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Education Vouchers: Constitutional Issues and Cases

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Summary

Whether government ought to provide assistance to help parents send their elementary and secondary school children to out-of-district public schools and/or private schools has become a recurring issue for Congress and state legislatures. One dimension of that issue concerns whether the use of such assistance at private sectarian schools violates the part of the First Amendment to the Constitution providing that "Congress shall make no law respecting an establishment of religion ...." In numerous cases the Supreme Court has construed the establishment clause to impose constraints on the provision of public aid to sectarian elementary and secondary schools. But the constraints are not absolute, and the Court's recent decisions suggest that the constitutional constraints are loosening.

Under the establishment clause **direct** public assistance to religious entities must be secular in nature and limited to secular use. Prior to the Court's recent decisions, this requirement had made it very difficult for religious entities deemed to be "pervasively sectarian," such as religious elementary and secondary schools, to receive aid directly from the government, because religion was presumed to pervade all of their activities. But the Court now appears to have abandoned that presumption As a consequence, such entities now appear to be constitutionally eligible for such assistance, subject to the secular nature and secular use requirements.

However, public aid programs that benefit sectarian entities only **indirectly**, such as voucher programs, need not be so limited. If the government designs an indirect aid program so that the initial beneficiaries (the taxpayers or voucher recipients) inevitably use the benefits to subsidize religious entities, the Court's decisions indicate that the program will likely be found unconstitutional. But if the benefits are made available on a religion-neutral basis and if the initial beneficiaries have a genuine choice between secular and religious providers about where to use the assistance, the Court's decisions indicate that the program likely will be found to be constitutional even though religious institutions gain some benefit.

Illustrating the difficulty of navigating the constitutional shoals of these standards, several state and federal courts have recently reached conflicting conclusions about the constitutionality of particular voucher or voucher-related programs. State supreme courts in Wisconsin, Arizona, and Ohio have held particular programs **not** to violate the establishment clause In contrast, the U.S. courts of appeals for the First Circuit and the Sixth Circuit and the Maine Supreme Court have held particular tuition subsidy programs to violate the establishment clause. In addition, a state court in Vermont has held such a program to violate its state constitution, one in Florida has held to the contrary, and one in Pennsylvania has found a local program to violate state law. The U.S. Supreme Court has so far refused to review any of these cases.

This report summarizes the constitutional standards that currently govern direct and indirect government assistance to sectarian schools as well as the pertinent state and lower federal court decisions. It 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 out-of-district public schools or private schools, including sectarian institutions, has become a recurring and politically charged issue at both the federal and state levels. Congress, for instance, has adopted several voucher and tax benefit programs that have been vetoed by President Clinton.[1] Several states, in turn, have instituted voucher programs either for specific localities or on a state-wide basis.[2]

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[1] 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 such expenses as tuition and fees, special needs services, books and equipment, room and board, and transportation 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 information on the consideration of school choice proposals in the 106th Congress and subsequently, *see* CRS Issue Brief IB98035, *School Choice: Current Legislation*, by Wayne Riddle and Jim Stedman.

[2] Wisconsin adopted a voucher plan applicable only to Milwaukee, and Ohio did so for Cleveland. In 1999 Florida adopted a state-wide voucher program that includes private sectarian schools. See Fla. Stat. Ch. 229.0537 (1999) (Opportunity Scholarship Program). For additional information on state school choice programs, *see* CRS Report 95-344, *Federal Support of School Choice: Background and Options*, by Wayne Riddle and Jim Stedman.

One of the recurring dimensions of the voucher issue[3] concerns whether the inclusion of sectarian elementary and secondary schools in the universe of schools which students might attend with vouchers violates the part of the First Amendment to the Constitution providing that "Congress shall make no law respecting an establishment of religion ...."[4] In numerous cases the Supreme Court has construed the establishment clause to impose limitations on the provision of public aid to sectarian elementary and secondary schools. But the constraints of the establishment clause are not absolute. The Court's decisions permit a limited degree of public aid to be provided directly to sectarian elementary and secondary schools and a broader range of assistance to be provided indirectly. But the Court's standards are not completely transparent. Perhaps as a consequence, conflicting judicial decisions have recently been handed down on the constitutionality of particular voucher and voucher-related programs in the states of Wisconsin, Ohio, Arizona, and Maine. In addition, state courts in Vermont and Florida have reached contrary decisions under their state constitutions, and a court in Pennsylvania has found a local program to be prohibited by state law.

