

Report for Congress

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Education Vouchers: Constitutional Issues and Cases

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Summary

On June 27, 2002, the Supreme Court in *Zelman v. Simmons-Harris*, by a 5-4 margin, upheld the constitutionality of a school voucher program that gives tuition assistance to poor children in failing public schools in Cleveland to enable them to attend private schools in the city, notwithstanding that most of the schools are religious in nature. In so doing the Court substantially loosened the constraints that apply to voucher programs under the establishment of religion clause.

At issue in the case was Ohio's Pilot Scholarship Program, which provides up to \$2250 to poor students in kindergarten through the eighth grade in Cleveland for use at private schools in the city. Eighty percent of those schools are religious, and most of the voucher children (96%) attend the religious schools. The Court's prior decisions addressing the constitutionality of indirect aid – *Committee for Public Education v. Nyquist*, *Mueller v. Allen*, *Witters v. Washington Department of Social Services for the Blind*, and *Zobrest v. Catalina Foothills Public Schools* – seemed to suggest that a voucher program would pass constitutional muster only if its benefits were made available on a religion-neutral basis and if religious schools did not dominate the choices open to parents and their children. The lower federal courts in *Zelman* found the first test to be met but held the program unconstitutional on the grounds it did not give parents a genuine choice between secular and religious schools. But the Supreme Court held that the choices available to the parents were broader than just the private schools where the vouchers might be redeemed. Chief Justice Rehnquist stated for the Court:

Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school.

Given this broad range of educational choices, the Court held that “the program challenged here is a program of true private choice ... and does not offend the establishment clause.” Four Justices vigorously dissented.

Zelman appears, at least for now, to resolve most of the questions concerning the constitutionality of school voucher programs under the establishment of religion clause and to shift the public debate to the policy arena. But legal questions remain with respect to the constitutionality of such programs under the more strict church-state provisions of some state constitutions and whether those state limitations are consistent with either the free exercise or equal protection clauses of the U.S. Constitution. State and lower federal courts have reached conflicting decisions on these issues so far.

This report details the constitutional standards that currently apply to indirect aid programs and summarizes all of the pertinent Supreme Court decisions, with particular attention to *Zelman*. It also summarizes recent and ongoing state and lower federal court cases concerning vouchers. The report will be updated as events warrant.

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Education Vouchers: Constitutional Issues and Cases

Introduction

Whether government ought to provide assistance in the form of education vouchers or tax assistance to help some or all parents send their elementary and secondary school children to private schools, including sectarian institutions, has been a recurring and politically charged issue at both the federal and state levels for at least the past two decades. Congress has repeatedly been embroiled in the issue¹; President Bush last year signed into law a bill that extends the existing college education IRA to the elementary and secondary school level²; and the House is expected soon to consider a bill (H.R. 5193) to allow low-income parents to deduct educational expenses incurred at the elementary and secondary school level, including those incurred at sectarian schools, from their gross income for federal

¹For example, a number of efforts to enact a school voucher program and to extend tax benefits to the elementary and secondary education level were made during the Clinton Administration, but all failed to get through both houses or were vetoed by the President. In the first session of the 104th Congress, the House added a school voucher plan to the appropriations bill for the District of Columbia; but the measure died after a filibuster in the Senate. In the first session of the 105th Congress, the House again added a voucher plan to the D.C. appropriations bill; and it also adopted a tax-preferred education savings account proposal for elementary and secondary education that would have expanded the definition of “qualified education expenses” in the existing higher education IRA to include costs incurred in attending a public, private, or religious school providing elementary or secondary education, as well as certain home schooling expenses. But both measures died after filibusters in the Senate.

During the first session of the 105th Congress, the House also considered, but rejected, a free-standing voucher plan for all low-income students. Both the House and the Senate adopted a voucher plan during the second session of the 105th Congress as part of the FY 1999 appropriations bill for the District of Columbia. But President Clinton vetoed the measure. During the second session both the House and the Senate also approved tax-preferred savings accounts for elementary and secondary education expenses, including private school tuition; but again President Clinton vetoed the measure.

For more detailed information on the consideration of school choice proposals in the 104th-107th Congresses and on the pertinent policy arguments, *see* CRS Issue Brief IB98035, *School Choice: Current Legislation*, by David Smole, and CRS Report RL30805, *School Choice: Legislative Action by the 104th through 106th Congresses*, by Wayne Riddle and Jim Stedman.

²P.L. 107-16, § 401 (June 7, 2001); 115 Stat. 57; 26 U.S.C.A. § 530. Education IRAs may now be established and expended on a tax-free basis for the costs of tuition, fees, books, room and board, uniforms, transportation, computer hardware and software, and Internet access at both public and private elementary and secondary schools as well as for college expenses.

income tax purposes. Several states have also instituted voucher programs either for specific localities or on a state-wide basis.³

A key issue in the debates on educational vouchers⁴ has been whether the inclusion of sectarian elementary and secondary schools in the universe of schools which students might attend violates the part of the First Amendment to the Constitution providing that “Congress shall make no law respecting an establishment of religion”⁵ In a number of decisions between 1973 and 1993 addressing the constitutionality of programs indirectly aiding religious schools – *Committee for Public Education v. Nyquist*, *Sloan v. Lemon*, *Mueller v. Allen*, *Witters v. Washington Department of Social Services for the Blind*, and *Zobrest v. Catalina Foothills Public Schools* -- the Court had seemed to suggest that a voucher program would pass constitutional muster only if its benefits were made available on a religion-neutral basis and if the initial beneficiaries had a genuine choice between secular and religious schools about where to use the assistance. However, these criteria were not wholly transparent, and as a consequence, state and lower federal courts that subsequently wrestled with the issue often reached contradictory results. In the past decade, for instance, conflicting judicial decisions were handed down on the constitutionality of particular voucher and voucher-related programs under the establishment clause in the states of Wisconsin, Arizona, Maine, and Ohio.

Prior to the Ohio case, the U.S. Supreme Court repeatedly bypassed opportunities to review these state and lower court decisions. But on June 27, 2002, the Court resolved most issues related to how the foregoing criteria ought to be applied. In *Zelman v. Simmons-Harris*⁶ the Court upheld as constitutional, 5-4, a voucher program providing assistance to poor children in Cleveland’s public schools to enable them to attend private schools in the city. The Court did so notwithstanding the facts that most of the private schools in the city (more than 80%) were religious in nature and most of the voucher children (96%) attended those schools. In so doing the Court further loosened the strictures the establishment clause had previously been construed to place on public aid to religious institutions.

Although *Zelman* seems to resolve the major questions concerning the constitutionality of voucher programs under the establishment of religion clause, a related question concerns their constitutionality under certain provisions of the state constitutions and, in turn, whether those state constitutional provisions violate the

³Wisconsin has a voucher plan applicable only to Milwaukee, and Ohio has one for Cleveland. In 1999 Florida adopted a state-wide voucher plan. For additional information on state school choice programs, see CRSReport 95-344, *Federal Support of School Choice: Background and Options*, by Wayne Riddle and Jim Stedman.

⁴This report uses the term “voucher” broadly to mean not only tuition subsidy and tuition grant programs but also tax benefit proposals.

⁵Although worded as limitations on what Congress can do, both the establishment and free exercise clauses of the First Amendment have been held to apply to the states as well as part of the liberty protected from undue state interference by the due process clause of the Fourteenth Amendment. See *Everson v. Board of Education*, 330 U.S. 1 (1947) and *Cantwell v. Connecticut*, 310 U.S. 296 (1941).

