's demands for prayers in school and educational vouchers for religious education reflect this trend as well.<sup>5</sup> The persuasiveness of Professor Carter's criticism that modern culture scorns religion as a "hobby,"<sup>6</sup> however, should not lend credibility to his legal argument that government should abandon its former position of separation and neutrality towards religion and strike out in favor of greater aid to religious education.<sup>7</sup> While some government accommodation to religious practices is required by the Free Exercise Clause, government aid to religious elementary and secondary education crosses the line from accommodation into the realm of establishment because of the combination of two key factors: the impressionable nature of young children, and the pervasiveness of religious teachings in religious elementary and secondary schools. Contrary to the opinion of Mayor Schundler, state funds distributed as education vouchers to support religious elementary and secondary schools constitute aid to religion tantamount to an establishment of religion.

California's Proposition 174 was the latest and largest attempt to create a voucher program. It offered the purest test for the popularity of a radical voucher program because of its state-wide scope, its inclusion of private and religious schools, and its lack of restrictions on voucher redeeming schools.<sup>8</sup> Despite the overwhelming defeat of the initiative, however, voucher proposals are more popular than ever.<sup>9</sup> The most controversial elements of Proposition 174 can be modified in ways to make voucher programs more popular with voters, yet such proposals may still raise constitutional concerns if they include religious schools as eligible voucher redeeming institutions. Because political change and social reform in California often sets the pace and scope of change across the nation, the resolution of the finer points of school choice programs in California may influence legislation across the rest of the country. The inclusion of religious schools in Proposition 174 indicates that the final decision between private school choice and public school choice has yet to be made.

The foundering of public schools across the country has increased the popularity of school choice programs that propose to send state and federal aid to religious elementary and secondary schools, and creates a fertile ground for Professor Carter's argument to take root. For example, the concern over the failing school system in Jersey City led Mayor Schundler

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4. STEPHEN CARTER, *THE CULTURE OF DISBELIEF* (1993).

5. Religious News Service, *Public Schools May Become Constitutional Battleground*, STAR TRIB.: MINNEAPOLIS / ST PAUL, Nov. 19, 1994, at 8E.

6. CARTER, *supra* note 4, at 23-43.

7. *Id.* at 105-15.

8. See *infra* notes 52-88 and accompanying text.

9. Ed Mendel, *Though Vouchers Flunked, Focus on Reform Remains*, SAN DIEGO UNION TRIB., Nov. 4, 1994, at A-1.

to advocate a city-wide voucher program that included religious schools.<sup>10</sup> When critics raised concerns over the constitutionality of using state funds for religious education, Mayor Schundler dismissed their concerns based on his view of the current Establishment Clause jurisprudence allowing the private choice of parents to insulate from constitutional scrutiny what was previously considered state action.<sup>11</sup> Such a program delegates a decision to a private actor that the state itself may not make. The idea that the choice of parents to send state money through vouchers to religious elementary and secondary schools escapes the restrictions of the Establishment Clause is misplaced and ill-founded. This argument errs in its belief that because government funds secular education, government should and can constitutionally aid religious education at the elementary and secondary level, and anything less is hostility towards religion. The view that the Establishment Clause is hostile to religion misunderstands the very nature of the First Amendment and would wrongly allow aid to flow to religious education. Neither the separation of church and state nor the exclusion of government aid to religious institutions is based on hostility towards religion. Unfortunately, the current Supreme Court view of the Establishment Clause seems likely to permit such aid by analyzing a system of school vouchers through rose-tinted glasses that recast state legislation as neutral programs where private individual choice sends aid to religious education. Under this type of Establishment Clause analysis, courts will most likely approve school vouchers programs that include aid to religious education.

This article will present an analysis under the Establishment Clause of California Proposition 174 as the most popular and recent incarnation of a state wide proposal that would have allowed government tax dollars to flow to religious education under a school choice program. In doing so, Section I will examine the arguments for and against this proposition. Section II will then examine the current Establishment Clause doctrine governing aid to religious elementary and secondary schools as embodied in *Mueller v. Allen*,<sup>12</sup> *Witters v. Washington Services for the Blind*,<sup>13</sup> and *Zobrest v. Catalina Foothills School District*.<sup>14</sup> In Section III, the article will then criticize this view of the Establishment Clause, and conclude that parental or student choice in directing vouchers to religious education only shrouds a thin veil over the flow of government aid to religious institutions as a purposeful part of an educational reform package. The current approach to the Establishment Clause reveals that the principle of private choice by a parent or student allows a carefully drafted, neutral program to escape Establishment Clause prohibitions. Under a system of limited government,

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10. Jack Anderson & Michael Binstein, *Jersey City: Laboratory for School Choice*, WASH. POST, Sept. 26, 1993, at C7.

11. Romano, *supra* note 1, at 1.

12. 463 U.S. 388 (1983).

13. 474 U.S. 481 (1986).

14. 113 S. Ct. 2462 (1993).

state and federal governments may not enlist or empower private citizens to do what the sovereign may not. This section examines the critique in current literature espousing the view that a strong Establishment Clause jurisprudence is hostile towards religion.<sup>15</sup> The article concludes that religious liberty is better protected when the government refrains from sending state funds to religious education under the guise of parental choice.

School vouchers and the inclusion of religious schools in voucher programs have increased in popularity as a potential educational reform to remedy the conventional wisdom that the public school system is in a state of disaster.<sup>16</sup> The media grips our attention by calling the problems plaguing our public schools a "crisis in education." This fear lives in our state and national legislatures. Efforts across the country work to reform elementary and secondary public schools in order to stem the tide of falling test scores and rising costs. Everyone seems to have a finger to point at the source of the problem, and proposals to reform public schools are proliferating. One of the increasingly popular reform measures includes allowing parents and students "school choice." Many pundits explain that the "buzz word" for the 1990s in school reform proposals is "choice."<sup>17</sup> Current proposals for school choice fall into two broad categories: choice by public school students within the public school system or choice by all students between public and private schools. The school choice tuition voucher, which includes private schools, completely or partially subsidizes a student's choice to attend a private school. Under Proposition 174, money that previously funded public education would have flowed to private schools, including religious schools.<sup>18</sup>

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15. CARTER, *supra* note 4, at 105, 115. See *infra* notes 212-19 and accompanying text.

16. Laura A. Locke & Steve Scott, *Education in California: The Age of Turmoil and Hope*, CAL. J., June 1993, at 7 [hereinafter *Education in California*].

17. Carol L. Ziegler & Nancy M. Lederman, *School Vouchers: Are Urban Students Surrendering Rights for Choice?*, 19 FORDHAM URB. L.J. 813 (1992). "Choice" assumes that competition for students and the tuition dollars they represent will drive schools to increase their responsiveness to parents and abandon the bureaucratic infrastructure that plagues most public school systems. Two views of school choice exist in the policy debates and literature: unlimited school choice and public school choice. See *id.* at 813-14 & n.3 (drawing a distinction between programs limited to public school choice and programs including private independent and religious schools despite the lack of strong distinction in much of the popular discourse). The broader based school choice allows parents to choose to send children to private schools and have the state subsidize tuition with funds that were previously allotted to the public school system. The California voucher initiative, commonly known as Proposition 174, falls into this category. The other type of school choice is public school choice where parents of children in the public school system may choose to send their students to the public school of their choice. The range of options under public school choice may vary but usually include a choice of public schools within the resident's school district. See generally *id.* (discussing public school choice, comparing voucher plans to public school choice, and analyzing the affect of vouchers on the public school system).

18. This paper will use the term "religious schools" to refer to what many courts and commentators in the literature have meant by "sectarian schools" in order to avoid charges of discrimination against religion. See Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term "Sectarian,"* 6 J.L. & POL. 449 (1990). In an effort to indicate that the separation of church and state is not a glorified academic euphemism to shroud hostility towards religion, I have chosen to use the term "religious schools" in place of the term "sectarian schools" in order not to cast a negative shadow on religious schools. Baer's conclusion mistakenly views the separation of church and state as based on the view of religion as bigoted, parochial, and marginal, which prompted the Founders and members of the Court to banish it from the public realm. Yet the Founders believed in the importance of religion, and it was its

School choice proposals are becoming increasingly popular at the local, state, and national level. In keeping with the theme of reducing federal government controls, Republican members of Congress support vouchers for education to attend private or public schools.<sup>19</sup> President Clinton proposed limited, public school choice as an option in his Goals 2000 package.<sup>20</sup> Former President Bush proposed a nation-wide voucher program for public and private school choice in his America 2000 bill.<sup>21</sup> At the state level, the Wisconsin legislature created a limited program of private school choice for students from low-income families.<sup>22</sup> In 1992, a citizens group in California proposed a school choice program, Proposition 174, which gained enough signatures to qualify as a state-wide ballot initiative in a 1993 special election.<sup>23</sup> Although Proposition 174 lost by a landslide margin of seventy-three percent, the popularity of vouchers has not abated.<sup>24</sup> Proposition 174 merits special attention because the initiative proposed the largest and most sweeping school choice program proposed to date and because California often leads the nation in social change.

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extreme importance that led them to place it beyond the hands of the legislature. *See infra* notes 212-19.

19. Religious News Service, *supra* note 5, at 8E.

20. President Clinton included a limited public school choice program as part of his initial education package. As the Goals 2000 bill wound its way towards passage, a more extensive voucher proposal that included private and religious schools was rejected by the Senate. Jeffrey L. Katz, *Education: Senate Passes Goals 2000; Bill Heads to Conference*, 52 CONG. Q. WKLY. REP. 332 (Feb. 12, 1994). In its final form the Goals 2000 bill allowed localities to establish public school choice plans. Robert M. Wells, *Divisions: House Education Bill*, 52 CONG. Q. WKLY. REP. 1246-49 (May 14, 1994).

21. U.S. DEPT. OF EDUCATION, AMERICA 2000: AN EDUCATION STRATEGY 5-7 (1991).

22. WIS. STAT. § 119.23 (1990). The Milwaukee Parental Choice Program began in 1990 as the first private school voucher program in the country. The program allows eligible students to attend non-sectarian, private schools in the city. The student's family must have an income equal to or less than 1.75 times the poverty level. The program requires that eligible students attended a public school the previous year or were not enrolled in school. The total number of participants could not exceed one percent of the Milwaukee Public School population. This one-percent limitation placed the level of participants at about 1,000 possible students. The program limited participating private schools based on several standards for attendance, achievement, grade advancement, and parental involvement. Frank R. Kemerer et al., *Vouchers and Private School Autonomy*, 21 J.L. & EDUC. 601, 613, 621 (1992).

Proposition 174 differs from the Milwaukee Program in several important aspects. Most importantly for this paper, the initiative included religious schools as voucher-redeeming schools. The initiative placed no limits on eligible students in their total number or income level. The initiative in California would have allowed vouchers for all five million students in public schools in its first year. In its second year, the initiative would have given vouchers to students attending private schools. The initiative had more lax standards governing which schools may qualify as voucher-redeeming schools. Proposition 174 also lacked oversight and audit provisions to evaluate the performance of voucher-redeeming schools from year to year. *Id.* at 614. Because of these distinctions, the conclusion of several authors that the litigation over the Milwaukee Program represents the issues likely to arise in litigation over similar school choice program is unlikely to be true for Proposition 174. *Id.* at 615. However, following any enactment of a plan substantially similar to Proposition 174 litigation would likely arise over the exclusion of handicapped students. *Id.* at 619.

23. Stanley Moss, *School Vouchers—Will They Save or Destroy Public Education*, CAL. J., June 1992, at 311. EXCEL, Excellence through Choice in Education League, petitioned for over 600,000 signatures to qualify to have the "Parental Choice in Education" Initiative, Proposition 174, listed on the California ballot. *Id.*

24. *Former Congressmen Debate California School Voucher Vote* (National Public Radio Broadcast, October 20, 1993) available in NEXIS, CMPGN Library, NPR File. [hereinafter *Former Congressmen Debate*] (Statement of Mr. Weber).

## I. SCHOOL CHOICE UNDER PROPOSITION 174

Political and social changes that originate in California often influence the rest of the nation.<sup>25</sup> The story of Proposition 174 provides an important crucible to examine the pros and cons of school choice, and what happens with these issues in California may become a watershed for similar state-wide legislation in the rest of the country. Before considering the details of Proposition 174, some background on the California public school system is necessary. California has the largest public school system in the country. Over 5.2 million students enroll in California's public school system.<sup>26</sup> In 1992, California spent twenty-seven billion dollars to fund school levels K-twelve,<sup>27</sup> a total amount larger than any other state but a relative amount placing California thirty-ninth in per pupil spending.<sup>28</sup> California suffers, along with many states, from escalating education costs and unimpressive or falling test scores.<sup>29</sup> Increasing numbers of students have limited English skills and speak another language at home only compounding learning difficulties in the classroom.<sup>30</sup> This influx of students with limited English skills puts additional strain on already scarce resources.<sup>31</sup> Despite some improvements in the indicators,<sup>32</sup> concerns over the quality of education remain a central concern of political debate.<sup>33</sup> Confidence in the public schools system has continued to decline.<sup>34</sup> Because several funding guarantees and tax restrictions constrain efforts to reform school financing in California more than other states,<sup>35</sup> Proposition 174 supposedly offered

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25. *Id.*

26. MARCH FONG EU, SECRETARY OF STATE OF CALIFORNIA, CALIFORNIA BALLOT PAMPHLET: SPECIAL STATEWIDE ELECTION, Nov. 2, 1993, at 32 (1993) [hereinafter CALIFORNIA BALLOT PAMPHLET]; *Education in California*, *supra* note 16. The Secretary of State prepares the ballot pamphlet for each election. To prevent confusion, state initiatives are numbered consecutively since 1982, regardless of the success of former measures.

