“OPPORTUNITY” FOR ALL?:

HOW TAX CREDIT SCHOLARSHIPS WILL FARE IN NEW JERSEY

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> *“A nation of well-informed men, who have been taught to know and prize the rights which God has given them, cannot be enslaved. It is in the regions of ignorance that tyranny reigns.”*[1]

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1. BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY AND ESSAYS OF DR. BENJAMIN FRANKLIN 71 (Philadelphia, J.B. Lippincott & Co. 1864).

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INTRODUCTION

Recent media attention has created yet another firestorm around the national debate over education reform. From the much-publicized $100 million donation by Facebook CEO Mark Zuckerberg to support public schools in Newark, New Jersey,[2] to protests staged by schoolteachers against the elimination of collective bargaining rights,[3] political, education, and civil rights leaders across the country have seized the limelight to advance their agendas in the latest push in education reform.

Perhaps in no other state has the battle over education reform been more politically charged than in New Jersey, with Republican Governor Chris Christie aggressively taking on the state's teachers union over tenure reform, cuts in pension and health benefits, teacher evaluation, and school choice.[4] As a result, many of the state's education reform discussions have fallen along traditional political lines.[5]

Additionally, in the latest round of school finance litigation, the Supreme Court of New Jersey declared cuts in school funding unconstitutional and ordered state lawmakers to restore at least $500 million to public education.[6] In the meantime, high-profile funding continues to pour into Newark as a result of Mayor Cory Booker's fundraising efforts.[7] Amidst these public and private reform efforts is a legislative measure several years in the making that

2. Richard Pérez-Peña, *Facebook Founder to Donate $100 Million to Help Remake Newark's Schools*, N.Y. TIMES, Sept. 23, 2010, at A27.

3. *See, e.g.*, Monica Davey, *Wisconsin Bill in Limbo as G.O.P. Seeks Quorum*, N.Y. TIMES, Feb. 19, 2011, at A14; Fredreka Schouten, *Unions Shift Funds to Battle State Legislation: Dollars Once Marked for Donations Will Be Used to Fight Laws Curbing Labor Privileges*, USA TODAY, May 5, 2011, at 6A.

4. Alan Steinberg, *Christie Versus the NJEA*, POLITICKER NJ (Nov. 5, 2009, 11:29 PM), http://www.politickernj.com/alan-steinberg/34855/christie-versus-njea; *see* Matt Bai, *How Chris Christie Did His Homework*, N.Y. TIMES SUNDAY MAG., Feb. 27, 2011, at MM32.

5. *See* Monica Langley, *Governor Christie's Ultimate Test*, WALL ST. J., Oct. 22, 2010, at A1.

6. Abbott v. Burke (*Abbott XXI*), 20 A.3d 1018, 1045 (N.J. 2011).

7. Luisa Kroll, *More Billionaires Sign Up to Help Newark*, FORBES.COM (Sept. 27, 2010, 4:13 PM), http://blogs.forbes.com/luisakroll/2010/09/27/more-billionaires-sign-up-to-help-newark/?boxes=HomepageSpecialStorySection; *see* Nancy Solomon, *Fight Ensues Over Facebook Money for N.J. Schools*, NPR (June 20, 2011), http://www.npr.org/2011/06/20/137172536/fight-ensues-over-facebook-money-for-n-j-schools (explaining some criticism with how donors may influence schools' administrations and curricula).

garners support from both sides of the political aisle: the New Jersey Opportunity Scholarship Act—a five-year pilot tax credit program that would provide scholarships to low-income students in poor-performing public schools.[8]

Meanwhile, in April 2011, the U.S. Supreme Court issued its decision in a case involving a similar education tax credit program in Arizona[9] that was challenged for its lack of religious neutrality.[10] Opponents and supporters of the New Jersey Opportunity Scholarship Act had cautiously awaited the U.S. Supreme Court's decision in *Arizona Christian School Tuition Organization v. Winn*, knowing that the legislative and political fate of the New Jersey bill would depend in part on the Court's assessment of tax credit scholarship programs. However, the Court never actually reached the merits, instead concluding that the taxpayer plaintiffs had no standing to challenge the scholarship programs.[11] Thus, the constitutionality of tax credit programs remains unresolved.

This Note will review the overall historical and legal frameworks of school choice litigation to date and examine the constitutional and political viability of the New Jersey Opportunity Scholarship Act in the context of New Jersey education reform. Part I presents a brief overview of the larger school choice debate. Part II examines the two modern fiscal embodiments of school choice—school vouchers and tax credit scholarships—and highlights the distinctions between the two programs. Part III lays out the legal background of school choice litigation at both the federal and state levels. Part IV provides a background on New Jersey education and presents the major components of the New Jersey Opportunity Scholarship Act. Finally, Part V analyzes the potential legal challenges to the New Jersey bill, especially in light of the state judiciary's prominent role in shaping New Jersey education, and briefly considers some of the policy concerns surrounding the bill.

I. WHAT IS SCHOOL CHOICE?

Simply defined, "school choice" is the parents' ability to "choos[e] a school that meets the needs of [their] child."[12] The term generally

8. Assemb. B. 2810, 214th Leg. (N.J. 2010). There is also an identical bill in the New Jersey Senate: S.B. 1872, 214th Leg. (N.J. 2010).

9. *See* ARIZ. REV. STAT. ANN. § 43-1089 (1997) (allowing a credit against taxes for voluntary cash contributions made to school tuition organizations).

10. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1440 (2011); Petition for Writ of Certiorari, Ariz. Christian Sch. Tuition Org. v. Winn, 130 S. Ct. 3350 (2010); Petition for Writ of Certiorari, Garriott v. Winn, 130 S. Ct. 3324 (2010). The two cases were combined and argued before the U.S. Supreme Court on November 3, 2010.

11. *Winn*, 131 S. Ct. at 1447-49.

12. *School Choice . . . What Is It?*, EDUCATION BREAKTHROUGH NETWORK,

can be construed to include a family's decision to "choose where they live based on the desirability of public school policies and outcomes,"[13] or it may refer to a growing array of programs and experiments that provide alternatives to the public school a particular child is required to attend.[14] In the last fifty years, the term "school choice" most identifies with the latter construction and has become a controversial reform movement.[15]

Initially, Southern states were using early school choice mechanisms to resist desegregation.[16] Then in the 1960s, when the failures of public education were thrust into a broader political agenda after a series of key social, economic, and judicial events, "school choice" became a major platform for education reformers.[17] Economist Milton Friedman advocated for the application of free market principles in public education as a means to force reform in public schools,[18] while the U.S. Supreme Court decided several landmark cases that determined the extent of government involvement in parochial and nonparochial schools.[19] The stage was thus set for the ongoing debate between proponents and opponents of school choice.

A. *The Case for School Choice*

The case for school choice consists of both market and nonmarket rationales. While Milton Friedman first proposed the idea of applying traditional supply and demand market theories to the country's

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http://www.edbreakthrough.org/SCinfo.php (last visited Nov. 11, 2011).

13. Jay P. Greene, *Civic Values in Public and Private Schools*, *in* LEARNING FROM SCHOOL CHOICE 83, 88 (Paul E. Peterson & Bryan C. Hassel eds., 1998).

14. *Choice*, EDUCATION WEEK, (Aug. 3, 2004), http://www.edweek.org/ew/issues/choice/ (highlighting intradistrict choice, controlled choice, magnet schools, charter schools, and voucher programs).

15. *See* THOMAS L. GOOD & JENNIFER S. BRADEN, THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS, AND CHARTERS 1-2 (2000) ("[M]any policymakers are convinced that the present system of schooling is so flawed that it can be saved only by bold, aggressive experiments."). As such, the term "school choice," as used in this Note, will mainly refer to the modern reform movement that has spawned private and public alternatives to the traditional public school paradigm.

16. JEFFREY R. HENIG, RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR 101 (1994).

17. *Id.*

18. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 93-100 (1962).

19. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 402-03 (1983) (upholding Minnesota statute allowing income tax deduction for education-related expenses that also benefited parents of children attending private and religious schools); Meek v. Pittenger, 421 U.S. 349, 371-73 (1975), *overruled by* Mitchell v. Helms, 500 U.S. 793, 797 (2000) (upholding programs funded by public money to provide educational materials and equipment to students in private schools); Lemon v. Kurtzman, 403 U.S. 602 (1971); Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236 (1968); Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947).

education systems, his primary concern was to detail the consequences of allowing public schools to operate as monopolistic providers.[20] Friedman believed that public school systems had become lazy monopolies because parents were unable to afford the tuition of private schools in addition to paying taxes to support public education.[21] Therefore, as more students and public resources left the public school system in favor of private alternatives, Friedman predicted that the pressure on public schools to abandon their inefficient ways would inevitably lead to an overall improvement of the public school system.[22]

Several nonmarket rationales for school choice have also been asserted alongside, or in place of, the market-theory approach. For one, educational choice is seen to embrace individuality and personal growth while recognizing a "child-centered" approach to learning.[23] Choice becomes a "tool for maximizing children's capacity for intellectual and moral autonomy" by allowing families to find a suitable learning environment based on an individual child's needs.[24]

Educational choice can also be a vehicle for the transmission of distinct cultural and social values and worldviews across generations in order to sustain pluralism and diversity, two important features of a modern society.[25] Parents are afforded the freedom to "select among schools that emphasize distinct cultural and intellectual traditions."[26] For example, the Yew Chung International School in California's high-tech Silicon Valley seeks to provide "a bilingual and multicultural learning environment" in order to prepare its students "for success in a globalised world."[27]

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20. *See* FRIEDMAN*, supra* note 18, at 93-98 (noting that where only one school services a community "competition cannot be relied on to protect the interests of parents and children").

21. *See id.* at 86-98 (noting that parents' choice of schools is restricted because few can afford to send their children to private schools without subsidies). Furthermore, as is inherent in most monopolies in both the private and public sectors, there is "little incentive to keep costs low or keep quality high, since the absence of competition allows them to translate high prices and low quality into higher salaries and less-demanding work conditions, without fear that their patrons will be lured away." HENIG, *supra* note 16, at 59.

22. FRIEDMAN, *supra* note 18, at 86-107.

23. HENIG, *supra* note 16, at 14-15.

24. *Id.* at 15. However, this perspective has been criticized as being "emblematic of a dangerously undisciplined and misdirected liberalism." *Id.*

25. *See id.* at 16.

26. *Id.*

27. *Educational Philosophy*, YEW CHUNG INT'L SCH. SILICON VALLEY, http://www.ycis-sv.com/about-us/-educational-philosophy (last visited Nov. 11, 2011). Likewise, religious schools, which have long existed in the American education landscape, function as a means for families to pass on religious traditions and cultural heritage. *See A Brief Overview of Catholic Schools in America*, NAT'L CATHOLIC EDUC. ASS'N, http://www.ncea.org/about/HistoricalOverviewofCatholicSchoolsinAmerica.asp

A third nonmarket rationale for educational choice relates to the political interests of communities marginalized by race or class.[28] According to this perspective, schools are a resource in a community's struggle to assert political influence.[29] Specifically, local schools become a training ground of sorts for communities to reinforce and "transmit local values," to develop and exercise skills that "build self-confidence," and to collectively experience democracy.[30] In short, school choice has been framed "in terms of a civil-rights struggle."[31]

Additionally, some education reformers have a "contingent allegiance" to educational choice.[32] Their support of educational choice stems from what they believe to be the failure of traditional systems and a desire to establish schools that possess the characteristics for success found in research and linked to desirable outcomes.[33] This perspective tends to view bureaucrats and teachers unions as obstacles and seeks to circumvent their resistance to institutional change by generating enough enthusiasm and support from diverse constituencies to withstand this internal resistance and, subsequently, to implement new decision-making paradigms in order to prevent further resistance.[34]

Finally, in low-income urban communities, school choice programs are seen as the only lifeline for parents of children in failing public schools.[35] In such instances, parents have already exhausted other options and were likely turned away from a better public or charter school because there were no spaces to accommodate their children.[36] For these parents, a voucher or scholarship would provide their children with an immediate opportunity to receive a better education at a private school.[37]

It therefore is important to reiterate that supporters of school choice represent a wide spectrum of political and socioeconomic

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(last visited Nov. 11, 2011) (describing how Catholic schools developed because of the Franciscans' desire to "teach children Christian doctrine, reading and writing").

28. HENIG, *supra* note 16, at 17-18.

29. *Id.* at 17.

