STATE CONSTITUTIONAL LAW—EDUCATION—WHY VOUCHER PROGRAMS DO NOT ERASE THE CONNECTION BETWEEN CHURCH AND STATE. *MEREDITH v. PENCE*, 984 N.E.2D 1213 (IND. 2013).

*Matthew O'Connor**

I. INTRODUCTION

In *Meredith v. Pence*,[1] the Supreme Court of Indiana upheld the state's voucher school funding program as the plaintiffs could not meet the elevated burden to invalidate a statute under three of the state's constitutional clauses.[2] The court determined that the plaintiffs had to show "that there are no set of circumstances under which the statute can be constitutionally applied."[3] Although the plaintiffs presented evidence that this program would divert a substantial amount of public funding to private schools,[4] the court found that the plaintiffs failed to meet their high burden of proof.[5] This decision seems to mirror how the United States Supreme Court felt, but other states have dealt with this issue

* J.D. Candidate, Rutgers University School of Law—Camden, May 2015.

1. 984 N.E.2d 1213 (Ind. 2013).

2. *Id.* at 1230–31. Specifically, the plaintiffs challenged the statute under article VIII, section 1 and article I, sections 4 and 6 of the Indiana Constitution. *Id.* at 1217.

3. *Id.* at 1218 (quoting Baldwin v. Reagan, 715 N.E.2d 332, 337 (Ind. 1999)).

4. The plaintiffs provided evidence that this statute could divert sixty percent of Indiana's schoolchildren to private schools. *Id.* at 1222. Additionally, ninety-seven percent of the participating schools are sectarian, and many parts of the state have no religious private schools at all. Dana Eberle-Peay, *The Federal Constitution Versus a State Constitution: Revisiting* Zelman v. Simmons-Harris *in Indiana*, 41 J.L. & EDUC. 709, 711 (2012).

5. *Meredith*, 984 N.E.2d at 1216. In reviewing the constitutionality of a statute, the court stated that "every statute stands before us clothed with the presumption of constitutionality unless clearly overcome by a contrary showing." *Id.* at 1218 (quoting *Baldwin*, 715 N.E.2d at 338).

differently.[6] This Comment will argue that the court incorrectly interpreted the text of the Indiana Constitution in finding the current voucher program constitutional and departed from Indiana precedent. Further, this Comment will also suggest that this ruling will have a devastating impact on Indiana public schools as large amounts of funding will be diverted away from public institutions with no plan in place to offset the cuts. Moreover, this Comment will assert that the Indiana voucher program and the Indiana Supreme Court's decision in *Meredith* are not in line with a majority of other states that have very similar constitutional provisions.[7]

II. STATEMENT OF THE CASE

At issue in *Meredith* was the constitutionality of Indiana's Choice Scholarship Program,[8] which was enacted by the Indiana General Assembly in 2011.[9] The vouchers "may be used toward tuition at participating nonpublic schools in Indiana."[10] To participate in the voucher program, a student must "live in a household with an annual income of not more than one hundred fifty percent (150%) of the amount required for the individual to qualify for the federal free or reduced price lunch program."[11] The court described the method of determining the voucher amount as being based on "statutorily defined criteria pegged to the federal free or reduced price lunch program with the maximum voucher being ninety percent (90%) of the state tuition support amount."[12] In order for a nonpublic school to accept students with

---

6. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 663 (2002) (finding that Ohio's voucher program did not violate the Establishment Clause of the First Amendment); Cain v. Horn, 202 P.3d 1178, 1184 (Ariz. 2009) (finding that a school-voucher program allowing state aid to private schools was in violation of the no aid clause under the state constitution); Bush v. Holmes, 919 So. 2d 392, 398 (Fla. 2006) (striking down the Opportunity Scholarship Program because it diverted public funds into separate private systems that competed with the state's free public schools and thus violated the Florida Constitution's education clause); La. Fed'n of Teachers v. State, 118 So. 3d 1033, 1037 (La. 2013) (striking down the state's voucher system because of its method of expending funds); Hartness v. Patterson, 179 S.E.2d 907, 909 (S.C. 1971) (finding that the use of public funds to provide tuition to religious institutions is prohibited by the state constitution).

7. *See* Martha McCarthy, *The Legal Status of School Vouchers: The Saga Continues*, 297 WEST'S EDUC. L. REP. 655, 665–66 (2013).

8. IND. CODE ANN. § 20-51-4-1 (West 2011).

9. *Meredith*, 984 N.E.2d at 1217, 1218–19.

10. *Id.* at 1219 (citing § 20-51-1-4.5 (repealed 2013) (defining "Eligible individual") and § 20-51-1-4.7 (defining "Eligible school")).

11. *Id.* (quoting § 20-51-1-4.5 (repealed 2013)) (internal quotation marks omitted).