⁶122 S.Ct. 2460, 2002 U.S. LEXIS 4885, 70 U.S.L.W. 4683 (2002).

free exercise of religion or equal protection clauses of the U.S. Constitution. A number of states have church-state provisions in their constitutions that seemingly are more strict than the establishment of religion clause; and some voucher programs have been challenged under these provisions. Indeed, on August 5, 2002, a circuit court in Florida struck down that state's voucher program on the grounds it violated a section of the state constitution barring public aid from being provided to any sectarian institution "directly or indirectly"⁷; and prior to *Zelman* Vermont's Supreme Court struck down that state's voucher program on the grounds it violated a state constitutional provision stating that no person "can be compelled to ... support any place of worship."⁸ But on July 18, 2002, the U.S. Court of Appeals for the Ninth Circuit held that an application of a provision in the Washington Constitution similar to Florida's to bar the award of scholarship to a student who planned to study for the ministry violated the free exercise clause of the First Amendment.⁹

The following sections summarize the standards articulated by the Court under the establishment of religion clause for public aid programs that provide assistance directly to sectarian schools and other religious entities and, in greater detail and with special attention to *Zelman*, for programs that provide assistance to sectarian schools indirectly (*i.e.*, by means of voucher and tax benefit programs). Although some of the state and lower federal court decisions concerning vouchers that were handed down in the decade prior to *Zelman* may now be primarily of historical rather than precedential interest, some involved state constitutional questions as well as establishment clause issues; and, as noted, at least two decisions have come down since *Zelman* that illustrate the legal issues raised for voucher programs by certain state constitutions. As a consequence, a concluding section of this report summarizes the state and lower federal court decisions on voucher and voucher-related programs handed down both before and after *Zelman*. This report will be updated as events warrant.

Direct Aid

A basic tenet of the Supreme Court's interpretation of the establishment clause is that the clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."¹⁰ Thus, the Court has held that public assistance which flows **directly** to religious institutions in the form of grants or contracts must be limited to aid that is "secular, neutral, and nonideological...."¹¹ That is, under the establishment clause government can provide direct support to secular programs and services sponsored or provided by religious entities but it cannot directly subsidize such organizations' religious activities or

⁷Holmes v. Bush, ___ So.2d ___ (Cir. Ct. Leon Cty., decided August 5, 2002).

⁸Chittenden Town School District v. Vermont Department of Education, 738 A.2d 539 (Vt.), *cert. den sub nom.* Andrews v. Chittenden Town School District, 528 U.S. 1066 (1999).

⁹Davey v. Locke, 2002 U.S. App. LEXIS 14461 (9th Cir. 2002).

¹⁰Grand Rapids School District v. Ball, 473 U.S. 373, 385 (1985).

¹¹Committee for Public Education v. Nyquist, 413 U.S. 756, 780 (1973).

proselytizing.¹² Direct assistance, the Court has held, cannot be used for religious indoctrination.¹³

Thus, religious schools and other entities are not automatically disqualified from participating in direct public aid programs. But the no-religious-indoctrination restriction on such aid means that a religious organization's secular functions and activities must be separable from its religious functions and activities. As a consequence of that requirement, the Court until recently had held that "pervasively sectarian" entities, *i.e.*, entities so permeated by a religious purpose and character that their secular functions and religious functions are "inextricably intertwined," were generally ineligible to receive direct government assistance.¹⁴ That construction of the establishment clause was a particular obstacle for direct aid to religious elementary and secondary schools, because the Court generally deemed such schools to fall within the pervasively sectarian category.¹⁵ For other entities such as religiously affiliated hospitals, social welfare agencies, and colleges, the Court presumed to the contrary and, consequently, allowed a greater degree of direct aid.¹⁶

¹²In most of the cases involving aid to religious institutions, the Court has used what is known as the Lemon test to determine whether a particular aid program violates the establishment clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster "an excessive entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The secular purpose prong of this test has rarely posed an obstacle to public aid programs benefiting private sectarian schools, but the primary effect and entanglement prongs have operated, in Chief Justice Rehnquist's term, as a "Catch-22" for such programs. Under the primary effect test a direct aid program benefiting religious schools which is not limited to secular use has generally been held unconstitutional because the aid can be used for the schools' religious activities and proselytizing. But if a direct program is limited to secular use, it has often still foundered on the excessive entanglement test, because the Court has held the government's monitoring of the secular use restriction to intrude it too much into the affairs of the religious schools. See *Lemon v. Kurtzman*, *supra*. The Court has for some time been sharply divided on the utility and applicability of the tripartite test and particularly of the entanglement prong. Nonetheless, the Court still uses the Lemon test; and, although it is no longer the only test the Court uses in establishment clause cases, the Court reaffirmed its applicability in its most recent school aid cases. The Court has, however, made both the primary effect and entanglement tests less stringent. See *Agostini v. Felton*, 521 U.S. 203 (1997) and *Mitchell v. Helms*, 530 U.S. 793 (2000).

¹³*Mitchell v. Helms*, 530 U.S. 793 (2000).

¹⁴*Committee for Public Education v. Nyquist*, *supra*; *Lemon v. Kurtzman*, *supra*; *Bowen v. Kendrick*, 487 U.S. 589 (1988).

¹⁵See, *e.g.*, *Committee for Public Education v. Nyquist*, *supra* (maintenance and repair grants to sectarian elementary and secondary schools held unconstitutional); *Lemon v. Kurtzman*, *supra* (public subsidy of teachers of secular subjects in sectarian elementary and secondary schools held unconstitutional); and *Wolman v. Walter*, 433 U.S. 229 (public subsidy of field trip transportation for children attending sectarian schools held unconstitutional).

¹⁶See, *e.g.*, *Bradfield v. Roberts*, 175 U.S. 291 (1899) (public grant to Catholic hospital to provide medical care to the poor upheld); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (grants to religiously affiliated agencies to provide pregnancy prevention and care services to (continued...))

But the Court has recently abandoned that presumption regarding sectarian elementary and secondary schools.¹⁷ Pervasive sectarianism, in other words, is no longer a constitutionally preclusive criterion for direct aid to such entities. The basic constitutional standards governing direct public assistance to religious entities, including schools, now appear to be that the aid must be “secular, neutral, and nonideological” in nature, distributed on a religion-neutral basis, not be used for religious indoctrination, and not precipitate excessive entanglement between government and the institution benefitted (although the Court has left open the possibility that other as-yet-unspecified constitutional requirements may exist as well).¹⁸

Indirect Aid

Public aid that is received only **indirectly** by sectarian institutions — *i.e.*, assistance that is received initially by a party other than the religious entity itself in such forms as tax benefits or vouchers — has, on the other hand, been given greater leeway by the Court. Such programs still must be religiously neutral in their design and have been held unconstitutional by the Court where their structure has virtually guaranteed that the assistance flows largely to pervasively sectarian elementary and secondary schools. However, where the design of the programs has not dictated where the assistance is channeled but has given a genuine private choice between secular and religious providers to the immediate beneficiary (the taxpayer or voucher recipient), the Court has held the programs to be constitutional even though pervasively sectarian institutions have benefited. Moreover, in the recent decision of *Zelman v. Simmons-Harris*, *supra*, the Court legitimated most school voucher programs by holding that, for constitutional purposes, the universe of choices available to voucher recipients is not limited to the entities where the vouchers can

¹⁶(...continued)

adolescents upheld); and *Tilton v. Richardson*, 403 U.S. 672 (1971) (grants for the construction of academic buildings at institutions of higher education, including ones religiously affiliated, upheld).

¹⁷ *Agostini v. Felton*, *supra*, and *Mitchell v. Helms*, *supra*.

¹⁸In both *Agostini v. Felton*, *supra*, and *Mitchell v. Helms*, *supra*, the Court upheld the aid programs in question as constitutional on the basis not only that the aid was secular in nature, made available on a religion-neutral basis, and barred from use for purposes of religious indoctrination but also that it was subject to other statutory and regulatory restrictions. In *Agostini* the Court noted that the aid program did not result in any government funds actually reaching religious schools’ coffers and that it supplemented rather than supplanted school expenditures. Similarly, in *Mitchell* the concurring (and decisive) opinion of Justice O’Connor noted that the aid program had not only the foregoing characteristics but also that there was no evidence that aid had actually been diverted to religious use and that there were a number of state and local monitoring activities to guard against that possibility. It also seemed important in *Mitchell* that the direct aid in question was of an in-kind nature (educational materials and equipment). There was no majority opinion in that case, but the three opinions filed all expressed doubt about the constitutionality of direct money grants to pervasively sectarian institutions. In any event, both *Agostini* and *Mitchell* held such additional factors as those cited, along with the nature of the aid, its mode of distribution, and the prohibition on its use for religious indoctrination, to be “sufficient” to render the program constitutional, although it specifically refrained from saying the additional factors were constitutionally “necessary.”

be used but includes the full range of educational choices available to them, *i.e.*, a voucher program can be constitutional even if most of the private schools where they can be redeemed are religious in nature.

