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Brett A. Geier, Funding God's Schools - A Legal Analysis of Appropriating Public Dollars to Parochial Schools: Does Michigan's Latest Legislation Violate the Separation of Church and State?, 49 J.L. & EDUC. 285 (2020).

ALWD 6th ed.

Geier, B. A., Funding god's schools - a legal analysis of appropriating public dollars to parochial schools: Does michigan's latest legislation violate the separation of church and state?, 49(3) J.L. & Educ. 285 (2020).

APA 7th ed.

Geier, B. A. (2020). Funding god's schools a legal analysis of appropriating public dollars to parochial schools: Does michigan's latest legislation violate the separation of church and state?. Journal of Law & Education, 49(3), 285-338.

Chicago 17th ed.

Brett A. Geier, "Funding God's Schools - A Legal Analysis of Appropriating Public Dollars to Parochial Schools: Does Michigan's Latest Legislation Violate the Separation of Church and State?," Journal of Law & Education 49, no. 3 (Summer 2020): 285-338

McGill Guide 9th ed.

Brett A Geier, "Funding God's Schools - A Legal Analysis of Appropriating Public Dollars to Parochial Schools: Does Michigan's Latest Legislation Violate the Separation of Church and State?" (2020) 49:3 JL & Educ 285.

AGLC 4th ed.

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MLA 8th ed.

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OSCOLA 4th ed.

Brett A Geier, 'Funding God's Schools - A Legal Analysis of Appropriating Public Dollars to Parochial Schools: Does Michigan's Latest Legislation Violate the Separation of Church and State?' (2020) 49 JL & Educ 285

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Funding God's Schools—A Legal Analysis of Appropriating Public Dollars to Parochial Schools: Does Michigan's Latest Legislation Violate the Separation of Church and State?

Brett A. Geier*

ABSTRACT

The United States Constitution provides in the First Amendment a simple, yet, when applied, confluence set of ideas to protect independent religious rights and proscribes government coercion of religious principles. By the creation of the religious clause, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” an opaque demarcation was created, which has been contested since the First Amendment was passed. The intent and practical application of the clause is frequently highlighted in public schools whereby schools must ensure that all students’ religious rights are protected (Free Exercise Clause), yet must mitigate coercion activities so as not to violate the Establishment Clause. One area of the public school realm that frequently has, and is witnessing intense debate regarding its constitutional permissiveness, is utilizing public funds for parochial schools. While it may seem obvious that the First Amendment proscribes government from intermingling with sectarian entities, and no more influential can it be than to financially support these schools, but courts have circumvented this distinction by allowing public funds to flow to parochial schools in the spirit of the “child benefit theory” or religious discrimination.

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While the Supreme Court, in the past, has upheld appropriation of public funds to parochial schools for items such as textbooks and transportation, the Court seems to be willing to continue to loosen the restraints for these expenditures. The Court's recent *Trinity* decision relies on the "child benefit theory" and religious discrimination to determine that religious entities may not be discriminated against when state grants are available to the general public. This appears to be the direction the Court is heading as it contemplates the *Espinoza* decision, which seeks to determine the constitutionality of the cancellation of a tax credit scholarship program in Montana due to use of the monies toward parochial tuition.

Within these national cases are the continued attempt by states to appropriate public funds toward parochial schools. A statute passed in Michigan as part of the 2016-2017 School Aid Act and subsequently renewed in 2017-2018 appropriated 2.5 million dollars each year to assist parochial schools with mandates as passed by the state legislature is being contested on its constitutionality. The State of Michigan has a "no-aid" clause, which was approved by voters in 1970, which seems to restrict public appropriations of parochial school to that of transportation only; however, in light of the trend of the Supreme Court may be found constitutional. In fact, the Michigan Court of Appeals did not find the statute completely infirm—the Michigan Supreme Court is next to analyze the case. The case, known as *The Council of Organizations*, is ripe for the continued loosening of restrictions to appropriate public funding for parochial schools, despite the legal precedent supporting a constitutional violation. This case is analyzed from a background perspective of the statute, which is couched in federal and state precedent to make a conclusion that the statute should be struck down.

I. INTRODUCTION

Religion interspersed with state activities conjure some of the most impassioned debates—there are those who contend that religion should have little to no business in state activities compared with those who proffer state support (most notably financial) of religious activities. In no other place can one see the intensity of this debate as lucidly than in public schools. Public schools are often the nexus at which diverse religious theories and philosophies intersect with different actors fervently

defending their right to expression yet mandating that the school take no official position on religion. Preeminent founding father, Thomas Jefferson, forecasted the conflict between religion and state when he responded to the Danbury Baptists in 1802 by amplifying the First Amendment's Religious Clause.¹ He noted in his response that the American people declared their legislature "should make no law respecting an establishment of religion or prohibiting the free exercise thereof thus building a wall of separation between Church and State."² The "wall of separation" philosophy has seen attacks throughout American jurisprudential history and various legal holdings have aided the permeations of Jefferson's wall.

Public schools are often the epicenter for religious and state conflict. The Establishment Clause and the Free Exercise Clause of the First Amendment construct a perfect environment for conflict between church and state to arise in public schools. A public school must ensure that it does not influence or coerce the students (Establishment Clause)³ while protecting individual rights to practice one's own religion (Exercise Clause)⁴—an unenviable task for public schools to officiate. One of the most pronounced aspects of religious contention in public schools is the permissibility of government to fund religious organizations. More specifically, state legislatures throughout the Nation have attempted to fund parochial schools through different mechanisms such as grants, scholarships, direct, and indirect funding with various constitutional

1. Letter from Thomas Jefferson to Messrs, Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A committee of the Danbury Baptist Association, in the State of Connecticut (Jan 1, 1802), *available at* <https://www.loc.gov/loc/lcib/9806/danpre.html> (last visited Feb. 11, 2020). Writing to President Thomas Jefferson, the Danbury Baptist Association wanted to congratulate him on his election to the presidency and to seek his approval of religious freedom. With the Bill of Rights not pertaining to the states during this time, many states still had officially established religions, and Connecticut was one of those states. The Danbury Baptists knew of Jefferson's leading role in the struggle to end state-established religion in Virginia and felt Jefferson would lend a sympathetic ear. However, in his response, Jefferson stated, "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof;' thus building a wall of separation between Church [and] state."

2. *Id.*

3. U.S CONST. amend. I.

4. *Id.*

success.⁵ In some of these programs, legislatures seek to support religious organizations and employ nefarious legal machinations to obfuscate the true intent of supporting religious education and in others there is a sincere effort and transparency under the aegis of the state to support religious entities.⁶ With many states having “no-aid” clauses in their respective constitutions, what may seem to be a lucid issue is convoluted due to legal precedent, the details of a program, and political climates.

The State of Michigan has recently reached such a threshold and stands as another exemplar of government funding parochial schools in the Nation.⁷ The Michigan Legislature appropriated 2.5 million dollars in its 2016-2017 and 2017-2018 school aid budgets to provide support for nonpublic (including parochial) schools for purposes related to the public goals of ensuring the health, safety, and welfare of the students in nonpublic schools and to reimburse nonpublic schools for costs described in the portion of the law.⁸ A strong opposition has coalesced to this appropriation and is contesting this issue in the Michigan courts with various results. This Article will investigate the legal issue in Michigan, couch the analysis in federal and state judicial precedent on funding parochial schools, and with that applied, conclude what holding to expect from the Michigan Supreme Court and potentially a United States Supreme Court Review.

II. MICHIGAN SEEKS TO AID PAROCHIAL SCHOOLS

A. Conflict Arises

The conflict began in the 1960s when many Michigan parents who paid the expense of their children at private schools, and bore the cost of government schools through taxes, urged the legislature to allow for

5. Valerie Strauss, *Should Taxpayers Fund Religious Education? Betsy DeVos Says Yes. Now, The Supreme Court Will Decide*, THE WASHINGTON POST (Jan. 2, 2020), <https://www.washingtonpost.com/education/2020/01/22/should-taxpayers-fund-religious-education-betsy-devos-says-yes-now-supreme-court-will-decide/>.

6. *Id.*

7. Jonathan Oosting, *Snyder Signs Education Budget With Private School Aid*, THE DETROIT NEWS (June 27, 2016), <https://www.detroitnews.com/story/news/politics/2016/06/27/snyder-signs-hike-state-education-budget-law/86432130/>.

8. *Id.*

taxpayer-funded support for private schools.⁹ The increasing costs to families of funding both the government school system and the private schools that educated their children created significant support for partial taxpayer funding of private education.¹⁰ In 1970, then Governor William G. Milliken and the Michigan Legislature proposed appropriating 22 million dollars in direct aid to pay for the salaries of lay teachers in non-public schools.¹¹ While it was settled law that the government could not directly support religious instruction, it was also well established that the state can adopt policies, which indirectly aid religious institutions, particularly through some form of tax preference.¹² The debate over taxpayer financing and private schools in Michigan reached a crisis point in 1970, and the solution was to pass a new amendment to the Michigan Constitution banning even indirect aid to private schools.¹³

The Legislature responded by passing Public Act 100 of 1970, the school aid bill for the year, which provided direct financial support to eligible private schools.¹⁴ This aid could be used only for instruction in nonreligious subjects.¹⁵ Michigan's law was similar in concept to laws passed in a handful of other states, including Pennsylvania and Rhode Island.¹⁶ The Michigan Supreme Court quickly upheld Public Act 100, ruling in an advisory opinion that "the Constitution of the State of Michigan [does] not prohibit the purchase with public funds of secular educational services from a private school."¹⁷

9. Matthew J. Brouillette, "*Parochiaid*" and the 1970 Amendment to the Michigan Constitution, MACKINAC CENTER FOR PUBLIC POLICY (July 16, 1999), <https://www.mackinac.org/2041>.

10. *Id.*

11. Brief for Plaintiff at 3, Council of Orgs. v. State of Michigan, No. 343801 (Mich. Ct. App. 2019).

12. Matthew J. Brouillette, "*Parochiaid*" and the 1970 Amendment to the Michigan Constitution, MACKINAC CENTER FOR PUB. POL. (July 16, 1999) <https://www.mackinac.org/2041>.

13. *Id.*

14. *Id.*

15. CITIZENS RESEARCH COUNCIL OF MICHIGAN, CITIZENS COMMENTS 3 (October 1970). The law allowed up to 50 percent of the salaries of certified lay teachers to be reimbursed by the state. *Council Comments*, October 1970. <https://crcmich.org/PUBLICAT/1970s/1970/cc0833.pdf>.

16. *Traverse City Sch. Dist. v. AG.*, 384 Mich. 390 at 406 (1971), n. 1.

17. Advisory Opinion re Constitutionality of 1970 Public Act 100, 384 Mich. 82 (1970); as cited by the same court in *Traverse City Sch. Dist. v. AG.*, 384 Mich. 390 at 406 (1971).