30. *Id.*

31. *See* David M. Powers, *The Political Intersection of School Choice, Race, and Values*, 60 ALA. L. REV. 1051, 1064-71 (2009) (noting that the civil rights "argument contends that poor children should be given the same opportunity to a quality education as children who come from wealthy families").

32. HENIG, *supra* note 16, at 18-19.

33. *Id.* at 19.

34. *Id.*

35. Michelle Rhee, *Public Funding for Private Schools -- How Can I Ask Parents to Accept Less Than I'd Want for My Kids?*, HUFFINGTON POST (May 10, 2011, 9:04 PM), http://www.huffingtonpost.com/michelle-rhee/public-funding-for-privat_b_859991.html.

36. *Id.*

37. *Id.*

ideologies. Some supporters limit their preference for school choice as a means of last resort (i.e., poor-performing urban school districts), while some supporters staunchly believe that every family should be afforded the opportunity to choose their child's school, regardless of where they might reside or what their annual income is.

B. The Case Against School Choice

School choice opponents largely consist of teachers unions, education lobbyists, and public school advocates, representing those who serve in or utilize the public education system on a daily basis.[38] Their opposition to school choice rests on two primary concerns: vouchers violate the separation of church and state,[39] and public education systems will suffer as government funding is diverted away from already underfunded public schools.[40] Furthermore, while school choice proponents hail the success of school choice initiatives in improving student achievement, there is ample evidence that the results may be overstated.[41]

For now, the U.S. Supreme Court's narrow decision in *Zelman v. Simmons-Harris* has settled the First Amendment debate over whether traditional school vouchers violate the Establishment Clause.[42] However, while school choice opponents have largely

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38. Powers, *supra* note 31, at 1051; *see* Matthew J. Brouillette, *Opponents of School Choice*, MACKINAC CTR. PUB. POL'Y (July 16, 1999), http://www.mackinac.org/2089; *Vouchers*, NAT'L EDUC. ASS'N, http://www.nea.org/home/16378.htm (last visited Nov. 11, 2011); *School Vouchers,* AM. FED'N OF TEACHERS, http://www.aft.org/issues/schoolchoice/vouchers/ (last visited Nov. 11, 2011).

39. *See The Case Against Vouchers*, NAT'L EDUC. ASS'N, http://www.nea.org/home/19133.htm (last visited Nov. 11, 2011) ("Vouchers tend to be a means of circumventing the Constitutional prohibitions against subsidizing religious practice and instruction.").

40. *School Vouchers,* AM. FED. OF TEACHERS, *supra* note 38. A less documented sentiment—one that this author shares—against broadly implementing school choice programs is the concern that the traditional public school system can never be entirely replaced by charter or private schools. As such, since the public has already made a significant investment, there should be an emphasis on improving the system in place rather than building an entirely new one.

41. *See generally* ALEXANDRA USHER & NANCY KOBER, CTR. ON EDUC. POLICY, KEEPING INFORMED ABOUT SCHOOL VOUCHERS: A REVIEW OF MAJOR DEVELOPMENTS AND RESEARCH (July 2011); MARTIN CARNOY, ECON. POLICY INST., SCHOOL VOUCHERS: EXAMINING THE EVIDENCE (2001), *available at* http://www.givewell.org/files/Round2Apps/Cause4/Childrens20Scholarship20Fund/B/EPI.vouchers-full.pdf. *But see* DAVID FIGLIO & CASSANDRA M.D. HART, COMPETITIVE EFFECTS OF MEANS-TESTED SCHOOL VOUCHERS (2010), *available at* http://www.northwestern.edu/ipr/events/workshops/oscipr/papers/Figlio_HartCompetitionMay10.pdf; GREG FORSTER, FOUND. FOR EDUC. CHOICE, A WIN-WIN SOLUTION: THE EMPIRICAL EVIDENCE ON SCHOOL VOUCHERS (2011), *available at* http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/656/A-Win-Win-Solution---The-Empirical-Evidence-on-SchoolVouchers.pdf.

42. *See infra* Part III.A.

abandoned this argument in federal courts, their efforts in state courts have yielded more success.[43] Several voucher programs in the country have been successfully challenged under state constitutions,[44] which often provide more explicit protections against the use of public funding in religious schools.[45]

Beyond the constitutional concerns over school choice, school choice opponents contend that school choice initiatives will siphon away much needed resources from underperforming public schools.[46] When schools lose students through choice programs, they also lose state aid for the cost of educating those students. Therefore, since "the cost of running a classroom does not change if one or two students leave it," school districts must make do with reduced resources or find ways to make up the difference.[47] The Milwaukee voucher program, for example, is said to have forced many Wisconsin school districts to raise property taxes in order to make up for the loss of state aid to schools that had students who opted to participate in the voucher program.[48]

In assessing the ineffectiveness of school choice initiatives, school choice critics rely on a "sizable body of evidence proving [the] hollowness" of school choice promises.[49] Independent studies and studies sponsored by either side of the school choice debate have not found significant gains in student achievement.[50] Furthermore, many

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43. *See, e.g.*, Owens v. Colo. Cong. of Parents, Teachers & Students, 92 P.3d 933, 944 (Colo. 2004) (striking down Colorado voucher program under state constitutional provision that guaranteed local control over education); Bush v. Holmes, 919 So.2d 392, 413 (Fla. 2006) (finding that Florida scholarship program violated state uniformity clause).

44. *See infra* Part III.B. The latest school voucher program to be challenged in court is the "Choice Scholarship" pilot voucher program in Douglas County, Colorado. *See Judge to Rule on Douglas County School Voucher Case*, EDUC. NEWS (Aug. 8, 2011), http://www.educationnews.org/ednews_today/159573.html.

45. *See infra* Part III.B. However, "[i]t took more than a dozen years from the enactment of the nation's first urban voucher program to definitively clear the First Amendment hurdle. It may take many years to resolve the constitutionality of school choice under various state constitutional provisions." Clint Bolick, *The Constitutional Parameters of School Choice*, 2008 BYU L. REV. 335, 340 (2008).

46. *AFT Voucher Fact Sheet 2006*, AM. FED'N OF TEACHERS, http://www.aft.org/pdfs/teachers/voucherfactsheet06.pdf (last visited Nov. 11, 2011).

47. *Id.*

48. *See id.*

49. *School Vouchers: The Research Track Record* 3, AM. FED'N TEACHERS, http://www.aft.org/pdfs/teachers/vouchertrackrecord0305.pdf (last visited Nov. 11, 2011).

50. *See* JOHN F. WITTE ET AL., SCH. CHOICE DEMONSTRATION PROJECT, THE MILWAUKEE PARENTAL CHOICE PROGRAM LONGITUDINAL EDUCATIONAL GROWTH STUDY THIRD YEAR REPORT 13 (2010) ("[N]o significant differences in achievement growth in either math or reading between students in MPCP or MPS."), *available at* http://www.uark.edu/ua/der/SCDP/Milwaukee_Eval/Report_15.pdf; KIM K. METCALF ET AL., INDIANA CTR. FOR EVALUATION, EVALUATION OF THE CLEVELAND SCHOLARSHIP

voucher programs do not require students to take the same assessment tests as nonvoucher students,[51] making it difficult to fully evaluate the impact of school choice programs.

While there are many other arguments raised by public school advocates against school choice programs, the general ideology behind their concerns is rooted in the belief that education, as guaranteed under most state constitutions, is a public endeavor and should be the primary focus of public resources.[52]

II. SCHOOL VOUCHERS V. TAX CREDIT SCHOLARSHIPS

In the decades since Milton Friedman first proposed the application of market theory principles to education,[53] school choice has become a mainstay in education reform.[54] School vouchers and tax credit scholarships have become popular,[55] providing two mechanisms through which government-sanctioned funding allows families to choose their children's schools.[56] The two programs, though often referred to collectively as vouchers, actually present opportunities for distinct legal challenges.

A. School Vouchers

The first use of the term "voucher" has been credited to Milton Friedman.[57] In a 1955 article, he suggested that "[g]overnments could require a minimum level of education which they could finance by giving parents vouchers redeemable for a specified maximum sum

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PROGRAM (1998), *available at* http://www.manhattan-institute.org/pdf/PEPG_greene_6-99.pdf.

51. *AFT Voucher Fact Sheet 2006*, *supra* note 46.

52. *See The Case Against Vouchers*, *supra* note 39. As such, public school advocates urge the public to focus its attention on addressing the problems that pervade the public education system rather than divert public resources towards a parallel nonpublic school system.

53. *See generally* Milton Friedman, *The Role of Government in Education*, *in* ECONOMICS AND THE PUBLIC INTEREST 123-43 (Robert A. Solo ed., 1955).

54. Editorial, *The Year of School Choice*, WALL ST. J., July 5, 2011, at A14.

55. Other school choice initiatives include magnet schools, open enrollment, charter schools, and home school. *See* Robert A. Garda, Jr., *Coming Full Circle: The Journey from Separate but Equal to Separate and Unequal Schools*, 2 DUKE J. CONST. L. & PUB. POL'Y 1, 1, 74 (2007) (discussing the "evolution of education reform" and the prevalence of inequality in modern day education); *Types of School Choice*, FRIEDMAN FOUND. FOR EDUC. CHOICE, http://www.edchoice.org/School-Choice/Types-of-School-Choice.aspx (last visited Nov. 11, 2011) (highlighting various school choice options).

56. *See generally* ANDREW CAMPANELLA ET AL., ALLIANCE FOR SCH. CHOICE, HOPE FOR AMERICA'S CHILDREN: SCHOOL CHOICE YEARBOOK 2010-2011 1 (2011), *available at* https://s3.amazonaws.com/AFC/scy2011.pdf (providing "data on school voucher and scholarship tax credit programs, [and] analysis of trends and information regarding school choice"); ANDREW COULSON, THE MACKINAC CTR. FOR PUB. POLICY, FORGING CONSENSUS (2004), *available at* www.mackinac.org/archives/2004/s2004-01.pdf.

57. Friedman, *supra* note 53, at 127.

per child per year if spent on 'approved' educational services."[58] Education reformers churned the voucher concept until the 1970s, when the Federal Office of Economic Opportunity introduced one of the country's first voucher programs in Alum Rock, California, to provide assistance to "special needs" students.[59] While the program lasted for only five years, it provided a reference point for the country's increasingly lively discourse over school vouchers.[60] Studies of the California program showed "increased teacher autonomy, parental involvement, and school-level autonomy" but little impact on student achievement.[61]

In general, a school voucher[62] (or educational voucher) is defined as "an entitlement extended to an individual by government permitting that individual to receive educational services up to the maximum dollar amount specified."[63] Voucher systems vary in how they are financed, regulated, and applied.[64] Subtle differences can dictate the types and number of eligible students as well as the amount of funding available to each student.[65]

Typically, voucher programs are funded through direct state aid.[66] A child's parents are given a voucher with which they can enroll their child at a government-approved public or private school

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58. *Id*. Prior to Friedman's proposal, Congress had adopted the Servicemen's Readjustment Act of 1944 (G.I. Bill), Pub. L. No. 78-346, 58 Stat. 284 (codified as amended in scattered sections of 38 U.S.C.). HENIG, *supra* note 16, at 64.

59. LOUANN A. BIERLEIN, CONTROVERSIAL ISSUES IN EDUCATIONAL POLICY 94-95 (1993).

60. *See id.*

61. Beverly Browne, Pamela Kinsey-Barker & Direka Martin, *Vouchers: An Initiative for School Reform?*, HORIZON (1996), http://horizon.unc.edu/projects/issues/papers/Voucher.html.

62. Voucher programs are also referred to as "opportunity scholarship programs" in some states. *See* CAMPANELLA ET AL., *supra* note 56, at 10. This should not be confused with the scholarship tax credit program that would be established under the New Jersey Opportunity Scholarship Act.

There are currently three different types of voucher programs administered in eight states. *Id.* at 10. The "means-tested" voucher programs target families who meet specific income criteria; this type of voucher program is available in Ohio, Wisconsin, Louisiana, and Washington, D.C. *Id.* The "failing schools" voucher programs target children who attend poor-performing public schools. *Id.* Only Ohio and Louisiana provide such programs. *Id.* The "special needs" scholarship programs provide funding to children who require special educational services. *Id.* Six states offer such programs, including Florida, Georgia, Louisiana, Oklahoma, Ohio, and Utah. *Id.* Students in these programs are often required to have an Individualized Education Program ("IEP"), which lays out an individual child's unique educational needs based on his or her learning disability. *Id.*

63. GOOD & BRADEN, *supra* note 15, at 90-91 (quoting AUSTIN D. SWANSON & RICHARD A. KING, SCHOOL FINANCE: ITS ECONOMICS AND POLITICS 414 (2d ed. 1997)).