27. *Education in California*, *supra* note 16, at 9. The \$27 billion figure represents an increase of over 100% since 1983. Per pupil spending has increased by two-thirds during the same time. Adjusted for inflation, this increase is somewhat smaller, but it represents an increase of only 13% over 1983 levels. *Id.*

28. *Id.*

29. *Former Congressmen Debate*, *supra* note 24.

30. *Id.*

31. *Education in California*, *supra* note 16, at 8.

32. Since the 1980s drop-out rates have declined. Additionally more students are signing up for the SAT and advanced placement tests. *Id.*

33. *Former Congressmen Debate*, *supra* note 24.

34. *Education in California*, *supra* note 16, at 7.

35. In 1988, California passed Proposition 98, which devotes at least forty percent of the state's budget to public schools including community colleges. Proposition 111 amended 98 to forbid more than twenty-five percent of the state's funding for education to come from state property taxes. Together these two initiatives create a funding minimum for public schools K-12 and community colleges. Proposition 13 limited the use of property taxes in funding education. Provisions of Proposition 174 ensure that scholarship funds count towards the required minimum funding levels. Proposition 174 (b)(8) (Proposed Amendment to California Constitution art. IX, § 17 (a)(1)) in CALIFORNIA BALLOT PAMPHLET, *supra* note 26 [hereinafter Proposition 174]. Reprinted in Appendix. See also Senate Const. Amend. No. 30 (1991-1992 Reg. Sess.) (Bill introduced on Jan. 6, 1992 to the California Senate that follows the language of Proposition 174.); Assem. Const. Amend. 46 (1991-1992 Reg. Sess.) (1992) (Bill introduced on Feb.

the chance to escape these problems and increase the quality of education by creating competition among schools.

Critics of the public school system and proponents of Proposition 174 targeted the monopolistic, archaic, and inefficient nature of the public schools which create large bureaucracies and fail to produce satisfying educational results.<sup>36</sup> Economists have often proposed to increase school competition, and thereby education quality, through "school choice" or school vouchers.<sup>37</sup> A voucher system would allow parents to choose the schools their children attend based on highest education standards and achievement records of different schools. Forced to compete for funding, schools would then stream-line wasteful bureaucracy and inefficient practices in order to attain greater academic achievement out of each dollar spent. Proponents argue that school choice would increase accountability to parents and educational quality for students.<sup>38</sup>

Proponents of increased competition under the initiative compare public and private schools to the United States Postal Service and Federal Express. Proponents noted that the Postal Service was inefficient and unresponsive to customer needs until independent courier firms invaded the market and forced the Postal Service to compete by offering higher quality services. For example, they pointed out how the Postal Service did not offer overnight delivery until Federal Express and other mail courier systems did.<sup>39</sup> Similarly, proponents argued, large, bureaucratic, inefficient public schools would not offer greater academic quality in education until they are forced to compete with private schools for tuition dollars. In the same way competition forced the Postal Service to respond to customer desires for faster mail service, competition among schools would force public schools to offer better educational quality and raise academic standards or lose funding to other schools, private or public. In response to increasing public funding without corresponding improvements in academic standing, the slogan for Proposition 174 said, "You're not spending too little on education; you're getting too little in return."<sup>40</sup> Proponents claimed the initiative

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21, 1992 to the California Assembly tracking the language of Proposition 174.).

Teachers salaries also come under fire in the school funding debate. Critics point out that teacher's salaries are ranked seventh in the nation, while the overall per pupil spending is ranked thirty-ninth. High teacher salaries limit the resources remaining for educational programs. The president of the California Teacher's Association, Del Weber, defends the gap noting that these comparative figures are deceptive because California has the highest cost of living in the nation. *Education in California*, *supra* note 16, at 9.

36. Laura A. Locke, *The Issue of "Choice": A Voucher Initiative Goes Before Voters*, CAL. J., June 1993, at 13 [hereinafter *A Voucher Initiative*.]; Laura A. Locke, *The Voucher Initiative: Breakthrough or Break-Up for California Schools?*, CAL. J., Oct. 1993, at 9, 10, 17-22 [hereinafter *California Schools*].

37. Critics blame the public schools for their lack of innovation and claimed that they behaved essentially like monopolies. Moss, *supra* note 23, at 312. The source of the idea most likely originates in the *Wealth of Nations*. Adam Smith proposed a voucher system for parents to buy educational services for their children. *Id.*

38. *A Voucher Initiative*, *supra* note 36, at 13.

39. *The Issue of "Choice" in Education*, CAL. J. WKLY., May 31, 1993.

40. CALIFORNIA BALLOT PAMPHLET, *supra* note 26, at 36.

would have eliminated waste and mismanagement from bloated bureaucracy by forcing public schools to become more competitive for student vouchers and the tuition dollars they represent.<sup>41</sup>

Following this logic, the overall quality of education would improve. Proponents argued that vouchers give the public schools incentives to improve standards.<sup>42</sup> By allowing greater access for poorer families to send their children to private schools, supporters said that vouchers would have increased the fairness of the school system.<sup>43</sup> Vouchers would have potentially offered a way for students to escape crime-ridden schools.<sup>44</sup> Proponents also argued that the initiative would save the public school system billions of dollars, both in the short and long term.<sup>45</sup> The theory was that with many school-age children leaving the public school system, total costs would decline because of the voucher's value of only one-half of the cost of educating each pupil in the public school system.<sup>46</sup> The analysis prepared by the California Secretary of State's Office indicated that as each pupil left, the state would spend \$2,600 for the voucher and save \$3,700 in education costs, producing a net savings of \$1,100 per student. When the migration from the public schools stabilized after about five years, the state would save \$1 billion per year if thirty percent of students left the public school system.<sup>47</sup>

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41. The initiative provided no provision for auditing the use of these funds. Opponents noted that vouchers were virtually unrestricted and thus may have spawned fraud and waste. *Id.*

42. A Better Choice for Education, located in El Segundo, supported the initiative. Proponents of Proposition 174 included William Bennett, U.S. Secretary of Education from 1985-1988 under former President Reagan; H. Glenn Davis, Associate California State Superintendent of Public Instruction from 1970-1978; and Carmela Garnica, School Board Member, Palo Verde Unified School District. *Id.*

43. Locke, *A Voucher Initiative*, *supra* note 36, at 13-14.

44. CALIFORNIA BALLOT PAMPHLET, *supra* note 26, at 36-37.

45. *Id.* at 36. Proponents offered a savings figure of \$19 billion over eight years. These figures depend on several unknown and unquantifiable variables, the most important of which is the number of students leaving the public school system for private schools. *Id.* at 34. After five years, estimates indicate that the number of students shifting to private schools would stabilize. *Id.* The net costs or savings depends on the percentage shift of students from the public school system to private schools. The percentage of students leaving ranges from ten to thirty-three percent. If only ten percent leave, the public school system incurs costs of \$800 million. If twenty percent shift, the school system breaks even. If thirty-three percent leave, the public school system saves \$1 billion. *Id.* at 35. These figure depend on assuming that the voucher will remain at \$2,600 and that the net savings of student leaving is \$1,100. It is assumed that schools save \$3,700 for a pupil leaving. The most important uncertainty to highlight is that exactly how many student might have left was a great unknown equivalent to "spinning an educational wheel of fortune." *California Schools*, *supra* note 36, at 9, 14.

46. CALIFORNIA BALLOT PAMPHLET, *supra* note 26, at 34. The numbers of students that could leave in one year is, however, quite limited because of limited open spaces in private schools. Current studies estimate 43,000 available spaces in California private schools. *Election '93*, CAL. J., Nov. 1, 1993, at 37. Even if new schools formed under the initiative, the lag time in start up might delay any significant exodus from public schools—an occurrence the proponents of Proposition 174 seem to have overlooked in their calculation of the potential savings generated by its passage.

47. CALIFORNIA BALLOT PAMPHLET, *supra* note 26, at 35. Whether this was really possible was uncertain because the numbers of students that would leave the public schools was speculative at best with no research to back up the estimates. *California Schools*, *supra* note 36, at 14. The thirty-percent figure represents the highest estimated students leaving the public schools. At a twenty percent migration level, the state breaks even. If only ten percent leave, the state loses \$800 million per year. *Id.* The estimated number of students that would actually leave public school for private schools is not given. It is important to note that in the five-year transition period, the state would incur additional costs because it would have to fund scholarships used by students currently in private schools. *Id.*

In pursuit of greater quality in education by competition among schools for tuition dollars, the Excellence through Choice in Education League (EXCEL) gathered signatures to qualify their initiative, Parental Choice in Education, for a state-wide election ballot.<sup>48</sup> EXCEL did not receive the requisite signatures to qualify the initiative for the 1992 election, but did so shortly thereafter, and Governor Pete Wilson called a special election for 1993.<sup>49</sup> "Parental Choice in Education" was listed on the ballot as Proposition 174.<sup>50</sup> On election day in 1993, Proposition 174 resoundingly lost by a seventy-to-thirty percentage vote.<sup>51</sup>

Proposition 174 offered an educational scholarship for every resident, school-age child in California.<sup>52</sup> Scholarships could have been redeemed at any scholarship-redeeming school, which included public, private, and religious schools that met minimal non-discrimination requirements.<sup>53</sup> The amount of the scholarship, estimated at \$2,600, was guaranteed to at least match fifty percent of the total amount of state and local government spending per student for education during the preceding fiscal year.<sup>54</sup> The legislature could have set higher scholarship levels for different grade levels.<sup>55</sup> After one year, Proposition 174 would have required the Legislature to establish procedures to allow public schools to become independent "voucher redeeming" schools. The initiative required state academic testing,<sup>56</sup> but strictly limited any additional regulation of private schools and "voucher redeeming" independent schools.<sup>57</sup>

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48. EXCEL needed over 600,000 signatures to qualify the initiative for the state ballot. Moss, *supra* note 23, at 311.

49. George Skelton, *Capitol Journal: Wish List by Wilson Needs Aladdin's Lamp*, L.A. TIMES, May 24, 1993, at A3.

50. *Props Get Numbered*, CAL. J. WKLY., Aug. 9, 1993.

51. Mendel, *supra* note 9, at A1.

52. Proposition 174, *supra* note 35, subpart (a).

53. *Id.* This provision reads, "Empowerment of Parents: Granting of Scholarships. The State shall annually provide a scholarship to every resident school-age child. Scholarships may be redeemed by the child's parent at any scholarship-redeeming school. . . ." The requirements for voucher-redeeming schools are set forth in section (b) and require that schools not discriminate on the basis of race, ethnicity, color, or national origin; not promote unlawful behavior or hatred of any group on the basis of race, ethnicity, color, national origin, religion, or gender, and not have less than twenty-five students. *Id.*, subparts (b)(1)-(3).

54. *Id.*

55. *Id.*

56. *Id.*, subpart (a)(6).

57. *Id.*, subpart (b)(4). This feature makes Proposition 174 distinctly unlike most private school choice programs. See note 22, *supra*, on Milwaukee Parental Choice Program. Commentators often note that following private school choice programs, regulation of the private schools will increase. Kemerer, *supra* note 22, at 622-23. In fact, they suggest, "the best way to limit encroaching regulation is to curtail the legislature's ability to legislate via constitutional amendment. . .", which is precisely what Proposition 174 does. *Id.* at 622. Regulation of voucher redeeming schools is possible under the initiative, but very difficult because of the three-fourths super-majority requirement. The possibility of increased regulation may make participation in voucher program less appealing to private schools than it initially seems.

The criticism of Proposition 174 proved formidable and prolific.<sup>58</sup> Seven major education organizations opposed the initiative.<sup>59</sup> Both Democratic President Bill Clinton and Republican Governor Pete Wilson opposed the initiative.<sup>60</sup> The fact that Proposition 174 would have been enshrined in the California Constitution and would have required super-majorities of three-fourths of the Legislature to change scared off even expected conservative supporters.<sup>61</sup> In a surprising move, and in contrast to his anti-government rhetoric, even former President Reagan opposed the initiative.<sup>62</sup> Critics argued that Proposition 174 would not lead to any of the improvements that proponents claimed.<sup>63</sup> Critics argued that the comparison between Federal Express and private schools and the Postal Service and public schools was more apt description of the status quo, not the results of a voucher program.<sup>64</sup>

Out of all the criticism, five arguments were the most popular: (1) the net result would cost tax payers and drain money from the public schools; (2) benefits would only flow to the rich who could already afford private school tuition; (3) the program allowed and subsidized discrimination; (4) the program offered no academic standards; and (5) the program licensed the break up of the public school system.

First, Proposition 174 would have drained essential money from the public school system.<sup>65</sup> Each voucher-scholarship used to fund a student to go to private school would have immediately removed \$2,600 from the public school system. If the child did not return to public school, the individual public school would have lost another \$2,600, which represents

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58. Proposition 174 faced bipartisan opposition. Opponents included President Clinton; Governor Pete Wilson; Charity Webb, President of the California School Boards Association; Del Weber, President of the California Teacher's Association; and Norman T. Allen, Chairman of AARP California State Legislative Committee. A.G. Block, *Election '93*, CAL. J., Nov. 1, 1993, at 37 (noting opposition of Clinton and Wilson); CALIFORNIA BALLOT PAMPHLET, *supra* note 26, at 37 (listing opposition of Webb, Weber, and Allen).

59. *A Voucher Initiative*, *supra* note 36. Led by the Committee to Educate Against Vouchers, opposition organizations included the California School Boards Association, California Teachers Association, California Federation of Teachers, Association of California School Administrators, California School Employees Association, Service Employees Association, and the California PTA. *Id.* The opposition included negative endorsements from Governor Pete Wilson and President Clinton. *Election '93*, CAL. J., Nov. 1993, at 37.