12. *Id.* (footnote omitted) (quoting § 20-51-4-4) (internal quotation marks omitted).

vouchers, the school must be accredited by the Indiana State Board of Education, it must administer the Indiana statewide testing for educational progress, and it must participate in the Indiana State Board of Education's improvement program under section 20-31-8-3 of the Indiana Code.[13] Additionally, Indiana's legislation does not subject the school to teach a particular curriculum with the exception that it must teach "Indiana and United States history and government, social studies, language arts, mathematics, sciences, fine arts, and health."[14] However, the legislation does not allow the school to have admission standards that would discriminate on the basis of race, color, or national origin, but the program legislation is silent with respect to religion.[15] Moreover, students and their families are free to choose to go to a voucher-eligible school or go to a traditional public school.[16]

Following the statute's creation, several Indiana taxpayers brought suit against the Indiana Governor, the Superintendent of Public Instruction, and the Director of the Department of Education of the State of Indiana, arguing that the use of public funds to pay for religious schools violated several sections of the Indiana Constitution.[17] Specifically, the plaintiffs argued that this voucher system violated article VIII, section 1 and article I, sections 4 and 6.[18] Their principle argument was that these aforementioned sections of the Indiana Constitution prohibit funds to be used to pay for "the teaching of religion to Indiana schoolchildren and because it purports to provide those children's publicly funded education by paying tuition for them to attend private schools rather than the general and uniform system of Common Schools the [Indiana] Constitution mandates."[19] At trial, the plaintiffs and the defendants-interveners moved for summary judgment at which point the trial court denied the plaintiffs' motion and granted the defendants-interveners' motion.[20] The plaintiffs appealed and the defendants-interveners filed a verified joint motion to transfer

13. *Id.* (citing § 20-51-1-4.7).

14. *Id.* at 1219–20 (citing § 20-51-4-1(b)–(h)).

15. *See* § 20-51-4-1–11; § 20-51-4-3(a)–(b).

16. *Meredith*, 984 N.E.2d at 1220.

17. *Id.* at 1217. The suit was joined by the defendants-interveners, two parents who wanted to use the program so they could send their children to private schools. *Id.*

18. *Id.*

19. *Id.* (citation omitted) (quoting Brief of Appellants at 12, Meredith v. Pence, 984 N.E.2d 1213 (Ind. 2013) (No. 49S00-1203PL172), 2012 WL 3262456, at *12)) (internal quotation marks omitted).

20. *Id.*

jurisdiction to the Supreme Court of Indiana, which affirmed the judgment of the trial court.[21]

III. HISTORY OF THE INDIANA CONSTITUTION'S RELIGION AND EDUCATION CLAUSES

In 2002, the United States Supreme Court established in *Zelman v. Simmons-Harris* that a state may create a statutory scheme that funds private, religious schools without violating the First Amendment's Establishment Clause.[22] Thus, it was left to each individual state to decide whether these voucher programs violated its constitution.[23] Indiana's constitutional clauses that implicate a voucher program are article VIII, section 1[24] and article I, sections 4[25] and 6.[26] Any analysis of the Indiana Constitution will undoubtedly concern the history of the constitution, as the Indiana Supreme Court has emphasized this aspect of judicial interpretation.[27] Some argue that Indiana's 1816 constitution is important because of the changes that occurred when they adopted the 1851 constitution.[28] Specifically, prior to the adoption of article VIII, section 1, Indiana's constitution did not require the General Assembly to set up a general school system.[29] Additionally, it is argued that a major

---

21. *Id.*

22. 536 U.S. 639, 662–63 (2002).

23. There has been a trend among state supreme courts to find state constitutional provisions to offer more protections than the same or similar federal constitutional provisions. *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 114 (2009) ("[New Judicial Federalism] describes the fact that state judges in numerous cases have interpreted their state constitutional rights provisions to provide *more* protection than the national minimum standard guaranteed by the [F]ederal Constitution."). New Judicial Federalism is an important topic when discussing cases like *Meredith* because after the United States Supreme Court has ruled on an issue like voucher schools, states will have a "second look" at their constitutions to determine if they offer more protections than the Federal Constitution.

24. IND. CONST. art. 8, § 1 (directing the General Assembly "to provide, by law, for a general and uniform system of Common Schools").

25. *Id.* art. 1, § 4 ("[N]o person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.").

26. *Id.* art. 1, § 6 ("No money shall be drawn from the treasury, for the benefit of any religious or theological institution.").

27. *See* Barclay Thomas Johnson, *Credit Crisis to Education Emergency: The Constitutionality of Model Student Voucher Programs Under the Indiana Constitution*, 35 IND. L. REV. 173, 192 (2001) ("[I]nterpretation of the Indiana Constitution is controlled by the text itself, illuminated by history and by the purpose and structure of our constitution and the case law surrounding it." (quoting Price v. State, 622 N.E.2d 954, 957 (Ind. 1993))).

28. *Id.* at 193.

29. *Id.* at 195–96.

force behind the changes in the 1851 constitution had to do with Indiana's fiscal collapse in 1841, so the state had to implement a common school system.[30] Thus, the court in *Meredith* not only had to determine the constitutionality behind the voucher program, but also to what extent Indiana's history should determine the limits of the state's education and prohibition on public funding to religious institutions.