64. *Id.* at 91.

65. *Id.*

66. *See* COULSON, *supra* note 56, at 15; CAMPANELLA ET AL., *supra* note 56, at 10.

of their choice.[67] The funding is then provided to the school either in the form of a physical check delivered to the parents and then signed over to the school, or as direct payment to the school.[68] In essence, the money follows a student from school to school.[69]

B. Tax credits

In the 1980s, the Reagan administration began pushing for the use of tax credits to reduce the financial burden of parents who enroll their children in private schools.[70] Since then, tax credits have become an increasingly popular instrument for proponents of school choice.[71]

The most basic form of a tax credit program is a personal-use tax credit.[72] Personal-use tax credits can be either refundable or nonrefundable.[73] A refundable tax credit, like the one in Minnesota,[74] allows the taxpayer to recover any amount of the credit above his tax liability, thereby producing a negative tax balance.[75] By contrast, nonrefundable tax credits can only reduce the taxpayer's liability

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67. *See* COULSON, *supra* note 56, at 15.

68. *See id.*; Patrick J. Wolf, *School Voucher Programs: What the Research Says about Parental School Choice*, 2008 BYU L. REV. 415, 417 (2008) (distinguishing vouchers from other types of aid programs).

69. *See* GOOD & BRADEN, *supra* note 15, at 92.

70. J. Catherine Rapinchuk, *The Increasing Judicial Rationale for Educational Choice:* Mueller, Witters *and Vouchers*, 66 WASH. U. L. Q. 363, 366 n.19 (1988); *see also* Nathan Glazer, *The "Social Agenda," in* PERSPECTIVES ON THE REGAN YEARS 5, 11-12 (John Logan Palmer ed., 1986).

71. *See* CAMPANELLA ET AL., *supra* note 56, at 11-12.

72. *See* COULSON, *supra* note 56, at 29. Under this scheme, parents are allowed to reduce, up to a certain amount, their tax liability based upon the amount of money they spent in a tax year on their children's education. *See id.*

73. *Id.* at 30.

74. The education tax credit program in Minnesota was established in 1998 and "allowed a credit against the tax imposed by [Minnesota's income tax statute] in an amount equal to 75 percent of the amount paid for education-related expenses for a qualifying child" in primary and secondary grades. MINN. STAT. ANN. § 290.0674 (West 2007). Between 1998 and 2001, the program had allowed families to claim up to 100 percent of their education expenses. RESEARCH DEP'T., MINN. HOUSE OF REPRESENTATIVES, INFO. BRIEF, MINNESOTA'S PUBLIC SCHOOL FEE LAW AND EDUCATION TAX CREDIT AND DEDUCTION 3 (2008). The tax credit does not cover nonpublic school tuition. Families may claim up to $1,000 per child in tax credits and can now claim the credit for an unlimited number of qualified children. *Id.* Originally, the tax credit was capped at $2,000 per family, "effectively limiting the credit to two children per family." *Id.*

Also, the Minnesota tax credit is refundable, which means that if the credit exceeds the taxpayer's liability, the taxpayer will receive a refund for the remainder of the tax credit. MINN. STAT. ANN. § 290.0674(4). Additionally, the credit phases out as a family's income exceeds $33,500. *Id.* § 290.0674(2)(a).

75. COULSON, *supra* note 56, at 30.

down to zero dollars.[76]

A second type of tax credit program, also known as a donation tax credit[77] or scholarship tax credit,[78] more closely resembles traditional voucher programs but differs in the manner in which it is funded. Under the tax credit model, scholarships are funded through private charitable donations as opposed to public monies.[79] These tax credit programs usually provide dollar-for-dollar tax credits to businesses or individuals that donate money to scholarship funds managed by specially-created nonprofit, tax-exempt scholarship organizations.[80] The scholarships are then made available, often directly, to parents of students who meet relevant program requirements to cover tuition, fees, and certain other education-related expenses as allowed by the program guidelines.[81]

To date, eight states operate scholarship tax credit programs,[82] and, as will be discussed below, only Arizona's has been challenged for their constitutionality.[83]

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76. *Id.*

77. *Id.*

78. CAMPANELLA ET AL., *supra* note 56, at 11. Scholarship tax credits are sometimes referred to as tax credit scholarships.

79. *See* COULSON, *supra* note 56, at 30; CAMPANELLA ET AL., *supra* note 56, at 11; *School Choice: Scholarship Tax Credits*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/?tabid=12950 (last visited Nov. 11, 2011).

80. *School Choice: Scholarship Tax Credits*, *supra* note 79; CAMPANELLA ET AL., *supra* note 56, at 11. These scholarship organizations may also be referred to as school tuition organizations ("STOs"), scholarship granting organizations ("SGOs"), student scholarship organizations ("SSOs"), or scholarship funding organizations ("SFOs"). *Id.*

81. *See* CAMPANELLA ET AL., *supra* note 56, at 11; *School Choice: Scholarship Tax Credits*, *supra* note 79.

82. The eight states include: Arizona (ARIZ. REV. STAT. ANN. §§ 43-1089; 43-1183 (2005 & Supp. 2010)); Florida (FLA. STAT. § 1002.395 (2011) (amending and renumbering FLA. STAT. § 220.187)); Georgia (GA. CODE ANN. § 48-7-29.16 (2010)); Indiana (IND. CODE § 6-3.1-30.5 (West Supp. 2010)); Iowa (IOWA CODE § 422.11S (Suppl. 2011)); Oklahoma (OKLA. STAT. tit. 68, § 2357.206 (2011)); Pennsylvania (72 PA. CONS. STAT. ANN. § 8705-F (West Supp. 2011)); and Rhode Island (R.I. GEN. LAWS § 44-62 (2011)).

83. *See infra* Part II.B.1. Both of the individual and corporate tax credit programs have been subject to legal challenges in Arizona. The individual tax credit program has been challenged twice in Arizona courts. In *Kotterman v. Killian*, the plaintiffs challenged the tax credit under the Federal Establishment Clause and under the Arizona Constitution's religion and anti-gift clauses. 972 P.2d 606, 609 (Ariz. 1999). The Arizona Supreme Court upheld the tax credit program, finding that the taxpayer donations made to scholarship tuition organizations were not funds of the state because they never entered the state treasury. *Id.* at 617-18.

In 2001, the individual tax credit program came under a second legal challenge but was dismissed by the U.S. District Court for the District of Arizona. Winn v. Killian, No. CV-00-00287-EHC (D. Ariz. Feb. 27, 2001). It was subsequently reversed and remanded by the Ninth Circuit Court of Appeals. Winn v. Killian, 307 F.3d 1011 (9th Cir. 2002). The U.S. Supreme Court granted certiorari and affirmed the circuit court's decision. Hibbs v. Winn, 542 U.S. 88 (2004). In 2005, the district court again

III. LEGAL CHALLENGES AT THE FEDERAL AND STATE LEVELS

The legal battles over school choice have primarily been focused on the issue of using public dollars to provide education outside of the traditional public school system. Most of the litigation has been over traditional school voucher programs.[84] The Arizona case is the first challenge of a state tax credit program to reach the U.S. Supreme Court.[85] Until the Court delivered its decision in April 2011, proponents and opponents had relied on the legal history of school choice litigation in developing their legal strategies. As such, a brief review of the school choice jurisprudence developed—and currently developing—at the federal and state levels may be helpful in identifying potential challenges to the New Jersey Opportunity Scholarship Act.

A. School Choice in Federal Courts

In 1925, the U.S. Supreme Court issued its first major school choice decision and affirmed a lower court's decision to strike down an Oregon statute that required the state's children to attend only public schools.[86] The Court unequivocally recognized the "liberty of

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dismissed the case on grounds that the taxpayer plaintiffs "failed to state a claim under the Establishment Clause." Winn v. Hibbs, 361 F.Supp.2d 1117, 1123 (2005). The plaintiffs appealed once again, and the U.S. Supreme Court granted certiorari in 2010. Ariz. Christian Sch. Tuition Org. v. Winn, 562 F.3d 1002 (9th Cir. 2009). The Court issued its decision in April 2011, upholding the Arizona tax credit program after finding that the taxpayer plaintiffs had no standing to bring their claims. Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1449 (2011); *see* Adam Liptak, *Justices Revisit Tax Credits for Religious Schools*, N.Y. TIMES, at A17 (Nov. 3, 2010). For the transcript and audio recording of the oral arguments, see Transcript of Oral Argument, Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, No. 09-987 (2011), *available at* http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=09-987.

Likewise, Arizona's corporate tax credit program has also been challenged in court. In 2006, plaintiffs in *Green v. Garriott* filed a complaint alleging the unconstitutionality of the corporate tax credits, again, under the Federal Establishment Clause and Arizona's Blaine provisions. No. CV 2006-014135, 2007 WL 5649860 (Ariz. Sup. Ct. Mar. 5, 2007). In 2007, the trial court, relying on *Kotterman*, upheld the corporate tax credit under the same constitutional standard. On appeal, the Arizona Court of Appeals also upheld the tax credit, and the Arizona Supreme Court ultimately refused to consider the legal challenge. *Id.* at *3.

84. *See, e.g.*, Cain v. Horne, 183 P.3d 1269, 1278 (Ariz. Ct. App. 2008) (upholding school voucher programs for foster youth and disabled children); Bush v. Holmes, 919 So.2d 392, 398 (Fla. 2006) (finding state voucher program unconstitutional because public schools are the "sole means" for state to provide for children's education); Owens v. Colo. Cong. of Parents, 92 P.3d 933, 943-44 (Colo. 2004) (finding voucher program to violate state constitutional provision requiring school districts to retain substantial control over education).

85. This distinction is important, as the Supreme Court's decision in *Winn* may very well deviate from its reasoning in school voucher cases.

86. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535-36 (1925).

parents and guardians to direct the upbringing and education of [their] children . . . ."[87] However, the modern school choice movement would not begin until more than thirty years later, on the eve of the civil rights movement.[88]

After the Supreme Court's landmark decision in *Brown v. Board of Education*, southern states reacted by implementing "school choice" policies that were "thinly veiled attempts to prevent desegregation of their educational systems."[89] Rightfully, the Court "recogniz[ed] them to be the efforts at maintaining pernicious racial segregation" and struck down such policies.[90]

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87. *Id*. at 534-35.

88. HENIG, *supra* note 16, at 102-06 (detailing use of school choice in racial segregation and desegregation in the 1950s). The implications of litigation on school choice programs like the one established under the New Jersey Opportunity Scholarship Act are not without precedent in the United States. The first prominent challenge under the Establishment Clause was *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in which the U.S. Supreme Court created a three-pronged test for determining whether state action was unconstitutional. The test required that a statute have a secular legislative purpose, not have the primary effect of advancing or inhibiting religion, and not cause excessive government entanglement with religion. *Id.* at 612-13. However, the *Lemon* test proved difficult and inconsistent to apply. *See* Mitchell v. Helms, 530 U.S. 793, 835-36 (2000) (upholding government aid program allowing educational materials and equipment to be lent to private schools, including religious schools); Agostini v. Felton, 521 U.S. 203, 234-35 (1997) (upholding federally funded government program providing remedial education to disabled children in sectarian schools).

In applying the *Lemon* test, several corollaries have developed in this area of jurisprudence. Courts have made sure programs were neutral in distributing the vouchers, "regardless of [which] school [students] choose to attend." Jackson v. Benson, 578 N.W.2d 602, 617 (Wis. 1998); Simmons-Harris v. Goff, 711 N.E.2d 203, 210 (Ohio 1999). Courts have also required that money go to private schools only upon a parent's private, independent choice to use vouchers for that purpose. *Jackson*, 578 N.W. at 618. Furthermore, courts have noted that programs can only cause slight government entanglement with religion limited to establishing minimum requirements. *Id.* at 617-18.

89. Nina Gupta, *Rationality & Results: Why School Choice Efforts Endure Despite a Lack of Improvement on Student Achievement*, 3 J. MARSHALL L.J. 199, 203 (2010) (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954). Such policies included the "minority-to-majority transfer" as well as tuition vouchers to private school. *Id.*

In 1956, members of Congress from the southern states issued a "Southern Manifesto," which declared the *Brown* decision "'contrary to the constitution' and commended the 'motives of those states which have declared an intention to resist forced integration by any lawful means.'" HENIG, *supra* note 16, at 103 (citations omitted). Furthermore, by 1957, there were over 130 new legislative measures "designed to delay or prevent integration" in existence. *Id.* (citations omitted).

