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ABSTRACT

This paper discusses the legal implications of "Zelman v. Simmons-Harris," the Supreme Court ruling on education vouchers. The ruling opens the way for vouchers, as concerns the federal judiciary, but the decision did not abrogate many states' restrictive provisions regarding publicly funded voucher and tax-benefit programs. Nor did the decision prevent a state from imposing reasonable regulations on participating private schools. Some constitutional provisions in a number of states present a formidable bar to providing public funds for private-school attendance. Strong public-school interest groups can be expected to throw up roadblocks. Even where such programs emerge, there will be efforts to ensure comprehensive accountability measures for the expenditure of public money. These measures will frighten off many private schools that pride themselves on their independence from government. Furthermore, considerable uncertainty will remain regarding how vouchers will fare under state constitutional law in many states. A table that classifies states' constitutional orientation toward voucher programs is provided. Regardless of the outcome in the states, the Supreme Court's "Zelman" decision surely will stimulate new interest in school choice, vouchers, and tax credits in legislative arenas across the country. (RJM)

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THE U.S. SUPREME COURT'S DECISION IN THE CLEVELAND VOUCHER CASE: WHERE TO FROM HERE?

July 2002

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Abstract This paper discusses the legal implications of *Zelman v. Simmons-Harris*, the Supreme Court ruling on education vouchers. With a ruling in favor, the green light is now on for the development of voucher programs elsewhere. But, the green light shines only from the perspective of the federal constitution. The Supreme Court's decision does not abrogate the application of restrictive provisions in state constitutions to publicly funded voucher and tax benefit programs, nor does it restrict a state from imposing reasonable regulations on participating private schools. As argued here, these state constitutions need to be carefully understood before anticipating more education voucher programs. As a comparison, the legal status of tuition tax credits is also considered. These credits appear to have the edge over vouchers in several key respects.

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Introduction

In a five-to-four decision, the U.S. Supreme Court ruled on June 27 that the Cleveland voucher program, officially known as Ohio's Pilot Project Scholarship Program, does not violate the Establishment Clause of the First Amendment.[1] *Zelman v. Simmons-Harris*[2] is a very important ruling for the following reasons:

- The green light is now on for the development of voucher programs elsewhere. Indeed, the decision and much of the rhetoric expressed by the majority will serve as strong stimuli to school choice programs in general.
- The green light shines only from the perspective of the federal constitution. The Supreme Court's decision does not abrogate the application of restrictive provisions in state constitutions to publicly funded voucher and tax benefit programs, nor does it restrict a state from imposing reasonable regulations on participating private schools.
- To withstand constitutional attack in state court, voucher and tax benefits programs need to be carefully designed.

This paper discusses this seminal ruling and tries to convey a sense of what lies ahead.

What the Court Ruled

The Cleveland voucher program has had an arduous journey through the courts. Initiated on a pilot basis in the fall of 1996 following heavy promotion from Republican Governor George V. Voinovich, the program is targeted to low-income parents with children in kindergarten through grade three in the Cleveland City School District, one of the nation's lowest performing. (The district had become so deficient that it was taken over by the state pursuant to federal court order in 1995). Under the terms of the Cleveland program, scholarship recipients can continue in the program through the eighth grade. As designed, scholarships may be used at religious or nonreligious private schools within the Cleveland district and at public schools in adjacent school

[1] The Establishment Clause reads, "Congress shall make no law respecting an establishment of religion. . . ." By virtue of the Fourteenth Amendment to the U.S. Constitution, it applies to states and their political subdivisions.

districts.[3] Dependent upon income, families either receive 90 percent of private school tuition up to $2,250 or 75 percent of private school tuition up to $1,875. There are no restrictions on how the schools use the money. In the case of out-of-district public schools, the program provides a flat $2,250 tuition grant. These districts also received additional per-pupil state funding.[4] A companion program provides tutorial assistance grants up to $360 for parents whose children attend the Cleveland school system.

When oral arguments were heard before the U.S. Supreme Court in February 2002, just over 4,200 students were enrolled in the program, costing $14.9 million annually. Some 60 percent of participating students came from low-income families. Nearly all attended religious private schools, not surprising in that 46 of the 56 participating schools are church-affiliated. According to a study by Policy Matters Ohio, a local think tank, 21 percent previously were enrolled in Cleveland city schools, while 33 percent previously attended private schools.[5] The remaining students were newly enrolled kindergartners or came from outside the district. If the child attends a private school, the legislation provides that the scholarship check is payable to the parent but transmitted directly to the school, where the parent then endorses it over to the school. The effectiveness of the voucher program in raising student achievement has been the subject of much debate, with no firm conclusion one way or the other.[6]

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[2] ___ S.Ct. ___ , 2002 WL 1378554 (June 27, 2002).