IV. THE COURT'S REASONING

Written by Chief Justice Dickson, the Supreme Court of Indiana issued its unanimous decision on March 26, 2013.[31] The court first noted that the issues before it did not include the public policy merits of the school-voucher program as the court's policy preferences were not relevant.[32] The court then discussed how "a party [who] claims that a statute is unconstitutional on its face . . . assumes the burden of demonstrating that there are no set of circumstances under which the statute can be constitutionally applied."[33] Additionally, the court noted that Indiana jurisprudence requires that every statute that comes before the court has a "presumption of constitutionality unless clearly overcome by a contrary showing."[34] Further, the court established the method of interpreting and applying the Indiana Constitution as one that requires an examination of the language and text in the context of the history surrounding the constitution's adoption.[35]

> Because article IX, section 2 created a loophole, requiring only that the General Assembly provide a general school system as soon as circumstances will permit, Indiana never developed a general system of schools and quite a number of children went without any education.
>
> . . . .
>
> [T]he 1851 Constitution abandoned the rather informal education system set out by the 1816 Constitution . . . .

Id. (internal quotation marks omitted).

30. *Id.* at 197. Indiana enacted the Internal Improvements System of 1836, which the state hoped would push it into the Industrial Revolution, but the system ended up leaving the state bankrupt. *See id.* at 197–99 ("Indiana's fiscal collapse was the major impetus behind the 1851 Constitution . . . .").

31. Meredith v. Pence, 984 N.E.2d 1213, 1216 (Ind. 2013).

32. *Id.*

33. *Id.* at 1218 (quoting Baldwin v. Reagan, 715 N.E.2d 332, 337 (Ind. 1999)).

34. *Id.* (quoting *Baldwin*, 715 N.E.2d at 338).

35. *Id.*

> [T]he intent of the framers of the Constitution is paramount in determining the meaning of a provision. In order to give life to their intended meaning, we examine the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, . . . the history of the

When discussing the plaintiffs' challenge under article VIII, section 1, the court noted how this clause ("Education Clause") requires two distinct duties of the General Assembly.[36] The court found evidence of this distinction in the text, which uses the conjunction "and," which it believed suggests that the phrases are separate and distinct.[37] The court believed this view was strengthened when looking at the permissive requirement found in the 1816 Indiana Constitution and how the language was changed in the 1851 constitution to "require" and not just "permit" the legislature to provide a system of uniform common schools.[38] Essentially, the court thought the distinction meant that the General Assembly had the duty to encourage moral, intellectual, scientific, and agricultural improvement, in addition to providing the common school system.[39] Moreover, the court held that the phrase "by all suitable means" further strengthens the idea that the legislature has broad discretion in how to accomplish these tasks.[40] Turning to the question of whether this voucher program violates the legislature's two distinct requirements, the court held that the "plaintiffs proffer no evidence that maximum participation in the voucher program will *necessarily* result in the elimination of the Indiana public school system."[41] Additionally, the court noted that this statute does not violate this section of the constitution as the program falls under the legislature's duty "to encourage" and not the second requirement, "to provide for."[42] Thus, the court held that the voucher program does not violate article VIII, section 1 of the Indiana Constitution as the legislature has the power to encourage the moral and intellectual growth through voucher programs without violating its duty to provide for a common school system.[43]

Next, the court turned to the plaintiffs' claims that the school-voucher program violates article I, section 4 of the Indiana Constitution

---

> times, and . . . the state of things existing when the constitution or any part thereof was framed . . . . The language of each provision of the Constitution must be treated with particular deference, as though every word had been hammered into place.

Id. (quoting Embry v. O'Bannon, 798 N.E.2d 157, 160 (Ind. 2003)).

36. *Id.* at 1220–21 ("The first is the duty to *encourage* moral, intellectual, scientific, and agricultural improvement. The second is the duty to *provide* for a general and uniform system of open common schools without tuition." (quoting Bonner *ex rel.* Bonner v. Daniels, 907 N.E.2d 516, 520 (Ind. 2009))).

37. *Meredith*, 984 N.E.2d at 1221.

38. *Id.* at 1221–22.

39. *Id.* at 1222.

40. *Id.*

41. *Id.* at 1223.

42. *Id.* at 1224.