Precursors to *Zelman v. Simmons-Harris*. Prior to its decision on June 27, 2002, in *Zelman v. Simmons-Harris*, *supra*, the Court had handed down seven decisions relevant to the question of the constitutional parameters governing indirect assistance. In two decisions particular programs of indirect assistance were struck down; in five others particular programs were upheld.

In *Committee for Public Education v. Nyquist*, *supra*, and *Sloan v. Lemon*¹⁹ in 1973 the Court found tax benefit and tuition grant programs that were available **only** to children attending private elementary and secondary schools to have a primary effect of advancing religion and, thus, to violate the establishment clause. In *Nyquist* a state tuition grant program provided specified amounts of tuition reimbursements to low-income parents of children who incurred tuition costs in sending their children to private elementary or secondary school, while in *Sloan* tuition reimbursements were provided to **all** parents who incurred tuition costs in sending their children to such schools. In addition, a related program in *Nyquist* permitted higher-income parents of children attending such schools to take an amount specified in the statute as a tax deduction for each attendee without regard to their actual expenditures; the specified deduction gradually declined as income increased.

In both cases the Court found that most of the private schools attended were religiously affiliated (85-90%), that those schools were pervasively sectarian in nature, and that the aid was not limited to secular use either by its nature or by statutory restriction. As a consequence, it concluded that “the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.”²⁰ “In both instances,” it said in *Nyquist*, “the money involved represents a charge made upon the state for the purposes of religious education.”²¹ Rather than providing a *per se* immunity from constitutional challenge, the Court said, “the fact that the aid is disbursed to parents rather than to the schools is only one among many factors to be considered.”²² In these cases the tuition grant and tax subsidy programs, the Court asserted, were both an encouragement to parents to send their children to nonpublic, mostly religious schools and a reward for doing so. Moreover, it said, to allow the factor that the aid was disbursed to the parents rather than directly to the schools to have controlling significance would “provide a basis for approving through tuition grants the *complete subsidization*” of all religious schools ... – a result wholly at variance with the Establishment Clause.²³

In a pregnant footnote in *Nyquist*, however, the Court stated that “we need not decide whether the significantly religious character of the statute’s beneficiaries

¹⁹413 U.S. 825 (1973).

²⁰*Committee for Public Education v. Nyquist*, *supra*, at 783.

²¹*Id.*, at 791, quoting from the lower court decision at 350 F.Supp. 655, 675 (1972).

²²*Id.* at 783.

²³*Id.* at 782, n. 38.

might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.”²⁴ Several subsequent cases presented the Court with precisely that kind of public assistance, and in each instance the Court found the program in question to be constitutional. In the process it refined the criteria governing the constitutionality of indirect aid programs.

*Mueller v. Allen*²⁵ concerned a Minnesota tax deduction given to the parents of **all** elementary and secondary schoolchildren, both public and private, for a variety of educational expenses, including private school tuition. *Witters v. Washington Department of Services for the Blind*²⁶ involved a vocational rehabilitation grant by Washington to a blind applicant who wanted to use the grant for study at a Bible college to prepare for a religious vocation; the program provided similar grants to other blind applicants for a wide variety of job training and educational purposes. *Zobrest v. Catalina Foothills School District*,²⁷ in turn, involved a Tucson school district’s subsidy of a sign-language interpreter under the federal “Individuals with Disabilities Education Act”²⁸ for a deaf student attending a sectarian secondary school; similar assistance was available to disabled students in public schools and nonsectarian private schools. The Court held all three forms of assistance not to violate the establishment clause.

The Court differentiated the tax benefit program in *Mueller* from the one it had held unconstitutional in *Nyquist* by emphasizing that it was a genuine tax deduction and that

the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools.²⁹

The Court further stressed that any aid received by sectarian schools in Minnesota became “available only as a result of numerous, private choices of individual parents of school-age children.”³⁰ Moreover, it rejected the argument that the tax deduction was unconstitutional because it disproportionately benefited religious institutions. Parents of children attending private schools, most of which were religious, could deduct tuition while parents of public school children could not; and thus, it was contended, the tax deduction served primarily to subsidize attendance at such schools. The Court said that it “would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to

²⁴*Id.*

²⁵463 U.S. 388 (1983).

²⁶474 U.S. 481 (1986).

²⁷509 U.S. 1 (1993).

²⁸20 U.S.C.A. § 1401 *et seq.*

²⁹*Mueller v. Allen, supra*, at 397.

³⁰*Id.* at 399.

which various classes of private citizens claimed benefits under the law.”³¹ The decision was 5-4.

In *Witters*, a unanimous decision, the Court again emphasized that in the vocational rehabilitation program “any aid provided is ‘made available without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited’” and that “any aid provided ... that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.”³² The program, the Court stated, did not have the purpose of providing support for nonpublic, sectarian institutions; created no financial incentive for students to undertake religious education; and gave recipients “full opportunity to expend vocational rehabilitation aid on wholly secular education.”³³ “In this case,” the Court found, “the fact that the aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.”³⁴ Finally, the Court concluded, there was no evidence that “any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education.”³⁵

Finally, in *Zobrest* it underscored that the program at issue was “a general government program that distributes benefits neutrally to any child qualifying as ‘handicapped’ under the IDEA without regard to the ‘sectarian-nonsectarian or public-nonpublic nature’ of the school the child attends.” It further reiterated the factor it had found important in both *Mueller* and *Witters* — that “a government-paid interpreter will be present in a sectarian school only as a result of the private decisions of individual parents.”³⁶ The IDEA, the Court said, “creates no financial incentive for parents to choose a sectarian school; and as a consequence, it

³¹*Id.* at 401.

³²*Witters v. Washington Department of Services for the Blind, supra*, at 487.

³³*Id.* at 488.

³⁴*Id.*

³⁵*Id.* Notwithstanding the unanimity of the decision, five of the Justices authored or joined in concurring opinions that disclaimed the constitutional significance of the amount of aid that ended up in the coffers of religious schools. Justice Marshall, who wrote the opinion of the Court in this case, cited the absence of any evidence that “any significant portion of the aid expended ... will end up flowing to religious institutions” as an additional factor supporting the program’s constitutionality. But all of the concurring opinions stressed instead that this case was controlled by the Court’s decision in *Mueller v. Allen, supra*, for the reason that “state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second prong of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries.” *Witters, supra*, at 491 (Powell, J., concurring). They placed no reliance on the factor of the substantiality of the aid flowing to religious institutions cited by Justice Marshall. Justice Marshall, it might be noted, had been one of the dissenters in *Mueller* and made virtually no reference to that case in his opinion for the Court in *Witters*.

³⁶*Zobrest v. Catalina Foothills School District, supra*, at 10.

concluded, “an interpreter’s presence there cannot be attributed to State decisionmaking.”³⁷ Like *Mueller*, the Court’s decision was 5-4.

In addition to these full decisions subsequent to *Nyquist* and *Sloan*, the Court also summarily affirmed two lower federal court rulings upholding education grants to college students, including those attending religious colleges, that helped them defray the cost of attendance. Both *Smith v. Board of Governors of the University of North Carolina*³⁸ and *Americans United for the Separation of Church and State v. Blanton*³⁹ involved the federal “State Student Incentive Grant” program.⁴⁰ Under that program the federal government makes matching grants to the states to subsidize scholarship grants to undergraduate students “on the basis of substantial financial need.” Both North Carolina and Tennessee allowed the grants to be used at public and private colleges, including religiously affiliated colleges. In addition, North Carolina, but not Tennessee, barred the grants from being used to train for a religious vocation. In both instances the programs were held not to violate the establishment clause by three-judge federal district courts, and the Supreme Court summarily affirmed. The district courts reasoned that the scholarship grant programs did not directly aid the sectarian purposes and activities of the religiously affiliated colleges attended by some of the students but did so only incidentally as the result of the choices of the students and their parents. In summarily affirming these decisions, of course, the Supreme Court adopted only the lower courts’ conclusions regarding the constitutionality of the programs and not their reasoning.