[3] Ohio Rev. Code Ann. §§ 3313.974 - 3313.979 (West 2002). To meet the requirements of the state constitution, the program encompasses any school district that is or has been under federal court order requiring management by the state superintendent of public instruction. At the time of the lawsuit, the Cleveland district was the only district in the state that met this condition.

[4] The parties disputed the actual amount that suburban districts would receive. Doris Simmons-Harris, a member of a group of Ohio taxpayers who challenged the program, maintained the districts would receive about $4,750 per student. Ohio Superintendent for Public Instruction Susan Tave Zelman pegged the figure at $6,544. The matter was moot, however, because no out-of-district school district opted to participate in the program.

[5] Mark Walsh, "High Court, High Noon," *Education Week*, February 21, 2002. The statute stipulates that no more than 50 percent of all scholarships be awarded to students already attending private schools. Ohio Rev. Code Ann. § 3313.975(B).

[6] Different researchers have found different results. A group of researchers led by Harvard's Paul Peterson has found significantly higher achievement results among scholarship recipients. See Peterson, Howell, and Greene, "Lessons from the Cleveland Scholarship Program,"available on the Web at www.ksg.harvard.edu/pepg. University of Indiana

After surviving a challenge in state court, litigation began in federal court. The federal district court ruled against the program, a decision affirmed by the U.S. Court of Appeals for the Sixth Circuit by a two-to-one vote.[7] The key concern centered on the fact that out-of-district public school districts chose not to participate. Nor did high tuition-charging private schools. Thus, as implemented, the judges found the program skewed toward religion in violation of the Establishment Clause. The key U.S. Supreme Court precedent for this ruling was *Committee for Public Education v. Nyquist*, a 1973 decision often cited by voucher opponents. In that decision, the Supreme Court invalidated a New York law that provided financial assistance to private schools and to low-income parents to attend them.[8] The primary beneficiaries were Catholic schools.

The dissenting Sixth Circuit judge argued that as designed, the voucher program encompasses a choice of both public and private schools. In addition, parents can choose to remain in the Cleveland city schools and opt to participate in the tutoring program. The fact that some schools did not participate could be rectified by the legislature. Given the range of choice envisioned in the legislation, the dissent cited the U.S. Supreme Court's 1983 *Mueller v. Allen* ruling as the appropriate precedent. In *Mueller*, the Court by a five-to-four vote upheld a Minnesota tax deduction program for expenses occurred in providing tuition, textbooks, and transportation for children in public or private schools.[9] That program did not violate the Establishment Clause, the majority ruled, because it was available to all parents whether they used it for public or private

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researcher Kim Metcalf, who has been commissioned by the Ohio Department of Education to evaluate the program, has found no discernible pattern regarding student achievement over the past four years. His reports can be found on the Indiana Center for Evaluation's website at www.indiana.edu/~iuice.

[7] *Simmons-Harris v. Zelman*, 72 F. Supp.2d 834 (N.D. Ohio 1999), *aff'd*, 234 F.3d 945 (6th Cir. 2000).

[8] With regard to tuition grants awarded low-income parents, the *Nyquist* majority asserted that "if the grants are offered as an incentive to a parents to send their children to sectarian schools by making unrestricted case payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions." *Id.*, p. 786. But in a key footnote, the majority noted that it was reserving for later determination "a case involving some form of public assistance (e.g., scholarships) made available without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." *Id.*, p. 783, n. 38. In writing for the majority in *Zelman*, Chief Justice Rehnquist pointed out the relevance of this observation for the Cleveland scholarship program.

[9] *Mueller v. Allen*, 463 U.S. 388 (1983)

school expenses.

Thus, two fundamentally conflicting views of the Cleveland voucher program's constitutionality were presented to the U.S. Supreme Court. The Court split as to which view should prevail. Writing for the majority, Chief Justice William Rehnquist, who had authored the *Mueller* decision, found the reasoning in that case controlling. He noted that Ohio had created several programs that parents could choose from in addition to the voucher program to provide alternatives to the Cleveland public schools. Included among them are magnet schools and charter schools (called "community schools" in Ohio). The voucher program, he pointed out, "is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district." In her concurring opinion, Justice Sandra Day O'Connor emphasized this fact, pointing out that significantly greater public funds are spent on programs like these than on the voucher program. Thus, she observed, "the support that the Cleveland voucher program provides religious institutions is neither substantial nor atypical of existing government programs." Justice O'Connor has been considered the swing vote in cases like this. In *Zelman*, she provided the critical fifth vote for the majority position.

Nor did the Court find the Cleveland program itself tilting in favor of religious schools. "It confers educational assistance directly to a broad class of individuals defined without reference to religion," wrote Justice Rehnquist. "The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion."