60. *Id.*

61. Albert Shanker, *Where We Stand: Conservatives and Vouchers*, N.Y. TIMES, Nov. 28, 1993, at E7 (advertisement).

62. Robert D. Novak, *Half-Hearted Fight for Choice*, WASH. POST, Oct. 18, 1993, at A19.

63. Moss, *supra* note 23, at 312-13.

64. Richard Zeigler, *Vouchers*, CAL. J., Oct. 1993, at 10. The counter argument to the Postal Service analogy noted that the Postal Service must take all classes of mail from priority to book rate, whereas premium services only accept priority mail, for which they can charge premium rates. Although the arrival of express couriers provided competition, they also drain away high end revenues. Similarly, the public school system must take all students from the most intelligent to the most challenged, mentally or physically. Private schools may screen out problem students that have poor English skills, behavioral problems, weak study habits, or physical handicaps. Finally, the point is brought home by noting how devastated the Postal Service would be if one half of the revenues generated by the 32 cent stamp went to subsidize express courier services. *Id.*

65. See *supra* notes 45-47 and accompanying text.

the other half of the total funds that the school received for that student's enrollment.<sup>66</sup> This diversion of money shrinks the pool of available money for neighborhood public schools. Opponents argued that when schools were hit with the loss of funds from students leaving, the schools lacking resources will become "defunct and unable in any practical sense to serve [their] remaining students."<sup>67</sup> Under the Postal Service analogy, the services the Postal Service could afford to provide would be severely undercut if half of the thirty-two cent stamp were suddenly diverted to subsidize Federal Express.<sup>68</sup> In the long term, depending on the number of students who left the public school system, the initiative might have generated net costs of up to \$800 million per year instead of saving the billions that proponents claimed.<sup>69</sup> In the short term, it was a certainty that costs would have been higher until the number of students leaving the public school system stabilized.<sup>70</sup> In addition to costs incurred by students leaving the public schools, proponents failed to consider the impact of funding scholarships for students in private schools. Two years after adoption, students in private schools would have been eligible for state-funded voucher-scholarships. Providing vouchers for private school would have expanded the eligible number of voucher students by ten percent.<sup>71</sup> The additional cost of funding scholarships for students attending private school would have raised the short and long term cost regardless of how much money might have been saved from students leaving the public schools.

Second, critics charged that Proposition 174 only served the interests of the rich who already have children in private schools.<sup>72</sup> Under the Postal Service analogy, subsidizing Federal Express would provide cheaper high end services for the wealthy while diverting money from the system designed to serve everyone.<sup>73</sup> The California initiative would have allowed students to subsidize their choice of private and parochial school.<sup>74</sup> Two years after the enactment of the initiative, every student in a religious or private school would have qualified for a voucher. According to critics, the measure would have thus served as a reward for those well-off enough to afford private school tuition in whole or in part but would not help less well-off parents

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66. Moss, *supra* note 23, at 312-13.

67. *Id.*

68. Zeigler, *supra* note 64, at 6.

69. *See supra* note 45 and accompanying text.

70. CALIFORNIA BALLOT PAMPHLET, *supra* note 26, at 35.

71. *See A Voucher Initiative*, *supra* note 36, at 14 (reporting that 90% of school children in California are in public schools).

72. This conclusion is also supported by the fact that the greatest supporters were parents with children in private school. Supporters trailed opposition in every other demographic group and across party lines. Bill Stall, *The Times Poll: Opposition to School Vouchers Rises Sharply*, L.A. Times, Oct. 21, 1993, at B1.

73. Zeigler, *supra* note 64, at 6.

74. *Former Congressmen Debate*, *supra* note 24.

because they would not be able to afford the tuition that the \$2,600 scholarship did not cover.<sup>75</sup>

Third, critics accused Proposition 174 of sanctioning discrimination on the basis of religion, gender, handicapped status, and poor educational skills. While Proposition 174 prohibits voucher-redeeming schools from discriminating on the basis of race, ethnicity, color, or national origin,<sup>76</sup> vouchers could subsidize schools that discriminate on the basis of religion, gender, handicapped status, test scores, and income.<sup>77</sup> Public schools, on the other hand, must accept all students regardless of religion, gender, physical capability, intelligence, or wealth. Under the comparison to the Postal Service, the public school system must accept and educate all classes and kinds of students, like the Postal Service carries all classes, shapes, and sizes of mail, whereas private schools accept only brightest, most well behaved, most talented, students with good English skills and Federal Express sets its own standards for what mail it accepts. According to opponents, taxpayers then would have subsidized this discrimination in private schools without recourse because of Proposition 174's restrictions on the ability of the legislature to regulate private schools.<sup>78</sup> Then, after a year, when public schools could apply to become independent schools, greater numbers of students could be subject to discrimination in independent schools and the same restrictions on regulation of private schools would apply.

Fourth, Proposition 174 would have set academic standards neither for which schools can receive vouchers nor for who may teach in them. In fact, Proposition 174 would have limited regulation of the private schools in order to provide maximum flexibility to establish school policy and curriculum.<sup>79</sup>

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75. CALIFORNIA VOTER PAMPHLET, *supra* note 26, at 37. Proponents respond that sixty-four percent of California's private schools are willing to charge less than \$2,600 in tuition. *Id.* at 36.

76. Proposition 174, subpart (b)(1), *supra* note 35, at 44.

77. CALIFORNIA BALLOT PAMPHLET, *supra*, note 26, at 33, 36-37. While voucher redeeming schools may not teach hatred of groups based on race, ethnicity, color, national origin, religion, or sex, schools may receive vouchers despite any discrimination on the basis of religion, gender, sexual orientation, handicapped status. Coupled with the strong mandate against abridging the flexibility of private schools to pursue their own academic programs, this statutory omission created a strong argument that the drafters intended to allow such schools to be included as voucher redeeming schools. *Id.*

78. *A Voucher Initiative*, *supra* note 36. See also *infra* notes 79-85 and accompanying text.

79. Proposition 174, *supra* note 35, subpart (b)(4). The proposition explicitly gave private schools freedom from regulation:

Private schools shall be accorded maximum flexibility to educate their students and shall be free from unnecessary, burdensome, or onerous regulation. No regulation of private schools, scholarship-redeeming or not, beyond that required by this section and that which applied to private schools on October 1, 1991, shall be issued or enacted, unless approved by a three-fourths vote of the Legislature or, alternatively, as to any regulation pertaining to health, safety, or land use imposed by any county, city, district, or other subdivision of the State, a majority vote of qualified electors within the affected jurisdiction.

*Id.* This provision set forth strong provisions to protect private schools freedom from regulation that usually accompanies accepting state money. The prospect of invasive regulation of the private schools including religious schools as to what is acceptable creates significant drawbacks to accepting state funds for education. If you take Caesar's coin, you take Caesar's law. This concern, not mentioned by the media or opposition, may be far more damaging in the long run than proponents ever imagined. It raises significant entanglement concerns over the long-term. See *infra* notes 231-232 and accompanying text.

Private schools and independent voucher-redeeming schools are not subject to the battery of state regulations for the public schools system, and nothing in Proposition 174 changed this. For example, private schools are not required to have credentialed teachers, rather they may hire "anyone capable of teaching."<sup>80</sup> In addition, any future regulation of these schools would have required a three-fourths super majority vote of the legislature.<sup>81</sup> The super-majority requirement would have placed control of any future regulation of schools in the hands of only eleven state senators, who would then have a minority veto over any reform.<sup>82</sup> These lax controls also would not have included any provisions for the state to audit private school use of funds, which could produce widespread abuse, waste, and fraud.<sup>83</sup> Moreover, anyone with twenty-five potential students could have started up a school and qualified for state funds.<sup>84</sup> When a witches' coven announced it was considering opening a private school that would qualify for vouchers, previously speculative fears that anyone could soon be teaching children in approved schools supported by state funds became real.<sup>85</sup> With such a lack of control, Proposition 174 provided little guidance or oversight to guarantee improved educational results.

Finally, critics argued that Proposition 174 abandoned the public school system by authorizing the breakup of the public schools.<sup>86</sup> This provision of Proposition 174 may have been the most radical and controversial. After one year, Proposition 174 would have directed the legislature to expeditiously create means for public schools to become independent, "scholarship-

80. CALIFORNIA BALLOT PAMPHLET, *supra* note 26, at 33.

81. Proposition 174, *supra* note 35, subpart (b)(4).

82. CALIFORNIA BALLOT PAMPHLET, *supra* note 26, at 37.

83. *Id.*

84. Proposition 174, *supra* note 35, subpart (b)(3).

85. Dan Morain, *School Voucher Campaign Zeros in on Swing Voters*, L.A. TIMES, Sept. 20, 1993 at A1; *Former Congressmen Debate*, *supra* note 24.

86. Proposition 174 included a section entitled "empowerment of teachers," which allowed the "break up" of the public school system: "Conversion of Schools. Within one year after the people adopt this section, the Legislature shall establish an expeditious process by which public schools may become independent scholarship-redeeming schools. . . ." Proposition 174, *supra* note 35, subpart (c). Widespread, state-wide, organized, public education as we know it today has only existed for the past 125 years. 2 GEORGE B. TINDALL, *AMERICA: A NARRATIVE HISTORY* 796-801 (1984). While the first public schools emerged in the twenty years following the ratification of the Constitution, these efforts remained confined to large urban areas, such as New York City. *Lemon v. Kurtzman*, 403 U.S. 602, 645 (1971). The majority of schools prior to that time had a close link to religion. TINDALL, *supra*, at 491. The history of education on the nineteenth century is a protest against secular funds needed for religious education. Much of this struggle takes on a pointed anti-Catholic, anti-immigrant nature, but the education, however, retained a general Protestant religious and morality content. ROBERT T. MILLER & RONALD B. FLOWERS, *TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT* 617 (4th ed. 1992); TINDALL, *supra*, at 793.

Common school education is an American tradition that provides common ideals and experience. A unique American feature is free public education available to all. *California Schools*, *supra* note 36, at 10. The idea was born out of the need for educated citizens who would need to be educated on issues of the day in order to participate in democratic government. Despite the room for parental choice in the United States, enshrined in the Constitution since *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), state accreditation standards may suffice to insure that common principles of that state are taught, *e.g.*, U.S history, civics, and the three R's. See Theodore Sky, *The Establishment Clause, the Congress, and the Schools: An Historical Perspective*, 52 VA. L. REV., 1395, 1465 (1966).

redeeming" schools and operate as private schools.<sup>87</sup> Given the strong provisions that prevent the regulation of the private schools except by a three-fourths majority vote of the legislature,<sup>88</sup> public schools could have been released from the requirements that are currently in place, which would leave no guarantees to insure any minimum quality of education.

Throughout all this criticism, most critiques focused on policy implications. Although the general counsel to the California general assembly objected that Proposition 174 would violate the First and Fourteenth Amendments, very few commentators mentioned constitutional concerns.<sup>89</sup> Voters may consequently accept a voucher proposal that addresses these policy objections and still provides state funds directly to religious schools. Public discontent with poor quality education did not dissipate with the defeat of Proposition 174.<sup>90</sup> Despite this defeat, California remains on the cusp of education reform,<sup>91</sup> and the popularity of school choice survived the 1993 election.<sup>92</sup> In fact, a Gallup poll revealed that fifty percent of Americans support vouchers.<sup>93</sup> This high level of support for vouchers indicates that different voucher plans may gain favor among voters where Proposition 174 did not.

Several changes to Proposition 174 could make school choice far more popular without removing the constitutional concerns. First, a plan that allowed greater regulation of voucher-eligible schools would increase accountability and allay public fears that taxpayers had no control over tax dollars.<sup>94</sup> Means-tested eligibility for students would help alleviate concerns that the program was only designed to help the rich, yet maintain the ability to increase fairness by allowing greater choice to students from families without the resources to currently attend private schools. Disqualifying schools which engage in unlawful discriminatory practices would also reduce much of the broad opposition to this voucher plan. Creating minimum academic and performance standards for eligible schools would have the same effect as allowing greater regulation of schools, and would provide greater assurances that the program would help raise the quality of education, not merely create a new financing system with no results. Finally, a school choice plan that did not authorize the break up of the public schools would gain more support among parents, elected officials, and teachers associations.<sup>95</sup> Any combination of these changes would mitigate the concerns voiced in opposition to Proposition 174, yet they would not necessarily

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87. Moss, *supra* note 23, at 313.

88. Proposition 174, *supra* note 35, subpart (b)(4). See also *supra* note 79.

89. *California Schools*, *supra* note 36, at 11-12.

90. Stall, *supra* note 72, at B1.

91. Moss, *supra* note 23, at 313. *Former Congressmen Debate*, *supra* note 24.

92. See *Former Congressmen Debate*, *supra* note 24 (Former Rep. Vin Weber (R-Mn)).

93. David Smollar, *Schools Poll Finds Support for Vouchers*, L.A. TIMES, Feb. 13, 1992, at B1.

94. *Id.*

95. Stall, *supra* note 72, at B1.

prevent aid from flowing to religious schools. These changes would make new legislation more popular, yet offer the same threat to religious liberty. Such a new voucher proposal might well pass the policy resistance that Proposition 174 met. Thus, the courts remain the final arbiter of whether such a program runs afoul of the U.S. Constitution.