43. *Meredith*, 984 N.E.2d at 1225.

in that it is contrary to the requirements that "no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent."[44] With respect to article I, section 4, the court stated that the "clause is a restraint upon government compulsion of individuals to engage in religious practices absent their consent."[45] Thus, while the plaintiffs argued that the voucher program "supports" religion, the court determined that "support" does not include the use of compelled taxes intended for religious purposes as this clause does not limit government expenditures; rather it is a prohibition on forcing individuals to attend religious services.[46]

Moreover, the court examined whether the voucher program violates article I, section 6 because it involves government expenditures for prohibited benefits and whether the schools eligible to participate in this program are "religious or theological" as defined in section 6.[47] To the first issue of whether this is a permissive expenditure, the court expressed its skepticism that the framers intended to prohibit any and all government expenditures from which a religious institution derives benefit.[48] Thus, the court held that the proper test for determining whether legislative expenditures violate this section of the constitution "is not whether a religious or theological institution *substantially* benefits from the expenditure, but whether the expenditure *directly* benefits such an institution."[49] Further, the court held that "[a]ncillary indirect benefits to such institutions do not render improper those government expenditures that are otherwise permissible."[50] In determining whether this program directly funded the religious institutions, the court held that the program's direct beneficiaries are the lower-income Indiana families with school-age children, not the religious or theological institutions that these children may attend.[51] The court believed that the voucher program did not directly fund religious activities because "*no* funds may be dispersed to *any* program-eligible school without the *private, independent selection by the parents of a program-eligible*

---

44. IND. CONST. art. 1, § 4.
45. *Meredith*, 984 N.E.2d at 1226.
46. *Id.*
47. *Id.* at 1227.
48. *Id.* ("Certainly religious or theological institutions may derive relatively substantial benefits from . . . municipal services. But the primary beneficiary is the public, both the public affiliated with the religious or theological institution, and the general public.").
49. *Id.*
50. *Id.*
51. *Meredith*, 984 N.E.2d at 1228–29.

student."[52] Thus, it was the court's opinion that any benefits that religious schools may derive are "ancillary to the benefit conferred on families with program-eligible children."[53]

Finally, the court examined article I, section 6 to explore whether the framers intended "religious or theological institution[s]" to include educational institutions. To this, the court found that while the framers were favorable to advancing the role of government in providing common schools, it was not their intent to exclude all religious teaching from publicly financed schools.[54] Thus, the court held that the phrase "religious or theological institution" does not preclude the government from funding programs and institutions that provide primary and secondary education.[55]

V. ANALYSIS

As Justice Hugo Black observed in the majority opinion for *Everson v. Board of Education*, "[n]either 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.'"[56] With this idea in mind, the court in *Meredith* resolved the issue before it incorrectly. It is a firmly established principle that Indiana must fund a public school system that, although need not be identical, must have similar courses of study and equal qualifications.[57] This Comment will argue that the Indiana voucher program will undermine the General Assembly's obligation to provide for a free public education. Further, this Comment will examine Indiana jurisprudence to show that the *Meredith* court departed from the precedent that would have invalidated the voucher program. Moreover, this Comment will compare *Meredith* to other states' decisions to see how it fits among a national trend of permitting religious voucher schools.

---

52. *Id.* at 1229.
53. *Id.*
54. *Id.* at 1230.
55. *Id.*
56. 330 U.S. 1, 16 (1947) (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).
57. WILLIAM P. MCLAUCHLAN, THE INDIANA STATE CONSTITUTION: A REFERENCE GUIDE 127 (1996).

A. How the Scholarship Program Will Violate Indiana's Education Clause

As the court stated in *Meredith*, article VIII, section 1 of the Indiana Constitution, or the "Education Clause," has been interpreted as requiring two separate and distinct functions of the General Assembly: (1) the duty to "encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement" and (2) the duty "to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all."[58] Thus, the court concluded that as long as the General Assembly maintained its duty to provide for public schools that are open to everyone, it has fulfilled its duties.[59] However, the problem with the court's reasoning is that while the General Assembly can fulfill its first duty with the use of a voucher program, this will directly undermine its second duty to maintain a uniform public school system.

Indiana's voucher program will undoubtedly threaten the public school system because of a lack of funding, which in turn will lead to more children who choose voucher schools.[60] Additionally, Indiana has no plan to offset the budget reductions.[61] This vicious cycle of underfunded public schools is exactly the scenario that the drafters of the 1851 Indiana Constitution looked to avoid.[62] Additionally, because Indiana's

---

58. *Meredith*, 984 N.E.2d at 1217 n.1. The court reasoned that the use of "and" meant that the framers' intent was to require two distinct and separate duties of the General Assembly. *Id.* at 1222.

59. *Id.* at 1223.

60. Eberle-Peay, *supra* note 4, at 715.

> [W]hen children leave a school to go elsewhere, that does not produce a budget reduction for the original school. That school has the same expenses and teacher salaries to cover, and the children who continue to attend that school will suffer for a reduction in funds. The voucher program does not supplement the public school system, as proponents argue, but detracts from it in a financially tangible way.

Id. (internal quotation marks omitted).

61. McCarthy, *supra* note 7, at 671.

> Once a substantial number of students attend private schools, the electorate will not want to support public education. Indeed, school privatization decisions currently being made could greatly alter the nature and structure of education in our nation, perhaps as significantly as the common school movement did more than a century ago.

Id.