Writing in dissent for himself and Justices Stevens, Ginsburg, and Breyer, Justice David Souter asserted that the majority's interpretation of the Establishment Clause in light of the Court's precedents had reached "doctrinal bankruptcy." He offered a lengthy discussion of these precedents

to show that a majority on the Court had long been particularly concerned about neutrality of government aid programs and the potential for divertibility of government aid to sectarian purposes. But now, he asserted, a new majority found its way around these concerns by viewing the Cleveland voucher program as part of a broader context of educational opportunities available to children in the Cleveland schools and by focusing on the role of parents in deciding among the options. "If 'choice'," he wrote, "is present whenever there is any educational alternative to the religious schools 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 a religious school."

The dissenters also focused on the fact that the vast majority of the voucher money flows to religious schools. Justice Souter noted that almost two out of three families using vouchers send their children to religious schools not of the families' faith. This is so, he maintained, because there are so few secular options, in part because of the small size of the scholarship. Justice O'Connor took issue with this point, noting that no voucher student has been turned away from a nonreligious private school participating in the voucher program.

The dissenters were particularly troubled by the use of the money. "In paying for practically the full amount of tuition for thousands of qualifying students," Justice Souter observed, "the scholarships purchase everything that tuition purchases, be it instruction in math or indoctrination in faith." But the majority found this immaterial. Chief Justice Rehnquist agreed that most of the private schools in Cleveland are religious but noted that this is true of most American cities. To have the constitutionality of the program turn on the percentage of religious schools in a given area that are religious, he pointed out, would be absurd. "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a

religious school."

To those of us who have studied Supreme Court Establishment Clause jurisprudence, the Court's decision was not surprising. Starting with the *Mueller v. Allen* decision in 1983, the high court had indicated that, while direct aid is generally prohibited, public money that flows indirectly to religious private schools does not raise the same constitutional concerns.[10] Chief Justice Rehnquist emphasized this line of precedent in *Zelman*.[11]

In a short concurring opinion that focused in part on how urban public schools ill serve underprivileged minority children, Justice Clarence Thomas pointed out that ten states now provide some form of publicly funded private school choice to parents. There will be more as a result of the Court's ruling. However, in a number of them, the constitutional barriers such programs face are significant.

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[10] These decisions include *Witters v. Washington Department of Services*, 474 U.S. 481 (1986) (provision of vocational rehabilitation services to aid a blind student to pursue studies at a Christian college to become a minister does not violate the Establishment Clause); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) (school district's providing a sign-language interpreter under the federal Individuals with Disabilities Education Act to a deaf student attending a Catholic high schools does not violate the Establishment Clause); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995) (university's permitting the use of student activities fee to be paid to third party printers of a student religious newspaper does not violate the Establishment Clause); *Agostini v. Felton*, 521 US. 203 (1997) (permitting public school teachers to deliver compensatory education on both public and private school campuses does not violate the Establishment Clause, since the benefits are provided without regard to the sectarian-nonsectarian, or public-private nature of the institutions benefitted); and *Mitchell v. Helms*, 120 S.Ct. 2530 (2000) (use of federal funds to underwrite the costs of computers, computer software, and other instructional materials in religious nonprofit private schools does not violate the Establishment Clause). While the latter two decisions involved direct aid to religious private schools, the justices in the majority indicated that had the aid been indirect, e.g., through parents, there would be little Establishment Clause concern. As Justice Sandra Day O'Connor noted in her concurring opinion in *Mitchell*, "[W]hen the government provides aid directly to the student beneficiary, that student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education. The fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student's private decision." (Emphasis in original), p. 2559.

[11] Justice Rehnquist emphasized that in three cases, the Court had rejected Establishment Clause challenges to programs where government money finds it way to religious private schools only by choice of aid recipients. The three are *Mueller v. Allen*, *Witters v. Washington Department of Social Services*, and *Zobrest v. Catalina Foothill School District*. Each is capsulized in the footnote above. He noted that "*Mueller*, *Witters*, and *Zobrest* thus 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." He added, "we have never found a program of true private choice to offend the Establishment Clause."

The State Constitutional Hurdle

The battle over vouchers and tax benefit programs will not end with *Zelman*. The Supreme Court justices were speaking only in the context of the Establishment Clause of the First Amendment. They said nothing about the application of restrictive provisions in state constitutions to voucher programs. In recent decisions, the justices have been particularly mindful of the concept of federalism – the division of power between a central government and state governments – and have used it to limit the intrusion of the federal government on state authority.[13] Indeed, Justice Thomas in his concurring opinion suggested that states should be relatively unfettered by the Establishment Clause to pass laws that "include or touch on religious matters." While the Court was silent in *Zelman* about the ability of states to apply their own strict anti-establishment of religion provisions to the voucher question, in the past the Court has recognized the right of states to do so.[14] Thus, in ruling unanimously in 1986 in *Witters v. Washington Department of Social Services* that the Establishment Clause does not prevent a state from providing vocational rehabilitation services to a student studying for the ministry at a Christian college, the justices noted that they were only considering the matter from the perspective of the U.S. Constitution and that, on remand, the Washington State Supreme Court was free to consider the "'far stricter' dictates of the Washington state constitution."[15] The Washington high court later did so and struck the program down.[16] Further,