Until recently, the Supreme Court has vigilantly guarded religious liberty by declaring unconstitutional laws that provide aid to religion that amount to an establishment of religion.<sup>96</sup> Among these cases are the religion education cases. Aid to religious education is one of the most contentious Establishment Clause issues. Modern Establishment Clause jurisprudence begins with this issue,<sup>97</sup> and school vouchers programs allowing public funds to flow to religious schools return this unclear area of the law to the forefront of public debate. The popularity of school choice programs that include private, religious schools provides the vehicle for the chain of cases which allow government financial aid to flow through a parent's or student's choice to send state funds to religious education to gain greater prominence. Another decision could establish and confirm an unfortunate trend and departure from the traditional protections of the Establishment Clause.

## II. THE CURRENT STATE OF THE LAW

The current trend in Supreme Court cases involving indirect aid to religion has weakened the strong protection once provided under the *Lemon* test.<sup>98</sup> By strictly focusing on a private choice in a neutral program analysis, the Court has allowed money to flow to religious institutions as the secondary, indirect effect of legislation. This principle allows legislatures to carefully craft legislation that sanctions and funds a private actor to do what the Establishment Clause forbids the government to do.<sup>99</sup> Proposition 174 would have most likely passed the test in its current spectral incarnation after *Mueller v. Allen*,<sup>100</sup> *Witters v. Washington Department of Services for the*

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96. *E.g.*, *Everson v. Board of Ed.*, 330 U.S. 1 (1947) (applying the Establishment Clause to the states through the Fourteenth Amendment); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding unconstitutional programs to give aid to the "secular" side of religious education); *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (finding unconstitutional state-funded programs that gave direct cash grants to religious schools and gave tuition reimbursements to parents); *Meek v. Pittenger*, 421 U.S. 349 (1975) (finding unconstitutional state-funded remedial education services that included loaning public school equipment, materials, and teacher for use in religious school); *Aguilar v. Felton*, 473 U.S. 402 (1985) (finding unconstitutional the state loaning of public school teachers to religious schools); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (holding unconstitutional a timeshare program funding public school teachers work in religious schools).

97. *Everson*, 330 U.S. at 1.

98. *Lemon* 403 U.S. at 612-13. The test requires that legislation must (1) have a secular purpose, (2) have a principle or primary effect that neither advances nor inhibits religion, and (3) not foster an excessive entanglement with religion. *Id.*

99. For a description of the trends in aid to education cases from *Everson* to *Witters* see David Futterman, Note, *School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Parochial Schools*, 81 GEO. L.J. 711, 715-25 (1993)

100. 463 U.S. 388 (1983).

*Blind*,<sup>101</sup> and *Zobrest v. Catalina Foothills School District*.<sup>102</sup> The cumulative effect of these cases indicates that the Court will find a legislature does not establish religion when the funds the state distributes under a general program which makes no reference to religion are directed to religious institutions by the choice of private actors. Under this formalistic analysis, Proposition 174 would have passed scrutiny under the Establishment Clause.

### A. California State Constitutional Provisions

The Supreme Court's weak interpretation of the Religion Clauses has led at least one commentator to call it malpractice for any attorney to fail to plead state constitutional provisions in addition to federal constitutional claims because state provisions are the only ones providing forceful protection of religious liberty.<sup>103</sup> For example, the guarantees of the California Religion Clauses<sup>104</sup> extend further than the federal Free Exercise and Establishment Clauses by prohibiting any preference expressed by the legislature.<sup>105</sup> This additional protection derives from the language in the first clause of the section prohibiting a preference for religion, not from the California's Establishment Clause itself. Provisions in the California Constitution also prohibit public funds from supporting private schools, religious or non-religious.<sup>106</sup> Several other provisions of the California Constitution<sup>107</sup> create stronger prohibitions than the federal Establishment Clause against the flow of public funds to religious institutions.<sup>108</sup> The California Constitution prohibits the use of public aid for sectarian purposes<sup>109</sup> and further prohibits the appropriation of public funds for sectarian schools.<sup>110</sup> Together these provisions prohibit appropriation or payment of public funds to support religious schools and prevent any official involvement that has the direct, immediate, and substantial effect of promoting religious purposes. These provisions, which would normally provide greater religious

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101. 474 U.S. 481 (1986).

102. 113 S. Ct. 2462 (1993).

103. Douglas Laycock, *Summary and Synthesis: The Crisis of Religious Liberty*, 60 GEO. WASH. L. REV. 841, 854 (1992) [hereinafter *Summary and Synthesis*].

104. CAL. CONST. art. I, §4. "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion. . . ." *Id.*

105. *Woodland Hills Homeowners Org. v. Los Angeles Community College Dist.*, 266 Cal. Rptr. 767 (Cal. Ct. App. 1990); *Feminist Women's Health Ctr., Inc. v. Philibosian*, 203 Cal. Rptr. 918 (Cal. Ct. App. 1984). The legislature may not express a preference for the views of a religious organization. *Id.* A law expressing a denominational preference is treated as suspect and subjected to strict scrutiny under the *Lemon* test. *Woodland Hills*, 266 Cal. Rptr. at 767.

106. See CAL. CONST., art. IX, §8 and art. XVI, §5. See also 61 Op. Att'y Gen. 64, at \*20 (Cal. 1981).

107. CAL. CONST. art. XVI, § 5; CAL. CONST. art. IX, § 8.

108. *Bennett v. Livermore Unified Sch. Dist.*, 238 Cal. Rptr. 819 (Cal. Ct. App. 1987).

109. CAL. CONST. art. XVI, § 5.

110. CAL. CONST. art. IX, § 8.

freedoms to the citizens of California, would not have provided any impediment to Proposition 174 because the initiative stipulated repeal of conflicting provisions of the California Constitution to allow for full implementation.<sup>111</sup> Accordingly, Proposition 174 would have overridden the California Establishment Clause and enshrined aid to religious education in the California State Constitution.<sup>112</sup> Therefore, the only safeguards to protect religious liberty that would have had any effect on Proposition 174 are federal Constitutional guarantees, namely the Establishment Clause of the First Amendment.

### B. The Federal Constitutional Provisions

While the Court has repeatedly rejected the principle that "any program which in some manner aids an institution with a religious affiliation" violates the Establishment Clause,<sup>113</sup> it has recognized the close and influential relationship between religious institutions and elementary and secondary schools run by these institutions raises Establishment Clause concerns when governmental aid reaches these institutions.<sup>114</sup> The Court has previously held that aid to religious schools cannot be viewed separately or differently from aid to religion because religious schools are "pervasively sectarian."<sup>115</sup> Justice Douglas has written that the propagation of religious faith forms the *raison d'être* of religious schools, where the parish schools consume forty to sixty-five percent of parish budgets.<sup>116</sup> Religious indoctrination forms an essential part of the curricula at religious schools, and the religious mission of religious institutions permeates every aspect of education, creating an atmosphere where "secular and religious education are so inextricably intertwined, that substantial aid to the sectarian school enterprise as a whole . . . amounts to a forbidden establishment of religion."<sup>117</sup> The Court should always be careful to scrutinize any program that allows tax dollars to flow to religious education in order to insure that

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111. Proposition 174, *supra* note 35, subpart (a)(4). For the California Constitution Establishment Clause see CAL. CONST., art I, § 4. See *infra* notes 99-108 and accompanying text.

112. See 61 Op. Att'y Gen. 64 (Cal. 1981). Douglas Laycock called it malpractice to plead only federal constitutional claims under the Religion Clauses after *Employment Division v. Smith*, 494 U.S. 872 (1990). *Summary and Synthesis, supra* note 103, at 854. While he focused on the Free Exercise Clause in his article, the same argument applies to Establishment Clause claims because state guarantees or religious liberty are often more expansive than the federal clauses.

113. *Mueller v. Allen*, 463 U.S. 388, 393 (1983) (quoting *Hunt v. McNair*, 413 U.S. 734, 742 (1973)). See also *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2466 (1993) (repeating the principle that religious institutions may constitutionally receive aid if the financial benefit is sufficiently attenuated under a broad program not distributing benefits with reference to religion).

114. *Meek v. Pittenger*, 421 U.S. 349, 364 (1975).

115. *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971). See *supra* note 18 (concerning the use of the word "sectarian").

116. *Id.* at 628 (Douglas, J., concurring).

117. *Committee for the Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 652 (1980) (quoting *Meek v. Pittenger*, 421 U.S. 349, 366 (1975)).

state funds do not flow to benefit religious education and thereby endanger religious liberty.

The first clause of the First Amendment to the Constitution provides: "Congress shall make no law respecting an establishment of religion. . . ."<sup>118</sup> In *Everson v. Board of Education*, the Court made the Establishment Clause applicable to the states through the Due Process Clause of the Fourteenth Amendment.<sup>119</sup> Analysis under the Establishment Clause must begin with consideration of the cumulative tests and criteria developed by the Court over the years.<sup>120</sup> The myriad cases that followed *Everson* over the next twenty-five years focused on the purpose and effects of state legislation on religion. These cases culminated in the Court's establishing the tri-partite test set forth in *Lemon v. Kurtzman*.<sup>121</sup> In the twenty years after *Lemon*, the test has been severely criticized for its lack of guidance, and the results of the *Lemon* test have been sharply criticized in the aid to religious education cases,<sup>122</sup> but it has yet to formally overruled or abandoned. Under the *Lemon* test, a statute must have a secular legislative purpose, must have a principle or primary effect that neither advances nor inhibits religion, and must not foster an excessive entanglement with religion.<sup>123</sup> In aid to education cases, the shape and strength of the *Lemon* test depends largely upon the degree of review under the primary effects test. The former strength of this test has been mitigated by the recently formalistic reading of the second element of the *Lemon* test. While current cases cite *Lemon* and no longer proceed through an analysis prong-by-prong, such an

118. U.S. CONST., amend I, cl. 1.

119. 330 U.S. 1 (1947). *Murdock v. Pennsylvania* makes reference to the fact that the Fourteenth Amendment made the First Amendment applicable to the states. *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943). This case is not usually cited as authority to support the incorporation of the protections of Establishment Clause into the Fourteenth Amendment because it focuses on the freedom of the press and on the free exercise of religion. *Id.* at 117.

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

121. 403 U.S. 602, 612-13 (1971). The future of *Lemon* is uncertain. Justice O'Connor prefers an endorsement test. Justice Kennedy prefers a coercion test. Still the Court has not overruled *Lemon* formally nor abandoned it. Thus, even in its beleaguered form, it remains the relevant framework for this analysis. Professor Lupu points out, however, that even with in this framework different principles are emerging in different Establishment Clause contexts. Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 767 (1992).

122. The most scathing criticism of the *Lemon* test flows from Justice Scalia's pen in *Lamb's Chapel v. Center Moriches Union Free School District*: The test lurks as a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried. *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys. . . ." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2149 (1993) (Scalia, J., concurring). Other Justices have criticized or outright proposed the abandonment of the *Lemon* test. *E.g.*, *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 400 (1985) (White, J., dissenting); *Edwards v. Aguillard*, 482 U.S. 578, 610, 640 (1987) (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 91, 108-12 (1984) (Rehnquist, J., dissenting); *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part and dissenting in part); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 820 (1973) (White, J., dissenting). Religion Clauses scholars have also criticized the separationist views enshrined in the *Lemon* test. Professor Steven Carter's criticism accurately reflects much popular sentiment and distrust of religious motivation, but his analysis of history fails to assess important principles in the Establishment Clause. His criticism of the Court's insensitivity to religion more aptly fits the Court's Free Exercise jurisprudence culminating in the opinions in *Smith* and *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990). Laycock, *supra* note 99, at 846-51.

123. *Lemon*, 403 U.S. at 612-13.

analysis illuminates how easily Proposition 174 could have slipped through the test in its current form.

### C. *The Lemon Test*

#### 1. Secular or Civil Purpose

The first prong of the *Lemon* test requires that a law have a valid secular purpose. While the stated purpose of the law must not be a sham,<sup>124</sup> courts are generally reluctant to look beyond the stated purpose of a statute and attribute unconstitutional motives to a legislature when the text of a statute offers a facially valid purpose. Although the Court has critically examined legislative motives in enacting measures that sponsor prayer or teaching of religion in the public schools and found that the legislature was trying to endorse or disapprove of religion,<sup>125</sup> the Court has never invalidated a general welfare program of aid to education on grounds that the legislature intended to aid religious schools.

In the realm of aid to education, the Court has upheld legislative purposes that aim to improve the quality of education<sup>126</sup> and to help parents defray the costs of education.<sup>127</sup> In *Mueller*, the Court explained that

a State's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. . . . “The State has . . . a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.”<sup>128</sup>

In *Lemon*, the Court found that “A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate.”<sup>129</sup> Thus, to pass constitutional muster, the initiative must have simply alleged a valid purpose to improve the quality of education.<sup>130</sup>

124. *Wallace*, 472 U.S. at 75 (1984) (O'Connor, J. concurring).

125. See *Edwards*, 482 U.S. at 594 (invalidating the Louisiana Act requiring equal teaching time between evolution and Creationism Science because it was an attempt by the legislature to have religion taught in the public schools); *Wallace*, 472 U.S. at 55-56 (rejecting a moment of silence statute as an attempt to create state-sponsored prayer in public schools); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (rejecting Kentucky's stated secular purpose for posting the Ten Commandments on public school walls as a preeminent religious purpose).

126. *Lemon*, 403 U.S. at 613.

127. *Mueller v. Allen*, 463 U.S. 388, 395 (1983).

128. *Id.* (quoting *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part and dissenting in part)).

129. *Lemon*, 403 U.S. at 613.

130. Richard C. Mason, *School Choice and the Establishment Clause: Theories of "Constitutional Legal Cause,"* 96 DICK. L. REV. 629, 632 (1992).