The following sections summarize the constitutional standards articulated by the Court for public aid programs that provide assistance directly to sectarian schools and other religious entities and, in greater detail, for programs that provide assistance to sectarian schools indirectly (*i.e.*, voucher and tax benefit programs). A concluding section summarizes recent judicial decisions concerning state and local voucher and voucher-related programs.

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."[5] 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...."[6] 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 proselytizing.[7] Direct assistance must be limited to secular use.[8]

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[3] This report uses the term "voucher" broadly to mean not only tuition subsidy and tuition grant programs but also tax benefit proposals.

[4] The establishment clause has 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).

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

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

[7] In 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

(continued...)

Thus, religious organizations are not automatically disqualified from participating in publicly funded programs. But the secular use limitation on such aid means that a religious organization's secular functions and activities must be able to be separated from its religious functions and activities. As a consequence, until recently the Court 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.[9] That construction of the establishment clause was a particular burden for religious elementary and secondary schools, because the Court generally deemed such schools to fall within that category.[10] For other entities such as religiously affiliated hospitals, social welfare agencies, and colleges, the Court presumed to the contrary.[11]

But the Court has recently abandoned that presumption regarding sectarian elementary and secondary schools.[12] Pervasive sectarianism, in other words, is no longer a constitutionally preclusive criterion for direct aid programs. The basic

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[7] (...continued)
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. It should also be noted that the Court has substantially modified both the primary effect test and the entanglement test. *See* Agostini v. Felton, 521 U.S. 203 (1997) and Mitchell v. Helms, 120 S.Ct. 2530 (2000).

[8] Mitchell v. Helms, 120 S.Ct. 2530 (2000).

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

[10] See, *e.g.*, Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) (maintenance and repair grants to sectarian elementary and secondary schools held unconstitutional); Lemon v. Kurtzman, 403 U.S. 602 (1971) (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).

[11] See, *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 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).

[12] Agostini v. Felton, 521 U.S. 203 (1997) and Mitchell v. Helms, 120 S.Ct. 2530 (2000).

constitutional standards governing direct public assistance to religious entities now appear to be that the aid must be "secular, neutral, and nonideological" in nature and be limited to secular use by the recipient institution, although the Court has left open the possibility that other as-yet-unspecified constitutional requirements may exist as well.[13]

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 schools. However, where the design of the programs has not dictated where the assistance is channeled but has given a genuine 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.

Seven decisions by the Court are particularly important in defining the constitutional parameters of 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*[14] 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 aid to low-income parents of children attending private elementary or secondary school while another program permitted middle-income parents of children attending such schools to take a predetermined amount as a tax deduction for each attendee. In *Sloan* a state tuition grant program provided aid to all parents with children attending private elementary and secondary schools. In both cases the Court found that most of the private schools attended were religiously

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[13] In 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 and was restricted to secular use 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 reaching religious schools' coffers and that it supplemented rather than supplanted school expenditures. Similarly, in Mitchell the deciding opinion of Justice O'Connor noted that the aid program had not only those characteristics but also that there was no evidence that aid had been diverted to religious use and that there were a number of state and local monitoring activities. In both cases the Court held such factors, along with the secular nature of the aid and its limitation to secular use by the recipient institutions, to be "sufficient" to render the program constitutional, although it specifically refrained from saying they were constitutionally "necessary."

[14] 413 U.S. 825 (1973).

affiliated (85-90 percent), 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."[15] "In both instances," it said in *Nyquist*, "the money involved represents a charge made upon the state for the purposes of religious education."[16]

In three other cases involving programs indirectly assisting private sectarian schools, on the other hand, the Court reached a contrary conclusion. In *Mueller v. Allen*[17] Minnesota provided a tax deduction 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*[18] 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. *Zobrest v. Catalina Foothills School District*,[19] in turn, involved a Tucson school district's subsidy of a sign-language interpreter under the federal "Individuals with Disabilities Education Act"[20] for a deaf student attending a sectarian secondary school. The Court held all three forms of assistance to be constitutional.

The Court differentiated the tax benefit program in *Mueller* from the one it had held unconstitutional in *Nyquist* by noting 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.[21] (Emphasis added.)