Conflict and debate did not cease at that juncture. The Court's action in upholding Public Act 100 prompted the creation of a campaign to amend the 1963 constitution to expressly prohibit state funds from being used to support private school education.¹⁸ A ballot committee, known as the "Council Against Parochiaid," hastily organized a petition drive to place the issue on the statewide ballot.¹⁹ When it became clear in February of 1970 that the Legislature would pass parochiaid, the Council Against Parochiaid circulated petitions containing language that became known as Proposal C.²⁰ During the petition drive, the term 'parochiaid' was used to advance concerns that tax dollars might go toward specific religious institutions, not private schools in general.²¹ The petitions were initially thrown out by the attorney general and later, the board of canvassers, citing that the group failed to notify signers whether the amendment would rescind the education Section of the state constitution. Based on a split panel of the Michigan Court of Appeals and a subsequent 5-2 majority of the Michigan Supreme Court, the issue was placed on the ballot in 1970.²²

Confusion and anger surrounded the 1970 ballot campaign, which was ambiguous to both voters and public officials.²³ The common understanding of the voters in 1970 was that no monies would be spent to run a parochial school.²⁴ Proposal C (carrying the language of the new amendment) stated:

No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other private, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such private school or at any location or institution where instruction is offered

18. Brouillette, *supra* note 12.

19. *Id.*

20. *Id.*

21. *Id.*

22. CITIZENS RESEARCH COUNCIL OF MICHIGAN, *supra* note 15 at 3.

23. *Id.*

24. Council of Orgs. v. Governor, 566 N.W.2d 208, 455 Mich. 557 (1997).

in whole or in part to such private school students.²⁵

The amendment was approved by a margin of 338,098 votes: 1,416,838 to 1,078,740.²⁶

B. Background to Public Support for Parochial Schools in Michigan

Article 8, Section 1 of the Michigan Constitution states, “Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”²⁷ The second Section provides this paragraph:

The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.²⁸

Originally, Article 8 Section, 2, of the Michigan Constitution created in 1963 stated, “The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.”²⁹ As a result of Proposal C in November 1970, the following language was added as a second paragraph to Article 8, Section 2:

No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide

25. MICH. CONST. Art 8, § 2.

26. Brouillette, *supra* note 12.

27. MICH. CONST. Art 8, § 1.

28. MICH. CONST. Art 8, § 2.

29. *Traverse City School Dist. v. AG.*, 384 Mich. 390; 404, 185 N.W.2d 9, 25 (1971).

for the transportation of students to and from any school.³⁰

The statute at issue is M.C.L. 388.1752(b), Section 152, which was enacted by the Michigan Legislature pursuant to 2016 Public Act 249 and made effective October 1, 2016. Pursuant to 2017 Public Act 108, the Legislature amended M.C.L. 388.1752(b), effective July 14, 2017, which made substantive changes to the statute.³¹ The amended version of the statute appropriated general fund money “to reimburse actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule....”³² Adding this language in the statute has caused disagreement with those siding against the language arguing that it blatantly runs afoul of Article 8, Section 2 by appropriating public monies to parochial schools.³³

III. MICHIGAN’S LEGISLATURE SENDS AID TO PAROCHIAL SCHOOLS

The people of Michigan clearly created and implemented the position in Article 8, Section 2 of their constitution that “no public monies” shall be appropriated or paid by the Legislature to “aid or maintain” the nonpublic schools, and no grant of public monies shall be provided “to support the attendance of any student or the employment of any person at any such nonpublic school[.]”³⁴ The state constitution provides one caveat: “[T]he legislature may provide for the transportation of students to and from any school.”³⁵ Otherwise, the ban is absolute: no public money for nonpublic schools.³⁶ Thus, the statute at issue, M.C.L. 388.1752(b), Section 152, may reimburse transportation-related costs, but its reimbursement of the costs of complying with other state mandates for

30. CITIZENS RESEARCH COUNCIL OF MICHIGAN, STATEWIDE BALLOT ISSUES: PROPOSAL 00-1 SCHOOL CHOICE 2 (Sept. 2000).

31. MICH. COMP. LAWS § 388.1752 (b) (2016).

32. *Id.*

33. Ken Coleman, *Should Private Schools Get Public Funds? The Supreme Court Will Take Up A Key Case in March*, MICHIGAN ADVANCE (Jan. 19, 2020) <https://www.michiganadvance.com/2020/01/19/should-private-schools-get-public-funds-the-supreme-court-will-take-up-a-key-case-in-march/>.

34. MICH. CONST. Art 8, § 2.

35. *Id.*

36. *Id.*

health, safety, or welfare contradicts the common understanding of the constitutional provision's plain language.³⁷ The state constitution does not create an exception from its provision's plain language and failed to create an exception for prohibition compliance with health, safety, or welfare requirements.³⁸ Anti-statute individuals and groups contend that "any effort to save this statute for non-transportation-related reimbursements—contrary to the Michigan constitution is untenable."³⁹

On June 27, 2016, Public Act 249 of 2016⁴⁰ (including M.C.L. 388.1752(b), Section 152) was signed into law by Governor Snyder. Public Act 249 was the most recent iteration of the School Aid Act, which allocated state funding for the 2016-2017 school year.⁴¹ In M.C.L. 388.1752(a), Section 152(a), the public act appropriated over 38 million dollars to cover districts' costs of mandatory state reporting required by the Headlee Amendment case.⁴² In the subsequent Section, Section 152(b)(1), the Legislature appropriated 2.5 million dollars for fiscal year 2016-2017 to reimburse nonpublic schools for costs they would incur as a result of all state mandates they were required to follow.⁴³ The original Section 152(b)(1) specified which costs could be recouped: those costs "incurred by nonpublic schools as identified in the nonpublic school mandate report published by the Michigan Department of Education on November 25, 2014."⁴⁴ Section 152(b)(4) of the Act limited the reimbursement funds to "the nonpublic schools actual cost to comply" with covered mandates.⁴⁵

Section 152(b)(7) of the original statute further stated that the appropriated funds "are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools."⁴⁶ The Legislature also attempted to insulate the statute from legal challenge. It did this by characterizing the services as both:

37. MICH. COMP. LAWS § 388.1752 (b) (2016).

38. *Id.*

39. Brief for Plaintiff at 10, Council of Orgs. v. State of Michigan, No. 158751 (Mich. 2019).

40. 2016 Mich. Pub. Acts 80.

41. *Id.*

42. *Adair v. State*, 486 Mich. 468 (2010) (holding that if the state mandates that local governments provide any new or expanded programs, the state must provide full funding).

43. MICH. COMP. LAWS § 388.1752 (b)(1) (2016).

44. *Id.*

45. MICH. COMP. LAWS § 388.1752 (b)(4) (2016).

46. MICH. COMP. LAWS § 388.1752 (b)(7) (2016).

Incidental to the operation of a nonpublic school and non-instructional in character as well as not intended to aid or maintain any nonpublic school, support the attendance of any student at a nonpublic school, support the attendance of any student at a nonpublic school, support the attendance of any student where instruction is offered to a nonpublic school student, or support the employment of any person at any location where instruction is offered to a nonpublic school student.⁴⁷

The statute required the Michigan Department of Education to determine the amount of reimbursement to nonpublic schools for *employees* performing mandate-related tasks, by defining “actual cost” as “the hourly wage for the employee or employees performing the reported task or tasks ... which shall include a detailed itemization of cost.”⁴⁸

On March 21, 2017, the Council of Organizations and Others for Education about Parochiaid filed suit in the Michigan Court of Claims alleging that M.C.L. 388.1752(b) violated two provisions of the Michigan Constitution: 1.) Article 8, Section 2, which prohibits appropriating, paying, or using public monies to aid or maintain nonpublic schools or to support the attendance of any student or the employment of any person at any such nonpublic schools; and 2.) Article 4, Section 30, which requires two-thirds approval of each legislative house for appropriations of public funds for private purposes.⁴⁹ The Court of Claims issued a temporary restraining order to prevent any distribution of funds under the statute and, subsequently granted a preliminary injunction.⁵⁰

Almost one year later, on July 14, 2017, Governor Snyder signed Public Act 108 of 2017⁵¹ into law. The new public act amended M.C.L. 388.1752(b), Section 152(b)(4) to reiterate its reimbursement to the nonpublic schools for “actual costs in complying with a *health, safety, or welfare* requirement under a law or administrative rule of this state” (emphasis added).⁵² The statute further noted that the State would reimburse a nonpublic school’s “actual costs ... in complying” with these state law mandates.⁵³ The new version of the statute clarified that a

47. MICH. COMP. LAWS § 388.1752 (b)(7),(b)(8) (2016).

48. MICH. COMP. LAWS § 388.1752 (b)(9) (2016).

49. Council of Orgs. v. State, 321 Mich. Ct. App. 456, 452, 909 N.W.2d 449, 452 (2017).

50. *Id.*

51. 2017 Mich. Pub. Acts 79.

52. MICH. COMP. LAWS § 388.1752 (b)(4) (2017).

53. MICH. COMP. LAWS § 388.1752 (b)(1-4) (2017).

nonpublic school's time for taking attendance should be considered an actual cost, and it adds the following language regarding fees: "Training fees, inspection fees, and criminal background check fees are considered actual costs in complying with a health, safety, or welfare requirement under a law or administrative rule of this state."⁵⁴

On April 26, 2018, the Court of Claims granted the plaintiffs' motion for summary disposition, striking down both the amended and previous version of M.C.L. 388.1752(b), Section 152 as facially unconstitutional under Article 8, Section 2 but failed to reach the argument of the plaintiffs under Article 4, Section 30.⁵⁵ The State defendants appealed to the Court of Appeals, which reversed 2-1 the lower court's opinion.⁵⁶ The court concluded the statute is constitutional as "the Legislature may allocate public funds to reimburse nonpublic schools for actual costs incurred in complying with state health, safety, and welfare laws."⁵⁷ In reaching this conclusion, the majority specified that the mandate was constitutional only if it was undertaken to comply with a health, safety, or welfare mandate and three considerations were met:

1. [It] is, at most merely *incidental* to teaching and providing educational services to nonpublic school students (noninstructional in nature),⁵⁸
2. [It] does not constitute a *primary* function or element necessary for a nonpublic school to exist, operate, and survive,⁵⁹ and
3. [It] does not involve or result in excessive religious entanglement.⁶⁰

The majority identified the criminal background check fees as an example in which the nonpublic school would be subject to reimbursement.⁶¹ The Court of Appeals remanded the case to the Court of Claims, directing it to examine each of the actual costs under the proper criteria outlined.⁶² The Court of Appeals also ruled that the Court of Claims should address the claim raised under Article 4 and Article 8,

54. MICH. COMP. LAWS § 388.1752 (b)(10) (2017.).

55. Council of Orgs. v. State of Michigan, 326 Mich. App. 124, 130, 931 N.W.2d 65, 69 (Mich Ct. App. 2018).

56. *Id.*

57. *Id.*

58. *Id.* at 130-131.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

Section 2 on remand.⁶³ The defendants in the Court of Appeals case have appealed leaving the question, at this juncture, to the Michigan Supreme Court, but as described below the ability for government to provide funding to parochial schools is wrought with legal conundrums and strong philosophies on both sides of the wall separating church and state.

IV. FUNDING RELIGIOUS SCHOOLS WITH THE PUBLIC DOLLAR—A NATIONAL HISTORY

Public schools are the epicenter of activity for most local communities.⁶⁴ Most students and parents will attend a public school at some point in their educational career.⁶⁵ “Because all students are eligible and entitled to a public education, by nature of their attendance, they are bringing their religiosity into the cauldron of culture.”⁶⁶ The inclusion of student religious perspective into the school community can add to the necessity of maintaining viewpoint neutrality. “If world history has been any guide to the passion and ire that religion can raise among individuals, it is not a surprise that religion has caused titanic conflicts in public schools.”⁶⁷ The First Amendment draws litigation on a wide variety of issues; perhaps none more volatile than tensions between government and religious schools.⁶⁸ In particular, school funding raises a contentious debate. Conflicting ideologies have polarized funding discourse at the local, state, and federal levels. Of the issues embedded within school funding, allowing religious schools to receive public funds has proven to be highly controversial.

The request for public funds to support parochial schools has its genesis in the mid-nineteenth century when Roman Catholics decided to

63. *Id.* This requires both chambers of the legislature to approve by two-thirds majority to appropriate public funds for a private purpose.

64. Brett A. Geier & Annie Blankenship, *Praying for Touchdowns: Contemporary Law and Legislation for Prayer in Public School Athletics*, 15 FIR. AMEND. L. REV. 379, 393 (2017).

65. Jack Jennings, *Proportion of U.S. Students in Private Schools is 10 Percent and Declining*, HUFF. POST (Mar. 28, 2013), https://www.huffpost.com/entry/proportion-of-us-students_b_2950948.

66. Geier, *supra* note 64 at 393.

67. *Id.*

68. Martha McCarthy, *Beyond the Wall of Separation: Church-State Concerns in Public Schools*, 90 PHI DELTA KAPPAN 715 (2009).

create an extensive school system.⁶⁹ The overwhelming proportion of parochial schools were Roman Catholic because the public schools generally had a Protestant flavor.⁷⁰ In the nineteenth century, the Roman Catholic church was in its infancy in the United States and was considered an immigrant church.⁷¹ Because the Catholic Church was not viewed as prominent as the Protestant churches in early American history, it sought equal footing through all means possible. "The church's principal rationale for seeking public assistance was that the parochial schools served public good; they contributed to the educated citizenry necessary to the democracy and also relieved population pressures on the public schools. Consequently, the church felt that it was only right that some government money should help support its schools."⁷²

V. THE LEGITIMACY OF PAROCHIAL EDUCATION IN THE UNITED STATES

Prior to the involvement of various contests contending the permissibility of public tax dollars flowing to parochial schools, the Supreme Court first determined whether the existence of parochial schools was constitutional. The Court heard a case in 1922 when Oregon, in a fit of anti-immigrant passion, passed a law requiring all able-bodied and educable children to attend public schools of the state because private and parochial schools tended to perpetuate differences among people.⁷³ That law, a way of trying to assimilate immigrants, was challenged by a parochial school and a military academy. In *Pierce v. Society of Sisters*,⁷⁴ the Court ruled on the basis of the Fourteenth Amendment (the First was not applied to states until the 1940s).⁷⁵ The Society of Sisters and Hill Military Academy claimed the law impermissibly denied private and

69. RONALD B. FLOWERS, *THAT GODLESS COURT?: SUPREME COURT DECISIONS ON CHURCH-STATE RELATIONSHIPS* 71 (6th ed. 2005).

70. KENT GREENAWALT, *WHEN FREE EXERCISE AND NONESTABLISHMENT CONFLICT* 58 (2019). For example, using the King James version of the Bible.