Proposition 174 explicitly set forth six secular, educational purposes,<sup>131</sup> which focused on improving the quality of education available to all children.<sup>132</sup> The Proposition stated its purpose as follows:

The people of California, desiring to improve the quality of education available to all children, adopt this section to:

- (1) enable parents to determine which schools best meet their children's needs;
- (2) empower parents to send their children to such schools;
- (3) establish academic accountability based on national standards;
- (4) reduce bureaucracy so that more educational dollars reach the classroom;
- (5) provide greater opportunities for teachers; and
- (6) mobilize the private sector to help accommodate our burgeoning school-age population.<sup>133</sup>

These six elements detail specific goals that derive from the general purpose of improving the quality of education in California. These stated goals provide sufficient evidence of a legitimate legislative purpose for the requirement of the *Lemon* test. Similar to the approved purposes in *Mueller* and *Lemon*, the goals of Proposition 174 to assist all parents under subsections (1) and (2) would have provided a legitimate purpose. The other goals under subsections (3) through (6) would have provided additional legitimate state purposes for the initiative. Thus, Proposition 174 would have cleared the first prong of the *Lemon* test.

## 2. A Primary Effect that Neither Advances nor Inhibits Religion

Under this part of the test in religious school aid cases, the Court considers several factors in determining whether aid advances or inhibits religion to the danger of religious liberty: the age of children in the institution,<sup>134</sup> the "substantiality" of the aid to the religious school,<sup>135</sup> the broadness of the classification,<sup>136</sup> and the "directness" of the way the aid reaches a religious school.<sup>137</sup> The younger the children in the institution receiving aid, the more substantial the aid, the more directed the classifica-

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131. Proposition 174, *supra* note 35.

132. *Id.*, preamble.

133. *Id.*, purpose.

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

135. *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 483 (1986).

136. *Mueller v. Allen*, 463 U.S. 388, 395 (1983).

137. *Id.* Several commentators include another factor in this area of the law. Richard Mason indicates that the Court also considers "whether the law as a whole give the appearance that the state is 'endorsing' religion." Mason, *supra* note 130, at 630. Mason relies on *Lynch v. Donnelly*, 465 U.S. 668 (1984), for the support of this theory. I believe that *Lynch* is not a proper "similar case" to use to examine vouchers programs in the aid to religious education cases because it is a public forum case. The endorsement aspect of *Lynch* is no doubt important to a complete evaluation, but more as an independent alternative test than as an element of three traditional effects analysis of *Lemon*.

tion at religion, and the more direct the government aid to the school, the more likely the program will violate the Establishment Clause. Traditionally, religious schools were considered to be so “pervasively sectarian” that no aid could survive an Establishment Clause challenge if it supported the religious mission of the religious institution.<sup>138</sup> Despite the pervasive religious environment of religious elementary and secondary schools, more recent cases have allowed aid to flow to religious schools in certain circumstances when a parent or student directs state-funded aid to the religious institution instead of the state sending the aid directly. Chief Justice Rehnquist best summarized this view of the Establishment Clause in *Zobrest* when he wrote “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.”<sup>139</sup> Despite previous cases to the contrary,<sup>140</sup> the most important factor has become the directness of the aid.

The Court’s focus on the directness of the aid encapsulated in the use of the language of the school choice in Establishment Clause jurisprudence started with the Court’s opinion in *Mueller v. Allen* and had its most recent incarnation in *Zobrest*, which mainly relied on the private choice within a neutral, non-religious program analysis. The Court in *Mueller* emphasized several factors in deciding a law did not have a primary effect that advanced religion. First, the legislature has broad discretion in establishing any system of deductions in its Tax Code.<sup>141</sup> Second, and most importantly for the Court, all parents were included in the program, not just parents of children in religious schools, indicating the primary, secular effect of the statute.<sup>142</sup> This point formed the basis for how the Court distinguished the similar fact pattern in *Nyquist*. Proposition 174 shared with the plan in *Mueller* the feature the Court used to distinguish the plan in *Mueller* from the one rejected in *Nyquist*: the benefit from the aid was not limited to parents of private, religious education.<sup>143</sup> Third, government aid reached religious schools “only as the result of numerous private choices of individual parents of school age children.”<sup>144</sup> According to the Court, these distinctions provided enough room to carefully waltz around previous cases involving the “direct” transmission of state funds to religious schools.<sup>145</sup>

*Mueller* departed from previous line of cases that recognized the transparency and formalism of this analysis. What was forbidden by the

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138. *Meek v. Pittenger*, 421 U.S. 349, 366 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1975).

139. *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2466 (1993).

140. See Committee for Pub. Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756, 781 (1973) (noting that directness of aid is only one of several factors to review).

141. *Mueller*, 463 U.S. at 399.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

Establishment Clause in *Wolman* and *Nyquist* was allowed in *Mueller*, namely aid to religious schools that subsidized education, and not non-educational services.<sup>146</sup> *Mueller* also eliminated any serious effects analysis by rejecting a statistical analysis of how much aid in a general program actually flowed to religious schools.<sup>147</sup> In *Mueller*, the Court upheld a Minnesota law allowing taxpayers to deduct certain education expenses from gross income in computing state income tax despite the statistical evidence that ninety-six percent of the aid would reimburse parents expenses from religious schools.<sup>148</sup> The Court was satisfied that any unequal benefits to religious schools were mitigated by the equal benefit to the state of reducing the burdens on the public school system.<sup>149</sup> This comparison departed from prior cases because it looked to an "offsetting" effect on public schools as if it would somehow erase the effect of sending state funds to religious schools. (The parallel to Proposition 174 is quite striking. The proponents of Proposition 174 focused on the benefit to public schools system in reduced costs and burdens on public schools.<sup>150</sup>) Additionally, the Court refused to ground the constitutionality of a facially neutral law on varying annual reports, leaving the law in a state of continual uncertainty. The significance of this rejection cannot be overstated, because, in *Mueller*, ninety-six percent of the eligible beneficiaries of the Minnesota tax deduction were parents with children in religious schools.<sup>151</sup> If the private choice analysis insulated the Minnesota legislature's tax deduction in *Mueller* from having a primary effect to aid religion, then the primacy of that analysis swallows whole the importance of any other relevant factor. By making this simple argument, any court reviewing this legislation can drive Proposition 174 through the holes in the effects prong of *Lemon* test ripped open by *Mueller*.

Any remaining doubts the Court's erosion of the protections of the Establishment Clause through the use of the private choice by parents or students to direct funds to religious use was swept away by *Witters v. Washington Department of Services for the Blind*.<sup>152</sup> The Court in *Witters* used the private choice reasoning of *Mueller* to reject an Establishment Clause challenge to a Washington State program assisting the blind when a blind person sought to use the money at a private Christian college in order to become a pastor.<sup>153</sup> Although Justice Marshall, writing for the Court, did not cite *Mueller*, five Justices noted the parallel reasoning and cited

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146. *Id.*

147. *Id.*

148. *Id.* at 405 (Marshall, J., dissenting).

149. *Id.* at 402.

150. See CALIFORNIA BALLOT PAMPHLET, *supra* note 26, at 35-36 (outlining potential reduced outlays for school budgets, capital, and administrative costs).

151. *Mueller*, 463 U.S. 400-01.

152. 474 U.S. 481, 487 (1986); Futterman, *supra* note 99, at 725.

153. *Witters*, 474 U.S. at 481. Justices Powell and O'Connor in independent concurring opinions both recognized and cited the applicability of *Mueller*. *Id.* at 490-91, 493.

*Mueller* in separate concurring opinions.<sup>154</sup> In examining the Washington State program under the effects test, Justice Marshall set forth three reasons the program did not create a primary effect of advancing religion. First, the aid under the Washington program flowing to the religious school ultimately did so as the result of the “genuinely independent and private choices of the aid recipients.”<sup>155</sup> This element of *Witters* tracks the third element of the majority opinion in *Mueller*.<sup>156</sup> Second, the program to aid the blind created no financial incentive to undertake a religious education or attend a religious school.<sup>157</sup> Third, the Court focused on the facts that nothing in the record revealed that a significant portion of the aid went to religious institutions.<sup>158</sup>

One critical difference that could have been used to distinguish between *Witters* and Proposition 174 is that aid in *Witters* went to a student at a university—not elementary or secondary schools. This distinction had previously provided a dividing line between acceptable aid and unacceptable aid,<sup>159</sup> but it no longer appears relevant to the Court. *Zobrest* presented the issue of whether the distinction that *Witters* involved aid to a university instead of a elementary or secondary school outweighed the importance of the private individual choice in directing aid to the religious institution; it does not.

In *Zobrest*, the Court rejected an Establishment Clause challenge to the use of state funds to pay for a sign interpreter for a deaf student attending a private religious school.<sup>160</sup> The Court explicitly relied on the principle that the state funds sent to religious schools were part of a general program distributing funds neutrally to any child without regard to any religious affiliation of the school the student attends. Writing for the Court, Chief Justice Rehnquist followed the reasoning in *Witters* and *Mueller* that the private choice of the parents cannot be attributed to state decision making and thus the use of program funds that indirectly aid a religious institution did not offend the Establishment Clause.<sup>161</sup> Chief Justice Rehnquist made no mention of the amount of aid that would flow to religion, rather he emphasized how the program was available without regard to the religious or private nature of the institution benefitted, and thereby created no financial incentive for students to choose religious over non-religious education.<sup>162</sup>

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154. *Id.* at 490-91, 493 (concurring opinions of Justice White, of Justice Powell as joined by Chief Justice Burger and Justice Rehnquist, and of Justice O’Connor).

155. *Id.* at 488.

156. The third argument the Court set forth under the primary effects prong was that public funds become “available only as a result of numerous, private choices of individual parents of school age children.” *Mueller*, 463 U.S. at 399. In *Witters*, this analysis of private choice becomes the Court’s leading argument under the primary effect’s prong. *Witters*, 474 U.S. at 487.

157. *Witters*, 474 U.S. at 487.

158. *Id.* at 488.

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

160. *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2466 (1993).

161. *Id.* at 2467-68. In fact, the Court explicitly cited *Mueller* for this point. *Id.* at 2467.

162. *Witters*, 474 U.S. at 487.

The opinion ignored the distinction between university and elementary and secondary education. Thus, after *Zobrest*, the Court allows aid to flow to religious education regardless of the age of the children, the size of the program, or the substantiality of aid to the school—the only factor is the degree of directness.

Several principles arise out of *Mueller*, *Witters*, and *Zobrest* which allow programs to provide indirect aid to religious schools without violating the effect prong of the *Lemon* test. Aid does not violate the Establishment Clause when the state (1) makes a direct payment to parents or students, who then remit the aid to the school of their choice, religious or not;<sup>163</sup> (2) creates no incentive to attend a religious institution instead of secular ones;<sup>164</sup> and (3) makes benefits available to all children without regard to a religious institution receiving benefits.<sup>165</sup> An analysis of these provisions shows that Proposition 174 would have survived a constitutional attack under the Establishment Clause. First, Proposition 174 was a broad based program that includes all school-age children currently enrolled in the public schools. After two years, when children attending private and religious schools are included in the scholarship program, the initiative will include all school age children.<sup>166</sup> At every point, the initiative neither categorized students nor distributed aid with reference to religion, and after *Mueller*, *Witters*, and *Zobrest*, this fact provides strong evidence of a secular primary effect.

Second, under the Court's *Zobrest* and *Witters* analysis, Proposition 174 did not create an incentive for students or parents to choose a religious school. The scholarship amount remains at half the cost of educating a student in the public school system, regardless of student choosing a religious or non-religious school.<sup>167</sup> The scholarship under Proposition 174 does no more or less than the program in *Witters*, "It creates no financial incentive for students to undertake sectarian education. It does not create greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited . . . to students at sectarian institutions."<sup>168</sup> Under the Court's logic, because Proposition 174 would have offered public school students the same amount of money to go to other public schools; newly formed schools; private, non-religious schools; or religious schools, the *primary* effect does not advance religion. Furthermore, any court could now emphasize how the additional purposes of Proposition 174 to offer greater choice to parents, greater accountability to parents, and greater opportunity for teachers all would have served to expand the full

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163. *Zobrest*, 113 S. Ct. at 2467; *Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at 399.

164. *Zobrest*, 113 S. Ct. at 2467; *Mueller*, 463 U.S. at 399.

165. *Zobrest*, 113 S. Ct. at 2467; *Witters*, 474 U.S. at 487; *Mueller*, 463 U.S. at 398.

166. Proposition 174, *supra* note 35, subpart (a)(5).

167. *See id.*, subpart (a)(1) (assigning value to the voucher based on one-half the average amount of state and local spending per pupil—not determined by the type of school at which the voucher would be used).

168. *Witters*, 474 U.S. at 488.

benefits of the initiative beyond the students enrolled in religious schools, consequently taking the emphasis off religious schools and providing strong evidence under this analysis of a secular primary effect to improve education.

Third and perhaps most important, the drafters of Proposition 174 carefully composed its language to take advantage of the evolving view that the independent choices of a parent would insulate the state from any successful challenge under the Establishment Clause. The section "empowering parents" provides that parents are free to choose any scholarship redeeming school, and "*such selection shall not constitute a decision or act of the State or any of its subdivisions.*"<sup>169</sup> This language tracks the analysis set forth in *Mueller*, *Witters*, and *Zobrest*: when the state enacts a general program for a legitimate purpose to increase the quality of education and a parent independently and privately chooses where to spend the scholarship, the flow of state money to religious education is the result of the parent's choice, not state action.<sup>170</sup> Thus a court could find that Proposition 174's inclusion of religious schools does not constitute unconstitutional state action, rather it facilitates parental choice.