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[12] For a thorough discussion of the constitutionality of vouchers and scholarship programs under state constitutional law, see Chapter Five in R. Kenneth Godwin and Frank R. Kemerer, *School Choice Tradeoffs*. Austin, TX: University of Texas Press, 2002. For a detailed state-by-state legal examination, see Frank R. Kemerer, "The Constitutional Dimension of School Vouchers," *Texas Forum on Civil Liberties & Civil Rights* 3 (1998), pp. 137-185, and especially Frank R. Kemerer "State Constitutions and School Vouchers," *West's Education Law Reporter* 120 (1997), 1-42.

[13] This line of decisions has revealed a deep doctrinal difference among the justices. See Linda Greenhouse, "At the Court, Dissent Over States' Rights is Now War," *New York Times*, June 9, 2002.

[14] A state's exclusion of religious schools from a publicly funded voucher program in compliance with the state constitution's anti-establishment of religion provision would be greeted with charges of discrimination against religion and/or an intrusion on the rights of parents to choose schools for their children under *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Whether this may be the case awaits future litigation, since the *Witters* decision runs in the opposite direction.

[15] *Witters v. Washington Department of Services*, 474 U.S. 481 (1986), p. 489.

[16] *Witters v. State Commission for the Blind*, 771 P.2d 1119 (Wash.) (*en banc*), *cert. denied*, 493 U.S. 850 (1989).

there are provisions in state constitutions other than those restricting state money for sectarian purposes that can present barriers to voucher programs. These include restricting public funding to public schools only, requiring all education to be under state control, and requiring the legislature to assure that education serves a public purpose.

State constitutions vary widely in their wording, and the consequences can be important for both publicly funded vouchers and tax benefit programs. [Note: readers may wish to examine periodically the table later in this paper that suggests the predisposition of each of the 50 states toward the constitutionality of a voucher program encompassing religious schools.] The most restrictive state is Michigan, which has a constitutional provision prohibiting any "payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property" either directly or indirectly to any nonpublic school.[17] The provision is so strict that without a constitutional amendment, vouchers are unlikely in that state.[18]

Viewed only from the perspective of the wording of state constitutions, vouchers would appear to have tough sledding in a number of other states where state constitutions are not supportive. Florida, Georgia, Montana, New York, and Oklahoma have constitutional provisions preventing both direct and indirect aid to religious private schools. Some constitutional provisions prevent assistance that helps "support or sustain" religious private schools. States with constitutional provisions with like this include California, Colorado, Delaware, Illinois, Minnesota, Missouri, North Dakota, South Dakota, and Wyoming. The states of Hawaii and Kansas have constitutional provisions that restrict expenditure of public monies for the support or benefit of any private school, religious or not. Some state constitutional provisions require public monies be spent

[17] Mich, Const., art. 8, § 2.

[18] A constitutional amendment on the November 2000 ballot to modify the state constitution by permitting a tuition voucher program failed by a wide margin.

on public schools only, as in Massachusetts.[19] In 1987 the Supreme Judicial Court of Massachusetts unanimously advised the state senate that a tax deduction bill for private school expenses would violate this provision, noting "If aid has been channeled to the student rather than to the private school, the focus still is on the effect of the aid, not on the recipient."[20] In a footnote, the court pointed out that the "language of our anti-aid amendment is 'much more specific' than the First Amendment to the U.S. Constitution." Other state constitutions require public monies be spent for a public purpose. These provisions can deter legislatures from enacting voucher and tax benefit programs.

But state constitutional provisions alone are not necessarily determinative, because they are subject to interpretation by state supreme courts. While there are only a few decisions in the context of publicly funded vouchers and tax benefit programs, the outcomes vary, thus adding a measure of uncertainty. Ohio, the site of the Cleveland voucher program, itself is a case in point. The state's constitution contains two relevant provisions. The first provides that "No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society."[21] The second tilts in the direction of a public schooling system by stipulating that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of the state."[22] Despite the seemingly restrictive nature of these provisions, the Ohio Supreme Court interpreted them to mean the same thing as the Establishment Clause of the First Amendment when the Cleveland program came before it in 1999. Then, looking at the recent precedents from the U.S.

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[19] Mass. Const. art. XVIII, § 2 provides that "No grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining, or aiding any . . . primary or secondary school . . . which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the commonwealth or federal authority or both. . . ."

[20] *Opinion of the Justices to the Senate*, 514 N.E.2d 353 (Mass. 1987).

