VOUCHERS, TUITION TAX CREDITS, AND SCHOLARSHIP-DONATION TAX CREDITS: A CONSTITUTIONAL AND PRACTICAL ANALYSIS

William G. Frey*
Virginia Lynn Hogben**

I. INTRODUCTION

Many states have enacted programs to enable families to send their children to private schools. These programs range from vouchers that pay part or all of the child's private-school tuition,[1] to tax credits or deductions for private-school tuition and other

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* © 2002, William G. Frey. All rights reserved. William G. Frey received his B.A. *magna cum laude* from Brown University in 1975 and his J.D. in 1978 from Villanova Law School, where he was Articles and Book Review Editor of the *Villanova Law Review*.

He is a partner with the law firm of Wolf, Block, Schorr and Solis-Cohen, LLP in Philadelphia, Pennsylvania. Mr. Frey specializes his practice in government law, insurance and construction litigation. He heads the Government Law Practice Group in the Business Litigation Department of the firm, which represents state and local governmental entities in litigation matters.

Mr. Frey has represented the Commonwealth of Pennsylvania in school-funding matters in *Marrero v. Commonwealth*, 709 A.2d 956 (Pa. Cmmw. 1998) (dismissing claim for additional school funding as a non-justiciable political question), and *Pennsylvania Human Relations Commission v. School District of Philadelphia*, 732 A.2d 578 (Pa. 1999) (dismissing claim against Commonwealth for funding in twenty-four-year-old school-desegregation case).

** © Virginia Lynn Hogben, 2002. All rights reserved. Virginia Lynn Hogben received her B.A. *magna cum laude* from Princeton University in 1977, where she was a member of Phi Beta Kappa, and her J.D. *cum laude* in 1980 from the University of Pennsylvania Law School, where she served on the law review and was a member of the Order of the Coif.

She is an associate with the law firm of Wolf, Block, Schorr and Solis-Cohen, LLP in Philadelphia, Pennsylvania. Ms. Hogben has substantial experience in government law, insurance-law matters, and appellate work.

1. *E.g.* Fla. Stat. § 229.0537 (2001) (providing opportunity scholarships to students enrolled in the State's worst-ranked public schools who have been accepted to a private school); Ohio Rev. Code Ann. § 3313.975 (West 1999 & Supp. 2001) (providing scholarships and tutorial-assistance grants to students in school districts that have been supervised by the state superintendent under federal court order); Wis. Stat. § 119.23 (1990 & Supp. 2001) (providing Milwaukee students full tuition to private school based on family income).

expenses,[2] to tax credits for donations to "tuition-scholarship organizations," charitable organizations that provide scholarships for students to attend private schools.[3]

As the Supreme Court has recognized, the goal of assisting low-income families in sending their children to the school of their choice is legitimate and even laudable. In *Committee for Public Education and Religious Liberty v. Nyquist*,[4] the Court noted that "the tailoring of [a state program] to channel the aid provided primarily to afford low-income families the option of determining where their children are to be educated is most appealing."[5] Because the substantial majority of private elementary and secondary schools are religious schools, however, such programs raise issues of governmental subsidization of religion and are subject to constitutional challenge under the Establishment Clause of the First Amendment of the United States Constitution.[6] In addition, not only do states have their own constitutional prohibitions similar to the Establishment Clause, but many also have additional constitutional provisions containing language that appears specifically to bar government aid to religion, religious instruction, and religious institutions.[7]

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2. *E.g.* 35 Ill. Comp. Stat. § 5/201m (1969 & Supp. 2001) (providing tax credit to the custodian of private-school students equal to twenty-five percent of qualified education expenses, but not more than $500 per year); Iowa Code § 422.12 (1953 & Supp. 2001) (providing a tax credit equal to ten percent of the first $1,000 paid for tuition and textbooks for each dependent enrolling in an Iowa school).

3. *E.g.* Ariz. Rev. Stat. § 43-1089 (1997 & Supp. 2001) (providing tax credit of up to $500 for contributions to school-tuition organizations); Pa. H. 996, 185th Gen. Assembly art. XX-B, §§ 2001–2005-B (2001) (providing seventy-five to ninety percent business tax credit for donations to scholarship- and educational-improvement organizations).

4. 413 U.S. 756 (1973).

5. *Id.* at 795.

6. *E.g. Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 768 (1973) (eighty-five percent of New York private schools at the time were church affiliated); *Sloan v. Lemon*, 413 U.S. 825, 830 (1973) (over ninety-percent of Pennsylvania students in nonpublic schools were in religious schools); *Simmons-Harris v. Zelman*, 234 F.3d 945, 949 (6th Cir. 2000), *cert. granted*, 2001 WL 575830 (U.S. Sept. 25, 2001) (eighty-two percent of private schools in voucher program were church affiliated); *Jackson v. Benson*, 578 N.W.2d 602, 619 n. 17 (Wis. 1998) (over seventy percent of private schools in voucher program were sectarian).

7. *E.g.* Ariz. Const. art. 2, § 12 ("No public money . . . shall be appropriated for or applied to any religious worship, exercise or instruction or to the support of any religious establishment."); *id.* art. 9, § 10 (prohibiting the laying of "any tax . . . in aid of any . . . private or sectarian school"); Fla. Const. art. 1, § 3 ("No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."); Pa. Const. art. 3, § 29 ("No appropriation shall be made for charitable,

This Article will examine these three types of programs under the current state of the United States Supreme Court's Establishment Clause jurisprudence and evaluate their effectiveness in improving families' ability to send their children to the school of their choice, regardless of income.

Of the three types of programs, vouchers have the most serious constitutional problems. Tax deductions or credits for educational expenses, which reduce a family's taxes by the amount, or a portion of the amount, of tuition and other expenses, can pass constitutional muster, but do not provide assistance to the most needy and are a weaker vehicle than vouchers for improving families' educational choices. The type of program most likely to both withstand constitutional challenge and actually provide genuine educational choice, as opposed to providing financial assistance to private schools, is a tax credit for contributions to tuition-scholarship and other education programs.

II. THE ESTABLISHMENT CLAUSE AND ITS APPLICATION TO PRIVATE-SCHOOL-TUITION ASSISTANCE

The Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment,[8] provides that the states "shall make no law respecting an establishment of religion."[9]

The Supreme Court has long made clear that the Establishment Clause prohibits state subsidies of religion and state funding of religious indoctrination.[10] In its seminal decision addressing government assistance to religious schools, *Everson v. Board of Education of Ewing Township*,[11] the Court stated as follows:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.

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educational or benevolent purposes . . . to any denominational and sectarian institution, corporation or association."); Vt. Const. ch. 1, art. 3 ("[N]o person . . . can be compelled to . . . support any place of worship."); Wash. Const. art. 1, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.").