Thus, prior to *Zelman* the critical elements distinguishing indirect assistance programs that were held constitutional from those struck down under the establishment clause appear to have been that the purpose of the programs was not to provide aid to sectarian schools, that the initial recipients of the vouchers or other benefits were not selected on a religious basis, and that they had a genuine choice about whether to apply the vouchers or other assistance to education at religious or secular schools. In other words, if the government designed a voucher program so that the initial beneficiaries were selected on the basis of a religious criterion or a related proxy (such as enrollment in private elementary or secondary schools, most of which were sectarian), or if the universe of choices available to the initial beneficiaries was dominated by sectarian schools, the Court would hold the program unconstitutional on the grounds it had a primary effect of advancing religion. But if the class of initial beneficiaries included public as well as private schoolchildren and their parents and if they had a genuine choice among religious and secular schools about where to use the assistance, the Court would hold the program **not** to have an unconstitutional primary effect of advancing religion even though religious schools benefited, and sometimes disproportionately.⁴¹

³⁷*Id.*

³⁸429 F.Supp. 871 (W.D.N.C.), *aff’d mem.*, 434 U.S. 803 (1977).

³⁹433 F.Supp. 97 (M.D. Tenn.), *aff’d mem.*, 434 U.S. 803 (1977).

⁴⁰20 U.S.C.A. § 1070c *et seq.*

⁴¹The Court gave little discussion and no apparent reliance to the entanglement aspect of the Lemon test in these cases. It addressed the issue only in *Mueller*, and there it found the tax (continued...)

Justice Powell seemed to capture the critical factors governing the constitutionality of indirect aid programs in his concurring opinion in *Witters*:

Mueller makes the answer clear: state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries. Thus, in *Mueller*, we sustained a tax deduction for certain educational expenses, even though the great majority of beneficiaries were parents of children attending sectarian schools. We noted the State's traditional broad taxing authority ..., but the decision rested principally on two other factors. First, the deduction was equally available to parents of public school children and parents of children attending private schools. Second, any benefit to religion resulted from the "numerous private choices of individual parents of school-age children."⁴²

Zelman v. Simmons-Harris.⁴³ In *Zelman v. Simmons-Harris*, as noted above, the Court upheld as constitutional the Ohio Pilot Scholarship Program. That program had been enacted in partial response to a 1995 federal district court decision directing the state to take control of Cleveland's failing public schools. The program had two components. The main component provided scholarships to families with children in grades K-8 in Cleveland's public schools to enable those who chose to do so to send their children to private schools in the city or to public schools in the adjoining suburbs. Preference was given to students from families with incomes below 200% of the poverty line, and the scholarship could pay up to 90% of the private or out-of-district public school's tuition charge up to a maximum of \$2250. For students from families with higher incomes, the scholarship was capped at \$1875 and could pay up to 75% of the tuition charge. In the second component of the program, eligible students who chose to remain in public school could receive up to \$360 to pay for special tutorial assistance.

In the 1999-2000 school year 3761 students participated in the voucher program, and more than 2000 chose to receive tutorial assistance grants. Because

⁴¹(...continued)

benefit program not to precipitate any excessive entanglement between the government and the religious institutions that ultimately benefited from the program. In general the Court has not found excessive entanglement to exist except where a secular use restriction on a direct public aid program has required the government to engage in a "comprehensive, discriminating, and continuing...surveillance" of publicly funded activities on the premises of pervasively sectarian institutions. See, e.g., *Lemon v. Kurtzman*, *supra* and *Meek v. Pittenger*, 421 U.S. 349 (1975). But the Court has held such secular use restrictions and the consequent close monitoring not to be constitutionally necessary in indirect assistance programs. In addition, even in direct aid programs the Court has recently de-emphasized the risk that religious institutions receiving public aid will use the aid for religious purposes and, as a consequence, has de-emphasized the need for intrusive government monitoring of the institutions' use of the aid. See *Mitchell v. Helms*, *supra*.

⁴²*Witters v. Washington Department of Services for the Blind*, *supra*, at 490-91 (Powell, J., concurring).

⁴³122 S.Ct. 2460, 2002 U.S. LEXIS 4885, 70 U.S.L.W. 4683 (2002). For a more thorough summary of *Zelman*, see CRS Issue Brief IB10092, *Supreme Court: Church-State Cases, 2001-2002 Term*.

no suburban public schools chose to participate in the voucher program, all of the voucher students attended private schools in the city. Forty-six of the 56 private schools participating in the program that year (82%) were religiously-affiliated; and 96 %of the scholarship students were enrolled in those schools.

The Supreme Court upheld the scholarship program as constitutional, 5-4.⁴⁴ Chief Justice Rehnquist, writing for the Court, said that there was no dispute that the Pilot Scholarship Program served the “valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system.” The key question, he stated, was whether it had the forbidden effect of advancing or inhibiting religion; and the pertinent criteria for that question, he said, had been established in three prior cases involving indirect assistance to sectarian schools -- *Mueller v. Allen*, *Witters v. Washington Department of Services for the Blind*, and *Zobrest v. Catalina Foothills School District*. In each of these cases, he asserted, the Court had asked whether the aid was distributed to the initial recipients on a religion-neutral basis and whether those beneficiaries had a “true private choice” about whether to use the aid at religious or secular schools:

*Mueller, Witters, and Zobrest ... make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.*⁴⁵

Applying these criteria to the Cleveland program, the Court held the Pilot Scholarship Program to provide “educational assistance directly to a broad class of individuals defined without reference to religion, *i.e.*, any parent of a school-age child who resides in the Cleveland School District” (with a preference given low-income families).⁴⁶ It held as well that “the program challenged here is a program of true private choice.”⁴⁷

The latter ruling was the most controversial aspect of the decision and a major reason for the dissent by four Justices. In all of its prior cases concerning indirect assistance, the Court had analyzed the choice issue within the context of the challenged program, *i.e.*, it had asked whether the initial recipients of the aid had a broad and unfettered choice among a number of religious and secular options about where to use the aid. In *Zelman* the Court broadened its analysis of the options available to include not only where the scholarships themselves could be used – *i.e.*, private schools in the city, most of which were religious – but **all** of the educational alternatives available to parents in Cleveland. The Chief Justice stated:

There ... is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age

⁴⁴Joining in the majority were Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas. Justices Souter, Stevens, Breyer, and Ginsburg dissented.

⁴⁵*Zelman v. Simmons-Harris*, *supra*, at 70 U.S.L.W. 4687.

⁴⁶*Id.*

⁴⁷*Id.*

children. Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* of the options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.⁴⁸

Consequently, the Chief Justice concluded:

...[T]he Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.⁴⁹

In dissent Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, termed the Court’s decision a “dramatic departure from basic Establishment Clause principles” that reduced the criteria for evaluating the constitutionality of a voucher program to “verbal formalism” and that undermined “every objective supposed to be served” by the establishment clause. In particular, he charged, the Court’s analysis of the choice issue “ignores the reason for having a private choice enquiry in the first place.” That enquiry properly asks, he said, whether the parent or student that initially receives the public aid is free to channel it in either a secular or religious direction. But the majority eliminated the utility of that enquiry, he claimed, by bringing into the equation public spending on public magnet and community schools “that goes through no private hands and could never reach a religious school under any circumstance”:

If “choice” is present whenever there is any educational alternative to the religious school to which vouchers can be endorsed, then there will always be a choice and the voucher can always be constitutional, even in a system in which there is not a single private secular school as an alternative to the religious school.⁵⁰

Justice Souter further asserted that by allowing “substantial amounts of tax money” to be used to systematically underwrite religious practice and indoctrination, the Court’s decision undermined the three major purposes of the establishment clause. He claimed such aid violates respect for freedom of conscience by compelling individuals to subsidize religious instruction contrary to their own beliefs, compromises the integrity and independence of religious institutions by

⁴⁸*Id.* at 4688.