90. Gupta, *supra* note 89. While *Brown* is mostly known for desegregation in public schools, it has been credited with setting the stage to equalizing educational opportunities in general. *See* Paul Tractenberg, *Beyond Educational Adequacy: Looking Backward and Forward Through the Lens of New Jersey*, STAN. J. C.R. & C.L. 411, 413 (2008). Plaintiffs in *Brown* relied on the Equal Protection Clause in the Fourteenth Amendment to "seek the aid of the courts in obtaining admission to the

In the 1980s, the school choice debate continued in the courts, mainly focused on the constitutionality of public funding supporting parochial schools under the Establishment Clause.[91] In three cases, the Supreme Court rejected the First Amendment challenges on the premise that public funding that found its way to religious institutions as a result of independent, private choices could not be held in violation of the Establishment Clause.[92]

Finally, in 2002, the Court directly addressed the constitutionality of school vouchers in another landmark decision, *Zelman v. Simmons-Harris*.[93] With a 5-4 vote,[94] the Court upheld the Ohio school voucher program, finding that "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the

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public schools of their community on a nonsegregated basis." *Brown*, 347 U.S. at 487. The Court, recognizing that it "must consider public education in the light of its full development and its present place in American life throughout the Nation," ultimately concluded that "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities." *Id.* at 492-93. Notably, subsequent cases implementing the *Brown* ruling have "increasingly focused on educational quality and equality issues." Tractenberg, *supra* at 413.

91. There are other issues outside the scope of this Note. For example, the participation of private schools in school voucher programs raises a delicate issue of state action. *See* Angela Slate Rawls, *Eliminating Options Through Choice: Another Look at Private School Vouchers*, 50 EMORY L.J. 363, 374 (2001). While private schools are not *per se* public entities, school voucher programs are generally considered publicly funded. *Id.* As such, it can be argued that "participating voucher schools could take on the status of state actor, and thus be subject to more constitutional limitations, stricter judicial scrutiny, and heightened vulnerability to litigation." *Id.* at 375; *see* Michael Heise, *Public Funds, Private Schools, and the Court: Legal Issues and Policy Consequences*, 25 TEX. TECH L. REV. 137, 146 (1993) ("The prospect of losing autonomy in exchange for publicly funded vouchers presents many private schools . . . with a difficult dilemma.").

As a result of three 1982 Supreme Court decisions, courts focus on the "degree of discretion and independent judgment exercised by the private actor and the standards by which the actor governs his conduct" in determining state action. *Id.* at 147. The prevailing test for state action focuses on four factors. First, a court will determine whether the private entity is a recipient of public funds. Second, a private entity may be considered a state actor if the state exercises "coercive power or . . . provide[s] such significant encouragement, either overt or covert" over the private entity "that the choice must in law be deemed to be that of the State." Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982) (citations omitted). The third factor in determining state action is whether the private entity is performing a function that is traditionally or constitutionally the state's duty. Rawls, *supra* at 377. Finally, a court must examine the "nexus between the entity in question and the state." *Id.*

92. *See* Mueller v. Allen, 463 U.S. 388, 403 (1983); Witters v. Wash. Dep't. of Servs. for the Blind, 474 U.S. 481, 489 (1986); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13-14 (1993).

93. 536 U.S. 639 (2002).

94. *Id.* at 641.

disbursement of benefits."[95] Chief Justice Rehnquist further noted in the majority opinion, "[t]he constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."[96] *Zelman* has since represented the Supreme Court's blessing of state school voucher programs.[97] Nevertheless, with four justices dissenting and critics calling out the Court's inconsistency, it may only be a matter of time before the issue returns to the Supreme Court.[98]

Two years later, the Court complicated the battle for school choice proponents with its 2004 decision in *Locke v. Davey*.[99] With a 7-2 vote,[100] the Court held that Washington State had a "historic and substantial state interest" in denying funding to a student who chose to pursue a "devotional degree."[101] Specifically, the Court looked to the anti-establishment language in the Washington Constitution[102] and noted that "[m]ost States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry."[103] The Court then found that training for a religious profession was essentially a "religious endeavor," one "in which a State's antiestablishment interests come . . . into play."[104]

The most recent legal challenge over school choice to have reached the U.S. Supreme Court involved two of Arizona's tax credit programs that grant individual and corporate taxpayers dollar-for-dollar tax credits for voluntary donations made to nonprofit scholarship organizations.[105] These organizations grant scholarship assistance to students who wish to attend schools of their choice.[106]

The plaintiffs were Arizona taxpayers challenging the

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95. *Id.* at 652.

96. *Id.* at 658.

97. *See* Bolick, *supra* note 45, at 336 ("Chapter one in the litigation battle over school choice has already been written, and fortunately, the kids won." (footnote omitted)).

98. *See* Powers, *supra* note 31, at 1060-63 (explaining that *Zelman* was not as powerful a victory for school vouchers as voucher supporters originally believed).

99. 540 U.S. 712 (2004).

100. *Id.* at 714.

101. *Id.* at 725.

102. The provision explicitly states: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction . . . ." WASH. CONST. art. I, § 11 (amended 1993).

103. *Locke*, 540 U.S. at 723.

104. *Id.* at 721-22.

105. Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011); *see also supra* note 83 and accompanying text.

106. *Winn*, 131 S. Ct. at 1440.

constitutionality of the tax credit programs because, they argued, the programs diverted government money to private, religious schools in violation of the First and Fourteenth Amendments.[107] They claimed that state funding "being given to the beneficiaries of a State spending program on the basis of religion" is unconstitutional.[108] Therefore, because the school tuition organizations are religious and are government grantees distributing scholarships, the programs, which are funded by "money that's raised by the State's income tax," violate the Establishment Clause.[109]

Before the Supreme Court were two issues: (1) whether the taxpayers had standing to challenge the tuition tax credit when the program did not involve the direct transfer of tax dollars and (2) whether a state tax credit for tuition scholarships violates the Establishment Clause when most recipients use the scholarship funding for religious schooling.[110] That is, before the Court could reach the Establishment Clause issue, it first had to determine whether the taxpayers had standing to bring their claims.

Prior to *Winn,* the precedent for taxpayer standing in cases involving the use of tax dollars to support religious schools had been in favor of the taxpayer, due to a narrow exception created by the Supreme Court in *Flast v. Cohen*.[111] In *Flast*, the U.S. Supreme Court held that while taxpayers usually do not have standing to challenge the constitutionality of a federal statute,[112] "a taxpayer will have standing . . . when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power."[113] And since the Establishment Clause specifically limits Congress's taxing and spending power, a taxpayer has "a clear stake . . . in assuring that [such limitations] are not breached by Congress."[114]

In a 5-4 decision, the *Winn* Court moved away from *Flast* and

107. *Id.* at 1440-41.

108. Transcript of Oral Argument at 26, *Winn*, 131 S. Ct. 1436 (Nov. 3, 2010) (Nos. 09-987 & 09-991).

109. *Id.* at 31.

110. *Winn*, 131 S. Ct. at 1440-41.

111. 392 U.S. 83, 105-06 (1968). *See, e.g.*, Hibbs v. Winn, 542 U.S. 88, 110-12 (2004); Mueller v. Allen, 463 U.S. 388, 392-93 (1983); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 761-62 (1973); *see also Winn*, 131 S. Ct. at 1452-53 n.2 (Kagan, J., dissenting) ("Until today, this Court has never so much as hinted that litigants in the same shoes as the Plaintiffs lack standing under *Flast*.").

112. *See* Frothingham v. Mellon, 262 U.S. 447, 487 (1923) (rejecting taxpayer standing in a challenge of a federal statute on grounds that taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others; [and] is comparatively minute and indeterminable").

113. *Flast*, 392 U.S. at 105-06.

114. *Id.* at 105.

held that the taxpayer plaintiffs did not have standing to challenge the Arizona voucher program under the Establishment Clause because they were challenging a tax credit and not a traditional governmental expenditure.[115] During oral arguments, Acting Solicitor General Neal Katyal urged the Court to recognize that the plaintiffs could not show they had suffered an injury in fact because government funds were not being directed to religious institutions.[116] As he tried to illustrate, "[n]ot a cent of the [taxpayers'] money goes to fund religion. If you placed an electronic tag to track and monitor each cent that the [taxpayer] plaintiffs pay in tax, not a cent, not a fraction of a cent, would go into any religious school's coffers."[117] Indeed, the Justices themselves differed in seeing how "any money that the government doesn't take from [a taxpayer] is still the government's money."[118]

Nevertheless, while the Court in *Winn* never reached the substantive issue of whether the Arizona tax credits are an establishment of religion, it would have been unlikely for the Court to strike down the Arizona programs given its recent decisions in *Zelman v. Simmons-Harris*[119] and *Jackson v. Benson*.[120] Furthermore, future plaintiffs looking to challenge similar tax benefit programs will have difficulty finding their way into federal courts, as the U.S. Supreme Court's decision in *Winn* now makes challenging tax credit scholarship programs nearly impossible.[121]

B. School Choice in State Courts

For now, under the cover of *Zelman* and *Winn*, school choice supporters are satisfied that voucher and tax credit programs are protected at the federal level.[122] However, since *Zelman*, opponents have turned their attention to a new battleground, the state

115. *Winn*, 131 S. Ct. at 1447-48.

116. Transcript of Oral Argument, *supra* note 108, at 4-13.

117. *Id.* at 4-5.

118. *Id.* at 31.

119. 536 U.S. 639, 643-44 (2002) (upholding a school choice program in Cleveland, Ohio).

120. 578 N.W.2d 602, 610-11 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998). In denying certiorari, the Supreme Court allowed the Wisconsin Supreme Court decision to stand, thus upholding the Milwaukee voucher program.

121. *See generally* Nicole Stelle Garnett, *A* Winn *for Educational Pluralism*, 121 YALE L.J. ONLINE 31, 31-33 (2011), http://www.yalelawjournal.org/2011/05/26/garnett.html.

122. Bolick, *supra* note 45, at 336. As Bolick writes, "Few serious scholars have ever questioned whether school choice could be consistent with the First Amendment. . . . [W]hatever the policy merits of school choice, a well-designed program would satisfy First Amendment dictates." *Id.* at 336-37. The premise is based on the fact that "the constitutional text . . . does not require the separation of church and state, but prohibits laws 'respecting an establishment of religion.'" *Id.* at 337.

courts.[123] For nearly a decade, the war over school choice has been brewing in state courts, with challengers combing through state constitutions for provisions that might deem school choice initiatives unconstitutional.[124] In particular, three types of provisions are being used, with varying degrees of success, to challenge school choice programs at the state level.

1. "Compelled Support" Provisions & "Baby Blaine" Amendments

In *Locke v. Davey*, the Supreme Court focused on the antiestablishment language in the Washington State Constitution.[125] Such provisions are not uncommon and, in fact, exist in a majority of state constitutions as either a "compelled support" provision or as a "baby Blaine" amendment.[126] Currently, twenty-nine state constitutions include a "compelled support" provision,[127] and thirty-six states,[128] the District of Columbia, and the Commonwealth of Puerto Rico have adopted "baby Blaine" amendments.[129] Eighteen state constitutions include both provisions,[130] and only three states have neither.[131] The two types of provisions, though similar in

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123. *See* Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 58 (2005); *see generally* Irina D. Manta, *Missed Opportunities: How the Courts Struck Down the Florida School Voucher Program*, 51 ST. LOUIS U. L.J. 185, 186 (2006); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 576-77 (2003).

124. Bolick, *supra* note 45, at 341-48.

125. 540 U.S. 712, 722 (2004) ("[W]e can think of few areas in which a State's antiestablishment interests come more into play.").

126. Some state constitutions include both types of provisions. State Blaine amendments have also been referred to as "no-funding" provisions. Goldenziel, *supra* note 123, at 61, 63.

127. Richard Komer, *School Choice: The State Constitutional Challenge*, INSTITUTE FOR JUSTICE, http://www.ij.org/index.php?option=com_content&task=view&id=1735&Itemid=245 (last visited Nov. 11, 2011).

128. *Id.* The states are: Alaska, Arizona, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, South Carolina, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming. *Id.* In addition, the District of Columbia and Commonwealth of Puerto Rico have "baby Blaine" amendments. *Id.*

129. *Id.*; *see* Martin R. West, *School Choice Litigation After* Zelman, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 167, 176 (Joshua M. Dunn & Martin R. West eds., 2009); *Blaine Amendments, States,* BECKET FUND FOR RELIGIOUS LIBERTY, http://www.blaineamendments.org/states/states.html (last visited Nov. 7, 2011).