8. *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 8 (1947).

9. U.S. Const. amend. I.

10. *E.g. Walz v. Tax Commn.*, 397 U.S. 664, 668 (1970); *Everson*, 330 U.S. at 15–16.

11. 330 U.S. 1 (1947).

> Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.*[12]

In *Walz v. Tax Commission*,[13] the Court reaffirmed that "the 'establishment' of a religion" prohibited by the First Amendment includes "sponsorship, financial support, and active involvement of the sovereign in religious activity."[14]

The general test that the Court applies to determine whether a program is an unconstitutional establishment of religion is that laid down in *Lemon v. Kurtzman*:[15] To be constitutional, (1) the statute or program "must have a secular legislative purpose," (2) "its principal or primary effect must be one that neither advances nor inhibits religion," and (3) "the statute must not foster an 'excessive government entanglement with religion.'"[16] Although four of the present justices on the Court have stated that they would either discard or substantially alter the *Lemon v. Kurtzman* three-part test,[17] the basic principles of the *Lemon* test continue to be applied by a majority on the Court.[18]

Here, however, the devil is in the details. Programs to assist parents in sending their children to private schools easily satisfy the requirement that the statute have a secular purpose.[19] If the

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12. *Id.* at 15–16 (emphasis in original).

13. 397 U.S. 664 (1970).

14. *Id.* at 668.

15. 403 U.S. 602 (1971).

16. *Id.* at 612–613.

17. *Mitchell v. Helms*, 530 U.S. 793, 807–808 (2000) (Rehnquist, C.J. & Thomas, Scalia & Kennedy, JJ., plurality); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 750–751 (1994) (Scalia, J., dissenting).

18. *Mitchell*, 530 U.S. at 844–845 (O'Connor, J., concurring) (noting that *Lemon* criteria are still to be applied, although how they are to be weighed has changed); *Agostini v. Felton*, 521 U.S. 203, 222–223, 232–234 (1997) (modifying application of the third, excessive-entanglement prong to eliminate presumption that public-religious contact automatically created excessive entanglement, but continuing to apply *Lemon* three-pronged test).

19. *Mueller v. Allen*, 463 U.S. 388, 395 (1983); *Sloan v. Lemon*, 413 U.S. 825, 829–830

aid is in the form of a voucher or tax benefit to a private individual, such programs are also unlikely to result in excessive entanglement, as such types of aid would not require extensive monitoring of religious schools.[20] The far murkier question is whether such programs "have the 'effect' of advancing or inhibiting religion."[21] As the Court recognized in *Lemon*,[22] and continues to note,[23] this determination is a subtle, fact-specific matter with few clear guideposts.

The Supreme Court has addressed tuition subsidies and tax benefits for religion and religious education on several occasions. In 1973, in *Committee for Public Education and Religious Liberty v. Nyquist*[24] and its companion case, *Sloan v. Lemon*,[25] the Court held that payments and tax credits to parents to reimburse them for a portion of private-school tuition violate the Establishment Clause. In *Nyquist*, the statute provided both small tuition grants, which could not exceed fifty percent of private-school tuition, to the lowest income group and tax credits calibrated to give the same financial benefits to other parents with incomes within the eligible range.[26] In *Sloan*, the statute provided flat, per-child tuition grants to all parents who paid private-school tuition.[27]

The Court concluded that the effect of providing tuition reimbursements to parents was to support religious schools without restriction to their secular educational activities, even

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(1973); *Nyquist*, 413 U.S. at 773.

20. *Mueller*, 463 U.S. at 403. The Court in *Nyquist* suggested that the political divisiveness of a tuition-reimbursement program might raise entanglement issues. 413 U.S. at 794–798. The Court has subsequently made clear that such considerations are not sufficient to invalidate a statute on entanglement grounds and that a showing of "pervasive monitoring by public authorities" is necessary to establish unconstitutional entanglement. *Agostini*, 521 U.S. at 233–234.

21. *Agostini*, 521 U.S. at 223; *Mitchell*, 530 U.S. at 845 (O'Connor, J., concurring).

22. 403 U.S. at 612 ("Candor compels acknowledgement that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.").

23. *E.g. Mitchell*, 530 U.S. at 844 (O'Connor, J., concurring) (quoting *Rosenberger*); *Rosenberger v. Rector & Visitors of U. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) (resolution of Establishment Clause challenges "depends on the hard task of judging – sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite finely, based on the particular facts of each case.").

24. *Nyquist*, 413 U.S. at 799.

25. *Sloan*, 413 U.S. at 835.

26. *Nyquist*, 413 U.S. at 764–765.

27. *Sloan*, 413 U.S. at 828–829, 831.

though the funds or tax benefit went to the parents rather than to the school.[28] The Court specifically held in *Nyquist* that "reliev[ing] [the parents'] financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools" has the effect of aiding religious schools and thus advancing religion.[29] The Court summed up as follows:

> Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions.[30]

Accordingly, the Court concluded that such tuition grants and assistance "violate[d] the constitutional mandate against 'sponsorship' or 'financial support' of religion or religious institutions."[31] The Court left open the question whether a scholarship program would be constitutional even if it benefits sectarian schools in only one circumstance — when the program made assistance "available generally *without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.*"[32]

In 1983, the Court resolved that open question, with respect to tax deductions, in *Mueller v. Allen*.[33] In *Mueller*, the state provided parents a deduction for education expenses including tuition, tutoring, textbooks, transportation, and school extracurricular activities.[34] This deduction, unlike the tax benefits in *Nyquist*, was for actual expenses up to a maximum, rather than a flat amount, and was available to parents of public-school students as well as those who sent their children to private school.[35] The Court held that such a tax deduction did not violate the Establishment Clause, even if most of the benefit from the deduction in fact went to parents of children in religious schools.[36]

The Court concluded that two factors distinguished the

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28. *Nyquist*, 413 U.S. at 780–787.
29. *Id.* at 783.
30. *Sloan*, 403 U.S. at 832.
31. *Id.* at 832–833.
32. *Nyquist*, 403 U.S. at 782–783 n. 38 (emphasis added).
33. 463 U.S. 388, 390 (1983).
34. *Id.* at 390–392 nn. 1, 2.
35. *Id.* at 390 n. 1, 396–397 n. 6.
36. *Id.* at 394–403.