Under this private choice doctrine, there still remains some ground to argue that Proposition 174 violates the Establishment Clause, but these arguments will most likely not survive the force of the private choice analysis to immunize neutral programs from Constitutional attack when a private actor remits state funds to religious institutions. The strongest argument that Proposition 174 violates the Establishment Clause follows the reasoning in *School District of Grand Rapids School District v. Ball*.<sup>171</sup> In *Grand Rapids*, the Court found the program in question provided in-kind benefits to religious schools indistinguishable from a direct cash grant because the secular and religious education missions of religious elementary and secondary schools were so intertwined that aid relieved the schools of otherwise necessary costs involved with religious education.<sup>172</sup> Under the same analysis, vouchers would give aid indirectly to the schools and provide them with a subsidy in performing their educational function and thus violate the Establishment Clause. Yet *Zobrest* gravely weakened the strength and authority of the reasoning in *Grand Rapids*. Relying on the private choice analysis, Chief Justice Rehnquist rejected the subsidy argument when it was made against the handicapped program which provided the interpreter in the religious school because the primary benefit went to the student who incidentally chose a religious school.<sup>173</sup> The Court does not look at the

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169. Proposition 174, *supra* note 35, subpart (a)(4) (emphasis added).

170. See *supra* notes 141-165 and accompanying text.

171. 473 U.S. 373 (1985).

172. *Meek v. Pittenger*, 421 U.S. 349, 364 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 617; *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 652 (1980). See *supra* notes 114-117 and accompanying text.

173. *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2468-69 (1993).

effect on religion, but rather on the child.<sup>174</sup> This is the same shift made in *Mueller* where the benefit to public education “offset” any religious effect. It is important to recognize that the Court was not limited to this distinction—there were other possible factual differences to distinguish between the services provided to handicapped individuals in *Witters* and *Zobrest* and the general, remedial educational services provided to supplement education in *Grand Rapids*. These distinctions, however, were not mentioned in either case. Regardless of whether the money might reduce education costs or not, the question of the effect of the money never arises because, under the *Zobrest* logic, the government is not sending the funds to religious schools, the parents are. Given the private choice analysis used in *Zobrest* to distinguish *Grand Rapids*,<sup>175</sup> any argument that Proposition 174 violates the Establishment Clause based on *Grand Rapids* and the factual similarities of the nature of the aid to Proposition 174 would fall victim to the choice analysis adopted in *Mueller*,<sup>176</sup> endorsed implicitly in *Witters*,<sup>177</sup> and affirmed in *Zobrest*.<sup>178</sup>

A second possible way to distinguish *Zobrest* would rest on other cases where the Court has previously indicated that the amount of the aid flowing to religious institutions can be an influential factor as to whether a program created an unacceptable establishment of religion. In *Witters*, the Court relied on the fact that nothing indicated that a significant portion of the program’s funding would go to support religious schools.<sup>179</sup> Thus, in addition to the aforementioned factors, the program did not create a danger that it violated the Establishment Clause because the money that flowed to religious schools was inconsequential. Whether or not Proposition 174 may have met this requirement could have been based on careful factual and statistical analysis, yet such statistical evaluations were rejected by the Court in *Mueller* as part of the primary effects test.<sup>180</sup> The Court’s reasons for why it rejected statistical analysis are relevant to an evaluation of Proposition 174. First, the Court noted that parochial education has secular benefits in that it provides an alternative to the public schools and creates “wholesome competition,”<sup>181</sup> which is exactly what Proposition 174 explicitly set out to do. Furthermore, the amount of aid to the religious institution analysis was not repeated in *Zobrest*. Chief Justice Rehnquist carefully mentioned three significant factors of *Witters*, but subtly changed the amount of aid argument

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174. This position looks at the “primary” effect as only extending as far as the first recipient of the funds, not the aggregate primary effect. This focus on the first recipient departs from earlier Court cases that focused on the aggregate primary effect of the aid. *Nyquist*, 413 U.S. at 774-81.

175. *Zobrest*, 113 S. Ct. at 2468-69 (essentially finding attenuated financial benefit attributable to private choices).

176. *Mueller v. Allen*, 463 U.S. 388, 399 (1983).

177. *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 483 (1986)

178. *Zobrest*, 113 S. Ct. at 2468-69.

179. *Witters*, 474 U.S. at 488.

180. *Mueller*, 463 U.S. at 401-02.

181. *Id.* at 402.

made by Justice Marshall into a concern over whether or not the program makes benefits available without reference to the religious or private nature of the institutions benefitted.<sup>182</sup> The cumulative force of *Mueller* and the change by Chief Justice Rehnquist in *Zobrest* rob of any efficacy the potential argument that Proposition 174 may give a substantial amount of aid to religion.

A third potential argument against the constitutionality of the initiative still available under the Establishment Clause as tempered by *Zobrest* follows the advice that "Deep Throat" told Woodward and Bernstein: "Follow the money." Opponents have room to argue that the initiative would have directly given aid to religion because the state *retains* possession of the voucher funds and gives the money *directly* to religious schools.<sup>183</sup> At first glance, the initiative explicitly disavows that the selection of a religious institution can be attributed to the state. It reads:

Scholarships provided here under are grants of aid to children through their parents and not to the schools in which the children are enrolled. . . . The parent shall be free to choose any scholarship-redeeming school, and such selection shall not constitute a decision or act of the State or any of its subdivisions. . . .<sup>184</sup>

A court resting on this section for proof that there is no state action ignores the advice of Ruth Bader-Ginsburg on statutory interpretation in her confirmation hearings, "Read, and then read on."<sup>185</sup> A careful reading of the mechanics of the next section of Proposition 174 reveals that the voucher or scholarship represents money that *never goes to the parent*. The money remains in the control and possession of the state at all times until it is disbursed to the school.<sup>186</sup> Subsection seven under the Empowerment of Schools section directs the state:

After the parent designates the enrolling school, the *State shall disburse the student's scholarship funds*, excepting funds held in trust pursuant to paragraph (3) of subdivision (a), in equal amounts monthly, *directly to the school* for credit to the parent's account. Monthly disbursements shall occur within 30 days of receipt of the school's statement of current enrollment.<sup>187</sup>

The parent directs the payment *and the state makes the payment*. Another section subtly reveals the same mechanics: if a student attends a private school where the tuition is less than the amount of the voucher, \$2,600, the

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182. Compare *Zobrest*, 113 S. Ct. at 2467 with *Witters*, 474 U.S. at 488.

183. Proposition 174, *supra* note 35, at subpart (b)(7).

184. *Id.*, subpart (a)(4).

185. *The MacNeil / Lehrer News Hour* (Educational Broadcasting & GWETA Broadcast, July 20, 1993), available in LEXIS, News Library, Script File.

186. Proposition 174, *supra* note 35, at subpart (a)(4).

187. *Id.*, subpart (b)(7) (emphasis added).

surplus remains in trust by the state for the students to use at a later time. If the credit is not used by the time of graduation, the student may spend the credit at *any* college or university meeting the standards for voucher redeeming schools in the state of California.<sup>188</sup> The student could use the remaining funds to pay tuition at a religious university. Despite the technical direct payment to schools, the state may still rely on the magical immunization of the parental choice that sent the money to the religious institution to cut the chain of state action. Parental and student choice saved the plans in *Mueller*, *Witters*, and *Zobrest*; it would have most likely saved Proposition 174.<sup>189</sup>

### 3. Excessive Entanglement

The strength of the entanglement prong has waned in the recent cases that apply the *Lemon* test.<sup>190</sup> In assessing the nature of entanglement, the Court evaluates (1) the character and the purpose of the institution benefitted, (2) the nature of the aid provided by the government, and (3) the resulting relationship between the government and religion.<sup>191</sup>

Proposition 174 offers aid to religious elementary and secondary schools.<sup>192</sup> This part of the entanglement prong would have been the most difficult hurdle to clear after Proposition 174 passed the primary effect test. In the end, however, this one aspect would not have provided grounds to find the initiative unconstitutional because, under the current view of state action in the primary effects prong, there will be no action by the government to “entangle” with religion. Proposition 174 would pass muster because the parents choose to direct aid to religious schools instead of the government giving financial support to the institution,<sup>193</sup> and, furthermore, the initiative does not monitor the use of funds in private schools.

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188. *Id.*, subpart (a)(3).

189. For a similar analysis of the Bush voucher plan, America 2000, see Futterman, *supra* note 99, at 727-28.

190. The entanglement prong of the *Lemon* test is what distinguished it from previous Establishment Clause cases that looked both at purpose and primary effect of a law. The entanglement prong draws on the principles set forth in *Walz v. Tax Comm'r*, 397 U.S. 664, 674-80 (1970).

191. *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971)

192. Proposition 174 allows private religious schools to qualify as “scholarship-redeeming school” as long as the school meets the basic requirements of the state to be a private school and meets the additional minimal requirements set forth in the initiative. Proposition 174 *supra* note 35, subpart (b). These additional requirements for “scholarship-redeeming schools” (1) prohibit schools from discriminating on the basis of race, ethnicity, color, or national origin, (2) prohibit schools from advocating unlawful behavior or teaching hatred of certain group or provides false information about the school, and (3) prohibit schools from having less than 25 students. *Id.*

193. This distinction is false one. See *infra* notes 194-228 and accompanying text.

### III. PRIVATE CHOICE THEORY WEAKENS THE PROTECTIONS OF THE ESTABLISHMENT CLAUSE

Proposition 174 was a state program designed to send *state* funds to religious education despite parental involvement veiled in the language of “choice.” A private choice in a neutral program should not insulate a program distributing state funds to religious education from constitutional review under the Establishment Clause. This Part criticizes the Court’s formalistic analysis under *Mueller*, *Witters*, and *Zobrest* for several reasons. Under the Court’s analysis in *Mueller*, *Witters*, and *Zobrest*, the directness of aid factor proves decisive.<sup>194</sup> The law of the Establishment Clause, however, should forbid a state from directly aiding religious education because it is indistinguishable from aiding religion.<sup>195</sup> Despite the emphasis on parental “choice” in Proposition 174, the choice of the parent was seriously circumscribed—so much so that it should not cut off the chain of state action. Second, because Proposition 174 lacks meaningful choice, it is indistinguishable from former programs found unconstitutional.

The possible constitutional analysis of Proposition 174 set forth in Part II.B. reveals that the current private choice theory allows the state to aid religious education under a general program to improve the quality of education. Proposition 174 would have given to the state the power to aid religious education with large grants of unrestricted state money through the filter of parent choice. However, regardless of whether the state or parent chooses the school, under Proposition 174 the state retains control and possession of the funds and then releases them to the religious school. Vouchers, as a lump-sum grant of state money, will provide support to the entirety of religious schools, including religious teachers salaries, religious school books, and prayer books. Such a program is and should be viewed as state aid to religion.

The voucher program established by Proposition 174 should be found to violate the Establishment Clause because the state contemplates and includes religious schools within its incentives package, encouraging and knowing that unrestricted state money will be used to support the entirety of the religious school’s mission and educational program. A parent’s choice to deliver the voucher to the religious school does not save the program. The attempt to save a program delivering state funds to religious schools through the vehicle of parental choice was prohibited by the Court in *Nyquist*.<sup>196</sup> In *Nyquist*, the Court focused on whether “grants delivered to parents rather than schools is of such significance as to compel a contrary result [to that of direct

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194. See *supra* notes 134-170 and accompanying text.

195. See *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, at 774-75 (1973) (noting that aid to religious schools must have some way on insuring that the aid does not reach the religious aspect of the schools).

196. *Id.* at 774-81.

aid].”<sup>197</sup> Looking at *Everson* and *Allen*, the Court in *Nyquist* concluded that the fact that aid is given to parents rather than to schools, “far from providing a *per se* immunity from examination of the substance of the States program, . . . [is rather] only one of many factors to be considered.”<sup>198</sup> Tuition grants in *Nyquist* were not subject to any restriction by the program nor by the nature of the aid given to the school. Notwithstanding the private choice made by parents, the Court concluded that the effect was “unmistakably to provide desired financial support for non-public, sectarian institutions.”<sup>199</sup> The same should be true for voucher programs that include religious elementary and secondary schools, such as Proposition 174, because even indirect aid runs aground of the Establishment Clause when there is no effective way to guarantee that the aid is not used exclusively for secular, neutral, and non-religious purposes.<sup>200</sup>

Parental choice might be a meaningful factor to limit state action, but a severely limited choice, such as that in Propositions 174, cannot. For example the donation of income from a federal paycheck to a church is a free choice sufficient to cut off state action. In *Witters*, Justice Marshall compared the results of the private choice to send the assistance grant to a religious college to the choice by a federal employee to donate her paycheck to a religious organization.<sup>201</sup> The Court concluded that there is no Establishment Clause violation in the paycheck example, and consequently, the private choice cuts off any action attributable to the state in the flow of funds to the religious seminary. Voucher programs that include religious schools are designed to aid education in a way that includes religious schools within the scope of its incentive structure, and thus the legislature, in creating such a program, directly foresees, intends, and allows state money to fund religious education. Consequently, Proposition 174 differs from both the blindness program and the federal paycheck.

The contrast with the federal paycheck example is illustrative. First and most importantly, it is a question of state funds vs. personal funds. Whereas the voucher is state money, the paycheck constitutes private money because the paycheck pays for services rendered; the transaction is complete. When a state program is designed to improve education and includes religious education, it is not neutral. The use of the paycheck does not fulfill any purpose of the program that gave the money to the employee in the first place. Under Proposition 174, the state would have created a voucher so that a parent could choose a voucher redeeming school, including religious schools, and thereby improve the quality of education. Under the paycheck scenario, the government did not create the employee’s employment in order to allow her to choose religious worship, rather it paid her for services

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197. *Id.* at 780-81.