The Court also 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."[22] Moreover, it rejected the argument that the tax deduction disproportionately benefited religious institutions because parents of children attending such schools could deduct tuition while parents of public school children could not, saying that it "would be loath to adopt a rule grounding the

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[15] Committee for Public Education v. Nyquist, *supra*, at 783.

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

[17] 463 U.S. 388 (1983).

[18] 474 U.S. 481 (1986).

[19] 509 U.S. 1 (1993).

[20] 20 U.S.C.A. 1401 *et seq*.

[21] Mueller v. Allen, *supra*, at 397.

[22] *Id.* at 399.

constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."[23]

In *Witters,* a unanimous decision, the Court again emphasized that in the vocational rehabilitation program "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." The Court also stressed that the function of the program was not to provide support for nonpublic, sectarian institutions and noted that 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."[24]

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."[25]

In addition to these full decisions, the Court has also summarily affirmed two lower federal court rulings upholding education grants to college students, including those attending religious colleges, that help them defray the cost of attendance. Both *Smith v. Board of Governors of the University of North Carolina*[26] and *Americans United for the Separation of Church and State v. Blanton*[27] involved the federal

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[23] *Id.* at 401.

[24] Witters v. Washington Department of Services for the Blind, *supra,* at 487. Justice Marshall wrote the opinion of the Court in this case and 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. Although the decision was unanimous, five Justices authored or joined in concurring opinions that seemed to disclaim this factor as having any constitutional significance. All of the concurring opinions stressed that this case was controlled by the Court's decision in Mueller v. Allen, *supra*. Justice Marshall had been one of the dissenters in that decision and made little mention of Mueller in the opinion of the Court he authored in Witters. But the five concurring Justices said Mueller controlled 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). Mueller, moreover, expressly discounted the importance of whether parents of children attending private school received a disproportionate amount of the tax benefit. As a consequence, there appears to be substantial doubt that the factor of the amount of aid flowing to religious institutions cited by Justice Marshall is a constitutionally significant factor.

[25] Zobrest v. Catalina Foothills School District, *supra,* at 10.

[26] 429 F.Supp. 871 (W.D.N.C.), *aff'd mem.*, 434 U.S. 803 (1977).

[27] 433 F.Supp. 97 (M.D. Tenn.), *aff'd mem.*, 434 U.S. 803 (1977).

"State Student Incentive Grant" program.[28] 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.

Thus, the critical elements distinguishing indirect assistance programs that have been held constitutional from those struck down under the establishment clause appear to be the religious neutrality of the beneficiary class and the element of choice. If the government designs a program so that the initial beneficiaries are selected on the basis of a religious criterion or a related proxy, or if the universe of choices available to the initial beneficiaries is dominated by sectarian entities, the program appears likely to be held unconstitutional on the grounds it has a primary effect of advancing religion. But if the class of initial beneficiaries includes public as well as private schoolchildren and/or their parents and if they have a genuine choice among religious and secular schools about where to use the assistance, the program is likely to be held **not** to have an unconstitutional primary effect of advancing religion even though religious schools may benefit.[29]

The Court's recent decision in *Mitchell v. Helms, supra*, does not appear to have changed these standards. Indeed, although there was no majority opinion in the case, all of the Justices appear to have affirmed the same constitutional standards for indirect aid. Justice Thomas authored an opinion joined by Chief Justice Rehnquist and Justices Scalia and Kennedy which, in effect, collapsed the distinction between direct and indirect aid programs and deemed both to be constitutional so long as the aid is distributed on the basis of religiously neutral criteria. He stated:

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[28] 20 U.S.C.A. 1070c *et seq*.

[29] It seems doubtful that the entanglement aspect of the Lemon test poses a serious obstacle to educational voucher programs. The Court addressed the issue only in Mueller, and there it found the tax 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 such secular use restrictions are not constitutionally necessary in indirect assistance programs. In addition, 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*.

> As a way of assuring neutrality, we have repeatedly considered whether any governmental aid that goes to a religious institution does so "only as a result of the genuinely independent and private choices of individuals." *Agostini, supra,* at 226 .... We have viewed as significant whether the "private choices of individual parents," as opposed to the "unmediated" will of government, *Ball*, 473 U.S. at 395, n.13 ..., determine what schools ultimately benefit from the governmental aid and how much. For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment.
> 120 S.Ct. at 2541 (Thomas, J.).