Mueller tax deduction from *Nyquist* and made it constitutional. First, unlike the tax benefit in *Nyquist*, it was a genuine tax deduction based on the taxpayer's expenses, rather than a flat, automatic benefit.[37] Second, and "*[m]ost importantly*, the deduction [was] 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."[38]

Three years after *Mueller*, in *Witters v. Washington Department of Services for the Blind*,[39] the Court answered the other aspect of the question left open in *Nyquist*, whether government payments for education or training at both public and private institutions violate the Establishment Clause if they are actually used for religious education.[40] The Court in *Witters* unanimously held that such assistance did not violate the Establishment Clause, even when used by the recipient for religious training at a religious college, because the aid was available for use at both public and non-religious private institutions, as well as at religious schools.[41] The Court in *Witters* specifically noted that the state assistance "creates no financial incentive for students to undertake sectarian education," and concluded that because it was available for use at a wide range of institutions, including public institutions, "[a]ny aid . . . that ultimately flows to religious institutions does so only as the result of the *genuinely independent and private choices* of aid recipients."[42]

The Court also has addressed the constitutionality of tax benefits for religion outside the context of education and private-school assistance. In *Walz*,[43] the Court held that a tax exemption for churches did not violate the Establishment Clause. The Court noted that the tax exemption was not limited to churches and religious institutions, but included a wide range of non-profit and charitable institutions:

> It has not singled out one particular church or religious group

37. *Id.* at 396.
38. *Id.* at 397 (emphasis added).
39. 474 U.S. 481 (1986).
40. *Id.* at 482–483.
41. *Id.* at 485–489.
42. *Id.* at 487–488 (emphasis added).
43. 397 U.S. at 680.

> or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by non-profit, quasi-public corporations which include hospitals, libraries, play grounds, scientific, professional, historical, and patriotic groups.[44]

The *Walz* Court also specifically recognized that a tax reduction or exemption is fundamentally different from a government payment, from the standpoint of the Establishment Clause. The majority opinion concluded that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."[45] In concurrence, Justice William Brennan further explained as follows:

> Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. *A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer.* It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, *"[i]n the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches," while "[i]n the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions."*[46]

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44. *Id.* at 672–673.

45. *Id.* at 675.

46. *Id.* at 690–691 (Brennan, J., concurring) (footnotes omitted, emphasis added). This recognition of the difference between a tax benefit and an outright subsidy in the context of government's relationship with religion is not undermined by the Court's analogies of tax benefits to subsidies in other contexts in *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544 (1983), and *Bob Jones University v. United States*, 461 U.S. 574, 591 (1983). Both *Regan* and *Bob Jones* dealt only with whether government could make a policy decision not to give tax benefits to certain activities, not whether government was constitutionally barred from providing tax exemptions or deductions. *Bob Jones*, 461 U.S. at 591–596 (upholding denial of charitable deductions and exemptions to racially discriminatory educational institutions); *Regan*, 461 U.S. at 545–551 (upholding constitutionality of denying charitable deductions for contributions to organizations engaged in lobbying). Indeed, the Court in *Regan*, citing *Walz*, specifically noted that "[i]n stating that exemptions and deductions, on the one hand, are like cash subsidies, on the other, we of course do not mean to assert that they are in all respects identical." 461 U.S. at 544 n. 5. The Court in *Bob Jones* referred to the effect of tax benefits as "indirect" and noted that "[c]haritable exemptions are justified on the basis that the exempt entity

In contrast, a tax exemption that provided its benefits *only* to religion did not survive Establishment Clause scrutiny in *Texas Monthly, Incorporated v. Bullock*.[47] The Court held in *Bullock* that a sales-tax exemption for religious periodicals promulgating the tenets of a religious faith violated the Establishment Clause because it gave preferential treatment and assistance to religion.[48] In a plurality opinion, Justice Brennan, contrary to his analysis in *Walz*, characterized the tax exemption as "a subsidy that affects nonqualifying taxpayers," and held that, because it was provided only to religious organizations, it violated the Establishment Clause.[49] Justice Brennan reasoned as follows:

> Insofar as that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause. However, when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . it "provides unjustifiable awards of assistance to religious organizations" and cannot but "conve[y] a message of endorsement" to slighted members of the community.
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> How expansive the class of exempt organizations or activities must be to withstand constitutional assault depends upon the State's secular aim in granting a tax exemption.[50]

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confers a public benefit — a benefit *which the society or the community may not itself* choose or *be able to provide*." 461 U.S. at 591 (emphasis added). Moreover, in *Camps Newfound/Owatonna, Incorporated v. Town of Harrison*, 520 U.S. 564, 590 (1997), the Court, in rejecting a claim that tax benefits should be treated as subsidies under the Commerce Clause, again reaffirmed that "there is a constitutionally significant difference between subsidies and tax exemptions."

47. 489 U.S. 1 (1989).

48. *Id.* at 8–17 (Brennan, Marshall & Stevens, JJ., plurality); *id.* at 28–29 (Blackmun & O'Connor, JJ., concurring).

49. *Id.* at 14–15 (Brennan, Marshall & Stevens, JJ., plurality).

50. *Id.* (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 348 (1987)).

Justice Harry Blackmun and Justice Sandra O'Connor, in their concurrence, concluded that,

> by confining the tax exemption exclusively to the sale of religious publications, [the state] engaged in preferential support for the communication of religious messages .... A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establish-ment Clause is all about and hence is constitutionally intolerable.[51]

These Supreme Court precedents remain good law. The Court has overruled a number of its decisions on other issues of private-school assistance and what types of secular, non-cash supplemental aid may be provided to private, religious schools as part of an aid program serving both public and sectarian schools.[52] The Court, however, has not revisited or impaired any of these precedents.

Some courts have suggested that *Nyquist* has been effectively overruled or limited.[53] Four of the present justices on the Supreme Court would, in fact, do so, and thus substantially revise and limit the scope of the Establishment Clause. In *Mitchell v. Helms*,[54] a four-justice plurality adopted the view that government support of religious schools is constitutional, provided that the aid is given on a neutral basis and is not itself religious in content, even if it is ultimately used to support religious instruction.[55] Under the *Mitchell* plurality's interpretation of the Establishment Clause,

> If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government
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> . . . .
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> So long as the governmental aid is not itself "unsuitable for

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51. *Id.* at 28–29 (Blackmun & O'Connor, JJ., concurring).

52. *E.g. Mitchell v. Helms*, 530 U.S. at 837 (overruling *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977)); *Agostini*, 521 U.S. at 235 (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985), and overruling in part *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985)).

53. *E.g. Simmons-Harris v. Goff*, 711 N.E.2d 203, 208 (Ohio 1999).

54. 530 U.S. 793 (2000).

55. *Mitchell*, 530 U.S. at 809–817 (Rehnquist, C.J. & Thomas, Scalia & Kennedy, JJ., plurality).