130. Komer, *supra* note 127.

131. The three states that have neither a compelled provision nor a "baby Blaine" Amendment are Louisiana, Maine, and North Carolina. *Id.*

language, derive from different histories that may affect a court's interpretation and subsequent decision.

As the U.S. Supreme Court noted in *Locke*, many of the early state constitutions contained specific antiestablishment language, also known as compelled support provisions, which went beyond the protections of the First Amendment.[132] The language, based on a 1786 Virginia bill authored by Thomas Jefferson and introduced in the Virginia legislature by James Madison,[133] was a direct response to the then-common practice of colonial states government's collection of money in support of churches.[134] Early state constitution drafters included the provisions to prohibit a state legislature from compelling its citizens to support religion.[135]

The other type of antiestablishment provision has a more controversial past. Sometimes referred to as "baby Blaine" amendments, these provisions were modeled after a federal constitutional amendment proposed by Congressman James G. Blaine of Maine in 1875.[136] During a time when Catholic immigrants were increasingly successful in lobbying for government support of parochial schools, non-Catholics began calling for government action to erect "religion-sensitive barriers to the flow of public benefits that exceed the church-state separation demanded by the Establishment Clause."[137] Congressman Blaine, immediately following a speech by President Grant in support of such legislation, introduced a new amendment,[138] which read:

> 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 therefor [sic], nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.[139]

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132. Locke v. Davey, 540 U.S. 712, 722 (2004).

133. *See* Thomas Jefferson, *An Act for Establishing Religious Freedom*, *in* 12 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL LAW OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619 84-86 (William W. Hening ed., 1823); Goldenziel, *supra* note 123, at 65.

134. Komer, *supra* note 127.

135. *Id.*

136. DeForrest, *supra* note 123, at 556-73.

137. Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 493 (2003).

138. This was after two failed attempts to end parochial school funding. Two amendments were proposed to Congress, one in 1871 and a second in 1872. *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 43-44 (1992).

139. H.R.J. Res. 1, 44th Cong., 4 CONG. REC. 205 (1875) (quoted in DeForrest, *supra* note 123, at 556).

However, Blaine's presidential ambitions, along with his anti-immigrant politics and his followers' anti-Catholic sentiments, would ultimately doom the amendment.[140] While the proposal won considerable support in the House of Representatives, it eventually failed in the Senate.[141] Nevertheless, within twenty years of the introduction of the federal Blaine Amendment, roughly thirty states adopted similar language into their state constitutions.[142]

The challenge posed to school choice by "compelled support" provisions and "baby Blaine" amendments is itself unsettled. While some scholars argue that these provisions do not pose a significant threat to school choice programs,[143] others are concerned that a state judiciary's interpretation of such provisions in its state constitution may very well mean the end of school choice programs.[144] After all, "baby Blaine" amendments are not all the same.

In states with "less restrictive" provisions, direct government aid is allowed to fund state services that might be used by students who attend sectarian schools.[145] States with "moderately restrictive" provisions tend to prohibit any direct funding but allow for indirect state funding of religious institutions or schools.[146] Finally, states with constitutional provisions that are considered "most restrictive" prohibit both direct and indirect state aid.[147]

With the Supreme Court's decision in *Locke*, "compelled support" provisions seem to pose a bigger threat to school choice programs than "baby Blaine" amendments. While the former has essentially received the Court's imprimatur, the controversial past of the latter has not yet been addressed by the Supreme Court, though school choice advocates do not seem concerned that such provisions could pose an insurmountable obstacle to the school choice movement.[148]

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140. Bolick, *supra* note 45, at 341-342 (2008).

141. DeForrest, *supra* note 123, at 567-68, 573-76. Supporters of the amendment then turned to their state constitutions and were largely successful in appending the language. Goldenziel, *supra* note 123, at 64.

142. DeForrest, *supra* note 123, at 573.

143. *See generally* Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295 (2008); DeForrest, *supra* note 123, at 582-85 (discussing several state cases reconciling Blaine Amendment language from their respective state constitutions with the permissibility of school choice programs that provide indirect aid to private schools).

144. Goldenziel, *supra* note 123, at 98.

145. Some scholars incorrectly categorize "compelled support" provisions as "less restrictive" Blaine amendments. *See, e.g.*, DeForrest, *supra* note 123, at 577-78. This could be an issue if Blaine amendments ever face a constitutional challenge, given their sordid history.

146. These include states such as Utah, Alabama, Texas, and Nebraska. *Id.* at 578-80.

147. *Id.* at 587.

148. *See* Green, *supra* note 143, at 298 ("[T]he Blaine Amendment is relatively

2. Getting Around Blaine with Tax Credits

In the context of compelled support provisions and "baby Blaine" amendments in state constitutions, the distinction between vouchers and tax credits becomes important in anticipating the potential legal challenges that can face legislation like the New Jersey Opportunity Scholarship Act. For although the Supreme Court ruled in favor of school vouchers in *Zelman*, surprisingly few states have implemented school voucher programs since then.[149] In fact, several school voucher initiatives have been successfully challenged in state courts.[150]

Because school vouchers are funded directly by taxpayer dollars, when the funding reaches parochial schools, the program faces the danger of violating state constitutional protections.[151] Almost certainly, judiciaries have reason to construe school voucher funding to be direct state aid.[152] In states that operate under moderately- to most-restrictive compelled support provisions or "baby Blaine" amendments, the fact that taxpayer dollars will end up in parochial schools may very well be grounds for a court to find a constitutional violation.[153]

Unlike school vouchers, tax credit programs are not per se funded by taxpayer dollars.[154] Instead, individuals or corporations make private donations to nonprofit organizations. The nonprofit organizations, in turn, provide scholarships to eligible students. The students then use the scholarships to pay their schools of choice. Therefore, under a tax credit scheme, a tax dollar never actually reaches a private school, thus making it difficult for school choice opponents to argue that *their* tax dollars support private schools.[155]

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insignificant—both as a constitutional event and as a tool for analyzing the no-funding amendments contained in the various state constitutions."); Jonathan D. Boyer, *Education Tax Credits: School Choice Initiatives Capable of Surmounting Blaine Amendments*, 43 COLUM. J.L. & SOC. PROBS. 117, 139-48 (2009) (explaining that tax credit programs may survive Blaine Amendment scrutiny).

149. As of January 2011, only seven states and Washington, D.C., have adopted voucher programs. However, seven states offer tax credit programs. Georgia is the only state to have enacted both a voucher program and a tax credit program since *Zelman* in 2002. *See* CAMPANELLA ET AL., *supra* note 56, at 11-12.

150. *See, e.g.*, Bush v. Holmes, 919 So.2d 392, 398 (Fla. 2006); Owens v. Colo. Cong. of Parents, Teachers and Students, 92 P.3d 933, 943-44 (Colo. 2004); Chittenden Town Sch. Dist. v. Vt. Dep't of Educ., 738 A.2d 539, 563-64 (Vt. 1999).

151. *See supra* Part II.A.

152. The judiciary's interpretation of such state constitutional provisions will be determinative. *See* Luke A. Lantta, *The Post-*Zelman *Voucher Battleground: Where to Turn After Federal Challenges to Blaine Amendments Fail*, 67 LAW & CONTEMP. PROBS. 213, 239-41 (2004).

153. *See* DeForrest, *supra* note 123, at 578-601 (discussing different changes to, and effects of, state constitutions arising from Blaine Amendments).

154. This is particularly true in light of the Supreme Court's decision in *Winn*.

155. *See supra* notes 105-18 and accompanying text.

3. Uniformity Clauses

The fight over school choice in state courts may also implicate the "uniformity" provisions in state constitutions.[156] Such provisions describe the kind of education a state must provide for its students and thus provide an explicit standard that the state judiciary must enforce.[157] Until 2006, state courts generally upheld school choice programs over challenges under the uniformity clause.[158]

However, in *Bush v. Holmes*,[159] just two years after *Locke*, the Florida Supreme Court struck down the Florida Opportunity Scholarship Program, which provided school vouchers to children who attended failing public schools. In a 5-2 decision, the court concluded that the Florida Constitution "prohibits the state from using public monies to fund a private alternative to the public school system."[160] The state Constitution requires that "[a]dequate 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."[161] Therefore, the Florida voucher program was struck down because it "reduce[d] funding for the public education system" and thereby "undermine[d] the system of 'high quality' free public schools that are the sole authorized means of fulfilling the constitutional mandate to provide for the education of all children residing in Florida."[162] While there is debate surrounding the legitimacy of the Florida court's decision,[163] courts in other states may nevertheless look to the Florida decision as persuasive authority—or at least as a tacit nod to examining school choice

156. Bolick, *supra* note 45, at 346 (referencing problems implicated by the uniformity provisions in the state constitutions of Wisconsin and Florida).

157. Uniformity clauses often contain terms like "uniform," "thorough," or "general." *See, e.g.*, ARIZ. CONST. art. XI, § 1; WIS. CONST. art. X, § 3; N.C. CONST. art. IX, § 2; COLO. CONST. art. IX, § 2; ORE. CONST. art. VIII, § 3; IDAHO CONST. art. IX, § 1; N.J. CONST. art. VIII, § IV, para. 1.

158. *See, e.g.*, Jackson v. Benson, 578 N.W.2d 602, 628 (Wis. 1998) (holding that the state legislature had succeeded in providing free uniform basic education and that the Milwaukee school choice program "merely reflects a legislative desire to do more than that which is constitutionally mandated"); State *ex rel.* Ohio Cong. of Parents & Teachers v. State Bd. of Educ., 857 N.E.2d 1148, 1166 (2006) (finding Community Schools Act to be in accord with the Ohio Consitution's uniformity clause).

159. 919 So.2d 392 (Fla. 2006).

160. *Id.* at 408.

161. FLA. CONST., art. IX, § 1(a).

162. *Holmes,* 919 So. 2d at 409.

163. Some speculate that the court invalidated the voucher program on a state constitutional provision in order to avoid review by the U.S. Supreme Court. *See* Bolick, *supra* note 45, at 346-47 ("In all probability, the court . . . decided to invalidate the program on a state constitutional provision that would not be reviewable by the U.S. Supreme Court . . . ."); Meir Katz, *The State of Blaine: A Closer Look at the Blaine Amendments and Their Modern Application*, 12 ENGAGE, no. 1, at 115 (2011).

programs under a state uniformity clause.[164]

Later that same year, the Supreme Court of Ohio, in a narrow 4-3 decision,[165] upheld the state's Community Schools Act, which statutorily provides "parents a choice of academic environments for their children" in the form of charter schools.[166] Among the arguments, appellants alleged that the charter school law violated the "thorough and efficient" clause of the Ohio Constitution, which provides: "The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state . . . ."[167] The schools would be publicly funded, therefore "divert[ing] money from local school districts . . . [and] depriving the districts of the ability to provide a thorough and efficient educational system."[168] The dissent agreed with the appellants and disapproved of the "hodgepodge of uncommon schools" that would be financed by the state.[169] However, the Supreme Court of Ohio ultimately held that the schools founded under the Community Schools Act did not violate the Ohio Constitution's uniformity clause, reaffirming the legislature's "exclusive authority to spend tax revenues to further a statewide system of schools compatible with the Constitution."[170]

IV. NEW JERSEY EDUCATION AND THE NEW JERSEY OPPORTUNITY SCHOLARSHIP ACT

A. *Education in New Jersey – A Brief History*[171]

New Jersey public education began in the 1600s and 1700s, when schoolhouses were mainly operated by religious institutions.[172] As the population expanded, the religious leaders contemplated a public education system, prompting a state-sponsored study in 1828 to assess the landscape of education in New Jersey.[173] For the next fifty years, the relationship between schools and the state and local

164. Bolick, *supra* note 45, at 347.

165. State *ex rel.* Ohio Cong. of Parents & Teachers v. State Bd. of Educ., 857 N.E.2d 1148, 1166 (2006).

166. *Id.* at 1152.

167. OHIO CONST. art. VI, § 2.

168. *Ohio Cong. of Parents & Teachers*, 857 N.E.2d at 1156.

169. *Id.* at 1166 (Resnick, J., dissenting).

170. *Id.* at 1160 (majority opinion).