71. Flowers, *supra* note 69 at 71.

72. *Id.*

73. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 45 S. Ct. 571 (1925).

74. *Id.*

75. *Id.* at 533-534.

parochial schools the liberty to do business in violation of that clause.⁷⁶ The Court agreed with that contention, and further held that Oregon's law interfered with the freedom of parents to educate their children as they wanted.⁷⁷ States could not prohibit private and parochial schools from existing.⁷⁸ The Court did say, however, that the educational standards in parochial schools had to conform to the standards of quality demanded by the state.⁷⁹ Amplifying the establishment of protection for public school education, "This case is often called the Magna Carta of parochial schools."⁸⁰

A. The Child Benefit Theory

After the Supreme Court's holding in *Pierce* legitimized parochial schools in the Nation, these schools re-established their quest to retain public funding in support of their respective mission. In 1930, a case came before the Court that challenged the use of state-financed textbooks in public schools being used in parochial schools.⁸¹ The core of the argument was that the program used public tax money for a private (parochial) purpose as opposed to a public purpose.⁸² It was contended that the use of tax money for this purpose was illegal under the Fourteenth Amendment.⁸³ In response to this argument, the Court effectuated an important church-state relation concept: the "child benefit theory."⁸⁴ "The 'child benefit theory' is the name given to the concept that the state may extend certain kinds of welfare aid to students attending church-related schools in situations where general aid to the parochial schools themselves would be unconstitutional."⁸⁵ The child benefit theory has occasionally been employed in subsequent cases to fend off attacks of Establishment Clause violations by those who contend that public monies are being expended in parochial schools.⁸⁶

76. *Id.* at 533.

77. *Id.* at 534-535.

78. *Id.* at 535.

79. *Id.*

80. Flowers, *supra* note 69 at 72.

81. *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370, 375, 50 S. Ct. 335, 335 (1930).

82. *Id.*

83. *Id.*

84. Flowers, *supra* note 69 at 72.

85. George R. LaNoue, *The Child Benefit Theory*, 4 THEORY INTO PRAC. 18 (1965).

86. *Id.*

B. Protection of Parochial School Transportation

In 1947, the Court held that public funds appropriated to provide transportation for students in secular and non-secular schools was constitutionally permissible and did not violate the Establishment Clause (This case is reviewed in detail below).⁸⁷ Justice Black wrote in this holding an important and repeatedly cited Section, which set the tone for Establishment Clause holdings in the future. He stated:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and state.”⁸⁸

In concluding the opinion, Justice Black stated, “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach, New Jersey has not breached it here.”⁸⁹ This opinion is important because it employed a strict-separationist perspective, yet concluded the policy nonviolative of the Establishment Clause due, in large part, to variations of the child benefit theory.

The Court reasoned that bus transportation of students to public and parochial schools is a type of welfare program analogous to “police and fire protection or sewage lines and sidewalks.”⁹⁰ These services are

87. *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1, 67 S. Ct. 504 (1947).

88. *Id.* at 15-16.

89. *Id.* at 18.

90. *Flowers*, *supra* note 69 at 73.

provided to churches and all segments of the community—they are implemented to protect public safety. The Court contended that the transportation program was intended to protect children from the dangers of walking to school or even commuting in private automobiles.⁹¹ “For the city to pay for transportation to church-related schools on public buses was not aid to religion but a way to protect children from the dangers of public thoroughfares. The child was the beneficiary, not the school or the church that operated the school.”⁹² Thus, due to public funds ultimately benefitting a public good, such as educating children, courts tend to hold in favor of the appropriation.

VI. THE BLAINE AMENDMENT AND ITS INFLUENCE ON THE STATES

As current issues in the adequacy of education funding continue to permeate the Nation’s public schools, an area that will continue to garner interest and contentious debate is whether, and to what extent, parochial schools can receive revenue allocated from state and federal coffers. Numerous states have constitutional amendments (like Michigan, under examination in this Article) or provisions that proscribe parochial schools from receiving public funds.⁹³ Thirty-seven states still have what is known as a “no-aid clause” or historically, a “Blaine Amendment.”⁹⁴ In his annual message to Congress in 1875, President Ulysses S. Grant called for a constitutional amendment that would have mandated secular schools ban religious exercises and the teaching of religion, and further prohibit the use of public money for sectarian schools.⁹⁵ A week

91. *Id.*

92. *Id.*

93. Lindsey M. Burke & Jarrett Stepman, *Breaking Down Blaine Amendments’ Indefensible Barrier to Education Choice*, 8 J. OF SCH. CHOICE 654 (2014).

94. Nick Sibilla, *The Court Case That Could Finally Take Down Antiquated Anti-Catholic Laws*, THE ATLANTIC (Jan. 12, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/espinoza-montana-bigoted-laws/604756/>.

95. Rob Boston, *The Blaine Game*, CHURCH AND STATE MAG. (Sept. 2002), <https://www.au.org/church-state/september-2002-church-state/featured/the-blaine-game>.

President Grant suggested to Congress a constitutional amendment “making it the duty of each of the several states to establish and forever maintain free public schools adequate to the education of all children [and forbidding the teaching in said schools of religious atheistic or pagan tenets.]”

following President Grant's address to Congress, House Speaker James G. Blaine introduced a constitutional amendment into Congress that, if passed and ratified, would have established President Grant's vision to eliminate public support for religious education.⁹⁶ Blaine's proposed amendment stated:

No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof, and no money raised by taxation in any state for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or land so devoted be divided between religious sects or denominations.⁹⁷

Despite the failure to pass the Blaine Amendment, most states have established church-state provisions "that are explicitly stronger than the Establishment Clause of the First Amendment in prohibiting the use of public funds for churches, church schools, or other religious enterprises."⁹⁸ The issues the failed Blaine Amendment sought to mitigate did not recede.⁹⁹ While not uniformly enacted throughout the Nation, the fact that seventy-six percent of states have implemented some version or modification of the Blaine Amendment reiterates the value of maintaining separation of church and state that many of the Nation's forefathers espoused.¹⁰⁰ Proscribing state support of parochial schools is a consistent archetype in the quest to maintain Jefferson's proverbial "wall" separating state affairs from religion.

96. KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 233 (9th ed. 2019). On December 14, 1875, the House of Representatives voted 180 to 7 in favor of passing the Amendment but on August 4, 1876, the Senate voted 28 to 6 failing to meet the two-third majority required for passage.

97. H.R.J. Res 1, 44th Cong., 1st Sess., 4 CONG. REC. 205 (1875), *quoted in* Frank J. Conklin & James M. Vache, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. PUGET SOUND L. REV. 411, 431-33 (1985).

98. ALEXANDER & ALEXANDER, *supra* note 96 at 233 (citing *Witters v. Washington Dep't of Services for the Blind* 474 U.S. 481 (1986)).

99. DOUGLAS F. JOHNSON, *FREEDOM OF RELIGION: LOCKE V. DAVEY AND STATE BLAINE AMENDMENTS* 36 (2010).

100. *Id.* As western territories were admitted to the union after 1876, both houses of Congress were required to approve or disapprove the new constitution. These states were required to put some provision in its constitution stating that it would maintain a public school system free from sectarian control.

The antithesis to the philosophy of prohibiting state dollars from being allocated to parochial schools is the current zealousness toward school choice and the constitutional impediment these amendments or provisions cause.¹⁰¹ Noteworthy, because of its opposition, is the posture that Justice Clarence Thomas has taken related to the history of the Blaine Amendments. Justice Thomas opined that states should be constitutionally required to provide public funding to pervasively sectarian schools, and not to do so, manifests a hostility toward religion, and in particular the Roman Catholic religion.¹⁰² Justice Thomas asserted that the strong separation language in state constitutions written after 1870 were simply subtle devices to deprive Catholic schools of public funding, thus, violative of the federal Constitution.¹⁰³ Identifying the core of Thomas' reasoning is his belief that state constitutional provisions that prohibit government aid to religion were enacted as Protestant manifestations of anti-Catholic bigotry of the Reconstruction Era. Thomas' "bigotry thesis" is grounded in his own educational background, and in his assumption that the strict separation provisions in post-reconstruction state constitutions had emanated from the Protestants in the U.S. Congress in the 1870s, led by Speaker of the House James G. Blaine and President Grant, both of whom Justice Thomas believes to have had strong and prejudiced anti-Catholic biases.¹⁰⁴

The Supreme Court's ruling in *Locke v. Davey*¹⁰⁵ (see below for a more detailed analysis of the case) yielded a dichotomy of precedents.¹⁰⁶ The ruling accepted the argument that Blaine Amendments are expressions of anti-Catholic bias, therefore, making them unconstitutional.¹⁰⁷ However, whether a state's Blaine Amendment passes constitutional muster is opaque due to the fact that in the Court's *Locke* ruling found no anti-Catholic bias behind the State of Washington's constitutional clause in question.¹⁰⁸ Therefore, a state clause appears to qualify as a Blaine Amendment only if anti-Catholic sentiment can be detected.¹⁰⁹ For the

101. Burke & Stepman, *supra* note 93 at 654.

102. Mitchell v. Helms, 503 U.S. 793, 828 (2000).

103. ALEXANDER & ALEXANDER, *supra* note 96 at 233.

104. *Id.*

105. 540 U.S. 712 (2004).

106. JOHNSON, *supra* note 99 at 19.

107. *Id.*

108. *Id.* (citing Wash. Const., Art I, § 2).

109. *Id.*

State of Washington's constitutional clause, no anti-Catholic documentation was found, thus it was deemed to not be a Blaine Amendment.¹¹⁰ Second, the *Locke* ruling makes clear that "many state constitutional clauses affecting the flow of tax dollars to religious programs and institutions will be affected by the declaration that some limitations on such flow will fall into the 'play in the joints' between the Establishment and Free Exercise clauses."¹¹¹ State legislators, courts, and educational policy makers need to understand the implications of Blaine Amendment history in light of the *Locke* decision to develop funding programs that will meet the test of constitutionality.¹¹²

VII. NATIONAL PRECEDENT FOR PUBLIC FUNDING OF PAROCHIAL SCHOOLS

The Supreme Court has ruled on a variety of cases dealing with issues regarding entanglement between public aid and religious institutions. Detailed below are eight seminal cases that provide seventy years of jurisprudence on issues of public taxpayer dollars used for religious purposes such as schools.

A. Everson v. Board of Education of the Township of Ewing

In *Everson v. Board of Education of the Township of Ewing*,¹¹³ the Court reviewed a New Jersey law that allowed for reimbursements of costs associated with transportation at public and nonpublic schools.¹¹⁴ In a 5-4 decision, the Court found the New Jersey Law did not violate the Establishment Clause of the First Amendment of the United States Constitution.¹¹⁵ The Court held that individuals of a particular religious faith could not be deprived a public benefit due to their religious ascriptions.¹¹⁶ Writing for the majority, Justice Black argued:

110. *Id.*

111. *Id.*

112. *Id.*

113. 330 U.S. 1, 67 S. Ct. 504 (1947).

114. *Id.*

115. *Id.*

116. *Id.*

We must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.¹¹⁷

Holding no constitutional violation, Justice Black closed his argument by stating:

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.¹¹⁸

In opposition, one of the dissenters urged that the First Amendment had the purpose of creating a “complete and permanent separation of religious activity and civil authority.”¹¹⁹ Another emphasized the religious aims of Roman Catholic schools.¹²⁰ Justice Black indicated that public funds cannot go to religious activities because a “wall of separation” exists between church and state,¹²¹ and that the New Jersey Law approaches the verge of state power.¹²² When one merges the language with the position of the four dissenters, one cannot help concluding that most of the Justices at the time had a highly restrictive view about public aid for religious education.¹²³

B. Board of Education v. Allen¹²⁴

Two decades after *Everson*, the Court adopted a less strict approach and approved New York’s program of lending textbooks to private schools designated for public school use or approved by a public board of education.¹²⁵ This was clearly a support to the essence of education, not the fringe of transportation. Justice White’s majority opinion

117. *Id.* at 16.

118. *Id.* at 18.

119. *Id.* at 31-32 (Rutledge, J., dissenting).

120. *Id.* at 22-23 (Jackson, J., dissenting).

121. *Id.* at 15-16.

122. KENT GREENAWALT, WHEN FREE EXERCISE AND NONESTABLISHMENT CONFLICT 58 (2019).

123. *Id.*

124. 392 U.S. 236 (1968).