> use in the public schools because of religious content" and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern.[56]

That new analysis of the Establishment Clause, however, was squarely rejected by the two other justices who made up the majority in *Mitchell.* Concurring in the judgment, Justice O'Connor, along with Justice Stephen Breyer, specifically agreed with the three dissenting justices that,

> generality or evenhandedness of distribution . . . is relevant in judging whether a benefit scheme so characterized should be seen as aiding a sectarian school's religious mission, *but this neutrality is not alone sufficient to qualify the aid as constitutional.*[57]

Moreover, these two justices expressly stated that they "also disagree with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause."[58] The concurrence instead reaffirmed that "our decisions provide no precedent for the use of public funds to finance religious activities."[59] Indeed, Justice O'Connor emphatically has held in other cases that "*any* use of public funds to promote religious doctrines violates the Establishment Clause."[60]

Justice O'Connor, in *Mitchell*, did recognize one exception to this prohibition of public funding of religious education — that is, when the aid reaches a religious institution or assists religious training solely as a result of private decisions of individual aid

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56. *Id.* at 820 (O'Connor & Breyer, JJ., concurring) (citations omitted, quoting *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968)).

57. *Id.* at 840 (emphasis added, quoting Souter, J., dissenting).

58. *Id.*

59. *Id.*

60. *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring) (emphasis in original); *see also Rosenberger*, 515 U.S. at 846–847 (O'Connor, J., concurring) ("Public funds may not be used to endorse the religious message."). *Rosenberger* did not modify this principle that government funds may not be used to support religion. In *Rosenberger*, the Court held that the student activity fee in question "is not a general tax" and that its ruling "cannot be read as addressing an expenditure from a general tax fund." 515 U.S. at 841. In addition, Justice O'Connor concurred in holding that use of state university student-activity funds for a religious publication did not violate the Establishment Clause because, in her view, the fund was "not government resources," but was instead "a fund that simply belongs to the students." 515 U.S. at 851–852 (O'Connor, J., concurring).

recipients in a "*true* private-choice program."[61] The examples of what constitutes a true private-choice program cited by the concurrence were *Witters,* in which the vocational training funds could be used at both public and non-public institutions,[62] and *Zobrest v. Catalina Foot Hills School District,*[63] in which the Court held that sign-language assistance to a student in a Catholic school was constitutional because the program of providing interpreters "distributes benefits neutrally to any child qualifying as 'disabled' under the [statute], *without regard to the 'sectarian-nonsectarian, or public-nonpublic nature, of the school* the child attends."[64]

III. THE PROBLEMS WITH VOUCHERS

Under the Supreme Court's Establishment Clause standards, private-school vouchers, tuition reimbursements, and scholarships paid by the state are subject to serious constitutional challenges. The tuition funded by the state encompasses both the religious and secular education at a private, religious school, and the private school is not restricted to using the state funds for only secular portions of its curriculum.[65] Thus, state funds provided from taxation of citizens who may not agree with the religious teaching of those schools are, in fact, used to support religious instruction.

Such funding of the religious mission of private schools runs afoul of the Court's long-standing interpretation of the Establishment Clause as prohibiting the levying of any "tax in any amount, large or small . . . to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion,"[66] and as prohibiting government "financial support . . . in religious activity."[67] Moreover, by making religious schools, along with other private schools, more affordable, state vouchers and other tuition payments aid those schools by providing them with students who would otherwise be

61. 530 U.S. at 841–842 (O'Connor & Breyer, JJ., concurring) (emphasis added).

62. 474 U.S. at 488.

63. 509 U.S. 1 (1993).

64. *Id.* at 10 (emphasis added).

65. *E.g. Nyquist,* 413 U.S. at 783; *Zelman,* 234 F.3d at 958–959; *Jackson,* 578 N.W.2d at 609.

66. *Everson,* 330 U.S. at 16.

67. *Walz,* 397 U.S. at 668.

unable or unwilling to attend.[68]

The only serious issue that could provide a basis for sustaining a voucher program under the Establishment Clause is the fact that the money reaches religious schools indirectly, as a result of the private choice of parents to send their children to those schools. The private decisions in elementary and secondary-education-voucher programs, however, are not the kind of "*genuinely* independent and private choices"[69] or "*true* private choice"[70] on which the Supreme Court has relied in permitting assistance that flowed to religious education.

The Court's decisions sustaining the constitutionality of aid that benefited religious schools on grounds of private choice have all consistently relied on the fact that the program was not merely neutral between religious and non-religious private schools, but that the program provided its benefits to all students, *including students in public schools*, as well as private schools.[71] These programs did not steer students toward private schools, or provide their benefits only for a subset of schools, but also provided benefits to those students who chose to go to public schools or other public institutions. Indeed, one of the critical facts on which the Supreme Court has repeatedly rested its decisions upholding programs providing aid to private, religious schools is whether the program provides the same benefits to public-school students as it does to private-school students.[72] In contrast, private-school-tuition-voucher or scholarship programs do not provide benefits to all students and families regardless of and independent of the educational choices they make. Rather, they fund only one type of educational choice — private schools — the vast majority of which are religious.

These issues are currently in litigation in the state and federal courts. Three states — Florida, Ohio, and Wisconsin — have enacted voucher programs that have been the subject of recent state and lower federal court decisions. Under Florida's statute, the state provides "opportunity scholarships" for private-school tuition only for students assigned to schools that have

68. *Nyquist*, 413 U.S. at 783.

69. *Witters*, 474 U.S. at 487 (emphasis added).

70. *Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring) (emphasis added).

71. *Zobrest*, 509 U.S. at 10; *Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at 397.

72. *Mitchell*, 530 U.S. at 846 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 209–210; *Bd. of Educ. v. Allen*, 392 U.S. 236, 238, 243 (1968); *Everson*, 330 U.S. at 17.

received unsatisfactory performance ratings from the state.[73] The private schools participating in the program are required to accept the state payment as full payment of tuition and fees.[74] Under Ohio's statute, the state provides private-school-scholarship payments to families in the Cleveland school district that apply for such scholarships, with preference given to low-income families.[75] The Ohio scholarship program provides payments of up to $2,250 for low-income students and $1,875 for all other families, and requires private schools participating in the program to limit their tuition so that the state payments satisfy ninety percent or seventy-five percent tuition, respectively.[76] The Wisconsin program provides for state payments to cover the full private-school tuition of the low-income students and permits up to fifteen percent of the students enrolled in Milwaukee public schools to be eligible for the payments.[77]

To date, there is no clear, ultimate determination of the constitutionality of these programs under the Establishment Clause. An action challenging the constitutionality of the Florida statute under both the federal Establishment Clause and various state constitutional provisions is pending in the Florida state courts.[78] A trial court ruling that the voucher program was unconstitutional under the Florida Constitution's public-education clause was reversed on appeal.[79] The appellate court did not, however, address the challenges to the statute under the Establishment Clause or Florida's religion clause.[80] Those challenges are pending

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73. Fla. Stat. § 229.0537(2)(a).

74. *Id.* § 229.0537(4)(i).