⁴⁹*Id.*

⁵⁰*Id.* agt 4701 (Souter, J., dissenting).

inevitably bringing government regulation in its wake, and threatens social conflict along religious lines as religious sects begin to compete for public subsidies and religious differences become the subject of public debate. “The reality,” Justice Souter concluded, “is that in the matter of educational aid the Establishment Clause has largely been read away.”⁵¹

Current Standards. In sum, then, the Supreme Court now interprets the establishment of religion clause to place only limited restraints on voucher programs that indirectly benefit sectarian schools. Since *Nyquist* it has consistently asked whether such programs serve a secular purpose and whether they have a primary effect of advancing religion; and under the latter test it has consistently asked whether the aid is distributed to its initial beneficiaries on a religiously neutral basis and whether the initial beneficiaries have a genuine choice among religious and secular options in using the aid. But *Zelman* makes clear that the Court no longer examines the choice issue in terms of the range of options where the aid itself can be used. Instead, the Court now analyzes whether the initial beneficiaries have a genuine, non-coerced choice among religious and secular options by looking at **all** of the educational options available. Given that universe of choice, Justice Souter’s charge that *Zelman* legitimates voucher programs even in systems “in which there is not a single private secular school as an alternative to a religious school” may well be true.

Moreover, to the extent that any doubt still existed, *Zelman* makes clear that the amount of aid that finds its way to religious schools in a voucher program is of no constitutional relevance. That conclusion seemed first to be adopted by the Court in *Mueller* and was then affirmed by five Justices in concurring opinions in *Witters*. The majority in *Zelman* reiterated the point: “The constitutionality of a neutral educational aid program simply does not turn on whether and why ... most recipients choose to use the aid at a religious school.”⁵²

Voucher programs that are adopted for the purpose of providing financial assistance to private religious schools or that confine their benefits exclusively to the parents of children already in private religious schools, as in *Nyquist*, may still be unconstitutional under the Court’s current standards. But *Zelman* seems to make clear that few other establishment clause inhibitions now apply to such programs.

Recent State and Lower Federal Court Decisions

Prior to the Supreme Court’s decision in *Zelman*, several state and lower federal courts reached conflicting conclusions about the constitutionality of particular voucher and voucher-related programs under the establishment of religion clause. The supreme courts of Wisconsin, Arizona, and Ohio held particular programs **not** to violate the establishment clause (although the Ohio court found its program to violate a procedural rule of the state constitution), while the U.S. courts of appeal for the First Circuit and the Sixth Circuit (in *Zelman*) and the Maine Supreme Court held to the contrary (although there is considerable doubt that the program in Maine is a

⁵¹*Id.* at 4706.

⁵²*Id.* at 4689.

genuine voucher program). Some of these decisions involved questions of state constitutional law as well. In other cases limited exclusively to state issues, appellate courts in Florida and Illinois held tuition subsidy and tax benefit programs not to violate their state constitutions, while the Vermont Supreme Court found its state constitution to forbid such programs (although the same doubt as to whether Vermont's program is a genuine voucher program exists as in the Maine program). In addition, an appellate court in Pennsylvania held a locally-initiated tuition subsidy program to violate state statutory law.

Subsequent to the *Zelman* decision, the issue of the constitutionality of voucher programs under the church-state provisions of state constitutions has become even more prominent, because many of those provisions are seemingly more restrictive of public aid, whether direct or indirect, than the First Amendment. As a consequence, litigation now is focusing not only on the meaning of particular state constitutional provisions but also whether those provisions, if construed to strike down voucher programs, violate the free exercise and/or equal protection provisions of the U.S. Constitution. So far a trial court in Florida has found that state's voucher program to violate a section of the state constitution barring the provision of public aid to sectarian institutions (*Holmes v. Bush, infra*); and the U.S. Court of Appeals for the Ninth Circuit has construed a similar provision of the Washington Constitution to have the same effect. But the latter court also found that provision of the Washington Constitution, so construed, to violate the free exercise clause of the First Amendment (*Davey v. Locke, infra*).

The cases are as follows:

(1) Jackson v. Benson. In *Jackson v. Benson*⁵³ the Wisconsin Supreme Court held the Milwaukee Parental Choice Program (MPCP) to be constitutional under both the establishment clause and the Wisconsin Constitution, 4-2. As originally enacted, the program provided vouchers worth up to \$2500 to a small number of poor children in grades 1-12 in Milwaukee to use to attend private nonsectarian schools in the city. But in 1995 Wisconsin substantially expanded the program and also began to allow private religious schools to participate. Upon suit a trial court found that two-thirds of the private schools participating were pervasively religious; and as a consequence, it held the expanded program to violate several provisions of the Wisconsin Constitution. In mid-1997 an appellate court affirmed, 2-1, in part on the grounds that the MPCP constituted a benefit to religious schools in violation of a section of Article I, § 18, of the state constitution prohibiting any money from being drawn from the treasury "for the benefit of religious societies, or religious or theological seminaries." The appellate court further held the voucher program to violate another section of the same provision stating that no person "shall ... be compelled to ... support any place of worship, or to maintain any ministry, without consent."

But in early 1998 the Wisconsin Supreme Court said the MPCP satisfied both sections of that state constitutional provision as well as the establishment clause of the First Amendment. The establishment clause was satisfied, the court held, because the program extended a benefit to parents on a religion-neutral basis and

⁵³218 Wis.2d 835, 578 N.W.2d 602, cert. den.,525 U.S. 480 (1998).

flowed to sectarian schools “only as a result of numerous private choices of the individual parents of school-age children.” The benefits clause of the state constitution, it asserted, should be interpreted in the same manner. Finally, it held, the compelled support clause of the Wisconsin Constitution was not violated because the program did not compel any person to attend a sectarian school or to participate in religious activities.⁵⁴

On November 9, 1998, the Supreme Court denied review.

(2) Kotterman v. Killian. In *Kotterman v. Killian*⁵⁵ the Supreme Court of Arizona held a program indirectly providing support for private schools, including sectarian schools, not to violate the establishment clause, 3-2. The case reviewed a state program allowing an annual tax credit up to \$500 for contributions to school tuition organizations (STOs). These private, tax-exempt organizations provide tuition grants to children “to allow them to attend any qualified school of their parents’ choice.” The tax credit is disallowed if a taxpayer designates that a donation be used for the benefit of a dependent, and the organizations are required to provide tuition grants to more than one school. The court said that the class of possible beneficiaries, *i.e.*, donors to the school tuition organizations, included all taxpayers and not a narrow group defined on the basis of religion. Moreover, it stated, Arizona’s program provided “multiple layers of private choice”:

Important decisions are made by two distinct sets of beneficiaries — taxpayers taking the credit and parents applying for scholarship aid in sending their children to tuition-charging institutions. The donor/taxpayer determines whether to make a contribution, its amount, and the recipient STO Parents independently select a school and apply to an STO of their choice for a scholarship. Every STO must allow its scholarship recipients to “attend any qualified school of their parents’ choice,” and may not limit grants to students of only one such institution Thus, schools are no more than indirect recipients of taxpayer contributions, with the final destination of these funds being determined by individual parents.

The decision was appealed to the Supreme Court; but on October 4, 1999, the Court chose not to review it.

(3) Simmons-Harris v. Goff.⁵⁶ In this predecessor case to *Zelman v. Simmons-Harris*, the Supreme Court of Ohio held the Ohio Pilot Scholarship Program as first enacted in 1995 not to violate the establishment clause but to violate a procedural provision of the Ohio Constitution. As noted in the discussion of *Zelman* above, the program provided scholarships worth up to \$2250 a year to children of poor families in the Cleveland public schools which could be used to

⁵⁴The Wisconsin Supreme Court also held the voucher program not to violate two other provisions of the Wisconsin Constitution – Art. IV, § 18, barring the legislature from enacting purely private or local bills; and Art. X, § 3, directing the state to establish a “uniform” system of free public schools in which “no sectarian instruction shall be allowed.” The court also held the program not to violate the “public purpose” doctrine that, while not explicit in the state constitution, “is a well-established constitutional doctrine.”

⁵⁵193 Ariz. 273, 972 P.2d 606 (Ariz. 1999), *cert. den.*, 528 U.S. 810 (1999).