198. *Id.* at 781 (emphasis added).

199. *Id.* at 780-83.

200. *Id.* at 780.

201. *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 483 (1986).

rendered. The parent's choice is the means the state uses to achieve its end of financing education. Thus, the transaction is not complete until the money reaches the religious school. Second, state control of the funds indicates the state action involved. The issue of who controls the use of funds distinguished the voucher from the paycheck. The employee has full control, dominion, and possession over the paycheck. Under the voucher proposal, parents never have dominion or possession over the money or scholarship, the state retains control.<sup>202</sup> Third, the state has no control over the use of the paycheck (except that it may not be used illegal purposes). The voucher, on the other hand, is restricted in its use. Even if the parent received the scholarship, it may only be used for education at a voucher-redeeming school. The parent may not buy groceries with it, pay her mortgage with it, spend it at the race track, or donate ten percent to her church. The state has control over the scope of the parent's choice in using the voucher and explicitly allows the inclusion of religious education. Finally, the tax consequences also differ. The federal paycheck is compensation for services rendered, no strings attached, and the employee must also pay taxes on her income. The voucher program is a creative state plan to finance education. The drafters of Proposition 174 implicitly recognized this distinction by having Proposition 174 explicitly note that the voucher does not represent income to the parent.<sup>203</sup>

These four distinctions reveal that the voucher is the state means to carry out state goals with state funds that are restricted to one possible use and not considered income to the parent. The differences also reveal that the voucher does not resemble the freely given donation of a taxpayer's money to her church or temple—rather, the state created the voucher as part of an education finance system that includes religious schools. These distinctions reveal that the “choice” of the parent is merely an uncertain delivery mechanism to allow the state to deliver unrestricted state funds to religious schools. Thus, the parent's “private” choice under Proposition 174 is, in essence, only a question of to which type of school the state money will be sent: and this “choice” is so restricted that it should not cut off state action for purposes of Establishment Clause analysis.

The infirmity of technical timing and routing mechanisms to deliver state funds to religious schools has been rejected in the past. The former, conservative, Republican Governor of California George Deukmejian pointed out the flimsy distinction between a voucher plan giving aid to religious schools and tuition reimbursements to parents, which have been rejected as unconstitutional direct aid to religious schools in violation of the Establishment Clause. In an opinion analyzing the constitutionality of a voucher program which included private religious schools, former state Attorney General Deukmejian wrote:

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202. Proposition 174, *supra* note 35, subpart (b)(7).

203. *Id.*, subpart (a)(4).

There does not appear to be a constitutionally significant basis for distinguishing between a state program providing public funds to parents that may be used to pay tuition in church-operated schools before the school year commences (a state voucher program) and a state program providing public funds to reimburse parents for tuition in church-operated schools after the school year is completed (New York program overturned in *Nyquist*).<sup>204</sup>

While Deukmejian wrote relying on *Nyquist*, his analysis highlights the frivolous and insignificant timing difference between a voucher program and what the Court struck down as direct aid to religious schools. Despite the intermittent development of private choice doctrine in *Mueller*, *Witters*, and *Zobrest*, the strength of the parallel to *Nyquist* is persuasive. When a state program is designed to improve education and includes religious education, it is not neutral. State restrictions on and possession of state funds overshadow a parent's choice to send state funds to religious schools such that the "private" choice is not independent of the greater state action. What distinguishes the two is *how* and *when* the state sends state funds to elementary and secondary religious schools, not *whether* the state sends state funds to religious schools. Consequently, timing and routing distinctions of the funds should have little constitutional significance to distinguish such a program from direct aid.

The crafty language that the decision belongs to the parent and that the decision of a parent "shall not constitute a decision or act of the State,"<sup>205</sup> should not obscure the fact that the state directly disburses government funds to religious institutions.<sup>206</sup> Blithely stating that the "sun is a planet" or saying that "state aid to religion is constitutional because it is not an act of the state" does not make either so. If accepted, this facile, tautological logic would immunize any law from constitutional attack as long as it was properly drafted. Under the Establishment Clause, it would allow the federal and state governments to do what the Constitution through the First Amendment plainly forbids by creating a general programs that in some small way involve private individuals. Such a doctrine gives the power to legislatures through the employment of ingenious lawyers, to subvert the command of the Constitution that it is the supreme law of the land.

Neither history nor law supports the formalism of private choice theory. At the creation of the Bill of Rights, the Founders rejected a form of the

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204. 61 Op. Att'y Gen. 64 (Cal. 1981) (concluding that vouchers programs including religious schools would violate the Establishment Clause). The opinion assumed that a vouchers program includes religious and private schools as eligible redeeming voucher schools regardless of the moral, social values, philosophy, or religion taught at the school. *Id.* See *Nyquist*, 413 U.S. at 786-87 (concluding that the timing of the reimbursement is of no constitutional significance).

205. Proposition 174, *supra* note 35, subpart (a)(4).

206. See *supra* notes 156-162 and accompanying text.

individual choice theory for the Establishment Clause.<sup>207</sup> The Founders rejected multiple establishments where religious assessments made by the state for the benefit of religion directed by the individuals to the religion of their choice.<sup>208</sup> Such individual choice did not relieve the coercive nature of the assessment, nor did it alleviate the establishment through sponsorship. In aid to religious education cases, the private choice of a parent to direct state funds to a religious school should not relieve it of its character as state aid to religion.

The Court's acceptance in *Mueller*, *Witters*, and *Zobrest* of the private choice reasoning obscures the fact that such reasoning is based on the theory that a state may delegate a power the state does not have to another actor. The private choice theory rests on the mistaken belief that the state may delegate power to parents to act in place of the state and thereby avoid the Establishment Clause challenge by removing the state actor. Other areas of the law support the view that forbids federal and state governments from delegating to private individuals a power that the state did not have to begin with. In *Planned Parenthood v. Danforth*,<sup>209</sup> the court rejected a spousal consent requirement before a woman could terminate her pregnancy during the first trimester. By requiring spousal consent, the state attempted to delegate to a husband the power to forbid a woman from choosing to terminate her pregnancy. The state was prohibited from creating spousal consent requirements because it could not delegate a power it was prohibited from exercising.<sup>210</sup> Similarly, because the Establishment Clause forbids the federal and state governments from directly giving state aid to religious education, the state cannot delegate the same power to parents and students to avoid a constitutional prohibition. Note that under *Danforth*, the government is not prohibited from regulating abortion—it simply may not give to another what it did not have power to do in the first place (prohibit abortion in the first trimester). Accordingly, this view of state's power does not invalidate all previous cases allowing aid to religious education under limited circumstances. Rather, it merely eliminates the mistaken view, set forth in private choice theory, that the state can avoid unconstitutional act by delegating the choice to give state money to religious education to a non-state actor, namely a parent. This is not to say that parents cannot give their own money to religious education; it is a restriction on the use of government funds.

There are several current popular views that a strong Establishment Clause jurisprudence has been hostile to religion and should be cast aside to

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207. See generally, James Madison, *A Memorial and Remonstrance*, in 8 THE PAPERS OF JAMES MADISON 298 (Robert A. Rutland et al. eds., 1973). See also Sky, *supra* note 86, at 1465.

208. Douglas Laycock, "Non-Preferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 894-99, 913-19 (1986).

209. 428 U.S. 52 (1976).

210. *Id.*

allow greater accommodation to an inherently religious people.<sup>211</sup> Stephen Carter criticizes the Court's view of religion as a "hobby" and says it out of step with the true beliefs of the American people.<sup>212</sup> According to this view, the Establishment Clause should accommodate aid to religious institutions in order to prevent hostility towards religion. California's Proposition 174 dovetailed with this view of the Establishment Clause. Proponents of Proposition 174 (and voucher proponents in general) often argue that the double burden of paying taxes to support the public school system and additionally paying private religious school tuition reveals the hostility of Establishment Clause jurisprudence to religion.<sup>213</sup> This view of the Establishment Clause is based on a mistaken view about the importance of religious liberty. The Establishment Clause was not designed as a weapon to marginalize religion. It captured the wisdom that not to separate church and state endangers religious liberty. The Founders used the "separation of church and state" to insure the protection of religious liberty because religion was essential and of fundamental importance, not because it was unimportant, irrational,<sup>214</sup> or dangerous.<sup>215</sup>

It is not because religious teaching does not promote the public or individual's welfare, but because neither is furthered when the state promotes religion education, that the Constitution forbids it to do so. Both legislatures and courts are bound by that distinction. In failure to observe it lies the fallacy of the "public function"—"social legislation" argument . . . . By no declaration that a gift of public money to religious uses will promote the general or individual welfare, or the cause of education generally, can legislative bodies overcome the Amendment's bar. . . . The Amendment has removed this form of promoting the public welfare from the legislative and judicial competence to make a public function. It is exclusively a private affair.<sup>216</sup>

A glib interpretation of this idea could support the idea that by giving the choice back to parents the state has left funding and choosing religious education to private citizens. The fallacy of this argument is the same as the one rejected in *Danforth*. The state has no original power to design a

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211. CARTER, *supra* note 4, at 105-15. For current classifications of different Establishment Clause jurisprudence see Lupu, *supra* note 121, at 779-81 (describing the landscape of religion clause scholars in categories of which clauses the authors favor to be strongly enforced). Writing for the Court in *Zorach v. Clauson*, Justice Douglas approved of a release time program for students to leave school in order to attend religious services, explaining, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Polls indicate that a large majority of the population of the United States identifies itself as religious. Yet the conclusory remark by Justice Douglas that our institutions presuppose a Supreme Being is more difficult to square with the fact the Constitution does not use the word "God," rather the Constitution derives and presupposes the authority from "We, the People," while, in contrast, the Declaration of Independence makes references many references to a Divine Creator.

212. CARTER, *supra* note 4, at 23-43.

213. *Id.* at 200.

214. *See id.* at 106-15.

215. *See* Baer, *supra* note 18, at 449.

216. *Everson v. Board of Educ.*, 330 U.S. 1, 52, 53 (1947) (Rutledge, J., dissenting).

program which delegates to a private actor the choice to send state funding to religious schools.

Proposition 174 would have allowed legislatures to achieve indirectly what they cannot do directly by giving the power it did not constitutionally have to a private actor. While some have used the principle of the separation of church and state and its application to prohibit state funding of religious schools as a reason to call religion a “wholly private affair,”<sup>217</sup> a more accurate word for “private” is “non-governmental.” The “wholly private affair” language conjures up the notion that religion has no place in public life. The Establishment Clause, however, allows for religion to play a role in public life. In fact, the Free Exercise Clause demands that this is so. For example, religious leaders may participate in our legislatures<sup>218</sup> and students may use public school facilities for voluntary religious meetings.<sup>219</sup> The state may even aid religious education at the college and university level because of the age difference in students and the different educational mission of these institutions that prevents the government from funding pervasively sectarian institutions.<sup>220</sup> Despite these accepted areas for accommodation, the Court has repeatedly recognized that the state may not fund religious education at the elementary and secondary level when there is no way to ensure that the aid will not flow to the religious mission of the school.<sup>221</sup> Vouchers, as a lump-sum grant of money, will provide support to the entirety of religious schools, including religious teachers salaries, religious school books, and prayer books. This is precisely what the Establishment Clause forbids.<sup>222</sup> Proposition 174 would have given to the state the power to aid religious education with large grants of unrestricted money through the filter of parent choice.

The principle here applies to religious elementary and secondary education cases, and not to other areas under the Establishment Clause for several reasons. As stated previously, the influence of religion dominates the curricula of elementary and secondary schools established and run by religious organizations which makes the secular and religious missions of the school inextricably intertwined.<sup>223</sup> This influence, along with the young age of school children, combine to form a unique environment different from that of a religiously affiliated university.<sup>224</sup> This reason alone may be adequate grounds to distinguish *Witters* from a voucher proposal such as Proposition 174. The Court has recognized the significance of religious

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217. *Id.* at 52.

218. *McDaniel v. Paty*, 435 U.S. 618 (1978).

219. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993)

220. *Tilton v. Richardson*, 403 U.S. 672, 685-87 (1971).

221. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774, 780 (1973)

222. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985).

223. *See supra* notes 114-117 and accompanying text.

224. *Tilton*, 403 U.S. at 685-87.

schools and distinguished this area of the law from other traditional exceptions where greater accommodation of religion is allowed, such as prayers before state legislatures,<sup>225</sup> the deductibility of charitable contributions to religious organizations,<sup>226</sup> and equal access for religious clubs to public schools after hours.<sup>227</sup> The unique nature of religious elementary and secondary schools converts what might appear as an acceptable accommodation of religion in other contexts into a forbidden sponsorship of religion. For this reason, the Court must remain vigilant against programs and schemes allowing state aid to flow to these institutions.

#### IV. CONCLUSION

Private choice theory flounders in its attempt to save indirect aid to religious education when it assumes that a state's action to give power to a private individual to choose to send state funds to religious schools will evade the Establishment Clause. This assumption is wrong because the choice is not effective to cut off state action and because a state cannot delegate an action it cannot take. The private choice under a neutral program theory should not insulate from constitutional review under the Establishment Clause a state program controlling, possessing, and distributing state funds to religious education. Indirect aid, just as much as direct aid, runs afoul of the Establishment Clause when there is no effective way to guarantee that the aid is not used exclusively for secular, neutral, and non-religious purposes. Voucher programs that include religious schools are designed to aid education in a way that includes religious schools within the scope of its incentive structure, and thus the legislature, in creating such a program, directly foresees, intends, and allows state money to fund religious education. Under Proposition 174, a parent would never have control nor possession of the state funds; a parent would remain restricted in her disposal of the funds to public or private schools (including religious schools); and a parent would not take the voucher into her income. Such funds should be considered within the scope of *state* action, despite parental involvement veiled in the language of "choice," because the *state* delivers *state* funds to the religious schools. Such programs are not neutral, and parental or student choice under such programs are not private. Such should be the fate of any program similar to Proposition 174.