75. Ohio Rev. Code Ann. §§ 3313.975, 3313.978(A); *Zelman*, 234 F.3d at 948.

76. Ohio Rev. Code Ann. §§ 3313.976(A)(8), 3313.978(A); *Zelman*, 234 F.3d at 948.

77. Wis. Stat. § 119.23(2), (4); *Jackson*, 578 N.W.2d at 608–609.

78. *Bush v. Holmes*, 767 S.2d 668 (Fla. Dist. App. 1st 2000), *rev. denied*, 2001 Fla. LEXIS 952 (Fla. Apr. 24, 2001).

79. *Id.* The only basis for the trial court's decision and the only constitutional challenge addressed by the appellate court was Florida Constitution Article 9, Section 1, which provides that the State is required "to make adequate provision for the education of all children" and requires that "[a]dequate provision shall be made by law for a uniform, efficient, safe, secure and high quality system of free public schools that allows students to obtain a high quality education . . . and other public education programs that the needs of the people may require." Article 9, Section 1 does not refer to religion or aid to religion.

80. *Holmes*, 767 S.2d at 671, 677. The appellate court specifically "emphasize[d] that our holding addresses only the narrow issue of the facial constitutionality of the [voucher program] under Article 9, Section 1 of the Florida Constitution." *Id.* at 671. The appellate court specifically declined to consider and left for the trial-court challenges to the program

in the trial court and have not been ruled on by any appellate court.[81]

The United States Court of Appeals for the Sixth Circuit has held that the Ohio voucher program is unconstitutional under the Establishment Clause.[82] The Wisconsin statute has survived constitutional challenge, at least thus far. The Wisconsin voucher program was upheld by the Wisconsin Supreme Court in 1998 against both Establishment Clause and state constitutional challenges, and the United States Supreme Court declined to hear the case.[83]

The Wisconsin decision, however, is not a persuasive resolution of the constitutional issue. The Wisconsin court's analysis largely ignored the fact that the voucher program, unlike the genuine or true independent-choice programs that the Supreme Court has upheld, does not provide the same additional benefit to those attending public as well as private institutions. Rather, the court relied on neutrality as the overriding and virtually sole test of constitutionality, based on the view that "state programs that are wholly neutral in offering educational assistance directly to citizens in a class defined without reference to religion do not have the primary effect of advancing religion."[84] That very type of test, however, was expressly rejected by the Court in *Mitchell*.[85]

The Wisconsin statute does have one unique feature, not present in the other voucher statutes, that could permit a court to

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based on the federal Establishment Clause, Article 9, Section 6 of the Florida Constitution, which restricts use of the state school fund to support of public schools, and Florida's religion clause, Article 1, Section 3, which provides, *inter alia*, that "[n]o revenue of the state. . . shall ever be taken from the public treasury directly or indirectly in aid of . . . any sectarian institution." Florida case law holds that "the question of the constitutionality of a statute is an issue of law, or of mixed fact and law, depending upon the nature of the statute brought into question and the scope of its threatened operation as against the party attacking the statute." *Holmes*, 767 S.2d at 677. The appellate court held that the constitutionality of the voucher statute is a question of fact and law, and reversed and remanded the case so that the trial court could hold an evidentiary hearing to further develop the record. *Id.*

81. The most recent activity in *Holmes*, as of this writing, is the trial court's order scheduling a management conference. Leon County Clerk of Courts, *High Profile Cases* <http://www.clerk.leon.fl.us/wrapper.php3?page=/court_departments/high_profile_cases/index> (last updated Nov. 9, 2001).

82. *Zelman*, 234 F.3d 945. At this writing, a petition for certiorari to the United States Supreme Court has been granted. 2001 WL 575830 (U.S. Sept. 25, 2001).

83. *Jackson*, 578 N.W.2d at 607.

84. *Id.* at 613.

85. 530 U.S. at 837, 877.

find the voucher less bound by religious ties. The Wisconsin statute requires that private schools participating in the voucher program permit voucher students to opt out and be excused from religious activities at the school, if the student's parent so requests.[86] If this option works in practice, it could separate the choice of religious education from the desire simply to obtain a non-public education and could, potentially at least, ensure that only those who want religious teaching receive it.

The Florida statute also has a distinctive feature that increases the genuineness and independence of the choice of a religious school, in that it provides that eligible families have an option of sending their children to a different public school.[87] The Florida voucher statute requires that the school district in question "[o]ffer that student's parent or guardian an opportunity to enroll the student in the public school within the district that has been designated by the state . . . as a school performing higher than that in which the student is currently enrolled or to which the student has been assigned."[88] In addition, the Florida statute provides that parents of eligible students also have the right to enroll their children in schools in adjacent school districts, to the extent that space is available, and requires that the adjacent school districts accept those students.[89]

In contrast, the Ohio statute provides no true public-school option or guarantee of a non-religious alternative. Although the Ohio statute on its face permits adjacent school districts to participate in the voucher program, it does not require them to participate or to accept Cleveland students.[90] Moreover, no public schools have in fact participated; therefore, no such public-school option actually exists under the Ohio voucher program.[91]

Absent such an opt-out or true alternative, public-school option, a voucher program has the potential of steering parents toward religious education with which they do not agree, simply to obtain a better education for their children. Ironically, the same desperate need to escape poor quality schools, which has been argued as supporting the desirability of vouchers,[92] creates

86. Wis. Stat. § 119.23(7)(c); *Jackson*, 578 N.W.2d at 608, 617.
87. Fla. Stat. § 229.0537(3).
88. *Id.* § 229.0537(3)(a)(2).
89. *Id.* § 229.0537(3)(b).
90. Ohio Rev. Code Ann. § 3313.976(c).
91. *Zelman*, 234 F.3d at 949.
92. *Id.* at 963, 971, 974 (Ryan, J., dissenting).

an incentive for students to attend religious schools and a potential for coercion in the Ohio program. The Ohio Supreme Court recognized that an admissions preference for members of affiliated religious organizations in an earlier version of the voucher statute was unconstitutional because "parents desperate to get their child out of the Cleveland City School District" would have an incentive to "'modify their religious beliefs or practices in order to enhance their opportunity to receive a School Voucher Program scholarship.'"[93] Given that the overwhelming percentage of private-school options available under the Ohio program are religious schools,[94] parents desperate to remove children from the Cleveland public schools would have that same incentive to send a child to a school that includes religious instruction with which the parents do not agree, and the religious aspects of such an education would not be a truly independent choice.