62. Johnson, *supra* note 27, at 175.

> [T]he relevant changes in the 1851 Constitution were principally three-fold. First, the 1851 changes were a reaction to the failure of Indiana's voluntary, private, and local school system. Second, the changes were a reaction to Indiana's fiscal collapse

voucher program is one of the broadest in the country, it will exacerbate the inevitable funding problems public schools will face.[63] Thus, while the Indiana Supreme Court said it would interpret the state constitution with an emphasis on history and intent, the court created its own meaning as to what the Education Clause requires and this will have a terrible impact on Indiana's public schools.[64]

B. Why This Decision "Substantially and Directly" Changes Indiana Precedent

With regard to article I, section 4, the *Meredith* court decided the issue correctly. This section of Indiana's constitution has consistently been interpreted as a blanket prohibition of preference for one religion.[65] Moreover, this provision is understood as requiring the regulation to be neutral in its impact, and so long as it is applied evenhandedly, it does not violate this constitutional provision.[66] Thus, the court's decision that Indiana's voucher program was neutral in its impact was correct as the program applies evenhandedly to all voucher-eligible schools.

However, with regard to article I, section 6 of the Indiana Constitution, the Indiana Supreme Court incorrectly decided that this voucher program did not indirectly violate the constitution. Moreover, the Indiana Supreme Court created a new test for interpreting article I,

---

and the desire to establish a general school system in a less-expensive fashion. Finally, the changes reflected a desire to do away with special and local legislation, which was perceived as one of the causes of Indiana's fiscal problems.

Id.

63. Eberle-Peay, *supra* note 4, at 711, 714.

The Indiana program favors private religious school parents, with 97% of the participating schools being sectarian . . . .

. . . .

[And] [t]he Indiana program, once fully implemented, will cover 60% of all students in the state. This is because eligibility for the program is not based on whether a student is in a "failing" school, but whether the student comes from a family with a household income of not more than 150% of the amount required for eligibility for federally subsidized lunch programs.

Id.

64. *Meredith*, 984 N.E.2d at 1218. The problem with this is that the Indiana Supreme Court stated it would not consider policy preferences when interpreting and applying the Indiana Constitution to the voucher program. However, making a policy decision is exactly what the court did when deciding this statute would not harm the legislature's duty to operate a public school system.

65. MCLAUCHLAN, *supra* note 57, at 37.

66. *Id.*; *see also* Lynch v. Ind. State Univ. Bd. of Trs., 378 N.E.2d 900, 908 (1978).

section 6 that is inconsistent with prior Indiana precedent. While this section of the state constitution has not received a lot of judicial interpretation, it is considered consistent with the Establishment Clause of the United States Constitution.[67] However, one major difference between the United States Constitution and the Indiana Constitution is that while indirect benefits to religious groups do not violate the United States Constitution,[68] traditionally, Indiana courts have found that article I, section 6 can be violated either directly or indirectly.[69] Specifically, in *State ex rel. Johnson v. Boyd*, the Indiana Supreme Court held that article I, section 6 "may be legally violated, either directly or indirectly."[70]

In *Boyd*, the court had to decide whether the treasurer of Vincennes City had, in violation of article I, section 6, diverted money from the common school fund to certain private, religious schools.[71] Plaintiffs brought suit after the city paid religious teachers' salaries to help keep the Roman Catholic parochial schools open for the 1934 school year.[72] Defendants argued that this was a legal use of funds to pay the teachers hired by the city and thus, payment of their salaries was not a direct or indirect benefit to a theological or religious institution.[73] Further, Defendants argued that the school's Board of Trustees passed a motion that would require the school to be operated in accordance with the constitutional and statutory requirements of the State of Indiana.[74]

Essentially, the *Boyd* court had to determine whether payment to teachers amounted to an indirect payment or donation to the church. Indiana's supreme court held that the city's taking over of religious schools was not a violation of article I, section 6. The court reasoned that because the school board simply assumed the instructional obligations and expenses for the schools to remain open, the previous occupation of

---

67. MCLAUCHLAN, *supra* note 57, at 38 ("There has been little interpretation of this section of the Indiana Constitution, but the general view of its meaning is consistent with that emerging from the relevant portions of doctrine under the Establishment Clause of the U.S. Constitution.").

68. Zelman v. Simmons-Harris, 536 U.S. 639, 679–80 (2002).

69. State *ex rel.* Johnson v. Boyd, 28 N.E.2d 256, 263 (Ind. 1940) ("Neither of these provisions may be legally violated, *either directly or indirectly* and any public official knowingly paying money from the public treasury in violation of these provisions would be required to reimburse said treasury for any amount so paid." (emphasis added)).

70. *Id.*

71. *Id.* 259–60.

72. *Id.*

73. *Id.* at 260.

74. *Id.* at 260–61. Essentially, Defendants argued that all they were doing was keeping the schools open for the following school year since the church no longer would.

parochial schools in the buildings was of no concern.[75] The court held that since no sectarian instruction was permitted, the city was merely establishing public schools in the buildings formerly occupied by the parochial schools.[76] Thus, this did not amount to a direct or indirect contribution to a religious institution.