171. For a more in-depth narrative of the education system in New Jersey, see N.J. DEP'T OF EDUC., PUBLIC EDUCATION IN NEW JERSEY (2001), *available at* http://nj.gov/njded/genfo/penj.pdf.

172. *Id.* at 7.

173. *Id.* The study found that "[m]any children were still unable to attend school; [o]ne in every five voters was unable to read or write; and [s]tate residents wanted a free public school system." *Id.*

governments would slowly take shape. Schools would receive funding from both the state and local governments, but the funding would be restricted to only education purposes.[174] Local districts were allowed to appoint school superintendents, and a state board of education was established along with the Office of the State Superintendent.[175]

In 1875, the New Jersey legislature, relying on the recommendations of an 1873 constitutional commission, appended by amendment an education clause to the state constitution.[176] By the turn of the century, public education was made available free of charge to everyone between the ages of five and twenty, and it was mandatory for students between the ages of six and sixteen.[177] The need for secondary education prompted the creation of junior high schools and vocational schools.[178] By the early 1970s, the state had reduced its education budget to 28 percent, raising concerns about education financing and, with it, the involvement of the state judiciary.[179]

In 1970, the plaintiffs, who included an African American mother and her sixth-grade son, Kenneth Robinson, filed a lawsuit against Governor William T. Cahill and other state officials to challenge the constitutionality of the state's school funding system.[180] The result was the landmark case of *Robinson v. Cahill*, in which the Supreme Court of New Jersey found the state's school financing system to be in violation of the state constitution's education clause.[181]

As a result of *Robinson*, the New Jersey legislature enacted the Public School Education Act of 1975 (the "1975 Act").[182] The 1975 Act required the establishment of educational goals, a system of monitoring the school districts, methods for corrective action, and a tax-base formula.[183] Subsequent decisions of the New Jersey judiciary further clarified the 1975 Act, though the issue of education financing would continue to dominate the education debate to this

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174. *Id.* at 8.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 8-9.

180. *See* DEBORAH YAFFE, OTHER PEOPLE'S CHILDREN: THE BATTLE FOR JUSTICE AND EQUALITY IN NEW JERSEY'S SCHOOLS 19-25 (2007). Plaintiffs included "residents, taxpayers and officials of Jersey City, Paterson, Plainfield, East Orange and the Township of Berlin (Camden County)." Robinson v. Cahill, 287 A.2d 187, 187 (N.J. Super. Ct. Law Div. 1972).

181. *See* Robinson v. Cahill, 303 A.2d 273, 297-98 (N.J. 1973).

182. N.J. DEP'T OF EDUC., *supra* note 172, at 9. The act was funded by the New Jersey Gross Income Tax of 1976. *Id.*

183. J. LEGIS. COMM. ON PUB. SCH. FUNDING REFORM, PUBLIC SCHOOL FUNDING IN NEW JERSEY, at 3 (2006).

day.[184] In the four decades since *Robinson*, the Supreme Court of New Jersey has stepped in and essentially "forced the state to direct additional funding to low performing school districts."[185]

In its most recent decision in the *Abbott v. Burke* litigation, the court held that the State failed to "fully fund" its obligation under the School Funding Reform Act of 2008 ("SFRA").[186] The court then ordered full funding of SFRA in the subsequent fiscal year but added that the "[c]ourt's jurisdiction is limited to rectification of the constitutional violation suffered by the Abbott litigants."[187]

B. New Jersey Opportunity Scholarship Act

As the issue of school equity continues its journey in New Jersey courts, policymakers have turned to the legislative process to take "immediate steps" to improve public education.[188] In 2010, New Jersey State Senator Raymond Lesniak introduced the Opportunity Scholarship Act ("OSA") as a bipartisan, "in-state answer to President Obama's Race to the Top Fund."[189] Earlier predecessors of a New Jersey school voucher program—the Urban School

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184. *See* Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1355-56 (2010).

185. *Id.* at 1355. For a more complete narrative of the history of *Robinson v. Cahill* and the 1975 Act, see YAFFE, *supra* note 180, at 9-55.

186. Abbott v. Burke (*Abbott XXI*), 20 A.3d 1018, 1024-25 (N.J. 2011).

187. *Id.* at 1042. The court found that "[w]hile substandard educational conditions . . . may exist in districts other than those that have been designated as Abbott districts, . . . the present Abbott plaintiffs d[id] not have standing in this litigation to seek vindication of the rights of children outside of the plaintiff class." *Id.* at 1042-43.

The *Abbott XXI* decision has been widely criticized as inconsistent and confusing. The court essentially returned the state to a two-tiered school funding system by distinguishing the State's obligations under SFRA for Abbott and non-Abbott districts. *See* Gordon Macinnes, *Abbott XXI, a Ruling for the Faint-Hearted*, NJSPOTLIGHT.COM (May 26, 2011), http://www.njspotlight.com/stories/11/0525/1757/; Chris Megerian, *Abbott Decision by N.J.'s Deeply Divided High Court Draws Fire from All Sides of School Battle,* NJ.COM (May 25, 2011), http://www.nj.com/news/index.ssf/2011/05/abbott_decision_by_njs_deeply.html; Christopher Baxter, *Christie: N.J. Supreme Court's Abbott Decision the Latest 'Invoice' from an Overzealous Bench*, NJ.COM (May 24, 2011), http://www.nj.com/news/index.ssf/2011/05/christie_supreme_court_abbott.html.

188. *The Christie Reform Agenda: Education is the Civil Rights Issue of Today*, THE OFFICIAL WEBSITE FOR THE STATE OF N.J., http://www.nj.gov/governor/news/news/552010/approved/20100930c.html (last visited Nov. 14, 2011).

189. Jason Butkowski, *Lesniak Introduces 'Opportunity Scholarship Act' to Help Kids Transfer Out of Chronically Failing School Districts*, POLITICKER NJ (Mar. 22, 2010, 8:12 PM), http://www.politickernj.com/jbutkowski/37908/lesniak-introduces-opportunity-scholarship-act-help-kids-transfer-out-chronically-f. The bill is modeled after Pennsylvania's Educational Improvement Tax Credit. *The Opportunity Scholarship Act (OSA) and Education Innovation Fund Pilot Q & A*, NEW JERSEY SCH. CHOICE ALLIANCE (Mar. 21, 2010), *available at* http://www.njcathconf.com/docs/education/SCA OSA Q&A20100412092213.pdf.

Scholarship Act in 2006 and the Urban Enterprise Zone Jobs Scholarship Act in 2008—had failed to garner enough political support to survive legislative committee reviews.[190] Nevertheless, supporters of the OSA are committed to pursuing an urban school voucher program in the State of New Jersey.[191]

The bill, as initially proposed, would establish a five-year pilot program that would provide dollar-for-dollar tax credits to corporations that make contributions to nonprofit scholarship organizations.[192] The donations would then be distributed as scholarships to low-income children[193] who attend a "chronically failing school"[194] or a nonpublic school located in any one of the thirteen pilot districts.[195] Currently, there are 180 schools in the state that meet the OSA's definition of a chronically failing school, and more than half are located in the thirteen pilot districts.[196]

While the bill only allows for up to $24,000,000 of tax credits in the program's first year, the ceiling will increase in each of the

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190. Interview with Derrell Bradford, Executive Director, Better Education for New Jersey Kids, in Hoboken, N.J. (Aug. 11, 2011) (on file with the author).

191. *Id.* Should the OSA fail to become law, supporters are prepared to "[t]ry again in the next session with a new bill that addresses the constructive feedback given during this phase of its advocacy." *Id.*

192. *See* S. 1872, 214th Leg. Sess. § 4(a) (N.J. 2010). Legislators and bill supporters are also considering a downsized version of the bill to improve the bill's chances of passage, including reducing the number of pilot school districts and the number of scholarships.

193. *Id.* As defined in the bill, a "low-income child" is "a child from a household with an income that does not exceed 2.50 times the official federal poverty level based on family size . . . for the school year preceding the school year for which an educational scholarship is to be distributed." *Id.* § 3 (internal citation omitted).

Supporters of the OSA tout the potentiality of making private schools more accessible to low-income families because they are believed to provide better education for students and do so at a lower cost. In fact, Catholic schools can reportedly "educate students at less than 50 percent of the cost incurred for public school students." Dan Lyons, Editorial, *Nonpublic Schools Save N.J. Taxpayers Billions*, E. EXPRESS TIMES (PA.), Aug. 12, 2010, at A4. As such, students who choose to attend private schools purportedly "save taxpayers more than $2 billion a year," a significant selling point in light of New Jersey's current fiscal situation. *Id.*

194. The bill defines a "chronically failing school" as one in which either: (1) more than forty percent of students score in the partially proficient range for *both* language arts and mathematics in each of the prior two school years; or (2) more than sixty-five percent of students score in the partially proficient range for either language arts or mathematics in each of the prior two school years. S. 1872, 214th Leg. § 3 (N.J. 2010).

195. The thirteen identified school districts currently include East Orange, Newark, Orange, Jersey City, Passaic, Paterson, Trenton, Perth Amboy, Asbury Park, Elizabeth, Plainfield, Camden, and Lakewood. S. COMM. SUBSTITUTE, LEGISLATIVE FISCAL ESTIMATE, S. 1872, 214th Leg. Sess., at 5 (N.J. Mar. 4, 2011), *available at* http://www.njleg.state.nj.us/2010/Bills/S2000/1872_E1.PDF. The list of included districts is subject to change. *See* John Mooney, *Politics and the OSA Pilot Program*, NJ SPOTLIGHT (Feb. 9, 2011), http://www.njspotlight.com/stories/11/0208/2355/.

196. S. COMM. SUBSTITUTE, *supra* note 195, at 4.

subsequent four years and allow for $120,000,000 in tax credits by the fifth year.[197] The program will be funding-neutral because the lost tax revenue will be offset by an equal reduction in state aid to participating school districts.[198]

A three-member Opportunity Scholarship Board will be created under the bill[199] and will identify three scholarship organizations, one in each of the State's northern, central, and southern regions, with one of the scholarship organizations designated as the lead scholarship organization.[200] Each region will receive funding based on the region's share of all students in the state enrolled in a chronically failing school or a nonpublic school located in a district that has a chronically failing school.[201] The amount of each scholarship will depend on the student's grade level and the per-student cost of education at both the school selected by the scholarship recipient and the district in which the chronically failing school is located.[202] The public or private school selected by the scholarship organization must accept the scholarship as payment in full for the entire cost of the student's education.[203]

V. REAL "OPPORTUNITY" FOR NEW JERSEY STUDENTS?

Since its introduction in 2010, the OSA has sparked heated interest from all sides of the education reform debate. Public school supporters insist that school choice initiatives like the OSA are not only unconstitutional but pose a "serious challenge" to the public school system.[204] School choice advocates disagree and maintain the bill's potential to provide educational opportunities to thousands of low-income students who are "trapped" in underperforming schools.[205] Nevertheless, should the OSA pass, both sides of the

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197. S. 1872, 214th Leg. Sess. § 4(d) (N.J. 2010). This translates into roughly 3,900 scholarships in the first year, 7,800 scholarships in the second year, 15,000 scholarships in the third year, 25,000 scholarships in the fourth year, and 40,000 scholarships in the final year. *See id.*

198. *See* John Mooney, *OLS Runs the Numbers on the Opportunity Scholarship Act*, NJ SPOTLIGHT (Mar. 17, 2011), http://www.njspotlight.com/stories/11/0316/2234/; S. COMM. SUBSTITUTE, *supra* note 195, at 1.

199. S. 1872 § 6(a). The Governor, the President of the Senate, and the Speaker of the General Assembly will each appoint one member to the Opportunity Scholarship Board. *Id.*

200. *Id.* § 6(b). The donations will be paid first to the lead organization, which will then distribute funds to the other organizations. *Id.* § 6(c).

201. *Id.* § 6.

202. *Id.* § 3.

203. *Id.* § 7(a)(1). The school, however, must participate in the program and cannot charge the family an amount that exceeds the amount of the scholarship. *See id.*

204. *NJ Voucher Bill Opponents Turn Up the Heat,* EDUC. L. CENTER (June 15, 2010), http://www.edlawcenter.org/news/archives/other-issues/125.html.

205. Andrew LeFevre, *Opportunity Scholarships Overcome Crucial Hurdles in New*

debate expect that the program will likely be challenged in court.[206]

Two important questions thus emerge. Does a tax credit program like the OSA pass muster under the New Jersey Constitution? And, perhaps more significantly, does the OSA have a place within education reform in New Jersey?