Whatever the independence of the choice or neutrality of the program, however, all of these voucher programs have the feature of having taxpayers subsidize religious institutions of faiths to which they do not adhere. Although it is hard to see a forced contribution to religion when a program provides government aid to only a small number of students and most of the students in those schools are not receiving government aid, if the tuition for most or all of the students in the school is paid by a voucher program, government is then not merely enabling students to attend particular schools, it is effectively funding the schools themselves. If most of, or the entire, student attendance is government-funded, then the education provided by that school, including its religious components, is truly government-supported. Thus, the broader a program becomes, and the more effective it is in enabling parents to obtain the private education they want for their children, the more graphically it conflicts with the core purposes of the Establishment Clause.

The fact that a program is only a pilot or experimental program is no protection against these problems. As the Supreme Court recognized in *Nyquist*,

> [W]e know from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own

93. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 210 (Ohio 1999).

94. *Zelman*, 234 F.3d at 949.

aggressive constituencies.[95]

Indeed, this is not merely a theoretical possibility. Wisconsin has already expanded its voucher programs ten-fold, from one-and-one-half percent to fifteen percent of the student population, and eliminated all limitations on the percentage and number of state-funded students who may attend the same private school.[96]

In any event, even if voucher programs survive constitutional scrutiny by the Supreme Court, they are not guaranteed to be a viable way to assist parents of children in private school in all states. State courts are free to interpret their own state constitutional equivalents to the Establishment Clause differently, and more stringently, than the United States Supreme Court. More importantly, a number of state constitutions contain prohibitions on assistance to religious institutions far more extensive and explicit than the Establishment Clause. For example, Florida's Constitution provides that "*[n]o revenue* of the state or any political subdivision or agency thereof *shall ever be taken from the public treasury directly or indirectly* in aid of any church, sect, religious denomination or *in aid of any sectarian institution.*"[97] Pennsylvania's Constitution squarely provides that "*[n]o appropriation shall be made for* charitable, *educational* or benevolent *purposes to . . . any denominational and sectarian institution*, corporation or association."[98] Both Arizona's and Washington's state constitutions provide that "*[n]o public money shall be appropriated for or applied to any religious instruction, or the support of any religious establishment*,"[99] and Arizona further prohibits *any tax "in aid of any . . . private or sectarian school.*"[100]

Although it is possible that some state courts could interpret these explicit prohibitions of funding of religious institutions to permit voucher programs,[101] passing such hurdles may require

95. 413 U.S. at 797.

96. *Jackson*, 578 N.W.2d at 607–609. The structure of the Florida program, by limiting eligibility for vouchers to only students in or assigned to those schools that have failed state standards, is not open-ended and does not have the same likelihood of effectively providing full state funding for some religious schools. Fla. Stat. § 229.0537(2)(a). This limitation, however, correspondingly restricts its ability to provide choice to parents beyond those few in the most desperate situation.

97. Fla. Const. art. 1, § 3 (emphasis added).

98. Pa. Const. art. 3, § 29 (emphasis added).

99. Ariz. Const. art. 2, § 12 (emphasis added); Wash. Const. art. 1, § 11 (emphasis added).

100. Ariz. Const. art. 9, § 10 (emphasis added).

101. Some scholarly analysis has contended that private-school vouchers flowing to

considerable linguistic gymnastics. In fact, state courts in Washington and Vermont that have addressed challenges to religious-school-tuition payments and vouchers have held that such programs violate more explicit state constitutional prohibitions, even if they may be constitutional under the federal Establishment Clause.[102]

IV. THE INADEQUACY OF TAX CREDITS AND DEDUCTIONS FOR TUITION PAYMENTS

In contrast to vouchers, tax deductions and credits permitting parents to reduce their tax payments by the amount or a percentage of private-school tuition and expenses have repeatedly been held constitutional. In *Mueller*, the Supreme Court held that tax deductions for actual private-school payments do not violate the Establishment Clause, at least when similar deductions are also permitted to families whose children attend public schools.[103] Indeed, educational-expense deductions are constitutional even if the bulk of the benefits from the deductions flows to parents who

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religious schools would not violate the Pennsylvania Constitution's prohibition in Article 3, Section 29 against "appropriation . . . for . . . educational purposes to . . . any denominational and sectarian institution." William B. Ball, *Economic Freedom of Parental Choice in Education: The Pennsylvania Constitution*, 101 Dick. L. Rev. 1, 275 (1997). Others have concluded that vouchers would violate Article 3, Section 29 of the Pennsylvania Constitution even if constitutionally permissible under the Establishment Clause. John Paul Jones, *Pennsylvania's Choice: "School Choice" and the Pennsylvania Constitution*, 66 Temp. L. Rev. 1289 (1993). Existing Pennsylvania court decisions upholding aid to parochial and other private schools under the Pennsylvania Constitution have involved the very different issue of providing school-bus transportation, *Springfield Sch. Dist. v. Dept. of Educ.*, 397 A.2d 1154 (Pa. 1979); *Rhoades v. Sch. Dist. of Abington Township*, 226 A.2d 53 (Pa. 1967), which is well established as not constituting funding of religion under the federal Establishment Clause. *Everson*, 330 U.S. at 1. Moreover, the Pennsylvania Supreme Court, in upholding such aid, has relied on the fact that under such a program "no state monies reach the coffers of these church-affiliated schools." *Springfield Sch. Dist.*, 397 A.2d at 1171. In contrast, voucher funds do "reach the coffers of. ... church-affiliated schools." *Id.* It is, however, beyond the scope of this Article to determine whether vouchers would be held to violate the Pennsylvania Constitution or predict the outcome of state constitutional challenges in other courts that have not addressed the issue.

102. *Witters v. Wash. Commn. for the Blind*, 689 P.2d 53 (Wash. 1984), *rev'd*, *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (striking down on state constitutional grounds the precise payments later held constitutional under the Establishment Clause by the Supreme Court in *Witters*); *Chittendon Town Sch. Dist. v. Dept. of Educ.*, 738 A.2d 539 (Vt. 1999) *cert. denied, sub nom. Anderson v. Vt. Dept. of Educ.*, 528 U.S. 1066 (1999) (striking down vouchers for religious schools under Vermont's coerced support clause regardless of whether Establishment Clause permits such payments).

103. 463 U.S. at 394–403.

send their children to private schools.[104] Following *Mueller*, courts have upheld other state statutes, providing tuition-tax credits and deductions against Establishment Clause challenges.[105]

This different treatment of tax deductions is consistent with basic Establishment Clause principles because a true tax deduction or credit reduces taxes, rather than paying out public money obtained from other taxpayers. Thus, a tax deduction or credit does not conflict with the long-standing interpretation of the Establishment Clause as prohibiting use of state funds to provide financial support to religion. Although taxpayers and religious schools receive a benefit, "the government does not transfer part of its revenue"[106] and does not "forcibly diver[t] the income of both believers and nonbelievers" to support religious teaching.[107] A religious school still must support itself through its own adherents willing to pay for its teaching, even if their burden has been somewhat reduced.