[21] Ohio Const., art. I, § 7.

Supreme Court as described in footnote 10 of this paper, the Ohio high court reached the same decision that the U.S. Supreme Court reached in *Zelman*.[23] The Wisconsin Supreme Court did the same in 1997 with regard to the Milwaukee voucher system despite restrictive language in the Wisconsin state constitution.[24]

To cite another example of the importance of state supreme court rulings, the Court of Appeals of New York, the state's highest court, has had a change of views on the meaning of the state constitution's prohibition on use of public money "to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught. . . ."[25] In 1938, the New York high court struck down school busing for parochial students by a four-to-three vote because it would violate this provision. The judges in the majority in *Judd v. Board of Education* noted that indirect aid encompasses "any contribution to whomever made, circuitously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interests and purposes."[26] But nearly 30 years later, the court had a change of view. By another four-to-three ruling in 1967, the court upheld the state's textbook loan program in *Board of Education v. Allen*.[27] In *Allen*, the majority said of the earlier decision, "We cannot

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[22] Ohio Const., art VI, § 2.

[23] *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999). The Ohio high court also observed that the scholarship program did not violate the state constitution's uniformity clause requiring a uniform system of education statewide because the statute encompasses not just the Cleveland district but any district that has been taken over by the state superintendent of public instruction pursuant to federal court order. Ohio. Rev. Code. § 3313.975(A). At the time of the lawsuit, the Cleveland district was the only district in the state that met this condition.

[24] *Jackson v. Benson*, 578 N.W.2d 602 (Wis.), *cert. denied*, 119 S.Ct. 466 (1998). The Wisconsin Constitution also has seemingly strict constitutional provisions. Article 1, § 18 is explicit on erecting a wall of separation between church and state: "nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall . . . any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

[25] N.Y. Const. art. XI, § 3.

[26] *Judd v. Board of Education*, 15 N.E.2d 576 (NY 1938), p. 582.

[27] *Board of Education of Central School District No. 1 v. Allen*, 228 N.E.2d 791 (NY 1967), *aff'd*, 392 U.S. 236 (1968).

agree with the reasoning of the majority in the *Judd* case and accordingly hold that it should not be followed... The architecture reflected in *Judd* would impede every form of legislation, the benefits of which, in some remote way, might inure to parochial schools. It is our view that the words 'direct' and 'indirect' relate solely to the means of attaining the prohibited end of aiding religion as such."[28] As discussed earlier, a New York plan to provide direct and indirect aid to private, mostly parochial, schools failed in the famous *Committee for Public Education v. Nyquist* decision of the U.S. Supreme Court in 1973. But in *Zelman*, the Supreme Court observed that *Nyquist*, in the words of Chief Justice Rehnquist, "does not govern neutral educational assistance programs that, like the program here, offer aid directly to a class of individuals defined without regard to religion." Thus, the way is clear for vouchers in New York under both federal and state law, and the state accordingly is listed in the permissive column in the table.

Other state supreme courts have reached the opposite decision in construing state constitutional provisions that appear more accommodating than those of Ohio, Wisconsin, and New York. A case in point is Alaska. There, the Constitutional Convention rejected inclusion of the "direct or indirect" terminology because it did not want to prevent all forms of assistance to private school students. The state constitution accordingly only restricts the expenditure of public funds "for the direct benefit of any religious or other private educational institution."[29] But this did not deter the state supreme court from striking down a state program providing grants to students to attend private colleges. In its ruling, the court observed, "merely channeling the funds through an intermediary will not save an otherwise improper expenditure of public monies."[30] In several recent decisions, courts in other states have used their state constitutional provisions to rule against existing voucher and voucher-like programs, but left the door open to redesigned programs that might be

[28] *Id.*, p. 793.
[29] Alaska Const., art. VII, § 1.
[30] *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979), p. 130.

better adapted to state constitutional law.[31]

A number of state supreme courts have ruled that, regardless of wording, religion clauses in their state constitutions mean the same thing as the First Amendment. Included among them are Alabama, Illinois, Maine, North Carolina, New Jersey, and Pennsylvania. In a few states like Colorado and Iowa, the state supreme court has suggested, but not ruled, that the state constitution's religious provisions are the equivalent of their First Amendment counterpart. Presumably, given the *Zelman* decision, vouchers and tax benefits programs now will have smooth sailing in these states, unless there are other constitutional provisions that might constitute a barrier, e.g., public monies must be spent only on public schools. Accordingly, these states are listed in the permissive column in the table.