The view that the separation of church and state represents hostility towards religion is also based on the fallacy that the state has the power to give parents control over sending state funds to religious schools in the first place. The Establishment Clause removed that power from the federal government 200 years ago and from the states almost fifty years ago through

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225. *Marsh v. Chambers*, 463 U.S. 783 (1983).

226. *Walz v. Tax Comm'r*, 397 U.S. 664 (1970).

227. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993).

the extensions of the Fourteenth Amendment.<sup>228</sup> Where the state has no “power,” it does not avoid violating the Constitution by giving that power to another actor.

Although the future of *Lemon* test is uncertain,<sup>229</sup> current trends in Establishment Clause jurisprudence under *Mueller*, *Witters*, and *Zobrest* have weakened the protections for religious liberty against sponsorship, encroachment, and control by government.<sup>230</sup>

In view of this possibility, religious institutions and private schools should resist what initially appears to be a financial boon. These institutions would be well advised to remember that the government’s rule follows shortly behind the government’s coin.<sup>231</sup> While Proposition 174 limited possible, future regulation of private schools, a reformed voucher proposal might create circumstances where federal or state regulations of *religious* education would follow aid in order to satisfy the demand for public accountability and minimum standards for education. This prospect might be more invasive and do far more damage to religious liberty than the initial impact of religious sponsorship.<sup>232</sup>

Although the Supreme Court may currently remain unsympathetic to the argument that parental choice does not immunize the state from the challenge that it purposefully aids religious education because the state includes religious schools among eligible voucher redeeming schools, other judges hopefully will be sympathetic to the argument that a state cannot delegate a power it does not have nor skirt the Establishment Clause by briefly involving parents as a means to send state funds to religious schools.

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228. *Everson v. Board of Educ.*, 330 U.S. 1, 104 (1947).

229. Before Justice White’s retirement, there were five votes to abandon *Lemon*, but no majority could agree on what test to adopt in its place. The recent decision to grant certiorari to *Grumet v. Board of Education*, provided the Court with the opportunity to formally abandon *Lemon* in favor of another test. *Grumet v. Board of Education*, 618 N.E.2d 94 (N.Y. 1993), *cert. granted*, 114 S. Ct. 544 (1993); Joan Biskupic, *School District Raises Church-State Question; Court to Review Hasidic Village Arrangement*, WASH. POST., Nov. 30, 1993, at A16.

230. Given that Justice Rehnquist does not even mention *Lemon* in *Zobrest*, the private choice analysis of *Mueller* and its progeny may survive if the Court formally abandons *Lemon*.

231. *Everson*, 330 U.S. at 27-28 (Jackson, J., dissenting) (quoting *Wickard v. Filburn*, “it is hardly a lack of due process for the government to regulate that which it subsidizes.” *Wickard v. Filburn*, 317 U.S. 111 (1942)). See *Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971) (noting that the history of government grants of money reveals that they are almost always accompanied by control and surveillance).

232. On a more practical note, despite the assurance of Mayor Schundler that the Court will unquestionably approve voucher program inclusive of religious schools, many organizations do not share this view. Romano, *supra* note 1, at 1. Such organizations will remain vigilant and will oppose aid to religious education. Legislators may be well advised to side-step what the Court may appear to allow to save the litigation costs of defending suits based on Establishment Clause challenges to voucher program funding religious education.

Those judges may be swayed by the reasoning of Justice Douglas concurring in *Abington Township School District v. Schempp*,<sup>233</sup>

The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools. . . . What may not be done directly may not have done indirectly lest the Establishment Clause becomes a mockery.<sup>234</sup>

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233. 374 U.S. 203 (1963).

234. *Id.* at 229-30 (emphasis in original omitted). *See also Everson*, 330 U.S. at 24 (Jackson, J., dissenting) ("The prohibition against establishment of religion cannot be circumvented by a subsidy bonus or reimbursement of expense to individuals for receiving religious instruction or indoctrination.").

## APPENDIX

## PROPOSITION 174: TEXT OF PROPOSED LAW

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure expressly amends the Constitution by adding a section thereto; therefore, new provisions proposed to be added are printed in *italic type* to indicate they are new.

PROPOSED LAW  
THE PARENT CHOICE IN EDUCATION INITIATIVE

The following section, the "Parental Choice in Education Amendment" is hereby added to Article IX of the California Constitution:

*Section 17. Purpose. The people of California, desiring to improve the quality of education available to all children, adopt this section to: (1) enable parents to determine which schools best meet their children's needs; (2) empower parents to send their children to such schools; (3) establish academic accountability based on national standards; (4) reduce bureaucracy so that more educational dollars reach the classroom; (5) provide greater opportunities for teachers; and (6) mobilize the private sector to help accommodate our burgeoning school-age population.*

*Therefore: All parents are hereby empowered to choose any school, public or private, for the education of their children, as provided in this section.*

*(a) Empowerment of Parents; Granting of Scholarships. The State shall annually provide a scholarship to every resident school-age child. Scholarships may be redeemed by the child's parent at any scholarship-redeeming school.*

*(1) The scholarship value for each child shall be at least fifty percent (50%) of the average amount of State and local government spending per public school student for education in kindergarten and grades one through twelve during the proceeding fiscal year, calculated on a statewide basis, including every cost to the State, school districts, and county offices of education of maintaining kindergarten and elementary and secondary education, but excluding expenditures on scholarships granted pursuant to this section and excluding any unfunded pension liability associated with the public school system.*

*(2) Scholarship value shall be equal for every child in any given grade. In case of student transfer, the scholarship shall be prorated. The Legislature may award supplemental funds for reasonable transportation needs for low-income children and special needs attributable to physical impairment or learning disability. Nothing in this section shall prevent the*

*use in any school of supplemental assistance from any source, public or private.*

(3) *If the scholarship amount exceeds the charges imposed by a scholarship-redeeming school for any year in which the student is in attendance, the surplus shall become a credit held in trust by the State for the student for later application toward charges at any scholarship redeeming school or any institution of higher education in California, public or private, which meets the requirements imposed on scholarship redeeming schools in paragraphs (1) and (3) of subdivision (b) of this section. Any surplus remaining on the student's twenty-sixth birthday shall revert to the state treasury.*

(4) *Scholarship provided hereunder are grants of aid to children through their parents and not to the schools in which the children are enrolled. Such scholarships shall not constitute a decision or act of the State or any of its subdivisions. No other provision of this Constitution shall prevent the implementation of this section.*

(5) *Children enrolled in private schools on October 1, 1991, shall receive scholarships, if otherwise eligible, beginning with the 1995-96 fiscal year. All other children shall receive scholarships beginning with the 1993-94 fiscal year.*

(6) *The State Board of Education may require each public school and each scholarship-redeeming school to choose and administer tests reflecting national standards for the purpose of measuring individual academic improvement. Such tests shall be designed and scored by independent parties. Each school's composite results for each grade level shall be released to the public. Individual results shall be released only to the school and the child's parent.*

(7) *Governing boards of school districts shall establish a mechanism consistent with federal law to allocate enrollment capacity based primarily on parental choice. Any public school which chooses not to redeem scholarships shall, after district enrollment assignments based primarily on parental choice are complete, open its remaining enrollment capacity to children regardless of residence. For fiscal purposes, children shall be deemed residents of the school district in which they are enrolled.*

(8) *No child shall receive any scholarship under this section or any credit under paragraph (3) of this subdivision for any fiscal year in which the child enrolls in a non-scholarship-redeeming school, unless the Legislature provides otherwise.*

(b) *Empowerment of Schools; Redemption of Scholarships. A private school may become a scholarship-redeeming school by filing with the State Board of Education a statement indicating satisfaction of the legal requirements which applied to private schools on October 1, 1991, and the requirements of this section.*

(1) *No school which discriminates on the basis of race, ethnicity, color or national origin may redeem scholarships.*

(2) *To the extent permitted by this Constitution and the Constitution of the United States, the State shall prevent from redeeming scholarships any school which advocates unlawful behavior; teaches hatred of any person or group on the basis of race, ethnicity, color, national origin, religion, or gender; or deliberately provides false or misleading information respecting the school.*

(3) *No school with fewer than 25 students may redeem scholarships, unless the Legislature provides otherwise.*

(4) *Private schools, regardless of size, shall be accorded maximum flexibility to educate their students and shall be free from unnecessary, burdensome, or onerous regulation. No regulation of private schools, scholarship-redeeming or not, beyond that requirement by this section and that which applied to private schools on October 1, 1991, shall be issued or enacted, unless approved by a three-fourths vote of the Legislature or, alternatively, as to any regulation pertaining to health, safety, or land use imposed by any county, city, district, or other subdivisions of the States, a two-thirds vote of the governmental body issuing or enacting the regulation and a majority vote of the qualified electors within the affected jurisdiction. In any legal proceeding challenging such a regulation as inconsistent with the section; the governmental body issuing or enacting it shall have the burden of establishing that the regulation: (A) is essential to assure the health, safety, or education of students, or, as to any land use regulation, that the governmental body has a compelling interest in issuing or enacting it; (B) does not unduly burden or impede private schools or the parents of students therein; and (C) will not harass, injure, or suppress private schools.*

(5) *Notwithstanding paragraph (4) of this subdivision, the Legislature may (A) enact civil and criminal penalties for schools and persons who engage in fraudulent conduct in connection with the solicitation of students or the redemption of scholarships, and (B) restrict or prohibit individuals convicted of (i) any felony, (ii) any offense involving lewd or lascivious conduct, or (iii) any offense involving molestation or other abuse of a child, from owning, contracting with, or being employed by any school, public or private.*

(6) *Any school, public or private, may establish a code of conduct and discipline and enforce it with sanctions, including dismissal. A student who is deriving no substantial academic benefit or is responsible for serious or habitual misconduct related to the school may be dismissed.*

(7) *After the parent designates the enrolling school, the State shall disburse the student's scholarship funds, excepting funds held in trust pursuant to paragraph (3) of subdivision (a) of this section, in equal amounts monthly, directly to the school for credit to the parent's account. Monthly disbursements shall occur within 30 days of receipt of the school's statement of current enrollment.*

(8) *Expenditures for scholarships issued under this section and savings resulting from the implementation of this section shall count toward the minimum funding requirements for education established by Sections 8 and*

8.5 of Article XVI. Students enrolled in scholarship-redeeming schools shall not be counted toward enrollment in public schools and community colleges for purposes of Sections 8 and 8.5 of Article XVI.

(c) *Empowerment of Teachers; Conversion of Schools.* Within one year after the people adopt this section, the Legislature shall establish an expeditious process by which public schools may become independent scholarship-redeeming schools. Such schools shall be common schools under this article, and Section 6 of this article shall not limit their formation.

(1) Except as otherwise required by this Constitution and the Constitution of the United States, such schools shall operate under laws and regulation no more restrictive than those applicable to private schools under subdivision (b) of this section.

(2) Employees of such schools shall be permitted to continue and transfer their pension and health care programs on the same terms as other similarly situated participants employed by their school district so long as they remain in the employ of any such school.

(d) *Definitions.*

(1) "Charges" include tuition and fees for books, supplies, and other educational costs.

(2) A "child" is an individual eligible to attend kindergarten or grades one through twelve in the public school system.

(3) A "parent" is any person having legal or effective custody of a child.

(4) "Qualified electors" are persons registered to vote, whether or not they vote in a particular election. The alternative requirement in paragraph (4) of subdivision (b) or this section of approval by a majority vote of the qualified electors within the affected jurisdiction shall be imposed only to the extent permitted by this Constitution and the Constitution of the United States.

(5) The Legislature may establish reasonable standards for determining the "residency" of children.

(6) "Savings resulting from the implementation of this section" in each fiscal year shall be the total amount disbursed for scholarships during that fiscal year subtracted from the product of (A) the average enrollment in scholarship-redeeming schools during that fiscal year multiplied by (B) the average amount of State and local government spending per public school student for education in kindergarten and grades one through twelve calculated on a statewide basis, during that fiscal year.

(7) A "scholarship-redeeming school" is any school, public or private, located within California, which meets the requirements of this section. No school shall be compelled to become a scholarship-redeeming school. No school which meets the requirements of this section shall be prevented from becoming a scholarship-redeeming school.

(8) "State and local government spending" in paragraph (1) of subdivision (a) of this section includes, but is not limited to, spending funded from all revenue sources, including the General Fund, federal funds, local

*property taxes, lottery funds, and local miscellaneous income such as developer fees, but excluding bond proceeds and charitable donations. Notwithstanding the inclusion of federal funds in the calculation of "State and local government spending," federal funds shall constitute no part of any scholarship provided under this section.*

*(9) A "student" is a child attending school.*

*(e) Implementation. The Legislature shall implement this section through legislation consistent with the purposes and provisions of this section.*

*(f) Limitation of actions. Any action or proceeding contesting the validity of (1) this section, (2) any provision of this section, or (3) the adoption of this section, shall be commenced within six months from the date of the election at which this section is approved; otherwise this section and all of its provisions shall be held valid, legal, and uncontestable. However, this limitation shall not of itself preclude an action or proceeding to challenge the application of this section or any of its provisions to a particular person or circumstance.*

*(g) Severability. If any provision in this section or the application thereof to any person or circumstance is held invalid, the remaining provisions or application shall remain in force. To this end the provisions of this section are severable.*