There are, however, some disadvantages to tax deductions and credits for private-school tuition. They are not the most effective method of enabling parents to send their children to the school of their choice. Tax deductions and credits that reduce the parents' tax burden only benefit those who have income on which they are taxed. Families whose resources are so limited that they need outright assistance to afford private-school tuition do not obtain the assistance they need and remain unable to send their children to a private school.

Moreover, to the extent that the deduction or credit is given to families within a wide spectrum of incomes, and is not strictly limited to the lowest incomes, tax deductions and credits are probably more effective as a way of providing financial aid to private schools than as a method of genuinely improving parents' ability to send their children to the school of their choice. Tax deductions and credits ordinarily do not regulate the amount of tuition private schools may charge. Schools are undoubtedly influenced in setting their tuitions, at least in part, by the ability of the students' families to pay that tuition. Because tax credits and deductions make a given level of tuition more affordable, private schools are likely to take into account total family

104. *Id.* at 401–403.

105. *Luthens v. Bair*, 788 F. Supp. 1032 (S.D. Iowa 1992); *Toney v. Bower*, 744 N.E.2d 351 (Ill. App. 4th Dist. 2001), *app. denied*, 2001 Ill. LEXIS 605 (Ill. Feb. 8, 2001).

106. *Walz*, 397 U.S. at 675.

107. *Id.* at 691 (Brennan, J., concurring).

resources, including any available tax credits or deductions, and raise their tuitions commensurately. If so, the end result would be a loss of state revenue and the provision of financial assistance to the private schools, but parents would remain no more able to afford private schools than they were before the tax benefit.

V. TAX CREDITS FOR TUITION-SCHOLARSHIP DONATIONS AS AN ALTERNATIVE

In the face of the constitutional problems with vouchers and the disadvantages of tuition-expense deductions and credits, at least two states have chosen a third route. Both Pennsylvania and Arizona have enacted tax credits for contributions to organizations that provide tuition scholarships to students to enable them to attend private schools.[108]

Pennsylvania's statute provides a seventy-five-percent-to-ninety-percent tax credit, up to $100,000 per company, to businesses for making contributions to either "scholarship organizations" or "educational improvement organizations."[109] "Scholarship organizations" are defined in the statute as non-profit organizations that "provide tuition to [low to middle income] students to attend a school located in [Pennsylvania]."[110] An "educational improvement organization" is defined as a non-profit entity that provides "grants to a public school for innovative educational programs."[111]

The Arizona statute provides that taxpayers may take a dollar-for-dollar credit of up to $500 per year for donations to "school tuition organizations" and charitable organizations that provide "educational scholarships or tuition grants to children to allow them to attend any qualified school of their parent's choice."[112] Qualified schools include any Arizona "nongovernmental primary or secondary school . . . that does not discriminate on the basis of race, color, sex, handicap, familial status or national origin."[113]

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108. Ariz. Rev. Stat. § 43-1089; Pa. H. 996, *supra* n. 3, at § 2001-B.

109. Pa. H. 996, *supra* n. 3, at § 2005-B. The tax credit is seventy-five percent, but increases to ninety percent if the business makes a written commitment to continue to provide the same amount of donations to the scholarship organization or educational-improvement organization for two consecutive years. *Id.*

110. *Id.*

111. *Id.*

112. Ariz. Rev. Stat. § 43-1089(A), (E)(2).

113. *Id.* § 43-1089(E)(1).

Both statutes make possible substantial assistance to enable even children in the poorest families to attend private schools. This type of program also stands on far sturdier constitutional ground than vouchers and state-paid scholarships. Because both statutes provide only a reduction in taxation,[114] no state funds are used in the scholarships and, consequently, no state funds, even indirectly, "ever reach the coffers of religious schools."[115] Thus, such programs cannot run afoul of the fundamental Establishment Clause principles that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions . . . whatever form they may adopt to teach or practice religion"[116] and that "*any* use of public funds to promote religious doctrines violates the Establishment Clause."[117] Under these programs, tuition-scholarship tax credits are akin to charitable deductions, which are constitutional even if they happen predominantly to benefit religious organizations.[118]

In addition, the amount of private choice that separates the benefit to religious schools from the government is far greater than in a voucher system. Two separate private choices are necessary before any money reaches a religious institution. First, donors make decisions whether to give money to a tuition-scholarship organization at all. Second, the students' families choose whether to obtain a scholarship and use it at a religious school.

Indeed, the Arizona statute has been upheld by the Arizona courts as constitutional, not only under the Establishment Clause, but also under Arizona's express constitutional prohibition against use of public money and taxation for religious instruction and private schools.[119]

Because they stand on firmer constitutional grounds, these types of tax credits also have a flexibility that most voucher statutes do not. The Ohio, Florida, and Wisconsin voucher statutes all require participating private schools to accept students randomly, without regard to academic ability or other admissions standards.[120] That restriction, designed to insulate the

114. Ariz. Rev. Stat. § 43-1089(B); Pa. H. 996, *supra* n. 3, at § 2006-B(C), (D).

115. *Agostini*, 521 U.S. at 228.

116. *Everson*, 330 U.S. at 16.

117. *Bowen*, 487 U.S. at 623 (O'Connor, J., concurring) (emphasis in original).

118. *Mueller*, 463 U.S. at 396 n. 5; *Walz*, 397 U.S. at 675.

119. *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), *cert. denied*, 528 U.S. 810, 921 (1999).

120. Fla. Stat. § 229.0537(4)(E); Ohio Rev. Code Ann. § 3313.977(A)(1); Wis. Stat.

programs from claims of religious discrimination and non-neutrality, is likely to deter at least some private schools from participation, particularly those with the most challenging academic programs and the most desirable learning atmospheres, thus, making them unavailable to the students receiving assistance. No such restrictions are placed on private schools under tuition-scholarship tax-credit programs, and schools will therefore be able to accept needy students without being forced to forego their admissions standards.

Although the statutes are the same in many respects, the Pennsylvania statute is even better designed to withstand constitutional challenge. The Arizona statute has potential constitutional flaws — although it does not provide state funds, it does discriminate in its benefits in favor of non-public schools and, at least potentially, could be viewed as providing tax benefits to religious donations that are not available for comparable non-religious donations. Under the Supreme Court's decisions in *Mueller*, *Witters*, and *Zobrest*, the genuinely independent private choice that makes a government benefit to religion constitutional under the Establishment Clause was held to exist only when the benefit was provided to *both public and non-public schools*.[121] The Arizona statute does not meet that standard — the credit is provided not for education in general, but only for funding tuition scholarships. Public schools are expressly excluded.[122] To the extent that availability of a benefit for both public and non-public schools is an essential requirement, even for a genuine tax deduction or credit that involves no payout of government funds, as it appears to be under *Mueller*,[123] the Arizona statute runs afoul of this requirement.