Applying the standard from *Boyd* to the facts in *Meredith*, the Indiana Supreme Court should have found that the voucher program was unconstitutional as it indirectly funds religious schools.[77] However, the *Meredith* court chose not to follow the *Boyd* precedent and instead created a new test for determining the constitutionality of benefits under article I, section 6. Specifically, the court held that "the proper test for examining whether a government expenditure violates [a]rticle I, [s]ection 6, is not whether a religious or theological institution *substantially* benefits from the expenditure, but whether the expenditure *directly* benefits such an institution."[78] The court reasoned that to hold otherwise would place every governmental expenditure at risk if it "incidentally, albeit substantially, benefit[ed] any religious or theological institution."[79] This is inconsistent with Indiana precedent, and such a theory would suggest that cases like *Center Township of Marion County v. Coe*[80] should be decided differently.

In *Coe*, the Indiana Court of Appeals was presented with the question of whether the Trustee for Center Township violated article I, section 6 when he reimbursed religious institutions that provided emergency shelter to the city's homeless.[81] Plaintiffs brought suit arguing that this

---

75. *Boyd*, 28 N.E.2d at 263–65.

76. *Id.* at 264.

77. Meredith v. Pence, 984 N.E.2d 1213, 1228–29 (Ind. 2013) ("The direct beneficiaries under the voucher program are the families of eligible students and not the schools selected by the parents for their children to attend."). Here, the Indiana Supreme Court was essentially echoing the reasoning of the United States Supreme Court as to why the Ohio voucher program was constitutional in *Zelman v. Simmons-Harris*. The *Zelman* Court reasoned that the funds were given to religious institutions indirectly as there was parental choice in choosing between a religious or secular voucher school. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002).

> [T]he Ohio program is entirely neutral with respect to religion. It provides benefits *directly to a wide spectrum of individuals*, defined only by 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. The program is therefore a program of true private choice.

Id. (emphasis added).

78. *Meredith*, 984 N.E.2d at 1227.

79. *Id.*

80. 572 N.E.2d 1350 (Ind. Ct. App. 1991).

81. *Id.* at 1353.

reimbursement violated article I, section 6 because the religious institutions required the homeless staying in the shelter to attend religious services.[82] The court held that this was a violation of article I, section 6 of the state constitution as the Trustee had no control over the religious institutions and made no effort to separate the institutions' sectarian purpose from the statutory benefit.[83]

However, *Coe* would likely have come out differently had it been subjected to the rationale from *Meredith*. If the *Meredith* standard was applied in *Coe*, the direct beneficiaries under the shelter program would be the homeless and not the shelters selected by the homeless. Therefore, applying the rationale from *Meredith*, any benefits that religious shelters derived from the statutory program in *Coe* would be considered ancillary to the benefit conferred on the homeless. Thus, the *Meredith* decision has created a standard that will uphold statutory provisions that previously would not have met the constitutional demands of article I, section 6.

C. Other States' Conclusions Regarding School-Voucher Programs

In analyzing *Meredith*, it is helpful to look at how other states have handled this issue as this ruling could potentially lead other states to reconsider their previous interpretations of their constitutional clauses.[84] Some states have held that their constitutions do not allow funding to religious schools,[85] while other states have held these programs constitutional.[86] For example, in 2006, the Florida legislature enacted the "Opportunity Scholarship Program" ("OSP") which offered students in failing school districts the opportunity to attend a higher performing public school or use the scholarship provided by the state to attend an eligible private school.[87] In *Bush v. Holmes*,[88] the Florida Supreme Court

---

82. *Id.* at 1358.

83. *Id.* at 1360.

84. McCarthy, *supra* note 7, at 670 ("Challenges to similar school finance plans based on comparable state constitutional provisions have resulted in mixed rulings. . . . [I]f additional states should adopt voucher plans, their legal status could differ, even in states with identical constitutional language.").

85. *See, e.g.*, Anderson v. Town of Durham, 895 A.2d 944 (Me. 2006); Op. of the Justices, 259 N.E.2d 564 (Mass. 1970); Duncan v. State, 102 A.3d 913 (N.H. 2014); Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539 (Vt. 1999); Witters v. State Comm'n for the Blind, 771 P.2d 1119 (Wash. 1989).

86. *See, e.g.*, Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist., Nos. 11CA1856 & 11CA1857, 2013 WL 791140, at *12 (Colo. App. Feb. 28, 2013), *cert. granted*, No. 13SC233, 2014 WL 1046020 (U.S. Mar. 17, 2014); Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998).