125. *Id.*

emphasized that the benefits went to parents and their children and assisted the public purpose of secular education.¹²⁶ This finding is synonymous with the tenets developed in the child benefit theory that reasoned that the benefits of the program went to the student and not directly to the parochial school or its religious mission.

C. Lemon v. Kurtzman

In *Lemon v. Kurtzman*,¹²⁷ the Court considered two cases involving the allocation of public funds to private schools for educational resources.¹²⁸ The holding “articulated a standard that has remained somewhat vague, contested, and debatable in coverage since that time.”¹²⁹ In both Rhode Island and Pennsylvania, a majority of students who attended nonpublic schools went to Roman Catholic ones.¹³⁰ Pennsylvania provided payments for textbooks and instructional materials, authorized payments for textbooks and instructional materials, and both states had authorized payments for part of the salaries of teachers of secular subjects.¹³¹

While the Court struck down the two state statutes at issue in the case, this holding is most famous (or infamous) for the three-part legal test the Court used to determine whether the state statutes violated the Establishment Clause:

- (1) The statute (or other state action) has a secular legislative purpose;
- (2) The principal primary effect of the statute or state action either advances or inhibits religion;
- (3) Did the statute or state action foster excessive entanglement with religion?¹³²

While the *Lemon* test has occasionally been used to decide Establishment Clause violations, its irregular use prevents it from being

126. *See Id.* at 243-48.

127. 403 U.S. 602 (1971).

128. *Id.*

129. GREENAWALT, *supra* note 122 at 59.

130. *Lemon*, *supra* note 127 at 610.

131. *Id.* at 609.

132. *Id.* at 612-13. These three prongs are not used as factors in a balancing test, but rather, they are used as requirements that must be met for a statute or state action to survive constitutional review.

the preeminent legal theory employed.¹³³ “[W]hile many lower courts and other legal authorities still rely on *Lemon*, the Supreme Court rarely cites *Lemon* or uses it to form Establishment Clause analyses.”¹³⁴ An example of the unpopularity of the *Lemon* test at the Supreme Court can be found in the spirited discontent of the late Justice Antonin Scalia. He highlighted his displeasure with what he termed “the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.”¹³⁵ Justice Scalia contended that the Court had been incongruous in its analysis of the Establishment Clause using the *Lemon* test,¹³⁶ noting, “[w]hen we wish to strike down a practice [the *Lemon* test] forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs ‘no more than helpful signposts[.]’”¹³⁷ The *Lemon* test is often the first legal theory employed to analyze an Establishment Clause violation with consternation on both sides of the issue. “Just how this test applies has been both uncertain and controversial; whether it applies at all and, if so, in which circumstances, has also been unclear over times.”¹³⁸

D. *Mueller v. Allen*¹³⁹

The Court moved decisively toward a more lenient approach to aid in 1983.¹⁴⁰ A state law in Minnesota allowed parents of students attending parochial schools to deduct from their state income taxes payment for tuition, textbooks, and transportation costs.¹⁴¹ The Supreme Court held that this was one of many deductions available to parents because the aid went to the parents and not to the parochial school.¹⁴² The parents who

133. Ann E. Blankenship-Knox & Brett A. Geier, *Taking a Day Off to Pray: Closing Schools for Religious Observance in Increasingly Diverse Schools*, 2 BYU EDUC. & L.J. 1,37-38 (2018).

134. *Id.* at 38.

135. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment).

136. *Id.* (“I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.”).

137. *Id.* (internal citations omitted).

138. GREENAWALT, *supra* note 122 at 59.

139. 463 U.S. 388 (1983).

140. *See Id.*

141. *Id.* at 391.

142. *Id.* at 399.

sent their students to public school were not required to pay any tuition unless they sent their students to a school outside of their district.¹⁴³ For those students who attended private schools about ninety-five percent of them were enrolled in sectarian schools, which meant that the overwhelming benefits went to parents who sent their students to religious schools.¹⁴⁴ The majority contended that the tax deduction did not “violate the Establishment Clause, but satisfie[d] all elements of the three-part test laid down in *Lemon*. . . .”¹⁴⁵

E. Agostini v. Felton¹⁴⁶

In 1985, the Supreme Court held that the Establishment Clause of the First Amendment barred the city of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program.¹⁴⁷ Twelve years later, in 1997, the Court revisited the issue in *Agostini* and ultimately reversed their opinion.¹⁴⁸ Justice O'Connor, writing for the majority, stated, “Not all entanglements, of course, have the effect of advancing or inhibiting religion”¹⁴⁹ “We agree with petitioners that *Aguilar* is not consistent with our subsequent Establishment Clause.”¹⁵⁰ Whereas the Court contended in *Aguilar* that the program of federally funding instructors in parochial schools necessitated an “excessive entanglement of church and state in the administration of [Title I] benefits,”¹⁵¹ the Court reversed its decision stating that “this carefully constrained program also cannot reasonably be viewed as an endorsement of religion.”¹⁵² The *Agostini* case, generally, demonstrates an effort by the Court to loosen the restrictions for public funding of parochial schools.

143. *Id.* at 405.

144. *Id.*

145. *Id.* at 388.

146. 473 U.S. 402 (1985).

147. *See Id.* (discussing the legality of funneling federal Title I funds through the States to the local educational agencies (LEA) and the LEA spending these funds to provide remedial education, guidance and job counseling to eligible parochial or public students).

148. *Agostini v. Felton*, 521 U.S. 203, 203 (1997).

149. *Id.* at 233.

150. *Id.* at 209.

151. *Aguilar*, 473 U.S. at 414.

152. *Agostini*, 521 U.S. at 235.

F. *Mitchell v. Helms*

In 2000, the Court heard the case *Mitchell v. Helms*,¹⁵³ which determined whether Chapter 2 of the Education and Consolidation and Improvement Act of 1981 violated the Establishment Clause of the First Amendment.¹⁵⁴ Under Chapter 2, local government agencies received federal funds and used them to provide educational materials and equipment for public and private schools. In a 6-3 decision, the Court held that this Section did not violate the Establishment Clause.¹⁵⁵ Justice Thomas, for the majority, argued:

Considering Chapter 2 in light of our more recent case law, we conclude that it neither results in religious indoctrination by the government nor defines its recipients by reference to religion. We therefore hold that Chapter 2 is not a ‘law respecting an establishment of religion.’¹⁵⁶

The majority opinion relied heavily on the principle of viewpoint neutrality. In his explanation of how the principle of neutrality affects this case, again, Justice Thomas wrote:

In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.¹⁵⁷

Addressing the exclusion of religious institutions from generally available programs, Justice Thomas articulated, “hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.”¹⁵⁸

153. 530 U.S. 793 (2000).

154. *Id.*

155. *Id.* at 793.

156. *Id.* at 808.

157. *Id.* at 809.

158. *Id.* at 828.

G. Zelman v. Simmons-Harris

In *Zelman v. Simmons-Harris*,¹⁵⁹ the Court took up the issue of an Ohio school voucher program in Cleveland that respondents argued is in violation of the Establishment Clause of the First Amendment of the United States Constitution.¹⁶⁰ Due to low academic performance, the State of Ohio enacted the Pilot Project Scholarship Program, which provided financial assistance for families to attend a school of their choice as well as provide tutorial aid for students.¹⁶¹ The Pilot Program allowed parents to select religious educational institutions.¹⁶² The respondents claimed that families utilizing public funds to attend religious school violated the First Amendment.¹⁶³ In a 5-4 decision, the Court held that Ohio's voucher program did violate the Establishment Clause.¹⁶⁴ Justice Rehnquist proffered:

In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only be financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options: public and private, secular and religious.¹⁶⁵

The Court's decision was made based on their interpretation of the Pilot Program granting families the opportunity to exercise "genuine choice" when making educational decisions.¹⁶⁶

H. Locke v. Davey

In 1999, the State of Washington established the Promise Scholarship to give college scholarship money to talented students.¹⁶⁷ A prohibition of the scholarship award was that it could not be used to obtain a degree

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

160. *Id.*

161. *Id.* at 639.

162. *Id.* at 645.

163. *Id.* at 648.

164. *Id.* at 662.

165. *Id.* at 662.

166. *Id.*

167. *Locke v. Davey*, 540 U.S. 712, 715 (2004).

in theology if the program is taught to cause belief.¹⁶⁸ In addition, the state constitution forbade funding religious instruction.¹⁶⁹ Joshua Davey was awarded a promise scholarship and he intended to pursue a double major in pastoral ministries and business at Northwest College in Washington.¹⁷⁰ Although Northwest College is a private Christian institution, using the Promise Scholarship for tuition would have been permissible as long as Davey declared a secular major.¹⁷¹ However, Davey was notified that he could not use state funds (the Promise Scholarship) if he declared a sectarian major.¹⁷² Davey forfeited his Promise Scholarship, majored in pastoral ministries, and subsequently filed suit in the U.S. district court.¹⁷³

The core question of this case was, “if a state provides college scholarships for secular instruction, does the First Amendment’s Free Exercise Clause require a state to fund religious instruction?”¹⁷⁴ Granting *certiorari*, the Supreme Court delivered a 7-2 opinion in favor of the state.¹⁷⁵ Delivering the opinion, Chief Justice William Rehnquist ruled that a state does not violate the First Amendment’s Free Exercise Clause when it funds secular college majors but excludes devotional theology majors.¹⁷⁶ The Court rejected Davey’s argument that the state scholarship program is unconstitutional because it is not neutral toward religion.¹⁷⁷ “The State has merely chosen not to fund a distinct category of instruction,”¹⁷⁸ the Court wrote. Similarly, the Washington Constitution—which explicitly prohibits state money from going to religious instruction—does not violate the free exercise clause. Unlike laws and programs, the Court has struck down under the free exercise clause, nothing in either the scholarship program or the state constitution

168. *Id.*

169. WASH. CONST. art. I, §11

170. *Locke*, 540 U.S. at 717.

171. *See id.*

172. *See Id.*

173. *Id.*

174. *See id.*

175. *Id.* at 714.

176. *Id.* at 712.

177. *Id.*

178. *Id.* at 713.

“suggests animus towards religion.”¹⁷⁹ States have a historic and substantial interest in excluding religious activity from public funding.

VIII. THE DISCORDANT OPINION OF SCHOOL VOUCHERS FOR PAROCHIAL EDUCATION

School vouchers provide an opportunity for parents to enroll their children in private, parochial schools using part or all of the public funding that is allocated for their childrens education.¹⁸⁰ A voucher policy, typically, requires funds spent by a public school district on a child's education to be allocated to the family in the form of a voucher to pay for partial or full tuition to a secular or non-secular school.¹⁸¹ Rapidly, a reasonable observer can see the eristic essence of school vouchers—public funds supporting religious education.

Legally, there has been much controversy over the use of vouchers with courts reaching mixed results over their constitutionality.¹⁸² The sole case the Supreme Court has weighed in on regarding vouchers came when the Ohio General Assembly, acting pursuant to a desegregation order, enacted the Ohio Pilot Project Scholarship Program (OPPSP),¹⁸³ which assisted children in Cleveland's failing public school system.¹⁸⁴ The program provided two types of assistance to parents of students in an a covered district.¹⁸⁵ First, the program provided tuition aid for students in

179. *Id.*

180. *What Are School Vouchers?*, ED CHOICE, <https://www.edchoice.org/school-choice/types-of-school-choice/what-are-school-vouchers-2/> (last visited Feb. 13, 2020).

181. *Id.*

182. CHARLES J. RUSSO, *STATE AID TO FAITH-BASED SCHOOLS* 104 (Charles J. Russo et al. eds, 7th ed. 2018).

183. Pilot Project Scholarship Program, OHIO REV. CODE ANN. §§ 3313.974-3313.979 (West 1999).

184. Over “75,000 students [were] enrolled in the Cleveland City School District . . . [and] the majority of these student [came] from low-income and minority families.” The District, while under state control, “failed to meet any of the 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency [exam] . . . More than two-thirds of high school students either dropped out or failed out before graduation.” *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002).