In short, considerable uncertainty remains regarding how vouchers will fare under state constitutional law in many states, assuming they emerge from the battle that public school adherents will wage in state legislatures. Based on the author's review of both state constitutions and interpretive law, the following table suggests the degree of constitutional support for voucher programs in the 50 states. A word of caution is in order. State constitutional provisions vary from state to state in their scope and wording. In a number of states, interpretive law has been reached in contexts other than vouchers. A prime example is New York where the Court of Appeals of New York's interpretation of the meaning of the "direct and indirect" language in the state constitution was reached in the context of a textbook loan program, not vouchers. Thus, the table is not designed to be predictive but rather to indicate a predisposition to the category within which each

[31] For example, the Supreme Court of Vermont ruled in 1999 that the state constitution's "Compelled Support Clause," which provides that no person "ought to, or of right can be compelled to" support any place of worship prohibited a school district's payment of student tuition to a Catholic high school. *Chittenden Town School District v. Vermont Department of Education*, 738 A.2d 539 (Vt.), *cert. denied, sub nom., Andrews v. Vermont Department of Education* 528 U.S. 1066 (1999). The problem was the absence of any restrictions on funding religious education. The court explicitly left it to the legislature to correct the problem. It added that whatever the U.S. Supreme Court might decide about a voucher program under the federal constitution would not affect its interpretation of the state constitution.

state has been placed. Note also that the table focuses only on voucher programs, not tax benefit programs. The latter are more likely to pass constitutional muster in many states for the reasons indicated in the next section.

Table 1

State Constitutional Orientation toward Voucher Programs*

Permissive Orientation		
Alabama	Arizona	Arkansas
Illinois	Maine	Maryland
Mississippi	Nebraska	New Jersey
New York	North Carolina	Ohio
Pennsylvania	Rhode Island	South Carolina
Utah	Vermont	West Virginia
Wisconsin		

Restrictive Orientation		
Alaska	California	Delaware
Hawaii	Idaho	Kansas
Kentucky	Massachusetts	Michigan
Missouri	North Dakota	Oklahoma
South Dakota	Virginia	Washington
Wyoming		

Uncertain Orientation		
Colorado	Connecticut	Florida**
Georgia	Indiana	Louisiana
Minnesota	Montana	Nevada
New Hampshire	New Mexico	Oregon
Tennessee	Texas	

Notes: *For the purpose of this Table, it is assumed that a state voucher program would encompass religious private schools. ** Litigation pending.

Vouchers or Tax Benefits?

To survive constitutional attack in states that have a hospitable constitutional climate, voucher programs will have to be carefully designed. Key features include:

- Payments to parents, not religious private schools (to prevent potential abuse, the check can be sent to the private school where it is endorsed over to the school by the parents)
- A broad choice of public and private schools
- A clear delineation of the public purpose of the voucher legislation
- Tailoring the amount of the voucher to the cost of instruction to avoid a windfall to religious schools
- Sufficient accountability measures to assure that public money is being spent wisely.

Aside from their constitutionality under state constitutional law, the problem with vouchers is that the money remains essentially public, thus requiring regulation and oversight to maintain accountability to survive what is termed "unconstitutional delegation law." Unconstitutional delegation law is a judicially created doctrine concerning the ability of a state legislature to delegate its core governmental functions to private parties.[32] That education is a core governmental activity is clearly established in all states, since state constitutions impose on state legislatures the responsibility to establish a schooling system.

The leading illustration of unconstitutional delegation law in the school choice context is litigation that greeted the Michigan charter school law in 1993. The charter law permitted private entities other than religious organizations to operate charter schools, termed "public school academies." The lawsuit contended that the operation of charter schools by private entities violated a state constitutional provision requiring the legislature to "maintain and support a system of free public elementary and secondary schools as defined by law."[33] In effect, the plaintiffs argued that

[32] This point is discussed in some detail in Frank R. Kemerer, "Legal Issues Involving Privatization and Accountability," National Center for the Study of Privatization in Education, Teachers College, Columbia University, August 2000. Available as Occasional Paper #6, at www.ncspe.org. See also Frank R. Kemerer and Catherine Maloney, "Legal Framework for Educational Privatization and Accountability," *West's Education Law Reporter*, 150 (2001): 589-627.
[33] Mich. Const. art. 8, § 2.

the academies were licensed private schools not under the control of the state. They also argued that the charter school law violated a constitutional provision vesting the state board of education with "leadership and general supervision over public education."[34] Refusing to accept the legislation at face value, the Michigan court of appeals agreed with the trial court that the charter school law was unconstitutional. "The Court must look through forms and behind labels into the substance of the law," the judges wrote. "The people have a right to have the limitations in a state constitution respected and given the fair and legitimate force which its terms require."[35]

By the time the case reached the Michigan Supreme Court, the legislature had revised the law to make sure that the academies are under the control of the state board of education and subject to its regulations. Other new restrictions require all teachers except college professors to be state certified, prohibit academies from levying taxes, and require academies to comply with provisions of the school code. In its 1997 decision upholding the constitutionality of the statute as revised, the Michigan Supreme Court cited these changes.[36]

The key to permissible delegation is the presence of guidelines and regulations to limit the discretion of private entities to usurp governmental authority for their own interests. In a 1999 ruling permitting private entities to operate public charter schools, a New Jersey state court cited this guideline set forth by the New Jersey Supreme Court: "To be constitutionally sustainable, a delegation must be narrowly limited, reasonable, and surrounded with stringent safeguards to protect against the possibility of arbitrary or self-serving action detrimental to third parties or the public good generally."[37] But the downside, of course, is intrusion on the autonomy of private entities.