⁵⁶86 Ohio St. 3d 1, 711 N.E. 2d 203 (1999).

attend either private schools in the city, including religious schools, or public schools in the school districts around Cleveland. The trial court found, however, that none of the surrounding public school districts had chosen to participate in the program and that 80% of the private schools that did participate were pervasively sectarian. Nonetheless, the trial court held the program to pass muster under the establishment clause and several provisions of the Ohio Constitution. On May 1, 1997, however, the Ohio Court of Appeals reversed, 2-1,⁵⁷ stating that the parents did not have a “genuine and independent” choice about where to use the scholarships and that the program provided “direct and substantial, non-neutral government aid to sectarian schools” in violation of the establishment clause and of two provisions of the Ohio Constitution it said were “coextensive” with the establishment clause.⁵⁸

On May 25, 1999, however, the Ohio Supreme Court reversed on the establishment clause issue (with one minor exception) by a margin of 4-3 but still held the program to violate one provision of the Ohio Constitution, 5-2. On the establishment clause issue, the court emphasized that the primary beneficiaries of the program were “children, not sectarian schools,” and that the relationship between state aid and the schools was “attenuated” because the parents made “independent decisions to participate in the School Voucher Program and independent decisions as to which registered nonpublic school to attend.” But while upholding most of the program, it did strike down one provision on establishment clause grounds. That provision allowed participating schools to give preference in admission on the basis, among other reasons, that the students’ parents were “affiliated with any organization that provides financial support to the school.” The court found that provision to create a financial “incentive for parents desperate to get their child out of the Cleveland City School District to ‘modify their religious beliefs or practices’ in order to enhance their opportunity to receive a ... scholarship” and thus to be unconstitutional.

Although finding the program generally to meet the requirements of the establishment clause, the court held it to have been enacted in a manner that violated the Ohio Constitution. The Ohio Constitution, it noted, mandates that each bill adopted by the legislature contain no more than one subject (Art. II, § 15D) as one means of preventing “logrolling.” But the voucher program had been enacted as a rider to a massive appropriations bill (it constituted 10 pages out of a 1000 page bill). Finding a “blatant disunity” between the voucher program and the rest of the appropriations bill and the absence of any “rational reason for their combination,” the court held the one-subject provision of the state constitution to have been violated. It delayed the effective date of the decision, however, until June 30, 1999, “in order to avoid disrupting a nearly completed school year.”

(4) *Simmons-Harris v. Zelman and Gatton v. Zelman.* This is the case that ultimately was accepted for review and decided by the Supreme Court as *Zelman v. Simmons-Harris*, and followed closely in the wake of *Simmons-Harris v. Goff*,

⁵⁷1997 Ohio App. LEXIS 1766 (Ct. App. Ohio, Tenth District, decided May 1, 1997).

⁵⁸Despite this decision, however, the program remained in effect while the appeal was pending in the Ohio Supreme Court. On July 24, 1997, that court stayed the decision pending resolution of an appeal.

supra. Both of the lower federal courts in this case the re-enacted Ohio Pilot Scholarship Program to violate the establishment clause.

On June 29, 1999, the Ohio legislature re-enacted the Pilot Scholarship Program that had been struck down in *Simmons-Harris v. Goff, supra*, with virtually no change as part of the “Education Budget Bill” (House Bill No. 282). On July 20 and 29, 1999, two new suits — *Simmons-Harris v. Zelman* and *Gatton v. Zelman* — were filed challenging the constitutionality of the program, this time in federal district court rather than state court. On August 24, 1999, the day most private schools opened for the fall term and the day before the Cleveland public schools opened, Judge Solomon Oliver granted the plaintiffs’ motion for a preliminary injunction, stating in a lengthy opinion that “the Plaintiffs have a substantial chance of succeeding on the merits.”⁵⁹ After a public outcry about the hardship the injunction placed on the voucher children who were already enrolled in private schools and on the public schools that suddenly had to accommodate several thousand new students, Judge Oliver on August 27, 1999, partially stayed the injunction and permitted students who had been enrolled in the scholarship program in the last school year to continue.⁶⁰ The court’s order allowed enrolled students to continue only for one more semester. But on November 5, 1999, the Supreme Court, by a 5-4 margin, granted an emergency request by Ohio and stayed the preliminary injunction in its entirety, allowing about 800 new students to participate as well and permitting the voucher program to continue beyond the first semester.⁶¹

On December 20, 1999, Judge Oliver held Ohio’s Pilot Scholarship Program to violate the establishment clause.⁶² He found that no out-of-district public schools were participating in the program, that 82% of the private schools which were participating were church-related, and that 96% of the voucher students attended such schools. Because of this domination by church-affiliated schools, he concluded that the program was “skewed toward religion” and provided “financial incentives to attend religious schools.” Under Ohio’s program, he asserted, “parents and their children do not have a significant choice between parochial and nonparochial schools That choice is essentially made for them as a function of the fact that almost all participating schools are religious in nature.” Thus, the court permanently enjoined continuation of the voucher program. But, on the basis of the consent of all of the parties, Judge Oliver stayed the injunction pending a final decision of an appeal to the U.S. Court of Appeals for the Sixth Circuit.

⁵⁹*Simmons-Harris v. Zelman*, 54 F.Supp.2d 725 (N.D. Ohio Aug. 24, 1999) (order granting preliminary injunction).

⁶⁰*Simmons-Harris v. Zelman*, 54 F.Supp.2d 725 (N.D. Ohio Aug. 27, 1999) (order modifying preliminary injunction).

⁶¹*Zelman v. Simmons-Harris*, 528 U.S. 943 (1999). The majority was comprised of Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas.

⁶²*Simmons-Harris v. Zelman*, 72 F.Supp.2d 834 (N.D. Ohio 1999).

On December 11, 2000, the U.S. Court of Appeals for the Sixth Circuit affirmed Judge Oliver’s decision, 2-1.⁶³ The majority found the case to be analogous to, and controlled by, the Supreme Court’s decision in *Committee for Public Education v. Nyquist, supra* (see pp 5-6). In that case, the appellate court said, the Court had held unconstitutional a state program reimbursing low-income parents for the cost of tuition incurred in sending their children to private elementary or secondary schools. Because 80% of those schools were sectarian, the Court said the tuition reimbursements provided an incentive for parents to send their children to sectarian schools and had the “unmistakable” effect of providing “desired financial support for nonpublic, sectarian institutions.”

The Sixth Circuit said “*Nyquist* governs our result.” Although the program invited public schools outside of Cleveland to participate, the court stated, none had chosen to do so. It said that the low level of the scholarship amount – \$2500 – “limited the ability of nonsectarian schools to participate in the program” but encouraged sectarian schools to do so, because the latter often had lower tuition needs. As a consequence, it said, the “choice” afforded the public and private school participants in the program was “illusory,” and “the program clearly has the impermissible effect of promoting sectarian schools”:

We find that when, as here, the government has established a program which does not permit private citizens to direct government aid freely as is their private choice, but which restricts their choice to a panoply of religious institutions and spaces with only a few alternative possibilities, then the Establishment Clause is violated There is no neutral aid when that aid principally flows to religious institutions; nor is there truly “private choice” when the available choices resulting from the program design are predominantly religious.

On February 28, 2001, the Sixth Circuit denied a petition for a rehearing *en banc*.⁶⁴ As noted, the Supreme Court agreed to review this decision; and on June 27, 2002, it reversed the ruling of the Sixth Circuit. *See infra* at pp. 10-13.

(5) Bagley v. Raymond School Department. In *Bagley v. Raymond School Department*⁶⁵ the Maine Supreme Judicial Court held the exclusion of private sectarian schools from a state tuition subsidy program to be required by the establishment clause, 5-1. In rural areas without public schools Maine provides tuition subsidies to enable the children to attend other public schools in nearby school districts or private nonsectarian schools. Once a parent selects a school, the state pays the subsidy directly to the school. Prior to 1981 the program allowed sectarian private schools to participate, but an opinion of the state attorney general that year ruled their participation to violate the establishment clause. Several parents in Raymond, Maine, who wanted to send their children to a Catholic high school challenged the exclusion of sectarian schools from the program as violating their rights under the establishment, free exercise, and equal protection clauses of the U.S. Constitution.

⁶³Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000).

⁶⁴*Simmons-Harris v. Zelman*, 2001 U.S.App.LEXIS 3344 (6th Cir. Feb. 28, 2001).

⁶⁵*Bagley v. Raymond School Department*, 1999 Me. 60, 728 A.2d 127, *cert. den.*, 528 U.S. 947 (1999) (No. 99-163).