185. A covered school district is “any Ohio school district that is or has been under federal court order requiring supervision and operational management [] of the district by the state superintendent. ” *Id.* at 644-45 (quoting OHIO REV. CODE ANN. § 3313.975(A)). At this time, “Cleveland [was] the only Ohio school district to fall within that category. *Id.* at 645.

kindergarten through third grade (which expanded each year through eighth grade) to attend a participating public or private school of their parent's choice.¹⁸⁶ Second, the program provided tutorial aid for students who chose to remain enrolled in public school.¹⁸⁷ In a covered or adjacent district, parents had the choice to send their student[s] to a religious or non-religious school, supported with state funds, as long as the program did not discriminate on the basis of race, religion, or ethnic background and must not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.¹⁸⁸ The highest amount of tuition was distributed to families with incomes below 200% of the poverty line, which equated to 90% of private school tuition up to 2,250 dollars.¹⁸⁹

In 1996, a group of Ohio taxpayers challenged the Ohio program in state court on state and federal grounds.¹⁹⁰ The Ohio Supreme Court rejected the federal claims but held that the enactment of the program violated certain procedural requirements of the Ohio Constitution.¹⁹¹ The state legislature immediately corrected the infirmities identified but left the basic provisions of the OPPSP intact.¹⁹² In July 1999, an attempt was made to enjoin the reenacted program on the ground that it violated the Establishment Clause of the First Amendment.¹⁹³ The Court of Appeals, affirming the judgment of the District court found that the program had the "primary effect" of advancing religion in violation of the Establishment Clause.¹⁹⁴

In its opinion, the Court noted that the First Amendment through the Fourteenth Amendment prevents a State from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion.¹⁹⁵ Emphatically, Justice Rehnquist, writing for the majority, commenced the holding by noting, "There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational

186. *Id.* (citing OHIO REV. CODE ANN. §§ 3313.975(B) and (C)(1)).

187. *Id.* (citing OHIO REV. CODE ANN. §§ 3313.975(A)).

188. *Id.* (quoting OHIO REV. CODE ANN. §§ 3313.975(A)(6)).

189. *Id.* at 646. (citing OHIO REV. CODE ANN. §§ 3313.975(A) and (C)(1)).

190. *See Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 8-9, 711 N.E. 2d 203, 211 (1999).

191. *Id.*

192. *Zelman*, 536 U.S. at 648.

193. *Id.*

194. *See Simmons-Harris v. Zelman*, 234 F.3d 945, 963 (6th Cir. 2000).

195. *Zelman*, 536 U.S. at 649 (quoting *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997)).

assistance to poor children in a demonstrably failing public school system.”¹⁹⁶ The remaining question required the Court to address whether the OPPSP had the forbidden effect of advancing or inhibiting religion.¹⁹⁷

The majority concluded that the Court’s jurisprudential history on these matters was consistent and that for true private choice programs the Court has remained “consistent and unbroken.”¹⁹⁸ Commenting on the self-proclaimed consistency, the Court contended that three cases support the distinction between government programs that provide aid directly to religious schools¹⁹⁹ and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.²⁰⁰ Insulated by these cases and history, the Court determined that the Ohio program was “entirely neutral with respect to religion.”²⁰¹ It permitted individuals the opportunity to choose among public and private, and secular and religious and, thus, did not violate the Establishment Clause.²⁰² The Court concluded that it was following an unbroken line of its own precedent supporting true private, parental choice that provided benefits directly to a wide range of needy private individuals, its only choice was to uphold voucher programs.²⁰³ Justice Stevens, dissenting, proclaimed, in contrast, that his conclusion was influenced by the history and current world conditions involving religious strife: “Whenever we remove a brick from the wall that was designed to separate religion and government, we

196. *Id.*

197. *Id.*

198. *Id.*

199. *See Mitchell v. Helms*, 530 U.S. 793, 810-814 (2000) (rejecting an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses, including private school tuition); *Agostini*, 521 U.S. at 225-227 (finding that it was not a violation of the Establishment Clause of the First Amendment for a state-sponsored education initiative to allow public school teachers to instruct at religious schools); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995) (holding that a university may not withhold funding because of religious viewpoint).

200. *See Witters v. Wash. Dept. of Services for Blind*, 474 U.S. 481 (1986) (holding that tuition aid to a student studying at a religious institution to become a pastor did so because of the genuinely independent and private choice of the aid recipient); *see also Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (rejecting an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools).

201. *Zelman*, 536 U.S. at 662.

202. *Id.* at 662-63.

203. Russo, *supra* note 182 at 105.

increase the risk of religious strife and weaken the foundation of our democracy.”²⁰⁴

Lower courts have not been as lucid as the Supreme Court providing mixed holdings on the constitutionality of vouchers.²⁰⁵ Based on the Supreme Court’s interpretation, it appears that the federal Establishment Clause does not impede states from adopting school voucher policies.²⁰⁶ According to *Ed Choice* in 2020, seventeen states and the District of Columbia have enacted laws creating a school voucher program. Simply because the courts have permeated the wall interpreting that the Establishment Clause as allowing various types of public aid for nonpublic school students does not mean states *must* use the funds for these purposes if support for transportation, textbooks, and other services in nonpublic schools conflicts with state law.²⁰⁷ Noteworthy, is the holding in *Locke v. Davey*,²⁰⁸ which upheld states’ discretion to adopt more stringent antiestablishment provisions than demanded by the First Amendment. The Court emphasized that the State of Washington constitutional provision was crafted to keep schools independent of sectarian control, rejecting the contention that it emanated from religious bigotry.²⁰⁹ A primary theory that courts have relied on to find many voucher programs constitutionally inviolate is that the “funds flow to religious institutions only due to decisions made by parents; such programs provide permissible *indirect* aid to religious institutions, and thus do not abridge the Establishment Clause or state religion clauses.”²¹⁰

204. *Zelman*, 536 U.S. at 686 (Stevens, J. dissenting).

205. For cases upholding voucher programs, see, e.g., *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Hart v. State of N.C.*, 774 S.E.2d 281 (N.C. 2015); *Oliver v. Hofmeister*, 368 P.3d 1270 (Okla. 2016). For cases invalidating voucher program, see, e.g., *Owens v. Colorado Cong. of Parents, Teachers and Students*, 92 P.3d 933 (Colo. 2004); *Eulitt ex rel. Eulitt v. Maine, Dep’t of Educ.*, 386 F.3d 344 (1st Cir. 2004).

206. MARTHA MCCARTHY, *STATE AID TO FAITH-BASED SCHOOLS* 292 (Charles J. Russo et al. eds, 7th ed. 2018).

207. *Id.*

208. 540 U.S. 712 (2004).

209. *Id.* at 724 n. 7 (finding that Washington’s constitutional prohibition on the use of public funds for religious worship, exercise, or instruction was *not* modeled on a failed constitutional amendment proposed by former House Speaker James Blaine in 1875, which allegedly reflected anti-Catholic sentiment).

210. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 131 S. Ct. 1436 (2011).

IX. CONTEMPORARY CASES

***A. Trinity Lutheran Church v. Comer*²¹¹—Religious Schools Eligible for Public Grants**

In 2012, a Learning Center in Missouri, which included a preschool and daycare center, originally independent, merged with and became managed under the auspices of the Trinity Lutheran Church.²¹² Among its facilities was a playground with an “unforgiving” pea gravel, which the Learning Center officials wished to replace with a softer, safer material, so that children who fell would have less chance of being injured.²¹³ The Learning Center applied for a grant through the State of Missouri’s Department of Natural Resources, which provided grant reimbursement to nonprofit organizations that used recyclable rubber tires to coat the playground in a softer safer material.²¹⁴ The Missouri Department of Natural Resources had a strict and express policy of denying grants to any applicants owned or controlled by a church, sect, or other religious entity.²¹⁵ Pursuant to this policy, the Department of Natural Resources denied the Learning Center’s application even though it ranked fifth out of forty-four with fourteen awarded.²¹⁶ The Department of Natural Resources explained that under Article I, Section 7 of the Missouri Constitution, the Department could not provide financial assistance directly to a church.²¹⁷

Trinity Lutheran sued in Federal District Court, alleging that the Missouri Department of Natural Resources violated its Free Exercise Clause of the First Amendment when it denied its grant application.²¹⁸ The district court dismissed the suit holding that the Free Exercise Clause “prohibits the government from outlawing or restricting the exercise of a religious practice, but it generally does not prohibit the withholding an affirmative benefit on account of religion.”²¹⁹ The district court likened

211. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2014 (2017).

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 2014.

this case to *Locke v. Davey*²²⁰ whereby a student was denied a scholarship because he wished to pursue a degree in devotional theology while program rules forbade funding for those wishing to study for the ministry.²²¹ A divided Eighth Circuit Court affirmed in favor of the Department of Natural Resources, agreeing that public officials violated neither the Establishment Clause, Free Exercise Clause, nor the state constitutional provision against aiding faith-based institutions.²²²

Upon accepting *certiorari*, the Supreme Court reversed the lower court rulings and remanded in favor of Trinity Lutheran.²²³ Writing for the majority, Justice Roberts opened the initial section of the two-part analysis by interpreting the Establishment Clause as not preventing Missouri from permitting the Learning Center to participate in the Scrap Tire Program.²²⁴ The Court held that the Department of Natural Resources' policy violated the right of Trinity Lutheran under the Free Exercise Clause of the First Amendment by denying the Church an otherwise available public benefit on account of the religious statute.²²⁵ Justice Roberts reasoned that "the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand."²²⁶

The holding noted that the Supreme Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion. In *McDaniel v. Paty*,²²⁷ the Court struck down a Tennessee statute disqualifying ministers from serving as delegates to the State's constitutional

220. See *Locke*, 540 U.S. 712.

221. *Trinity*, 137 S.Ct. at 2014. The three primary reasons this case is not congruous to *Trinity*: 1.) The student, Davey, was denied the scholarship because he wanted to use the funds to study the prohibited subject of pastoral theology while Trinity's grant proposal was rejected because it was the church, 2.) Although the student wanted to participate in the religious activity of studying for the ministry, Trinity sought to participate in the Scrap Tire Program to help pay for resurfacing its playground, a secular activity, and 3.) In *Locke v. Davey*, the program included religion, allowing faith-based institutions to participate so long as students did not study pastoral theology. See *id.*

222. *Id.* at 2041.

223. *Trinity*, 137 S.Ct. at 2012.

224. *Id.* at 2017.

225. *Id.* at 2019-2025.

226. *Id.* at 2025.

227. 435 U.S. 618 (1978).

convention.²²⁸ A plurality recognized that such a law discriminated against *McDaniel* by denying him a benefit solely because of his “‘*status*’ as a minister.”²²⁹ In recent years, when rejecting free exercise challenges to neutral laws of general applicability, the Court has been careful to distinguish such laws from those that single out the religious for disfavored treatment.²³⁰ It was noted in *Hialeah* that a fundamental principle of the Supreme Court’s free exercise jurisprudence that laws imposing “special disabilities on the basis of...religious status” trigger the strictest scrutiny.²³¹

The Department of Natural Resource’s policy expressly discriminated against recipients from a public benefit solely because of their religious character.²³² In comparison to the disqualification statute in *McDaniel*, the Department of Natural Resource’s policy puts the Trinity Lutheran to a choice: 1) It may participate in an otherwise available benefit program or remain a religious institution. When the State conditions a benefit in this way, *McDaniel* says plainly that the State has imposed a penalty on the free exercise of religion that must withstand the most exacting scrutiny.²³³ The Department of Natural Resources contends that declining to allocate to Trinity Lutheran a subsidy the State had no obligation to provide does not meaningfully burden the Church’s free exercise rights. Absent any such burden, the Department of Natural Resources is free to follow the State’s antiestablishment objection to providing funds directly to a church.²³⁴ But as even the Department of Natural Resources

228. *See id.*, where a plurality recognized that such a law discriminated against *McDaniel* by denying him a benefit solely because of his status as a minister.

229. *Id.* at 627.

230. *See, e.g.,* *Lying v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988) where the Court rejected a Free Exercise challenge because the First Amendment did not forbid the government from allowing timber harvesting and road construction in a national forest traditionally used for religious purposes by American Indian tribes in California. The *Lying* court decided in favor of the government because officials did not coerce the plaintiffs to violate their religious beliefs; *Emp’t Div. Dept. of Human Res. of Oregon v. Smith*, 110 S.Ct. 1595 (1990) where the Court upheld the dismissal of drug counselors for violating state law by ingesting peyote during a sacramental ritual in their nationally-recognized Native American Church; *and* *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) where the Santeria Church in Florida successfully challenged a city ordinance on the ritual slaughter of animals because the Free Exercise Clause protects believers from unequal treatment.

231. *Hialeah*, 113 S.Ct. at 2226 (citing *McDaniel v. Paty*, 435 U.S. 618 (1978)).

232. *See Trinity*, 137 S.Ct. at 2015.

233. *McDaniel*, 435 U.S. at 618.