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[34] Mich. Const. art. 8, § 3.

[35] *Council of Organizations and Others for Education about Parochiaid v. Governor of Michigan*, 548 N.W.2d 909 (Mich. App. 1996), pp. 912-913.

[36] *Council of Organizations and Others for Education about Parochiaid v. Governor of Michigan*, 566 N.W.2d 208 (Mich. 1997).

[37] *In re Charter School Application*, 727 A.2d 15 (N.J. Super. A.D. 1999), p. 44 (citing the New Jersey Supreme Court's decision in *Ridgefield Park Education Association v. Ridgefield Park Board of Education*, 393 A.2d 278 (N.J. 1978). The appellate decision was later affirmed by the New Jersey Supreme Court, which added that the Commissioner of Education must

In his dissent in *Zelman*, Justice Souter cited James Madison for the proposition that government aid to religion runs the risk of "'corrosive secularism" of religious schools. He cited regulations over the Cleveland voucher program as a case in point. The Cleveland program prohibits participating schools from discriminating on the basis of race, religion, or ethnicity; from advocating unlawful behavior or teaching hatred on the basis of race, ethnicity, national origin, or religion; requires minimum enrollment per class and for the school as a whole; and prohibits dissemination of false or misleading information.[38] Voucher schools may not charge more than ten percent of the voucher in additional tuition or fees. Except for enrolled students and siblings, admission is by lot in kindergarten through third grade. Priority is given to children from low-income families until the number admitted by lot totals 20 percent of the previous year's enrollment at each grade level.[39] These regulations are not overly restrictive, yet participating schools lose control over admissions by having to admit students by lot and to admit those who are not of the school's faith. For proper perspective on foot-in-the-door religious regulation, Justice Souter cautioned, "it is well to remember that the money has barely begun to flow." In a brief dissenting opinion of his own, Justice John Paul Stevens added that "Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."

Tax benefits provide an easier means of facilitating private school choice than vouchers. Justice Stephen Breyer observed in his separate dissent in *Zelman* that "government involvement in religious primary education is far more divisive than state property tax exemptions for religious

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assess the impact of charter schools on racial balance in public schools generally and take appropriate action to prevent resegregation. The New Jersey high court also required the commissioner to consider the economic impact charter schools may have on districts and either disapprove a charter school or adjust the funding formula set forth in the charter school law to assure constitutional compliance. *In re Grant of Charter School Application of Englewood on Palisades Charter School*, 753 A.2d 687 (N.J. 2000).

[38] Ohio. Rev. Code Ann. § 3313.976(A).

[39] *Id.* § 3313.974(C).

institutions or tax deductions for charitable contributions, both of which come far closer to exemplifying the neutrality that distinguishes, for example, fire protection on the one hand from direct monetary assistance on the other." As noted earlier, the U.S. Supreme Court upheld Minnesota's tax deduction program for public and private school expenses. A tax credit system is similar in principle to a tax deduction program, except that it provides a dollar-for-dollar offset against the tax due, while a tax deduction program only reduces taxable income. Unlike vouchers, tax credits are more likely to be considered private money. This may make them less vulnerable to attack on constitutional grounds under restrictive state constitutional provisions.[40] As private money, tax credits provide participating private schools with some insulation from state regulation. But there are limits too. Individual tax credits don't generate much money, are not available until long after the school year begins, complicate the tax system, and discriminate on the basis of wealth.

Proponents of school choice recently have seized on the general tax credit program as a more viable means of assisting families enroll their children in private schools. The general tax credit program permits any taxpayer, not just parents, to donate money to a clearinghouse entity and receive a tax credit for the donation. The clearinghouse entity is a tax-exempt organization that allocates the money it receives to parents to send their children to the school of their choice. Unlike the individual tax credit, a general tax system provides two insulating layers between the government and religious private schools – the donator and the clearinghouse – and, by so doing, lessens the chances of being constitutionally infirm and of intruding on institutional autonomy. Theoretically, most of the regulation would be placed on the administrative clearinghouse, not the

[40] In 2001, an Illinois appellate court upheld a challenge to that state's tuition tax credit program. *Toney v. Bower*, 744 N.E.2d 351 (Ill. App. 4 Dist., 2001). The statute provides a credit of up to $500 against the state income tax equal to 25 percent of tuition, book fees, and lab fees at a public or private school. The court considered the tax credit to be private, not public, money. The court noted that even if the tax credit were considered public money, the ruling would be the same because the Illinois Constitution's anti-establishment of religion provision is coextensive with the Establishment Clause of the First Amendment. The court based its ruling on the U.S. Supreme Court's decision in *Mueller v. Allen*, the Minnesota tax deduction case.