The Maine Supreme Court, however, held the exclusion of such schools to be constitutionally required. The free exercise clause, the court stated, did not give the petitioners any right to a public subsidy for a religious education for their children; and their exercise of their religious beliefs could not be said to be significantly burdened by the denial of such a subsidy. The establishment clause argument, it said, was misplaced, because that clause “simply does not speak to governmental actions that fail to support religion.” Finally, the court held, the petitioners’ equal protection contention failed, because the state had no constitutional choice but to exclude the religious schools. Any disparate treatment passed muster under the equal protection clause, it said, because the state had a compelling interest in abiding by the establishment clause prohibition on direct public funding of sectarian schools:

Although the school is chosen by parents, not the State, choice alone cannot overcome the fact that the tuition program would directly pay religious schools for programs that include and advance religion That state funds would flow directly into the coffers of religious schools in Maine were it not for the existing exclusion cannot be debated In the entire history of the Supreme Court’s struggle to interpret the Establishment Clause it has never concluded that such a direct, unrestricted financial subsidy to a religious school could escape the strictures of the Establishment Clause

The court stated that the legislature might craft a more flexible program but suggested that such a program would still face “significant problems of entanglement or the advancement of religion.” The court also held that the pertinent provisions of the Maine Constitution were not violated, because they were coextensive with the federal provisions.

The decision was appealed to the Supreme Court; but the Court on October 12, 1999, chose not to review it.

(6) Strout v. Albanese. In this parallel case the U.S. Court of Appeals for the First Circuit also held Maine’s exclusion of sectarian schools from its tuition subsidy program to be constitutionally required.⁶⁶ The facts and the claims were essentially the same as those in *Bagley*, the only difference being that this case was initiated by parents in Lewiston, Maine, who chose to send their children to a sectarian high school. The federal district court held the parents to have no constitutional right “to require the taxpayers to subsidize that choice,” and the appellate court affirmed. The First Circuit, as did the Maine Supreme Court, framed the issue as one involving the constitutionality of the **direct** payment of tuition by the state to sectarian schools, and it reached the same conclusion:

The historic barrier that has existed between church and state throughout the life of the Republic has up to the present acted as an insurmountable impediment to the direct payments or subsidies by the state to sectarian institutions, particularly in the context of primary and secondary schools Although the guidance provided by the Supreme Court has been less than crystalline ..., approving direct payments of tuition by the state to sectarian schools represents a quantum leap that we are unwilling to take. Creating such a breach in the wall separating the

⁶⁶178 F.3d 57 (1st Cir.), *cert. den.*, 528 U.S. 931 (1999) (No. 99-254).

State from secular establishments is a task best left for the Supreme Court to undertake.

The court further held the establishment clause to give a religiously affiliated group no right to secure state subsidies, that the exclusion of sectarian schools did not violate the parents' equal protection rights because Maine had a compelling interest in conforming with the requirements of the establishment clause by excluding such schools, and that the exclusion did not substantially burden the parents' right to the free exercise of religion.

The decision was appealed to the Supreme Court; but on October 12, 1999, the Court chose not to review it.

(7) Chittenden Town School District v. Vermont Department of Education. Like Maine, Vermont requires school districts that do not maintain a secondary school to pay tuition for students to attend either public high schools in nearby school districts or private schools. Also like Maine, the payments are made directly to the schools after the parents/children have made their choices. When the Chittenden School Board adopted a policy allowing tuition subsidies to be paid for attendance at sectarian secondary schools, the state terminated its education aid to the district. The Chittenden Town School District then sued, seeking a declaratory judgment that tuition subsidies for students attending sectarian schools are constitutional and an order restoring the state aid.

In *Chittenden Town School District v. Vermont Department of Education*, a trial court held such subsidies to violate both the U.S. and the Vermont constitutions; and on appeal the Vermont Supreme Court affirmed on state constitutional grounds, 5-0.⁶⁷ It did not address the establishment clause issue, it said, because “the construction of the federal constitution ... faces an uncertain future” Instead, the Supreme Court relied on the “compelled support” provision in Chapter I, Article 3, of the Vermont Constitution mandating that “no person ought to, or of right can be compelled to ... erect or support any place of worship ..., contrary to the dictates of conscience”

On the basis of an examination of the text of the compelled support provision, its history and application in Vermont, and judicial constructions of identical provisions in other states constitutions, the appellate court concluded that “the Chittenden School District tuition-payment system, with no restrictions on funding religious education, violated Chapter I, Article 3.” “The major deficiency in the tuition-payment system,” it said, “is that there are no restrictions that prevent the use of public money to fund religious education.”

The court also stressed that the prohibitions of Chapter I, Article 3, would apply even if the tuition payments were not made directly to the sectarian schools. It said:

... [T]he United States Supreme Court may well decide that the intervention of unfettered parental choice between the public funding source and the educational

⁶⁷738 A.2d 539 (Vt.), *cert. den. sub nom. Andrews v. Chittenden Town School District*, 528 U.S. 1066 (1999).

provider will eliminate any First Amendment objection to the flow of public money to sectarian education. We cannot conclude, however, that parental choice has the same effect with respect to Article 3. If choice is involved in the Article 3 equation, it is the choice of those who are being required to support religious education, not the choice of the beneficiaries of the funding.

Finally, the court rejected the contention that the exclusion of sectarian schools violated the parents' right to the free exercise of their religion.

On December 13, 1999, the Supreme Court denied review.

(8) *Giacomucci v. Southeast Delco School District*. On December 23, 1999, the Commonwealth Court of Pennsylvania affirmed a trial court decision holding that a local school district lacked the authority under the Pennsylvania Public School Code to institute a tuition subsidy program for students attending private schools or out-of-district public schools.⁶⁸ The school district had initiated a "School Choice Enrollment Stabilization Plan" providing subsidies ranging from \$250 for kindergarten students to \$1000 for high school students for the express purposes of expanding parental choice, improving school quality, and alleviating overcrowding in the public schools. But upon suit challenging the plan on both constitutional and statutory grounds, a trial court held that the school district had no authority under the School Code to provide such subsidies.

On appeal the seven-judge Commonwealth Court, without addressing any constitutional issues, unanimously affirmed (although two concurred only in the judgment). Emphasizing that a school district is wholly a statutory creation and that it has no powers other than those conferred by the School Code, the court found that "the School Code does not expressly authorize the reimbursement of tuition fees" and that it provided no implied power to the school district to initiate such a plan. The school district contended that the general directive in the Code that the districts "establish, equip, furnish, and maintain a sufficient number of elementary public schools" and educate its residents between the ages of 6 and 21 implicitly gave it the power to do so. But the court said that was "far too great a leap of logic." The school district also argued that it had implicit authority to take actions not expressly prohibited by the School Code, but the court held that school districts had implied authority only as a "necessary implication" of a specific provision of the Code. Finally, the court examined a number of features of the School Code and concluded that the General Assembly "did not intend to permit school districts to implement tuition reimbursement plans."

The school district chose not to appeal this decision.

⁶⁸*Giacomucci v. Southeast Delco School District*, 742 A.2d 1165 (Commonwealth Court 1999).

(9) Toney v. Bower.⁶⁹ On February 8, 2001, an Illinois appellate court upheld as constitutional under the state constitution a state statute allowing parents an income tax credit of up to \$500 for “qualifying education expenses” incurred in sending their children to elementary or secondary school. “Qualifying education expense” was defined to mean an amount in excess of \$250 incurred for tuition, book fees, and lab fees; and the credit was available to the parents of children attending either public or private schools, including sectarian schools.

The tax credit was challenged as compelling all taxpayers to support a ministry or place of worship in violation of § 3 of Article I of the Illinois Constitution, as being an appropriation or payment from a public fund in aid of sectarian schools and sectarian purposes in violation of § 3 of Article X, as not being for a public purpose as required by Article VIII, and as discriminating against the parents of public school children in violation of the “reasonableness” requirement of § 2 of Article IX. The plaintiffs argued that most parents of public school children could not benefit from the tax credit because book and lab fees never exceeded \$250 and tuition was charged only to a small number who attended public schools outside of their home district. As a consequence, they contended, parents of public school children were largely disqualified and “virtually all the money that will be diverted from the State treasury as a result of the Credit will be expended at private schools, the vast majority of which are sectarian.” Nonetheless, the trial court held the tax credit program to meet the requirements of the Illinois Constitution and, on appeal, the Appellate Court for the Fourth District affirmed.