234. *Trinity*, 137 S.Ct. at 2015.

acknowledges, the Free Exercise Clause protects against “indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.”²³⁵ *Trinity Lutheran* did not claim any entitlement to a subsidy.²³⁶ It asserted a right to participate in a government benefit program without having to disavow its religious character.²³⁷ The express discrimination against religious exercise here was not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant.²³⁸

The Department of Natural Resources attempted to circumvent Supreme Court precedent by arguing that the theory in *Locke* controlled in this case.²³⁹ The Court, in *Locke*, analyzed a scholarship program to assist high-achieving students in Washington with the costs of postsecondary education.²⁴⁰ The recipients were unrestricted to use these state funds at accredited religious and non-religious schools, but they were prohibited from using the funds to pursue a devotional degree.²⁴¹ The Court lucidly noted that *Locke* was not similar to cases in which the Court struck down laws requiring individuals to “choose between their religious beliefs and receiving a government benefit.”²⁴² In fact, the student in *Locke* was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*.²⁴³ In *Trinity*, the church was denied because of its essence—it is a church. The Missouri Department of Natural Resources failed the most rigorous scrutiny that the Court applies to laws that impose special disabilities on account of religious status.²⁴⁴ The standard for disapproving of law incorporating religious status demands a state interest “of the highest order” to justify the policy.²⁴⁵

235. *Lying*, 485 U.S. at 450.

236. *Trinity*, 137 S.Ct. at 2015.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Locke*, 124 S.Ct. at 1307 (2014).

241. *Id.*

242. *Id.*

243. *Id.*

244. *Lukumi*, 113 S.Ct. at 2217.

245. *McDaniel*, 98 S.Ct. at 1328.

B. Ramifications of *Trinity*

The holding in *Trinity* is noteworthy for several reasons, not least of which is that the Court reached a broad consensus in favor of the Learning Center when most of the Court's decisions during this period divided the Court along political ideologies resulting in many 5-4 rulings. The Justices coalesced around the position that state officials cannot single out religious groups or persons for treatment less favorable than the rest of society.²⁴⁶ Noteworthy is that Justices Thomas and Gorsuch sought stronger, more explicit protection for freedom of religion to the point that they were willing to overturn *Locke* as incorrectly decided.²⁴⁷ A generalization moving forward from this ruling is that the Court reduced the limits placed on aid available to faith-based educational institutions, which may demonstrate a willingness on the Court's behalf to permit public dollars appropriated to religious organizations, especially if money is allocated to help the child and solely for the purpose of advancing a religious agenda.

Charles Russo and William Thro noted six significant ramifications²⁴⁸ that came forth as a result of the *Trinity* ruling:

1. This case demonstrates an “ongoing extension of its recent jurisprudence favoring religious liberty.”²⁴⁹
2. “In a related long-term implication, although none of the Justices identified the disputed provision from Missouri as a Blaine-type amendment, the fact remains that the Supreme Court treated it as having placed a constitutionally impermissible limit on aid insofar as Justice Sotomayor pointed out, ‘[t]oday, thirty-eight’ jurisdictions in addition to Missouri have language in their constitutions restricting Aid to religious institutions and individuals, federal free exercise challengers are likely to ensue whenever public officials use these provisions to implement policies that discriminate based on religion.”²⁵⁰
3. “It remains to be seen whether *Trinity* is limited because it directly addressed generally available programs. ... It does not stand for the proposition the Supreme Court expanded the Free Exercise Clause to allow

246. Charles J. Russo & William E. Thro, *Blessed Trinity: Implications of Trinity Lutheran Church of Columbia v. Comer for Religious Liberty*, 44 REL. & EDUC. 247, 253 (2017).

247. *Id.* at 252.

248. *Id.* at 255.

249. *Id.*

250. *Id.*

states to distribute funds to religious groups at any time, for any purpose, or that public monies may automatically be spent on voucher programs and/or other K-12 educational choice initiatives for students whose parents wish to have their children attend religiously affiliated non-public schools. ... Trinity Lutheran has had an immediate impact in litigation seeking equal treatment between and among public, nonpublic secular, and nonpublic faith-based schools." State programs need not provide special benefits to nonpublic schools, but if officials choose to do so, they must afford religiously affiliated nonpublic schools the same on an equal basis."²⁵¹

4. *Trinity's* "impact be significant at all levels of schooling. As to K-12 education, because the Establishment Clause permits faith-based schools to participate in choice programs, states with voucher programs for non-public secular schools must now include religiously affiliated counterparts."²⁵²

5. "The Supreme Court's expansion of the scope of the Free Exercise Clause in *Trinity* diminishes state sovereignty concerning the establishment of religion. Put another way, borrowing a term from *Davey*, state officials have less 'play in the joints,' meaning they now have less freedom to adopt more restrictive policies under the Establishment Clause to deny generally available aid based solely on institutional, or individual religious associations."²⁵³

6. *Trinity* "likely enhances the rights of K-12 student religious groups. Stated differently, if public school boards provide funding for the activities of secular groups, they now may not refuse to offer similar financial support for religious groups such as Equal Access Bible Study Clubs simply because some of the money may be used for worship or proselytizing activities. If boards permit secular student political groups to exclude those who disagree with the objectives such as not wanting a member of a party different from the one with which they are affiliated to become their presidents, officials apparently must now allow religious groups to exclude those who fail to comply with their beliefs by affording them the opportunity to create their own good faith, albeit religious, eligibility or entrance requirements."²⁵⁴

251. *Id.* at 255-56.

252. *Id.* at 256.

253. *Id.*

254. *Id.* at 256-57.

To reiterate the Russo and Thro analysis, the *Trinity* decision has expanded the scope of the Free Exercise Clause and has minimized the state's authority under the Establishment Clause, which may prohibit a state from denying aid based on religious associations. The Michigan Law M.C.L. 388.1752(b)'s non-transportation-related reimbursement does not run afoul of the *Trinity* decision.²⁵⁵ To commence the analysis, there is no fundamental right to an education at a *state-funded* nonpublic school, nor is there a fundamental right to choose between a public school and a *state-funded* nonpublic school.²⁵⁶

None of the seminal cases analyzing parent's right to direct a child's education involved a positive right to enlist public monies to fund nonpublic schools.²⁵⁷ *Pierce v. Society of Sisters*²⁵⁸ identified the fundamental right to send a child to the school of a parent's choosing, *but* not a right to state funding of nonpublic school. The Equal Protection Clause is not violated by denying reimbursement for essential business operation expenses of nonpublic school,²⁵⁹ nor does it violate the Free Exercise Clause.²⁶⁰ Noted in the seminal case *Everson v. Board of Education*²⁶¹, the State could, if it wished, "provide transportation only to children attending public schools" without violating free-exercise rights

255. Brief of Amici Curiae Governor Gretchen Whitmer and Michigan State Superintendent of Public Instruction Michael Rice in Support of Petitioner at 10, Council of Orgs. v. State of Michigan, No. 158751 (Mich. Ct. App. 2019). [hereinafter Brief of Amici Curiae].

256. MICH. COMP. LAWS § 388.1752 (b)(9) (2016).

257. See *Wisconsin v. Yoder*, 406 US 205 (1972) (overturning state law that mandated compulsory school attendance for Amish until age 16).

258. 268 U.S. 510 (1925).

259. See, e.g., *Norwood v. Harrison*, 413 U.S. 455, 462 (1973) ("In *Pierce*, the Court affirmed the right of private schools to exist and operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.").

260. See *Locke*, 540 U.S. 712 at 720. No Free Exercise Clause violation for state constitution prohibition on scholarships for post-secondary education for degree in pastoral ministry. Like the State of Washington's constitution at issue in *Locke*, Michigan also prohibits the use of public funds of education in a seminary. MICH. CONST. Art 1, § 4.

261. 330 U.S. 1 (1947).

protected under the federal constitution.²⁶² That thesis is confirmed in the *Trinity* case.

C. The Renaissance of Tax Credits

Parochial school supporters continue to search for ways to funnel public funds to their cause. Receiving a tax deduction or tax credit, while not a new idea,²⁶³ “allows for donors to take tax deductions for contributions they make to a state-sanctioned entity that distributes those contributions to qualified students who then use the money for private and religious schools.”²⁶⁴ In the educational world, tax credits are a mechanism by which private school parents can pay tuition and receive a subtraction in the amount of the tax owed.²⁶⁵ This differs from a tax deduction, which is a reduction of income that is eligible to be taxed.²⁶⁶ Programs that utilize tax credits or tax deductions often provide a potential vehicle by which parents purchasing private school tuition to recoup the cost either through the tax credit or deduction protocol.

The constitutionality of tax benefits to those paying tuition to parochial schools has been legally analyzed at both state and federal jurisdictions and has evolved over time with mixed holdings. In the early 1970s, Ohio codified a program called the Parental Reimbursement Grant, which provided a tax credit to non-public school parents.²⁶⁷ The Supreme Court found that the grant program violated the Establishment Clause of the First Amendment.²⁶⁸ In 1973, the Supreme Court found unconstitutional

262. *Id.* at 16.

263. ALEXANDER & ALEXANDER, *supra* note 96 at 219.

264. Valerie Strauss, *Guess Which State Spends the Most Public Funds on Private and Religious School Education. Hint: Betsy DeVos has a House There*, WASH. POST (Mar. 1, 2019), <https://www.washingtonpost.com/education/2019/03/01/guess-which-state-spends-most-public-funds-private-religious-school-education-hint-betsy-devos-has-house-there/>.

265. *Tax Credit*, BLACK’S LAW DICTIONARY (9th ed. abr. 2010).

266. *Deduction*, BLACK’S LAW DICTIONARY (9th ed. abr. 2010).

267. The challenged statute provided state funds to be paid to school districts to be used for educational grants for students and to provide services and materials to pupils attending nonpublic schools within a school district.

268. *Wolman v. Walter*, 433 U.S. 229 (1977) (holding that expenditures of public funds for purchases of secular textbooks for loan to the students, for use of standardized test and scoring services which were the same as those used by the public schools, and for the provision of diagnostic and therapeutic services to the students was constitutional, but use of public monies for purchases of instructional materials and equipment for the students and for transportation for field trips was unconstitutional).

a New York statute that, *inter alia*, established a tuition reimbursement program for parents of children attending nonpublic elementary or secondary schools.²⁶⁹ A few years later, in New Jersey, the Court invalidated a tax benefit program for nonpublic school parents.²⁷⁰ Affirming the Third Circuit, the Supreme Court held that a personal deduction for each child who attended a nonpublic elementary or secondary school on a full-time basis was unconstitutional.²⁷¹ Charting a new lenient direction, the Court found permissible a Minnesota statute that allowed all parent taxpayers to deduct from their income taxes a legislatively specified amount.²⁷² The Court was not concerned that the tax deduction benefits to public school parents would be minimal because public schools do charge tuition or transportation fees and textbooks are, by and large, free.²⁷³ The primary benefits would then, of course, accrue largely to the advantage of parochial school parents.²⁷⁴ A major shift occurred during this judicial period, which promulgated and ultimately permitted tax credits and deductions to be used to fund tuition for parochial schools.

In recent years, advocates of parochial schools continue to seek creative methods to channel federal dollars to private schools under the guise of school choice. In March of 2019, Education Secretary Betsy DeVos announced she backed Senate legislation that would create the first federally funded school tax credit.²⁷⁵ Opponents of these programs declare that they drain resources from public school districts that educate

269. *Comm. for Pub. Educ. and Religious Liberty, et al. v. Nyquist, et al.*, 413 U.S. 756, 93 S.Ct. 2955 (1973) (holding the tuition reimbursement grants, if given directly to sectarian schools, would similarly violate the Establishment Clause, and the fact that they are delivered to the parents rather than the schools does not compel a contrary result, as the effect of the aid is unmistakably to provide financial support for nonpublic, sectarian institutions).

270. *Pub. Funds for Pub. Schs. of New Jersey v. Byrne*, 590 F.2d 514 (3rd Cir. 1979), *aff'd sub nom*; *Beggans v. Public Funds for Public Schools of New Jersey, et al.*, 99 S.Ct. 2818, 442 U.S. 907, (1979) (holding unconstitutional a New Jersey statute, which provided that a taxpayer who has dependent children attending nonpublic elementary or secondary school on full-time basis may for each child have a personal deduction against gross income).

271. *Id.*

272. *Mueller v. Allen*, 463 U.S. 388, 103 S. Ct. 3062 (1983) (noting that the court distinguished the earlier tax education or credit plans by noting that each of those limited tax benefits was available only to parents of private school children, whereas the Minnesota deduction was available to parents of all children in both private and public schools).

273. *Id.* at 400-01.

274. *Id.*

275. Strauss, *supra* note 264 at 165.

most of America's children.²⁷⁶ Under tax credit scholarship programs, donors take tax deductions for contributions they make to a state-sanctioned entity that distributes those contributions to qualified students who then use the money for private and religious schools.²⁷⁷ Ed-Choice declares that twenty-three tax credit scholarship programs are in effect throughout the Nation in addition to nine tax credit or deduction policies.²⁷⁸ As for the federal government, the proposed legislation would provide a 100 percent federal tax credit for donations by individuals or companies that help send children to private school. Spending on the program would be capped at five billion dollars.²⁷⁹ "Federal taxpayers may not be funding these scholarships directly, but they would be footing up to five billion dollars of the cost in lost revenue from the new tax credits."²⁸⁰ To sum, private actors may be fronting this money with their donations, but they would get a dollar-for-dollar tax credit in return—money that could be allocated elsewhere.