The other five Justices all supported a continuing constitutional distinction between direct and indirect aid programs. But they seemed to concur with respect to the constitutional standards governing indirect aid programs. Justice Souter, joined by Justices Stevens and Ginsburg, stated:

> ...[W]e have distinguished between direct aid that reaches religious schools only incidentally as a result of numerous individual choices and aid that is in reality directed to religious schools by the government or in practical terms selected by religious schools themselves. *Mueller* ...; *Witters* ...; *Zobrest* .... In these cases we have declared the constitutionality of programs providing aid directly to parents or students as tax deductions or scholarship money, where such aid may pay for education at some sectarian institutions ... but only as the result of "genuinely independent and private choices of aid recipients" ....
> 120 S.Ct. at 2584 (Souter, J., dissenting).

Justice O'Connor, joined by Justice Breyer, similarly stated:

> ...[W]e decided *Witters* and *Zobrest* on the understanding that the aid was provided directly to students who, in turn, made the choice of where to put that aid to use .... Accordingly, our approval of the aid in both cases relied to a significant extent on the fact that "[a]ny aid ... that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Witters, supra,* at 487 .... This characteristic of both programs made them less like a direct subsidy, which would be impermissible under the Establishment Clause ....
> 120 S.Ct. at 2558 (O'Connor, J., concurring).

Justice Powell appears to have captured 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."[30]

Recent Judicial Decisions

Several state and federal courts have recently reached conflicting conclusions about the constitutionality of particular programs said to be voucher and voucher-related programs. The supreme courts of Wisconsin, Arizona, and Ohio have 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 and the Maine Supreme Court have held to the contrary (although there is considerable doubt that the program in Maine is a genuine voucher program). In addition, the Vermont Supreme Court and a trial court in Florida, without addressing the establishment clause issue, have reached opposite conclusions about whether their state tuition subsidy programs violate their state constitutions (although the same doubt as to whether Vermont's program is a genuine voucher program exists as in the Maine program). Finally, an appellate court in Pennsylvania has held a locally-initiated tuition subsidy program to violate state law. The U.S. Supreme Court has so far refused to review any of the appeals that have been filed on these cases, although it did grant an emergency stay of a preliminary injunction issued against Ohio's scholarship program. The cases are as follows:

(1) Jackson v. Benson. In *Jackson v. Benson*[31] 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, primarily on the grounds that the MPCP constituted a benefit to religious schools in violation of a provision of the state constitution prohibiting any money from being drawn from the treasury "for the benefit of religious societies, or religious or theological seminaries" (Art. I, § 18). But in early 1998 the Wisconsin Supreme Court said the MPCP satisfied both that clause and the establishment clause of the First Amendment because it extended a benefit to parents on a religion-neutral basis and flowed to sectarian schools "only as a result of numerous private choices of the individual parents of school-age children." The decision was widely regarded as a likely vehicle for Supreme Court review; but on November 9, 1998, the Court denied review.

(2) Kotterman v. Killian. The Supreme Court of Arizona upheld as constitutional a program indirectly providing support for private schools, including

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

[31] 218 Wis.2d 835, 578 N.W.2d 602, *cert. den.*,525 U.S. 480 (1998).

sectarian schools, 3-2. *Kotterman v. Killian*[32] 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 found the tax credit not to violate the establishment clause. The class of possible beneficiaries, *i.e.*, donors to the school tuition organizations, included all taxpayers, it said, and not a narrow group defined on the basis of religion. Moreover, it said, 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. In *Simmons-Harris v. Goff*[33] the Supreme Court of Ohio held the Ohio Pilot Scholarship Program not to violate the establishment clause but to violate a procedural provision of the Ohio Constitution. The program provided scholarships worth up to $2500 a year to children of poor families in the Cleveland public schools which can be used to attend either private schools in the city, including sectarian 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 percent 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,[34] 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.[35]

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[32] 193 Ariz. 273, 972 P.2d 606 (Ariz. 1999), *cert. den.*, 120 S.Ct. 42 (1999) (Nos. 98-1716 and 98-1718).

[33] 86 Ohio St. 3d 1, 711 N.E. 2d 203 (1999).

[34] No. 96APE08-982 and -991 (Ct. App. Ohio, Tenth District, decided May 1, 1997).

[35] Despite 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.