87. FLA. STAT. ANN. § 1002.38(1) (West 2012).

> The Legislature finds that the State Constitution requires the state to provide a uniform, safe, secure, efficient, and high-quality system which allows the

dealt with the constitutionality of the OSP under the state's education clause in article IX, section 1.[89] The court stated that this clause made it the "state's 'paramount duty' to make adequate provision for education and that the manner in which this mandate must be carried out is 'by law for a uniform, efficient, safe, secure, and high quality system of free *public schools*.'"[90] The Florida Supreme Court held that "through the OSP the state [was] fostering plural, nonuniform systems of education in direct violation of the constitutional mandate for a uniform system of free public schools."[91] Further, the court reasoned that this constitutional provision

> mandates that a system of free public schools is the manner in which [Florida] is to provide a free education . . . and that "providing a free education . . . by paying tuition . . . to attend private schools is [] 'a substantially different manner' of providing a publicly funded education than . . . the one prescribed by the Constitution."[92]

Additionally, the court held that the OSP "does not supplement the public education system . . . [as] the OSP diverts funds that would otherwise be provided to the system of free public schools," which the

---

opportunity to obtain a high-quality education. The Legislature further finds that a student should not be compelled, against the wishes of the student's parent, to remain in a school found by the state to be failing. The Legislature shall make available opportunity scholarships in order to give parents the opportunity for their children to attend a public school that is performing satisfactorily.

Id.

88. 919 So. 2d 392 (Fla. 2006).

89. FLA. CONST. art. IX, § 1(a).

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

Id.

90. *Bush*, 919 So. 2d at 405 (emphasis added). "Article IX, section 1(a) is a limitation on the Legislature's power because it provides both a mandate to provide for children's education and a restriction on the execution of that mandate." *Id.* at 406; *see also* McCarthy, *supra* note 7, at 663.

91. *Bush*, 919 So. 2d at 398.

92. *Id.* at 407 (alterations in original).

Florida Constitution requires of the legislature.[93] Thus, the court held that this violated article IX, section 1 of the Florida Constitution.[94]

Similarly, in *Cain v. Horne*, the Arizona Supreme Court interpreted the state constitution's article IX, section 10 as prohibiting any legislation that would allow students to use state monies to attend a private school of their choice instead of the public school in their district.[95] In that case, the court had to determine whether the state's voucher program violated its constitution's article II, section 12 "religion clause" or the state's "no aid" clause found in article IX, section 10.[96] The court did not reach the question of whether this program violated the religion clause as it invalidated the legislation solely on article IX, section 10 grounds.[97] The Arizona Supreme Court reasoned that the aid clause prohibited a direct appropriation of public funds to private or sectarian schools, and the voucher program at issue did specifically that as it directly drew funds from the state treasury to private schools.[98]

---

93. *Id.* at 408–09. The Indiana Supreme Court dealt with the same issue differently when it held that as long as its state provided a uniform system of public education that is equally open to all, then the state has fulfilled its constitutional duties. This likely would not have persuaded the Florida Supreme Court because of its concern that public funds would be diverted from public schools.

94. *Id.* at 412.

95. 202 P.3d 1178, 1180, 1184 (Ariz. 2009) ("Article 9, [s]ection 10, of the Arizona Constitution states that [n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." (alteration in original) (internal quotation marks omitted)).

96. *Id.* at 1180–82.

97. *Id.* at 1184; *see also* Niehaus v. Huppenthal, 310 P.3d 983, 988–89 (Ariz. Ct. App. 2013). In *Niehaus*, the Arizona Court of Appeals had to determine whether a revised voucher program ("ESA") enacted by the state legislature in 2011 violated the religion clause of article II, section 12 of the Arizona Constitution. 310 P.3d at 984–85. The Arizona legislature altered the voucher program and enacted the ESA, which requires the state to deposit funds into an account from which parents may draw to purchase services, such as educational therapies, home-based instruction, curriculum, and tutoring. *Id.* at 988. In interpreting this clause, the court of appeals held that

> unlike in [a case], in which every dollar of the voucher programs was earmarked for private schools, none of the ESA funds are preordained for a particular destination. . . . This program enhances the ability of parents of disabled children to choose how best to provide for their educations, whether in or out of private schools. No funds in the ESA are earmarked for private schools. Thus, we hold that the ESA does not violate the [a]id [c]lause.

Id. at 988–89.

Therefore, the question of how Arizona's religion clause should apply to voucher programs was still up for debate as of October 2013, which is why the *Meredith* court's decision could have far-reaching implications.

98. *Cain*, 202 P.3d at 1184.

Most recently, the Supreme Court of Louisiana held that its state voucher program violated the state constitution by providing public school funds to nonpublic schools.[99] In *Louisiana Federation of Teachers v. State*, the lower court argued that the state's voucher program was unconstitutional as it diverted funds constitutionally mandated to public elementary and secondary schools to nonpublic entities.[100] Much like the *Meredith* court, the Supreme Court of Louisiana discussed how its constitutional jurisprudence places a heavy burden on proving a statute's unconstitutionality.[101] Even with this heavy burden, the court found that Plaintiffs had established that the legislation violates the state's constitution.[102] Specifically, the court reasoned that the statutory provisions would divert funds from public to nonpublic schools, and this violated article VIII, section 13(B) of the state's constitution, which required the funds to be allocated to parish and city school systems.[103]

> These programs transfer state funds directly from the state treasury to private schools. That the checks or warrants first pass through the hands of parents is immaterial; once a pupil has been accepted into a qualified school under either program, the parents or guardians have no choice; they must endorse the check or warrant to the qualified school.
>
> *Id.*

This is in direct contrast to the *Meredith* court, which reasoned that since the money went to the parents who then chose the school, it was not a direct benefit to the religious institution.