D. Espinoza v. Montana—What the Future May Hold for Parochial Funding from the Public Treasury

1. Background of the Case

276. *Id.*

277. *Id.*

278. School Choice in America Dashboard, ED CHOICE, <https://www.edchoice.org/school-choice/school-choice-in-america/> (last visited Feb. 13, 2020).

279. Strauss, *supra* note 264. States would have the option of participating, but they would not be forced to do so. Each participating state will determine how it will structure its program, including eligible students, education providers, and education expenses. Participating states would have to identify scholarship-granting organizations. These are typically nonprofit organizations that offer scholarships to low-income or special-needs students. Individuals and businesses donating to these scholarship-granting organizations are eligible to receive a non-refundable, dollar-for-dollar federal tax credit, but no contributor will be allowed a total tax benefit greater than the amount of the contribution. Depending on how the state structures its program, the scholarships could be used for a range of expenses. Families receive and control the use of scholarships for their child's elementary and secondary education, which may include career and technical education, apprenticeships, dual and concurrent enrollment, private and home education, advanced, remedial, and elective courses, industry certifications, special education services and therapies, transportation to education providers outside of a family's zoned school, tutoring, especially for students in low-performing schools, and summer and afterschool education programs.

280. *Id.*

Out of the State of Montana comes a recent case that may, generally, hold influence over whether states may proscribe public funds be allocated to sectarian causes. *Espinoza v. Montana*²⁸¹ involves a 150 dollar state tax credit for contributions to funds that provide scholarships for students to attend private schools, including religious institutions.²⁸² The Montana State Revenue Department, which administered the tax credit, issued Administrative Rule 1 that prohibited the scholarships from being used at religious schools.²⁸³ Rule 1's decree drew its authority from Article X, Section 6 of the Montana Constitution:

(1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination. (2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.²⁸⁴

This constitutional clause places Montana among the thirty-seven states that have no-aid-to-religion language in their state constitution (see section on Blaine Amendments in this Article).²⁸⁵ The plaintiffs are parents whose children attend a religiously-affiliated school in Montana.²⁸⁶ Because Rule 1 precludes religiously-affiliated private schools from the definition of a Qualified Education Provider (QEP), the student Scholarship Organization (SSO) cannot fund tuition scholarships at the school the Plaintiff's students attend.²⁸⁷ The Plaintiffs challenged Rule 1 and the Department responded, arguing Rule 1 was necessary because the Tax Credit Program as enacted by the Legislature violates Montana's Constitution.²⁸⁸ The district court determined the Tax Credit

281. 435 P.3d 603, 393 Mont. 446 (2018), *cert. granted*.

282. Tax Credit for Qualified Education Contributions, MONT. LAWS. Part 31, §15-30-3111.

283. *Espinoza*, 435 P.3d at 606.

284. MONT. CONST. Art X, § 6.

285. Mark Walsh, *In Arguments, U.S. Supreme Court Leans Toward Support for Religious Aid*, EDUC. WEEK (JAN. 22, 2020), http://blogs.edweek.org/edweek/school_law/2020/01/us_supreme_court_weighs_argume.html.

286. *Espinoza*, 435 P.3d at 606.

287. *Id.*

288. *Id.*

Program was constitutional without Rule 1 and accordingly granted the Plaintiffs summary judgment.²⁸⁹ The Montana Department of Revenue appealed the decision arguing that the Tax Credit is unconstitutional absent Rule 1.²⁹⁰ The Montana State Supreme Court had the following overarching question on appeal:

*Does the Tax Credit Program for Scholarships Violate Article X, § 6 of the Montana Constitution?*²⁹¹

The Montana Supreme Court commenced its analysis by recognizing in *Locke v. Davey* the tension between the Free Exercise and Establishment Clause and the “room for play in the joints between them.”²⁹² A States’ constitutional prohibition against aid to sectarian schools may be broader and stronger than the First Amendment’s prohibition against the establishment of religion. Important to note is the following holding from *Locke*, where a States constitution “draws a more stringent line that drawn by the United States Constitution,” the “room for play” between the Establishment Clause narrows.²⁹³ The Montana Constitution broadly and strongly prohibits state aid to sectarian schools leaving a minimal amount of “room for play.”²⁹⁴ The Montana Supreme Court found that the Montana Constitution more broadly prohibits “any” state aid to sectarian schools and draws a “more stringent line than that drawn” by federal counterpart.²⁹⁵ Therefore, the sole issue in the case is whether the Tax Credit Program runs afoul of Montana’s specific sectarian education no-aid provision, Article X, Section 6.²⁹⁶

In fact, the Montana Supreme Court did rule that the Tax Program aided sectarian schools in violation of Article X, Section 6 of the Montana Constitution.²⁹⁷ For the following reasons, the Montana Supreme Court forbade the state support of sectarian schools:

289. *Id.* at 455.

290. *Id.* at 454.

291. *Id.*

292. 540 U.S. at 718.

293. *See Locke*, 540 U.S. at 722.

294. *See Espinoza*, 435 P.3d at 608-09 (citing *Locke*, 540 U.S. at 722).

295. *See Locke*, 540 U.S. at 722.

296. *See Espinoza*, 435 P.3d at 609.

297. *Id.*

1. Article X, § 6, broadly and strictly prohibits aid to sectarian schools.²⁹⁸
2. The Tax Credit Program aids sectarian schools in violation of Article X, § 6.²⁹⁹
 - a. The Legislature aided sectarian schools when it enacted the Tax Credit Program.³⁰⁰
 - b. The Tax Credit Program permits the Legislature to indirectly pay tuition at private religiously affiliated schools.³⁰¹
 - c. The Legislature provided the tax credits to aid schools controlled in whole or in part by churches.³⁰²
3. Rule 1 is unnecessary because the underlying Tax Credit Program is unconstitutional and, further, the Department exceeded its rulemaking authority when it enacted Rule.³⁰³

The Montana Supreme Court, therefore, held that the Tax Credit Program violated Article X, Section 6's stringent proscription on aid to sectarian schools.³⁰⁴ Because the Tax Credit Program is unconstitutional, Rule 1 is superfluous and the Montana Department of Revenue exceeded the scope of its rulemaking authority when it enacted Rule 1.³⁰⁵

2. Oral Arguments in the Supreme Court.

As of this composition, the case was granted *certiorari* and oral arguments were heard by the Supreme Court on January 22, 2020. The petitioners in the case postured that the recipients of the state funds were the parents, not the schools, and would be amiss if that position were not confirmed. A core tenet for the petitioners echoes the *Trinity* holding in that a generally available benefit must not be denied to an institution

298. *Id.*

299. *Id.* at 612.

300. *Id.*

301. *Id.*

302. *Id.* at 613.

303. *Id.* at 614.

304. *Id.* at 615.

305. *Id.*

based on its religiosity.³⁰⁶ While the respondents contend that the State's constitution proscribes in Article X, Section 6 public funds being allocated to parochial institutions, Article VI, Paragraph 2 of the U.S. Constitution, known as the Supremacy Clause, establishes that the federal Constitution and federal law takes precedence over state law and constitutions, especially when a holding affirms discrimination in violation of the U.S. Constitution. Justice Alito emphasized this point, "[I]t is a violation of the Federal Constitution if a state Supreme Court bases a decision on a ground that discriminates in violation of the Constitution."³⁰⁷ Justice Kavanaugh amplified the potential discrimination aspect of the case by strenuously stating, "If we're going to give benefits to private schools, which you don't have to do...you do not have to give benefits to private schools or funds or tax credits, but if you do, don't tell someone they can't participate because they're Jewish or Protestant, or Catholic."³⁰⁸ Justice Kagan countered this proposition by summarizing a tenet of the State's argument, which proffered a distinction between *Trinity* (a playground) and this case (religious education), "We [the state] don't want to subsidize religious activity, in particular religious education. That's a far cry from *Trinity Lutheran*."³⁰⁹ Justice Breyer furthered the distinction between *Trinity* and this case on the concept of supporting religious education by stating, "[There is] nothing more religious except perhaps for the service in the Church itself than religious education. That's how we create a future for our religion."³¹⁰ To sum, for the petitioners, they contend that a generally applicable funding program was enacted, which gave a scholarship by way of a tax credit for donations to parents to use for enrolling their student[s] in the institution, public, private, parochial, etc. of their choosing.³¹¹ The petitioners claim to deny that right because of the premise of Article X, Section 6 discriminates due to the parents' desire to send their student[s] to a parochial institution and because that mandate

306. Transcript of Oral Argument at 23, *Espinoza v. Mont. Dept. of Revenue* 393 Mont. 446, 435 P.3d 603 (2018), *cert. granted*, (No. 18-1195, 2020 term) quoting Attorney Wall, "Even the state admits...There is zero founding era evidence that there—that you could have a generally available benefit and deny it to an institution based on its religious character..."

307. *Id.* at 37.

308. *Id.* at 66-67.

309. *Id.* at 28.

310. *Id.* at 62.

311. *Id.* at 68-70.

comes from the state constitution, the federal law and constitution should have precedence over this decision.³¹²

The Montana Department of Revenue initiated its defense of the State by proposing that the State did not want to get involved in religious education complying with the spirit of Article X, Section 6. The respondent's aberrant argument is that the State eliminated the program to protect religious freedom. As the respondents had been attacking the removal of the program because funds were reaching the parochial schools, the idiosyncratic theory for the respondents was their concern for protecting the integrity of religious institutions from the State. As Mr. Unikowsky, attorney for the respondents, stated, "[T]here's still a concern that ultimately the inevitable effect of these programs is that the government would exercise its leverage over schools."³¹³ Protecting the integrity of religious tenets of these schools by restricting state government influence may be seen by some as legerdemain.

A final assertion by the respondents seeks to interject historical intent of Article X, Section 6 into the defense, noting that there was a sincere effort by the delegates of state constitutional convention to ensure that government could not exercise its leverage on religion.³¹⁴ Justice Kavanaugh, dubiously, queried the respondents about this position, "You think that was the design of the no-aid clause, to—to help religious institutions?"³¹⁵ Responding, Mr. Unikowsky, stated, "Yeah. If you look at the transcripts of 1972, that's—is—what it's all about. There is [*sic*] numerous religious leaders who came forward and testified that that's the reason they wanted it."³¹⁶ Furthering the defense argument, Mr. Unikowsky noted Delegate Harper's (delegate from the Montana Constitutional Convention) position, who was not an anti-religious bigot, "He was the pastor of a church in Helena and he told his colleagues, drawing on his own religious faith, that the no-aid clause was necessary to ensure that religious schools were independent from government."³¹⁷

It appears in the current state of division among political ideologies in the Nation that the divided Supreme Court (with a slightly conservative

312. *Id.*

313. *Id.* at 66.

314. *Id.*

315. *Id.* at 65.

316. *Id.*

317. *Id.*

bent) will, likely, hold in favor of the petitioners in *Espinoza*. The Court, with its conservative leaning, is positioned to carry the legacy of *Trinity* further into the public funding of parochial education. Based on the oral hearings, the conservative justices are endorsing the notion that a generally offered program, such as a grant or scholarship, must be offered to all and individuals or institutions must not be discriminated against because of their religiosity. Whereas the Court found in *Locke* that state constitutional language could be more restrictive regarding public funds being appropriate to sectarian entities, the present-day conservative justices seem to be inclined to dismiss that notion in favor of the philosophy of the Supremacy Clause galvanizing authority with the federal government. Lastly, the distinction is lucidly made that in the Montana scholarship program, the funds went to the parents and, in turn, the parents decided what school to send their children. This argument circumvented the corollary that proscribes state funds being allocated to sectarian entities by establishing the notion that the funds went to parents to use as they saw fit.

The respondents rely on historical precedent of maintaining separation of church and state with the construction of “no-aid” clauses to protect parochial institutions from the influence of government. The argument is that the “no-aid” clause in the Montana Constitution was enacted to protect religious entities from government influence and intrusion. When the Montana Supreme Court found the scholarship program in violation of Article X, Section 6, it did not eliminate just the religious component of the program, it eliminated the entire program, thus intending to avoid charges of discriminating against religion. As both *Trinity* and *Espinoza* demonstrate, the federal courts appear to be willing to employ the “room for play in the joints” and find more permissibility for state support of religious organizations.