The appellate court stated that the restrictions concerning the establishment of religion in the Illinois Constitution are “identical to those contained in the federal establishment clause.” As a consequence, it found the issue to be controlled by the Supreme Court’s decision in *Mueller v. Allen*, 463 U.S. 388 (1983). It noted that in that case the Supreme Court had upheld a Minnesota program allowing taxpayers to claim a deduction on their state income taxes for “educational expenses” such as tuition, textbooks, and transportation. On the basis of the Court’s conclusions in that case, the appellate court held the Illinois tax credit (1) to serve the secular purposes of “ensuring that Illinois children are well educated” and of “maintaining the financial health of private schools”; (2) not to have a primary effect of advancing religion because the tax credit was “but one of many tax credits allowed by our tax laws,” was “equally available to all parents of public school children, as well as to those who send their children to private nonsectarian or sectarian schools,” and became “available to schools only as the result of private choices made by individual parents”; and (3) not to foster an excessive entanglement with religion. The appellate court also rejected the contention that the tax credit did not serve a “public purpose” and was not a “reasonable” tax classification as required by the state constitution, stating that the purposes of aiding the education of Illinois’ children and of maintaining the financial health of private schools were valid public purposes and that helping only those who incurred higher costs in sending their children to school was a reasonable distinction.

⁶⁹318 Ill.App.3d 1194, 744 N.E.2d 351 (Ill. App. 4th Dist.), *appeal denied*, 195 Ill.2d 573, 754 N.E.2d 1293 (2001). This decision has been followed in what appears to be a virtually identical case, *Griffith v. Bower*, 319 Ill.App.3d 993, 747 N.E.2d 423 (Ill. App. 5th Dist. April 3, 2001).

On June 6, 2001, the Illinois Supreme Court rejected a petition to review this decision.

(10) Davey v. Locke.⁷⁰ On July 18, 2002, the U.S. Court of Appeals for the Ninth Circuit held the free exercise clause of the First Amendment to be violated by a statute and a constitutional provision in the state of Washington that were applied to deny a college scholarship to an eligible student simply because he planned to pursue a degree in theology at a religious college. Article I, § 11, of the Washington Constitution provides in part that “[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.” Reflecting that stricture, a state statute providing college scholarships for in-state, low and moderate income college students included a provision stating that “[n]o aid may be awarded to any student who is pursuing a degree in theology.”⁷¹ As a consequence, the state denied a Promise Scholarship to a student enrolled in a religious college who sought to pursue a double major in Pastoral Ministries and Business Management and Administration.

Upon suit a federal district court granted summary judgment for the state. But the Ninth Circuit reversed, 2-1. The court held that the state’s statutory and constitutional restrictions could not survive strict scrutiny under the free exercise clause of the First Amendment.

The majority said that the state’s denial of a scholarship was religiously discriminatory and “lacks neutrality on its face.” As a consequence, the court stated, it could be upheld only if it were shown to serve a compelling public interest in a narrowly tailored manner. The state argued that not violating its own state constitution constituted such an interest and observed that its own Supreme Court had previously rejected a free exercise claim against a very similar statute in *Witters v. State Commission for the Blind*.⁷² But while recognizing state’s interest to be “indisputably strong,” the appellate court concluded that it was “less than compelling”:

The Promise Scholarship is a secular program that rewards superior achievement by high school students who meet objective criteria. It is awarded to students; no state money goes directly to any sectarian school. Scholarship funds would not even go indirectly to sectarian schools for non-secular study unless an individual recipient were to make the personal choice to major in a subject taught from a religious perspective, and then only to the extent that the proceeds are used for tuition and are somehow allocable to the religious major In these

⁷⁰2002 U.S. App. LEXIS 14461 (9th Cir. 2002).

⁷¹Wash. Rev. Code § 28B.10.814.

⁷²711 P.2d 1119 (1989). This decision was on remand from the U.S. Supreme Court’s decision in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), which held the establishment clause to be no bar to the provision of a vocational rehabilitation grant to a student who wanted to use it to study for the ministry. But the Court noted that Washington had constitutional provisions more strict than the establishment clause and left it to the state to determine whether the grant was barred by the state constitution. The Washington Supreme Court held that to be the case and found the free exercise objection to be unavailing.

circumstances it is difficult to see how any reasonably objective observer could believe that the state was applying state funds to religious instruction or to support any religious establishment by allowing an otherwise qualified recipient to keep his Scholarship.

Consequently, the majority held the statutory restriction and the state constitutional provision, as applied in this case, to violate the free exercise clause.

(11) Holmes v. Bush. On August 5, 2002, the Circuit Court for Leon County, Florida, held the state’s Opportunity Scholarship Program (OSP) to violate Article I, § 3, of the state Constitution, which bars public revenue from ever being used “directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.”⁷³ The OSP, enacted in 1999, makes students in public schools graded by the state as “failing” eligible for vouchers to pay for their enrollment in private schools, including sectarian schools, or other higher-rated public schools. For the initial three years of the program, only two elementary schools in Escambia County were deemed to be failing, and only 57 students opted to accept vouchers. Fifty-three of the students enrolled in four sectarian private schools while the other four enrolled in a nonsectarian private school. For the 2002-2003 school year ten public schools have been rated as failing, and several hundred students have reportedly applied for vouchers.

Soon after the OSP was first enacted in 1999, two suits were filed challenging the constitutionality of the program under both the state and federal constitutions. On March 14, 2000, the Circuit Court for Leon County, after consolidating the cases and addressing only one of the constitutional claims, held the OSP to violate Art. IX, § 1, of the Florida Constitution,⁷⁴ which states that

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

The trial court said that this section prescribes both the **objective** of making adequate provision for the education of all children within the state and the **exclusive manner** in which that duty is to be accomplished, namely, by means of a “uniform, efficient, safe, secure, and high quality system of free public schools.”

On appeal the Florida Court of Appeal for the First District reversed,⁷⁵ finding that the trial court had misapplied the maxim *expressio unius est exclusio alterius* (to express or include one thing implies the exclusion of the alternative). Article IX, § 1, it said, mandates that the state “make adequate provision for the education of all children” in Florida. But the appellate court held that it does not prescribe an

⁷³Holmes v. Bush, Case No. CV 99-3370 (Cir. Ct. Leon County, decided August 5, 2002).

⁷⁴Holmes v. Bush, Case No. CV 99-3370 (Cir. Ct. Leon County, decided March 14, 2000).

⁷⁵Bush v. Holmes, 767 So.2d 668 (Fla. Dist. Ct. App. 2000), *review denied*, 790 So. 2d 1104 (Fla. 2001).

exclusive means: “[S]ection 1 does not unalterably hitch the requirement to make adequate provision for education to a single, specified engine, that being the public school system.” In support of that conclusion, the court emphasized that Art. IX, § 1, did not explicitly bar tuition subsidies or explicitly direct that its mandate could be carried out only by means of public schools. It further noted that prior judicial decisions had held findings of implicit prohibitions in the constitution to be generally disfavored and that the legislature had in the past provided subsidies for certain “exceptional” students to attend private schools when the public schools lacked the necessary facilities or personnel. Consequently, the appellate court overturned the trial court’s decision on this issue and remanded the case to the trial court for further proceedings on the additional constitutional claims that had been raised against the program under other provisions of the Florida Constitution and the establishment clause.

On April 24, 2001, the Florida Supreme Court refused to hear an appeal of this decision.⁷⁶

On remand, and after the U.S. Supreme Court decision in *Zelman*, the plaintiffs in the suit abandoned their establishment clause claim and concentrated their arguments on Article I, § 3, of the Florida Constitution. As noted above, on August 5, 2002, the circuit court held the OSP to violate that clause. Although “empathizing” with the purpose of the legislation, Judge Davey said that he could not “abandon the clear mandate of the people as enunciated in the constitution.” The directive, he stated, was “clear and unambiguous” – no public aid may be provided to religious institutions. To accept the argument that the state did not provide any funds to sectarian schools under the OSP because parents made the choice of what schools their children would attend, he asserted, would represent “a colossal triumph of form over substance.”

Judge Davey enjoined the program, but a Florida appellate court reportedly has stayed that injunction pending appeal of his ruling. State officials have confirmed that they will appeal.

⁷⁶Holmes v. Bush, 790 So.2d 1104 (Fla. 2001).