99. La. Fed'n of Teachers v. State, 118 So. 3d 1033, 1071 (La. 2013).

100. *Id.* at 1042. Specifically, the lower court argued that this violated article VIII, section 13(B) of the Louisiana Constitution which requires the state to "annually develop and adopt a formula which shall be used to determine the cost of a minimum foundation program of education in all public elementary and secondary schools as well as to equitably allocate the funds to parish and city school systems." *Id.* (quoting LA. CONST. art. VIII, § 13(B)). The lower court argued that this requires the state legislature "to insure a minimum foundation of education in all public elementary and secondary schools." *Id.* (quoting LA. CONST. art. VIII, § 13(B)).

101. *Id.* at 1048.

> [A] party challenging the constitutionality of a legislative instrument must point to a particular provision of the constitution that would prohibit the enactment of the legislative instrument and must demonstrate clearly and convincingly that it was the constitutional aim of that provision to deny the legislature the power to enact the legislative instrument in question.
>
> *Id.*

This is very similar to the *Meredith* court's heavy burden of proof, which required the moving party to overcome the presumption of constitutionality. *See* Meredith v. Pence, 984 N.E.2d 1213, 1218 (Ind. 2013).

102. *La. Fed'n of Teachers*, 118 So. 3d at 1055. ("There is no question that state MFP funds are diverted under the challenged legislative instruments and that the diversion of state MFP funds is unconstitutional.").

103. *Id.* at 1051.

VI. IMPLICATIONS

The *Meredith* decision will have far-reaching implications if other state supreme courts follow Indiana's ground-breaking precedent.[104] Specifically, *Meredith* provides voucher proponents with a strong argument as to why religious institutions can be provided with state funds without violating constitutional clauses that typically prohibit state funding of religious institutions. Additionally, the *Meredith* decision gives ammunition to voucher advocates who believe these programs should not just be limited to those in financial need of the voucher. This is problematic because other states could follow the Indiana program and allow a high percentage of students to become eligible for vouchers. This will undoubtedly allocate a disproportionate amount of funding between private voucher-eligible schools and public schools in the same district.[105] Moreover, if states choose to follow *Meredith*, then in situations like *Coe*, courts will have to allow funds to flow to these religious institutions or create a new standard as to why these institutions are different than voucher school programs.

VII. CONCLUSION

In *Meredith*, the Supreme Court of Indiana held that Indiana's school-voucher program replaced the public school system, and thus, did not violate article VIII, section 1, which requires the state to maintain a "common" school system. Further, the court held that the voucher

---

> In Article VIII, § 13(B), we find clear and unambiguous restrictions upon the use of MFP funds. The sixth sentence of the paragraph states in pertinent part: "The funds appropriated *shall* be equitably allocated to parish and city school systems." Under well-established rules of interpretation, the word "shall" excludes the possibility of being "optional" or even subject to "discretion" . . . .

Id. at 1050–51 (citation omitted). The *Meredith* court's reasoning is not likely to persuade the Louisiana Supreme Court to rule differently as it decided that the diversion of state funds was not constitutionally permissible, while the Indiana Supreme Court held as long as the funds reached the parents, the state was fulfilling its duties to provide for public schools.

104. McCarthy, *supra* note 7, at 670 ("If the majority of the states adopt large-scale voucher programs to fund education and courts follow the Indiana Supreme Court's lead in endorsing such programs, this could launch a new chapter in the voucher narrative.").

105. *Id.* at 671 ("[Sixty percent] of [Indiana's] student population could take advantage of private education under [the state's] voucher program . . . . [And] [o]nce a substantial number of students attend private schools, the electorate will not want to support public education."). Thus, Indiana's voucher program is over-inclusive in that a large majority of children can apply for such vouchers.

program did not violate article I, section 4 as this section of the state constitution is understood as prohibition of government compulsion, and this program does not compel anyone to attend a voucher school, let alone a religious voucher school. Lastly, the court created a new standard in which to interpret article I, section 6, and in doing so, found that the voucher program does not directly benefit religious institutions, and thus, does not violate this constitutional provision. In its opinion, the court incorrectly determined that the state's voucher program did not violate the state's constitution as it failed to follow established precedent. Further, the court incorrectly decided that the voucher program would not harm the public school system, as there are no mechanisms to offset the funding public schools will no longer receive. Thus, the *Meredith* decision will have a devastating impact on Indiana public schools unless the state legislature responds with some sort of amendment to the voucher program. This decision will also provide voucher proponents with a strong argument as to why programs as over-encompassing as Indiana's are constitutional.