A. Legal for Now

Whether the New Jersey legislature ultimately adopts the OSA or another tax credit initiative in the future, legal challenges will likely ensue.[207] The U.S. Supreme Court's decision in *Winn* has, at least for now, made it difficult for tax credit scholarship programs to be challenged in federal courts.[208] However, the OSA will also need to overcome legal challenges at the state level.

Education and the issue of school choice are not new to New Jersey courts.[209] The New Jersey judiciary has played a prominent role in shaping the state's education landscape,[210] perhaps most famously in the state's decades-long school finance litigation.[211]

Jersey, HEARTLANDER MAG. (Feb. 15, 2011), http://www.heartland.org/schoolreform-news.org/Article/29345/Opportunity_Scholarships_Overcome_Crucial_Hurdles_in_New_Jersey.html.

206. Interview with Derrell Bradford, *supra* note 190.

207. *See id.*

208. *See supra* Part III.A.

209. *See, e.g.*, Crawford v. Davy, No. C-137-06, 2010 WL 162061 (N.J. Super. Ct. App. Div. Nov. 23, 2009) (finding that plaintiffs' claims under the "thorough and efficient" clause are premature but not nonjusticiable).

210. *See* Abbott v. Burke (*Abbott XXI*), 20 A.3d 1018 (N.J. 2011); Abbott v. Burke (*Abbott XX*), 971 A.2d 989 (N.J. 2009); Abbott v. Burke (*Abbott XIX*), 960 A.2d 360 (N.J. 2008); Abbott v. Burke (*Abbott XVIII*), 956 A.2d 923 (N.J. 2008); Abbott v. Burke (*Abbott XVII*), 935 A.2d 1152 (N.J. 2007); Abbott v. Burke (*Abbott XVI*), 1 A.3d 602 (N.J. 2006); Abbott v. Burke (*Abbott XV*), 901 A.2d 299 (N.J. 2006); Abbott v. Burke (*Abbott XIV*), 889 A.2d 1063 (N.J. 2005); Abbott v. Burke (*Abbott XIII*), 862 A.2d 538 (N.J. 2004); Abbott v. Burke (*Abbott XII*), 852 A.2d 185 (N.J. 2004); Abbott v. Burke (*Abbott XI*), 832 A.2d 906 (N.J. 2003); Abbott v. Burke (*Abbott* X), 832 A.2d 891 (N.J. 2003); Abbott v. Burke (*Abbott IX*), 798 A.2d 602 (N.J. 2002); Abbott v. Burke (*Abbott VIII*), 790 A.2d 842 (N.J. 2002); Abbott v. Burke (*Abbott VII*), 751 A.2d 1032 (N.J. 2000); Abbott v. Burke (*Abbott VI*), 748 A.2d 82 (N.J. 2000); Abbott v. Burke (*Abbott V*), 710 A.2d 450 (N.J. 1998); Abbott v. Burke (*Abbott IV*), 693 A.2d 417 (N.J. 1997); Abbott v. Burke (*Abbott III*), 643 A.2d 575 (N.J. 1994); Abbott v. Burke (*Abbott II*), 575 A.2d 359 (N.J. 1990); Abbott v. Burke (*Abbott I*), 495 A.2d 376 (N.J. 1985); Robinson v. Cahill (*Robinson VI*), 360 A.2d 400 (N.J. 1976); Robinson v. Cahill (*Robinson V*), 355 A.2d 129 (N.J. 1976); Robinson v. Cahill (*Robinson IV*), 351 A.2d 713 (N.J. 1975), *cert. denied sub nom.* Klein v. Robinson, 423 U.S. 913 (1975); Robinson v. Cahill (*Robinson III*), 335 A.2d 6 (N.J. 1975); Robinson v. Cahill (*Robinson II*), 306 A.2d 65 (N.J. 1973); Robinson v. Cahill (*Robinson I*), 303 A.2d 273 (N.J. 1973).

211. The issue of school finance has been used to address the disparities, often significant, between school districts within the state. The history of school finance cases is often divided into three waves, with litigants in each wave challenging state funding schemes based on federal and state constitutional violations. *See* Black, *supra* note 184, at 1360.

Furthermore, the state constitution has become a wellspring of legal claims for education reformers on both sides of the school choice debate, particularly because of the Supreme Court of New Jersey's "impressive reputation for its intellectually rigorous and forcefully progressive interpretations."[212]

If and when the OSA is challenged in state court, the focus will likely be on two particular provisions of the New Jersey Constitution: the "compelled support" provision[213] and the "thorough and efficient" clause.[214] This is consistent with the legal battles occurring in other

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Litigants in the short-lived first wave challenged their respective state funding schemes based on violations under the U.S. Constitution's Equal Protection Clause. *Id.* The first prominent state school finance case in the country was *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241 (Cal. 1971), in which the California Supreme Court recognized a person's wealth as a suspect classification and held education to be a fundamental right under both the U.S. Constitution and the California Constitution. *Id.* at 1253-55, 1264-66. The court found that the California funding system based on property taxes violated this fundamental right by creating vast spending disparities between school districts. *Id.* at 1264-66. However, just two years later, the U.S. Supreme Court held in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), that education was not a fundamental right protected by the U.S. Constitution. *Id.* at 23-28.

Shortly after the Supreme Court closed the door in *Rodriguez*, litigants of the second wave began pursuing their claims in state courts, relying on the education and equal protection clauses of their respective state constitutions. State courts, including the Supreme Court of New Jersey, began finding that "the equal protection requirements in their state constitutions were different from the federal requirements." SCOTT F. JOHNSON & SARAH E. REDFIELD, EDUCATION LAW: A PROBLEM-BASED APPROACH § 2.03, at 57 (2009). Some courts found that education was a fundamental right under their state equal protection clause. *See, e.g.,* Horton v. Meskill, 376 A.2d 359 (Conn. 1977). Five years later, the California Supreme Court in *Serrano II*, 557 P.2d 929 (Cal. 1976), revisited its decision in *Serrano I* and reaffirmed on the grounds that education remained a fundamental right under the California Constitution, and the funding disparities violated the state equal protection clause.

The third wave of school finance litigation focused on the education and tax clauses of state constitutions. Plaintiffs argued for a constitutionally required minimum standard of education, also known as adequacy standards. Under this adequacy-based argument, "all children are entitled to a base level of educational quality" that requires a sufficiency of school funding. Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL'Y 569, 582 (2004). In the 1990s, more than twelve states recognized a cause of action for a state's failure to provide an adequate education. Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 415 (2000). More significantly, a few courts that had previously rejected plaintiffs' equal protection arguments "have found their states' systems unconstitutional" under the adequacy standard. Obhof, *supra.*

212. Helen Hershkoff, *The New Jersey Constitution: Positive Rights, Common Law Entitlements, and State Action*, 69 ALB. L. REV. 553, 553 (2006) (internal quotation marks omitted).

213. N.J. CONST. art. I, para. 3.

214. N.J. CONST. art. VIII, § IV, para. 1.

states.[215]

1. The New Jersey Judiciary

Almost no other state supreme court has pushed the limits of its state constitution as the Supreme Court of New Jersey has done.[216] Indeed, the New Jersey judiciary is no stranger to education litigation. Less than a month after the U.S. Supreme Court declared that education was not a fundamental right under the U.S. Constitution in *San Antonio Independent School District v. Rodriguez*,[217] the Supreme Court of New Jersey responded with its own landmark decision. In *Robinson v. Cahill,* the court ardently held that although education was not a fundamental federal right, "wide spending disparities among school districts violated the New Jersey Constitution's requirement that the state maintain a 'thorough and efficient' system of public schools."[218] In 1976, the court finally held the state school finance legislation, the Public School Education Act of 1975 ("1975 Act"), to be constitutional, though recognizing potential problems that could arise in its application.[219] The result was *Abbott v. Burke,* a thirty-year battle in New Jersey courts that continues today.[220]

Nevertheless, the Supreme Court of New Jersey's history of activism has also evoked great criticism from conservative parties, including New Jersey Governor Chris Christie. In 2010, Governor Christie defied political tradition and refused to reappoint Associate Justice John Wallace, [221] a member of the court's more liberal wing. With several justices expected to retire during the Governor's current term, there is wide speculation that the Supreme Court of New Jersey may be bridled in the coming years.[222]

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215. *See supra* Part III.B.

216. *See* Hershkoff, *supra* note 212.

217. 411 U.S. 1, 43 (1973) (holding that education is not a fundamental right and does not invoke the strict scrutiny test).

218. Obhof, *supra* note 211, at 577 (citing Robinson v. Cahill, 303 A.2d 273 (N.J. 1973)).

219. *See* Robinson v. Cahill, 355 A.2d 129, 139 (N.J. 1976).

220. For a complete history of the Abbott cases, see *The History of Abbott v. Burke*, EDUC. L. CENTER, http://www.edlawcenter.org/cases/abbott-v-burke/abbott-history.html (last visited Nov. 16, 2011). Since the beginning of the *Abbott* litigation in 1981, the Supreme Court of New Jersey has struck down the Quality Education Act of 1990 and the Comprehensive Education Improvement and Financing Act of 1996. *See Abbott III*, 643 A.2d 575 (N.J. 1994); *Abbott IV*, 693 A.2d 417 (N.J. 1997). The most recent legislative attempt at school funding, the School Funding Reform Act of 2008, was challenged in the courts in *Abbott XXI*, 20 A.3d 1018 (N.J. 2011). *See The History of Abbott v. Burke*, *supra*; *see also supra* notes 186-87 and accompanying text.

221. Richard Pérez-Peña, *Christie, Shunning Precedent, Drops Justice from Court*, N.Y. TIMES, May 4, 2010, at A22. Justice Wallace became the first sitting justice in over sixty years to have unsuccessfully sought reappointment. *Id.*

222. Kevin Mooney, *Gov. Chris Christie's Revolutionary Charge Against N.J.'s*

In the meantime, the ongoing *Abbott* litigation represents the New Jersey judiciary's decades-long commitment to ensuring a "thorough and efficient" public education system. The court will inevitably play a significant role in determining the constitutionality of the OSA should any legal questions arise.

2. The New Jersey Constitution

One of the earliest state constitutions in the United States, the original New Jersey constitution was adopted quickly and with minimal controversy in 1776.[223] For sixty-eight years, New Jersey's "brief, temporary, and obviously flawed constitution"[224] remained in place, recognized as "the legitimate constitution of the state . . . until the people shall think proper to lay it aside, and to establish a better in its place."[225] The constitution was revisited in 1844 and again in 1947.[226]

i. "Compelled Support"

While New Jersey is among the minority of states that did not adopt a Blaine Amendment in the nineteenth century,[227] the original drafters included, and subsequent constitutional conventions preserved, the compelled support provision. In article I, paragraph 3, of the current constitution, the provision reads:

> No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry,

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Imperial Judiciary Could Restore Self Government, WASHINGTON EXAMINER (Feb. 21, 2011, 11:37AM), http://washingtonexaminer.com/blogs/opinion-zone/2011/02/gov-chris-christies-revolutionary-charge-against-njs-imperial-judiciary-c; Allen Steinberg, *The New Jersey Supreme Court: Christie Has Options*, POLITICKER NJ (Apr. 26, 2010, 2:24 AM), http://www.politickernj.com/alan-steinberg/38626/new-jersey-supreme-court-christie-has-options.

223. ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE 1 (1990); Melissa Scheier, *Constitutionalism in New Jersey: Constitutional Failures in a Changing Political Environment*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES, 114-15 (Connor and Hammons, eds., 2008).

224. WILLIAMS, *supra* note 223, at 5; *see* Scheier, *supra* note 223, at 113 ("The New Jersey constitutional experience provides us with an example of how poor constitutions, ones that do not fulfill their prescribed functions, can cause political inefficiency.").

225. WILLIAMS, *supra* note 223, at 5 (quoting State v. Parkhurst, 9 N.J.L. 427, 442-43 (1828)).

226. Scheier, *supra* note 223, at 116-17.

227. *See States*, BLAINE AMENDMENTS, http://www.blaineamendments.org/states/states.html (last visited Nov. 13, 2011).

contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.[228]

This provision appeared, almost verbatim, as article XVIII of the 1776 constitution and as article I, section III, of the 1844 constitution.[229]

In general, "the New Jersey Supreme Court has tended to equate [the compelled support provision] with the federal First Amendment religion guarantees."[230] Despite the broad detail in the state provision, New Jersey courts have refrained from raising the barrier separating church and state, suggesting the judiciary's willingness to permit indirect government aid to private education.[231] This is further evidenced by paragraph 3 of article VIII, section IV, which the Supreme Court of New Jersey has held makes clear that the legislature can provide support for transportation to students attending private religious schools without violating the Establishment Clause.[232]

The OSA will likely overcome a challenge under the state's compelled support provision for two reasons. First, as discussed earlier, the OSA's tax credit mechanism would mean that no direct government aid would go to private schools, and it is arguable that it even provides indirect aid. Because the source of OSA funding is through voluntary private corporate contributions, no public dollars are used to pay for the scholarships. In many ways, this makes for a stronger case than even school vouchers, since the latter is generally financed by direct state funding, where a certain amount of state dollars is set aside to pay a school for a student's education.