X. THE ANALYSIS AND CONCLUSION OF MICHIGAN STATUTE 388.1752(B), § 152(B)—FEDERAL AND STATE PERSPECTIVE

A. Couching M.C.L.388.1752, § 152(b) in Federal Precedent

While *Council of Organizations* currently resides in the Michigan court system, federal jurisprudence regarding the topic of public funds

supporting parochial schools will be valued in the decision. Federal holding will have some influence on the ultimate decision of whether the appropriation to parochial schools provided by M.C.L. 388.1752(b), Section 152(b) violates the religious clauses of the First Amendment in the federal Constitution. As examined in this Article, the federal judiciary has experienced “ebb and flow” between strict interpretation of the Establishment Clause proscribing any federal support for religious entities and permeations into the “Wall of Separation,” especially in public school scenarios, which tend to find in favor of the Free Exercise Clause.

Based on the *Trinity* decision and the oral arguments in *Espinoza*, the Court appears to be positioned to continue its philosophy of holding in favor of state support for parochial schools if the denial of public funds discriminates against the religious entity. Many of the state “no-aid” clauses are succinct and speak in lucid terms. In Michigan, Article 8, Section 2 shows that the people spoke in no uncertain terms: “no public monies” shall be appropriate or paid by the Legislature “directly or indirectly to aid or maintain any private, denomination or other nonpublic . . . school,” and “no payment,” “subsidy, grant or loan of public monies” shall be provided, directly, or indirectly, “to support the attendance of any student or the employment of any such nonpublic school[.]”³¹⁸ This language is simple, straightforward, and sweeping, and admits only one exception to its prohibition: “[t]he legislature may provide for the transportation of students to and from any school.” Federal jurisprudence, as developed in *Locke*, strengthened the argument that a state’s restriction on appropriating public funding to religious organizations may be stricter than federal interpretation, however, *Trinity* and *Espinoza* are trending away from that restriction. The theories in their respective holdings are employing the argument of the “child-benefit theory” and religious discrimination.

In the 1980s, the Court began crystallizing the philosophy that if a state fiscal appropriation is reaching the child, benefitting him or her, and directly supports his or her education, then it is constitutionally permissible. *Mueller*, in 1983, loosened the approach to aid by permitting state tax deduction on income tax for the payment of tuition, textbooks,

318. MICH. CONST. Art 8, § 2.

and transportation costs for private schools.³¹⁹ *Agostini*³²⁰ affirmed that there was no evidence to support that the entrance of public school teachers into parochial schools would inevitably lead to the indoctrination of state-sponsored religion.³²¹ In its *Agostini* holding, the Court noted that under its “new view,” only those policies which generate an excessive conflict between church and state will be deemed to violate the Establishment Clause.³²²

This “new view” continues to permeate jurisprudence by favoring religious liberty as is evidenced by the *Trinity* decision and the *Espinoza* case, which minimize the state’s authority under the Establishment Clause. Both cases amplify the notion that denying general funding is tantamount to religious discrimination and violates the Free Exercise Clause. The *Trinity* Court was transparent in that it has routinely rejected free exercise challenges where “the laws in question have been neutral and generally applicable without regard to religion.”³²³ It is a common rule that “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.”³²⁴ The Michigan constitution is congruous law—“it is neutral in character and applies generally to all nonpublic schools without regard to their religious nature.”³²⁵

Michigan Supreme Court Justice Stephen J. Markman noted in his concurrence on the court’s order granting leave that “if Const 1963, art 8, §2 is deemed to be effectively indistinguishable from the Missouri provision addressed in *Trinity Lutheran*, the denial of state funds in this case may well raise Free Exercise concerns under *Trinity Lutheran*.”³²⁶ Restating, the Court found in *Trinity* that a religious organization could not be denied state reimbursement for resurfacing a playground solely on the basis that it is a religious organization and if the state were to do so, the act could cause an infringement on the free exercise of religion.³²⁷ For

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

320. 521 U.S. 203, 117 S. Ct. 1997 (1997).

321. *Id.*

322. *Id.*

323. *Trinity*, 137 S. Ct. at 2020.

324. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520, 531 (1993).

325. Brief of Amici Curiae, *supra* note 255 at 30.

326. *Council of Orgs.*, 929 N.W.2d at 281.

327. *Trinity*, 137 S.Ct. 2012 at 2019.

Trinity, the Missouri Constitution, specifically, excluded religious organizations from receiving state funding:

[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.³²⁸

This Section served as the core thesis for the application denials at issue in *Trinity* and is not at issue in *Council of Organizations*. In Michigan, Article 8, Section 2 is neutral and generally applies to every “private, denomination or other nonpublic, pre-elementary, elementary, or secondary school.”³²⁹ Article 8, Section 2 of the Michigan Constitution applies to both religious and nonreligious schools without distinction. This Section is lucid and does not permit public money to be allocated to nonpublic schools for non-transportation-related expenses. Thus, this provision in the Michigan Constitution as applied to M.C.L. 388.1752(b), Section 152(b) is distinguishable from the core argument of *Trinity* and is not violative of the Free Exercise Clause.

In *Espinoza*, the contention among the petitioners is twofold. One, the state allocation for a scholarship was appropriated to the parents who then could decide what school, private or public, to use the funds to enroll their students. The argument is that the state is not violating the Establishment Clause because the funds are not directly allocated to the religious organization but flow through the parents and to deny parents a generally available scholarship actually chills their Free Exercise rights. Second, like Missouri, but unlike Michigan, the Montana constitution singles out religious organizations for special limitations. The Michigan constitution does not single out religious schools for disfavored treatment but prohibits funding to all nonpublic schools.

Irrespective of how the U.S. Supreme Court finds in the *Espinoza* case, or the holding in the *Trinity* case, the Michigan Supreme Court should conclude that the Michigan Constitution does not violate the federal Constitution. The reimbursement provided in M.C.L. 388.1752(b), Section 152b are not constitutionally protected or compelled. There is no fundamental right to an education at a *state-funded* nonpublic school, nor

328. MISS. CONST. Art. 1, §7.

329. MICH. CONST. Art. 8, §2.

is there a fundamental right to choose between a public school and a *state-funded* nonpublic school. The seminal cases regarding a parent's right to choose a child's education do not include a positive right to use public monies to fund nonpublic schools.³³⁰ Prohibiting reimbursement for essential business operational expenses of nonpublic schools does not violate the Equal Protection Clause,³³¹ nor does it violate the Free Exercise Clause.³³²

B. The Constitutionality of M.C.L. 388.1752(b), § 152b in State Court

When a court reviews a statute, the court must look to the text itself for meaning. "The primary goal when interpreting a statute is to discern the intent of the Legislature by focusing on the most 'reliable evidence' of that intent, the language of the statute itself."³³³ "When interpreting constitutional provisions, . . . [the] primary objective 'is to realize the intent of the people by whom and for whom the constitution was ratified.'"³³⁴ This tenet applies to constitutional analysis as well. Courts must review constitutional language to know the intent of the people at the time the constitution was ratified.³³⁵ While it is true that "[s]tatutes

330. See *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972) (overturning state law that mandated compulsory school attendance for Amish until age 16); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 45 S. Ct. 571 (1925) (identifying fundamental right to send children to school of parent's choosing, but not a right to state funding of nonpublic schools); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625 (1923) (overturning state law restricting foreign-language education).

331. *Norwood v. Harrison*, 413 U.S. 455, 462 (1973) ("In *Pierce*, the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.").

332. See *Locke v. Davey*, 540 U.S. 712, 719 (2004) (holding no Free Exercise Clause violation for state constitution prohibition on scholarships for post-secondary education for degree in pastoral ministry).

333. *Fairley v. Dep't of Corrections*, 497 Mich. 290, 296-297 (2015).

334. *Id.*

335. *Goldstone v. Bloomfield Twp. Pub. Lib.*, 479 Mich. 554, 558, 737 N.W.2d 476, 479 (2007) (citing *Studier v. Michigan Pub. School Employees' Retirement Bd.*, 572 Mich. 642, 652, 698 N.W.2d 350 (2005) (quoting *Wayne Co. v. Hathcock*, 471 Mich. 445, 468, 684 N.W.2d 765

are presumed to be constitutional,” that presumption must yield when a statute’s “unconstitutionality is clearly apparent.”³³⁶ Based on the intent of the framers of the Michigan Constitution, to contend that M.C.L. 388.1752(b), Section 152(b) is compliant with Article 8, Section 2 is illogical. The plain text of Article 8, Section 2 forbids the appropriation of public money to aid or maintain, directly or indirectly, nonpublic schools. It is difficult to see how the People could have stated this prohibition more clearly, or with more sweeping effect.

The setting for which Article 8, Section 2 was passed in the State of Michigan, the holding in *Traverse City School District v. Attorney General*³³⁷ remains the seminal decision. The provision was enacted by the People through an initiative amendment and was passed in response to the Legislature’s efforts “to give tax relief to tuition paying parents of children attending private schools.”³³⁸ In response to Public Act 100 of 1970 being passed, which appropriated public monies to nonpublic school units to pay a portion of the salaries of private lay teachers of secular nonpublic schools, concerned citizens petitioned to place Proposal C on the ballot in the 1970 general election. By a vote of the People, Michigan adopted the amendment, which became Article 8, Section 2. The passage of Proposal C clearly demonstrated that the People of Michigan did not want public monies to be used for parochial schools and to hold otherwise is flawed.

The Brief of Appellees provides a well-constructed overview comparing the language of Michigan’s Constitution with the intention of M.C.L. 388.1752b:

(2004); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012) “In their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations . . . Textualism is not well designed to achieve ideological ends, relying as it does on the most objective criterion available: the accepted contextual meaning that the words had when the law was enacted.”

336. *Taylor v. Smithkline Beecham Corp.*, 468 Mich. 1, 6 (2003).

337. 384 Mich. 390 (1971).

338. *Id.* at 406, n.2.

Const 1963, art 8, § 2	M.C.L. 388.1752b
<p>“no public monies shall be appropriated or paid or any public credit utilized”</p> <p>prohibits public monies “to aid or maintain any private, denominational or other nonpublic . . . school”</p>	<p>“[f]rom the general fund money appropriated under section 11, there is allocated an amount not to exceed \$2,500,000” § 152b(1).</p> <p>allocates general fund money “to reimburse actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state” for the intended purpose of “ensuring the health, safety, and welfare of the children in nonpublic schools and to reimburse nonpublic schools” §§ 152b(1), (7).</p> <p>Reimburses “ ‘actual costs’ [which] means the hourly wage for the employee or employees performing a task or tasks required to comply with a health, safety, or welfare requirement” § 152b (9)</p>
<p>“[n]o payment . . . shall be provided . . . to support the employment of any persons at any such nonpublic school”</p>	<p>“taking daily student attendance shall be considered a [reimbursable] actual cost in complying with a health, safety, or welfare requirement” § 152b (10)</p>
<p>“[n]o payment . . . shall be provided . . . to support the attendance of any student . . . at any such nonpublic school”</p>	

The Michigan Supreme Court found unconstitutional Chapter 2 of Public Act 100 of 1970 and in finding the entire chapter invalid, the court barred the funding of twenty-two million dollars for “participating nonpublic school units to pay a portion of the salaries of private lay teachers of secular nonpublic school courses in the nonpublic school for nonpublic school students.”³³⁹ M.C.L. 388.1752(b), Section 152b is a statute of similar ilk that was found unconstitutional based upon the straight forward application of the “common understanding” of Article 8, Section 2.³⁴⁰ The “common understanding” emphasis emphasized through much of Michigan’s jurisprudential history must be consistently employed in *Council of Organizations*, which will hold M.C.L. 388.1752(b), Section 152b violative of the state constitution.

The Legislature in Michigan passed M.C.L. 388.1752(b), Section 152b, which appropriated 2.5 million dollars to reimburse nonpublic schools in paying for the costs of meeting the State’s health, safety, or welfare mandates, which support student attendance and employment at the nonpublic schools.³⁴¹ It states that the state general fund will reimburse the nonpublic schools the cost of complying with health,

339. *Id.* at 413.

340. *Id.* at 406-408.

341. MICH. COMP. LAWS § 388.1752 (b) (2016).

safety, or welfare mandates, including the actual costs of the hourly wages of employees who perform these tasks.³⁴² This statute violates Article 8, Section 2 of the Michigan Constitution by providing public funds for the operation expenses of nonpublic schools. This appropriation is contrary to the wishes of the People of the State of Michigan when they passed Proposal C in 1970. In addition, federal jurisprudence should not provide a constitutional defense for M.C.L. 388.1752(b), Section 152b. The statute does not violate the Free Exercise Clause as the funds are not dispersed to parents who then decide at what type of school to expend them. The statute does not discriminate against religion as it incorporates all private schools and would be appropriated directly to the school for operational purposes—a direct violation of the Establishment Clause.

342. *Id.*