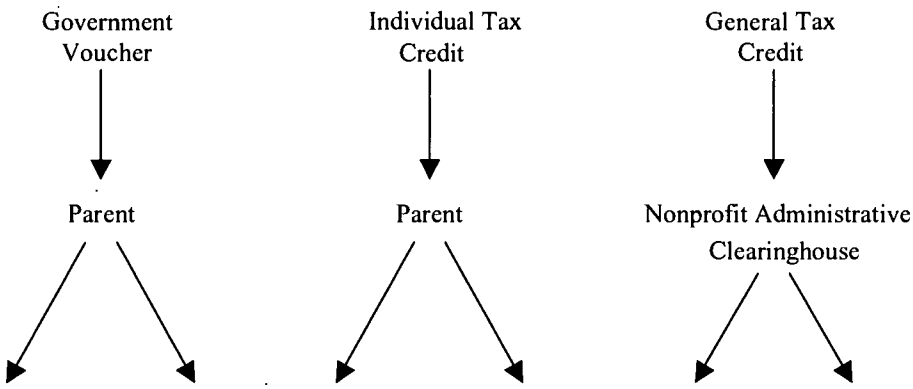
private schools. But the general tax credit system has its limitations as well, the most serious of which is the loss of state revenue that would occur if wealthy taxpayers, including corporations, were able to avoid paying state taxes by donating sizable sums to a clearinghouse entity. Arizona implemented a general tax credit system in 1997. It was upheld by the Arizona Supreme Court in 1999.[41] In a narrow three-to-two vote, the Arizona high court ruled that there was no violation of the state constitution's prohibition against the use of public money or property for the support of religious institutions, because taxpayer donations and resulting credits are not public money.[42] The Figure on the next page compares and contrasts vouchers and tax credits.

[41] *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999).

[42] Arizona Const. art. II, § 12 provides that no public money or property shall be "appropriated for or applied to" religious instruction or the support of any religious establishment. Art. IX, § 10 specifies in part that no tax "shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."

Figure 1

Comparing Vouchers and Tax Credits



Advantages

Parent Choice
May advance equity

Disadvantages

Incentive for regulation
Limited private school participation

Advantages

Parent Choice
Private school participation

Disadvantages

Funding delay
Limited money
Wealth discrimination
Complicates tax system
Limited accountability
Loss of state revenue

Advantages

Parent Choice
Private School participation
May advance equity

Disadvantages

Funding delay
Complicates tax system
Limited accountability
Loss of state revenue

Regardless of the nature of the school choice measure, the devil is in the details. Program design will affect outcomes, and it is in the legislative arena where the battles first will be fought. Voucher and tax credit proponents will encounter entrenched interest groups in most states willing to fight fiercely to prevent the privatization of American schooling. And, so long as these indirect aid programs remain small, few new private schools will spring up.

Conclusion

Despite the flurry of interest in vouchers and tax benefit programs that undoubtedly will follow the U.S. Supreme Court decision in *Zelman v. Simmons-Harris*, major hurdles remain.

State constitutional provisions in a number of states present a formidable bar to providing public funds for private school attendance. Strong public school interest groups can be expected to throw up roadblocks. Even where such programs emerge, there will be efforts to assure comprehensive accountability measures for the expenditure of public money. And these measures undoubtedly will frighten off many private schools that pride themselves on their independence from government. From all these perspectives, tuition tax credits, especially the general tax credit, seem to have the edge.

Regardless of the outcome, the Supreme Court's *Zelman* decision surely will stimulate new interest in school choice, vouchers, and tax credits in legislative arenas across the country. Exactly where and when programs will emerge cannot be predicted, though already one voucher bill has been filed. Just hours after the Supreme Court decision, House Majority Leader Dick Armey, R-Texas, introduced legislation to award more than 8,000 education scholarships of up to $5,000 to needy families in the District of Columbia.[43] Similar legislation passed both houses of Congress in the past but was vetoed by former President Clinton. With a voucher proponent now in the White

House, the chances of enactment are better, though the vote in the Senate remains uncertain. Secretary of Education Rod Paige, who supports school choice, hopes that a DC voucher program will "send a strong message to the rest of the country that school choice must be on the menu of options for improving our schools."[44] Exciting times lie ahead.

[43] Tamara Henry, "House Leader Seeks Vouchers in Capital," *USA Today*, July 1, 2002.
[44] *Id.*

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