Secondly, the interpretation of article VIII to allow the state to provide transportation for students who attend nonpublic schools is significant because it illustrates how New Jersey courts are to view public funding of education. Rather than focus on which schools are receiving public assistance, the courts' primary concern must be to provide assistance to students.[233] Under this paradigm, courts will not be as concerned with a family's ultimate choice of school but rather with the family's ability to pay for a better education. Scholarships under the OSA will likely be viewed as assistance

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228. N.J. CONST. art. I, para. 3.

229. WILLIAMS, *supra* note 223, at 32.

230. *Id.*

231. *See id.*

232. *See, e.g.*, W. Morris Reg'l Bd. of Educ. v. Sills, 279 A.2d 609, 613 (1971) (affirming lower court's holding that providing free transportation of children to private schools did not violate the First Amendment); Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 26-28 (1947) (finding that use of tax money for transportation of children to private schools serves a public function); WILLIAMS, *supra* note 223, at 121.

233. DeForrest, *supra* note 123, at 577-78; *see Sills*, 279 A.2d at 613 ("[The statute] remains a measure to aid the student rather than the school he attends . . . .").

provided to families to pay for the cost of education. More importantly, the OSA explicitly provides that families can choose either public or nonpublic schools,[234] which further weakens the argument that OSA funding is meant to subsidize nonpublic (or private)—or, more specifically, religious—schools.

ii. "Thorough and Efficient"

The OSA will also be subject to scrutiny under the state's education clause, a provision that was added to the constitution of 1844 by amendment in 1875.[235] The clause requires the legislature to "provide for the maintenance and support of a *thorough and efficient* system of free public schools for the instruction of all children in the State between the ages of five and eighteen years."[236] In 1973, the Supreme Court of New Jersey read this provision to mean "equal educational opportunity for children" and that "[a] system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command."[237] The court has been aggressive in enforcing this right ever since.[238] Not only has the court interpreted the right to education to "require the redistribution of public funds from one school district to another if needed to secure an adequate education for the state's children,"[239] but it has also recognized that "[t]he content of the Constitution's education clause is infused with the dynamism inherent in the education process itself."[240]

The New Jersey education clause can potentially be invoked by either side of the school choice debate. Public school advocates may decide to challenge the OSA for violating the "uniformity" language in the education clause. While unlike the Florida education clause, which explicitly includes the word "uniform,"[241] the New Jersey education clause requires an education system that is "thorough and efficient" and consists of "free public schools."[242] Challengers could potentially argue that because the program would likely require the

234. S. 1872, 214th Leg. § 3 (N.J. 2010) ("'Eligible school' means an in-district or out-of-district public school or an in-district or out-of-district nonpublic school located in this State offering a program of instruction for kindergarten through 12th grade . . . .").

235. WILLIAMS, *supra* note 223, at 120. For an in-depth discussion of the origins of the New Jersey "thorough and efficient" clause, see Peter J. Mazzei, *New Light on New Jersey's "Thorough and Efficient" Education Clause*, 38 RUTGERS L.J. 1087 (2007).

236. N.J. CONST. art. VIII, § IV, para. 1 (emphasis added).

237. Robinson v. Cahill, 303 A.2d 273, 294 (N.J. 1973).

238. WILLIAMS, *supra* note 223, at 120.

239. Hershkoff, *supra* note 212, at 554.

240. Levine v. N.J. Dep't of Inst. and Agencies, 418 A.2d 229, 236 (1980).

241. FLA. CONST. art. IX, § 1, para. a.

242. N.J. CONST. art. VIII, § IV, para. 1.

allocation of administrative and financial resources above and beyond what is currently in place, the OSA violates the efficiency mandate required by the State Constitution.[243] After all, New Jersey courts have "provide[d] meaningful hints about the meaning that might be attributed to the 'efficient system' language," including possible elements (e.g. efficiency of administrative procedures) of what might constitute an "efficient" education in New Jersey.[244]

Interestingly, the New Jersey education clause can also be invoked in support of the OSA. In 2009, the New Jersey Appellate Division denied plaintiffs in a class action lawsuit of a remedy in which the state would provide vouchers to allow students attending failing schools to transfer to a "successful" public or nonpublic school.[245] However, the court did not address the constitutionality of the voucher remedy in *Crawford v. Davy* and, instead, concluded that the plaintiffs' claims under the "thorough and efficient" guarantees in the education clause were premature in light of SFRA, which had only just been enacted and was not given "an opportunity for . . . full implementation and operation of the statutory evaluative and remedial measures."[246] Thus, the door to school choice initiatives, like the OSA, under the state "thorough and efficient" education clause was left ajar.[247]

The Appellate Division's opinion in *Crawford v. Davy* suggests that the OSA may be upheld in the future. First, the voucher program proposed by plaintiffs in *Crawford* would have been a judicial creation and not a legislative act.[248] The Supreme Court of New Jersey has made clear that "[t]he political branches of government . . . are entitled to take reasoned steps, even if the outcome cannot be assured, to address the pressing social, economic, and educational challenges confronting our state . . . [and] should not be locked in a constitutional straitjacket."[249] As such, the court will defer the lawmaking function to the political process. This is

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243. *See* Tractenberg, *supra* note 90, at 425-38.

244. *Id.* at 431-32.

245. Crawford v. Davy, No. C-137-06, 2010 WL 162061, *13 (N.J. Super. Ct. App. Div. Nov. 23, 2009).

246. *Id.* at *12. Earlier that year, in *Abbott XX*, the state supreme court had determined that "SFRA deserve[d] the chance to prove in practice that, as designed, it satisfie[d] the requirements of our constitution." *Abbott XX*, 971 A.2d 989, 1009 (N.J. 2009).

247. Of course, now that the Supreme Court of New Jersey has found SFRA to be underfunded in *Abbott XXI*, a program like the OSA could be seen as a possible remedy to the problem. *See generally* 20 A.3d 1018 (N.J. 2011). On the other hand, because the court in *Abbott XXI* ordered funding of the Abbott districts, the OSA could also be considered unnecessary, as most of the targeted districts under the OSA are also Abbott districts.

248. *Crawford*, 2010 WL 162061, at *2-3.

249. *Abbott XX*, 971 A.2d at 1009.

especially important in the education arena because discourses on education reform mostly take place in courts of public opinion, where initiatives like the OSA are (hopefully) considered in the larger context of education reform.

On the other hand, as the Appellate Division noted, the Supreme Court of New Jersey has also not shied away from "requir[ing] the adoption of programs and policies it deemed necessary to implement the constitutional requirement, after an extensive factfinding process involving the other branches of government."[250] In *Abbott V*, the court directed the state to implement a long list of reform measures, including a pre-kindergarten program that guaranteed the provision of high-quality early childhood education to the state's three- and four-year-old children.[251] In 1976, the court even shut down public schools for eight days because the legislature had failed to fund a state-funding formula under the Public School Education Act.[252] Most recently in *Abbott XXI*, the court ordered the state to reinstate $500 million to the Abbott Districts to fulfill its obligation under SFRA.[253] Therefore, if the state judiciary finds the OSA to be an effective mechanism to cure the state's failure to maintain a "thorough and efficient" education system, there is precedent that it may once again exercise its powers and uphold the scholarship tax credit program.

B. But is it Good Policy?

In the current legal landscape, the OSA will likely be upheld under both the federal and New Jersey constitutions. While a few voucher programs have been found unconstitutional by other state courts, no court has yet invalidated a scholarship tax credit program. Even so, the school choice discussion need not—and perhaps should not—end upon a court's decision to uphold (or strike down) a school choice program.[254]

Instead, policies like the OSA must be understood in the larger context of education reform in New Jersey. In a meaningful way, the Supreme Court of New Jersey has already taken the lead in clarifying the state's end goal: "that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."[255] However, the road to this lofty goal requires its participants to recognize that

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250. *Crawford*, 2010 WL 162061, at *5.

251. *Abbott V*, 710 A.2d 450, app. at 513 (N.J. 1998).

252. *See The History of Abbott v. Burke*, *supra* note 220.

253. *See Abbott XXI*, 20 A.3d 1018, 1045 & n.23 (N.J. 2011); *History of Funding Equity*, N.J. DEP'T OF EDUC., http://www.nj.gov/education/archive/abbotts/chrono (last visited Nov. 15, 2011).

254. Andrew J. Rotherham, *Putting Vouchers in Perspective*, PROGRESSIVE POLICY INSTITUTE (July 2002), http://www.dlc.org/documents/Ed_vouchers_702.pdf.

255. *Robinson I*, 303 A.2d 273, 295 (N.J. 1973).

"what a thorough and efficient education consists of is a continually changing concept" and that "embedded in the constitutional provision itself . . . are various objectives and permissible outcomes–equality, uniformity, diversity, and disparity."[256]

It is perhaps the court's recognition of this dynamism that acknowledges the fears and hopes of both sides of the school choice debate. For example, while public school advocates fear for the fate of public schools as more government resources are diverted away from school districts,[257] little attention is paid to the short-term purpose of the OSA: to provide "rapid relief" for desperate parents seeking a better education for their children "right now."[258] As Newark Mayor Cory Booker explained, "The [OSA does not] remove our moral obligation to fix the failing public schools in New Jersey, nor does it relieve the crime that's happening every day when we fail our children."[259] Instead, at face value, the OSA recognizes the needs of low-income students attending failing schools *right now*, many who cannot wait for institutional reform efforts that might take years to take hold.

At the same time, school choice advocates must not underestimate systemic reform efforts like those advanced under the ongoing *Abbott* litigation, which are yielding positive results for New Jersey public education and have been hailed as a model of urban education reform.[260] The state bears a tremendous burden under its constitutional mandate to provide a "thorough and efficient" education to all students in New Jersey. While the OSA might improve access to quality education for some of the students attending one of the 180 chronically failing schools in the state, the scholarship tax credit program cannot possibly provide educational opportunities for all of the 80,000 such students. Therefore it is unreasonable to completely abandon a public education system that—though imperfect—has been able to serve many students.

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256. *Abbott II*, 575 A.2d 359, 365-67 (N.J. 1990).

257. *See* Gordon MacInnes, *Opinion: Scholarship Act Puts Strange Spin on 'Opportunity*,' NJ SPOTLIGHT (Aug. 23, 2010), http://www.njspotlight.com/stories/10/0822/1148/.

258. *The Christie Reform Agenda: Education Is the Civil Rights Issue of Today, supra* note 188; *see* Tom Kean, Jr., Op-Ed., *Give Kids a Chance to Escape Failing Schools*, STAR-LEDGER, Feb. 10, 2011, at 15.

259. LeFevre, *supra* note 205.

260. *See* Linda Darling-Hammond, Commentary, *What are the Best Methods for School Improvement*, NAT'L J. ONLINE (Sept. 4, 2009, 3:25 PM), http://education.nationaljournal.com/2009/08/what-are-the-best-methods-for.php ("[A]n extraordinary leap in equity and opportunity that has propelled New Jersey to one of the top-achieving states in the nation and dramatically reduced the achievement gap between white students and their black and Hispanic peers.").

CONCLUSION

With the imminent adoption of the New Jersey Opportunity Scholarship Act, education reformers on both sides of the school choice debate waited eagerly for the U.S. Supreme Court's decision in *Winn*. For the first time, the constitutionality of a tax credit scholarship program went before the high court. But the constitutional arguments do not end there. State constitutions, including that of New Jersey, pose greater challenges to school choice initiatives like the OSA. However, the Supreme Court of New Jersey has paved the way in prioritizing the constitution's "thorough and efficient" mandate and will be a significant factor in the fate of the OSA. Furthermore, even if the New Jersey Opportunity Scholarship Act survives the legal obstacles, education reformers must carefully consider whether the OSA has a place in the overall plan to improve education outcomes for all of New Jersey's students.