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. In this case the U.S. Court of Appeals for the Sixth Circuit reached a decision on the Cleveland program opposite to that of the Ohio Supreme Court, holding the program to violate the establishment clause.[36]

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."[37] 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

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[36] Simmons-Harris v. Zelman, 72 F.Supp.2d 834 (N.D. Ohio 1999), *aff'd*, ___ F.3d ___ (6th Cir., decided December 11, 2000).

[37] 54 F.Supp.2d 725 (N.D. Ohio Aug. 24, 1999) (order granting preliminary injunction).

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, but only for one more semester.[38] 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.[39]

On December 20, 1999, Judge Oliver held Ohio's Pilot Scholarship Program to violate the establishment clause.[40] He found that no out-of-district public schools were participating in the program, that 82 percent of the private schools which were participating were church-related, and that 96 percent 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." Scholarship assistance to students is constitutionally permissible, he said, if it is generally available without regard to the public-nonpublic or sectarian-nonsectarian nature of the schools to be attended, because in such circumstances "aid ultimately supports the educational program of a religious institution only as a result of the private choice of the aid recipient" and, as a consequence, no "religious indoctrination is attributable to the government." But 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.

On December 11, 2000, the U.S. Court of Appeals for the Sixth Circuit affirmed Judge Oliver's decision, 2-1. 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* p. 4). 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 percent 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 –

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[38] 54 F.Supp.2d 725 (N.D. Ohio Aug. 27, 1999) (order modifying preliminary injunction).

[39] Zelman v. Simmons-Harris, 120 S.Ct. 443 (Nov. 5, 1999) (No. 99A320). The majority was comprised of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas.

[40] Simmons-Harris v. Zelman, 72 F.Supp.2d 834 (N.D. Ohio 1999).

"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.

Pending further appeal, the children now participating in the program are expected to be allowed to continue to attend their schools through the rest of this school year. The case is widely expected to go to the Supreme Court.

(5) Bagley v. Raymond School Department. The Maine Supreme Judicial Court has held the exclusion of private sectarian schools from a state tuition subsidy program to be required by the establishment clause, 5-1.[41] 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 be unconstitutional. In *Bagley v. Raymond School Department* 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. The Maine Supreme Court, however, held the exclusion of such schools to be constitutionally required. Neither the free exercise nor the establishment clause, the court stated, gave the petitioners any right to a public subsidy for a religious education for their children; and their disparate treatment passed muster under the equal protection clause, it said, because the state has a compelling interest in abiding by the establishment clause prohibition on direct public funding of sectarian schools:

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

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[41] Bagley v. Raymond School Department, 1999 Me. 60, 728 A.2d 127, *cert. den.*, 120 S.Ct. 364 (October 12, 1999) (No. 99-163).

(6) Strout v. Albanese. In this case the U.S. Court of Appeals for the First Circuit similarly held Maine's exclusion of sectarian schools from its tuition subsidy program to be constitutionally required.[42] 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 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.[43] 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

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[42] 178 F.3d 57 (1st Cir.), *cert. den.*, 120 S.Ct. 329 (October 12, 1999) (No. 99-254).

[43] 738 A.2d 539 (Vt.), *cert. den. sub nom.* Andrews v. Chittenden Town School District, 120 S.Ct. 626 (Dec. 13, 1999).

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, violates 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 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.[44] 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

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[44] Giacomucci v. Southeast Delco School District, 742 A.2d 1165 (Commonwealth Court 1999).

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.

(9) Holmes v. Bush. On October 3, 2000, the Florida Court of Appeal for the First District reversed a trial court decision and held a state voucher program for students in public schools designated as failing not to violate Article IX, § 1, of the Florida Constitution.[45] The Opportunity Scholarship Program (OSP), enacted in 1999, made 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 school year of 1999-2000, two elementary schools in Excambia County were deemed to be failing, and 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.

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.[46] That provision 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 **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." Moreover, it said, that is the **exclusive** means the constitution allows for carrying out the state's duty. "[A] constitutional prescription of the manner in which a constitutional objective is to be carried out does not allow the State to proceed other than in the constitutionally prescribed manner," it stated. As a consequence, it concluded, Art. IX, § 1, prohibits the state from paying tuition for students to attend private schools.

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[45] Bush v. Holmes, Case No. 1D00-1121 (Fla. Dist. Ct. App., decided October 3, 2000).

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

On appeal the Court of Appeal for the First District reversed, 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 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.

The appellees in the case have stated that they intend to appeal the decision to the Florida Supreme Court.