Although the Arizona Supreme Court upheld the statute despite this defect, its analysis of the issue was rather limited. The only tax benefit for public education to which the court could point was a $200 tax credit for public-school extracurricular activities.[124] That tax benefit, however, cannot be viewed as part of the school tuition-organization credit, or make it even-handed toward public education. The credit, with respect to public schools, is of a different nature than the tuition-scholarship

§ 119.23(3)(a).

121. *Zobrest*, 509 U.S. at 10; *Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at 397.

122. Ariz. Rev. Stat. § 43-1089(E).

123. 463 U.S. at 394–403.

124. *Kotterman*, 972 P.2d at 613, 616.

credit. It is only for extracurricular activities and character education, and is available to the parents themselves for activity fees they have paid.[125] In contrast, the tuition-scholarship credit is not only larger, but it is also not limited to private schools' extracurricular programs and cannot be used by any parent to offset education expenses.[126]

Moreover, the Arizona court's conclusion, that unequal treatment of contributions to private and public education is constitutional is questionable.[127] The inequality permitted by the Supreme Court in *Mueller* was different from that in the Arizona statute in two respects. First, the Supreme Court in *Mueller* relied on the fact that the tax deduction was facially neutral between public and private schools, and the disproportionate benefit occurred only in its use and effect.[128] The Arizona statutes are not facially neutral because, even if the public education and scholarship-tax credits were considered equivalent and part of the same program, the statutes on their face limit the credit for public-education extracurricular activities to less than one-half that allowed for private-school-scholarship contributions. Second, the deduction in *Mueller* was for expenses, not for charitable contributions. Higher deductions taken by private-school parents resulted only from the fact that their expenses that were subject to the deduction were substantially higher than public-school parents' payments.[129] The scholarship donations for which the Arizona statute provides a credit are not actual expenses, incurred by parents in educating their children, but are charitable donations. Differences between actual expenses of private-school parents, therefore, cannot justify the higher tax benefits given to private-school scholarship donors over public-school donors.

In addition, if all school-tuition organizations in fact provide scholarships to religious schools, an argument could be made that the Arizona statute is unconstitutional under *Texas Monthly, Incorporated v. Bullock*.[130] Under *Bullock*, tax benefits provided only to religious activities and excluding secular activities of the same nature are unconstitutional under the Establishment Clause because "[a] statutory preference for the dissemination of reli-

125. Ariz. Rev. Stat. § 43-1009.01; *Kotterman*, 972 P.2d at 613, 616.
126. Ariz. Rev. Stat. § 43-1089(A), (D).
127. *Kotterman*, 972 P.2d at 616.
128. 463 U.S. at 401.
129. *Id.* at 401–402.
130. 489 U.S. 1 (1989).

gious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable."[131] If gifts to school-tuition organizations necessarily require that the donations be available for religious education, the credit will be available only to those who wish to, or are willing to, support religious education, and will be denied to those who wish to assist in providing secular educational opportunities. Thus, such credit can potentially be viewed as an unconstitutional "statutory preference for the dissemination of religious ideas."[132]

The Pennsylvania statute, in contrast, has been drafted in a way that avoids these constitutional pitfalls. Unlike the Arizona tax credit, the Pennsylvania statute provides for a comparable tax credit for donations to programs for public-school students.[133] The same educational-improvement tax credit may be taken for contributions to "education improvement organizations" that provide funds for academic program enhancements for public schools,[134] as well as for contributions to tuition-scholarship organizations.[135] Thus, the benefit is designed to be available across-the-board to provide assistance to both public-school and private-school students, as required by *Mueller*, *Nyquist* and *Witters*.[136] In addition, unlike the Arizona statute, the Pennsylvania tax credit does not exclude public schools from the scholarships that may be provided by scholarship programs receiving donations under the tax credit.[137] Moreover, there is no *Bullock* problem of discrimination in favor of contributions to religious education, because the statute provides the same tax credit for contributions to secular, public education as it does for contributions to private-school tuition.[138]

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131. *Id.* at 28 (Blackmun, J., concurring).

132. *Id.*

133. Pa. H. 996, *supra* n. 3, at §§ 2001-B, 2005-B.

134. *Id.*

135. *Id.* § 2005-B.

136. This public-education option provided by the Pennsylvania statute is apparently a real and available option. As of September 2001, within a few months of enactment of the tax-credit statute, the Pennsylvania Department of Community and Economic Development had already approved and listed over ten educational-improvement organizations.

137. Pa. H. 996, *supra* n. 3, at § 2002-B.

138. *Id.* The statute does cap the total tax credits taken by all businesses in one year at $30 million, and provides that at least $20 million of this limit is reserved for scholarship organizations and only $10 million is reserved for public-school-educational-improvement programs. *Id.* § 2006-B(A). This limitation, however, could be justifiable as an attempt to

VI. CONCLUSION

When it comes to helping low-income parents send their children to the school of their choice, the best method of government assistance may be the least direct. Direct, full-tuition vouchers can accomplish the goal but are subject to serious legal challenges that have a good chance of blocking such programs altogether, or at least tying up such programs in litigation for years. Tax credits and deductions to families for private-school expenses stand on solid legal ground, but cannot assist those most in need, and may be ineffective in aiding parental choice if the benefits are simply consumed by tuition increases.

In contrast, tuition-scholarship and education-improvement tax credits can provide the most flexible way to give needy families educational opportunity and choice, while avoiding the constitutional problems inherent in appropriating tax dollars for use at religious institutions. Because both the decision to give the money to provide scholarships and the decision to use a scholarship at a religious school are private, such a program is a "*true* private-choice program,"[139] not a government use of taxpayer funds to subsidize any religion.

Indeed, a program such as Pennsylvania's has the potential to reduce some of the uglier overtones that have permeated the school-choice debate. Too often, those opposing such programs have been characterized as being bigoted and as being hostile to religious schools.[140] Those supporting such programs have been characterized as attempting to subsidize religious indoctrination and hostile to public education.[141] By allowing a tax credit for programs assisting both types of education, government recognizes the fundamental importance of education itself and the desirability of harnessing private generosity to improve educational opportunity. When, as is the case under the Pennsylvania

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estimate the likely use of the credit and protect both public-school support and tuition-scholarship organizations from being disproportionately excluded from the tax credits by early fundraising by the other group, as the credits are otherwise provided on a first-come-first-served basis. *Id.* § 2004-B(C). No disfavoring of secular education could be shown unless the limitation actually disproportionately operates to deny contributions to public education. In any event, under *Mueller*, perfect equality in a tax benefit between public and private education may not necessarily be required where public education is not excluded from the benefit. 463 U.S. at 401–403.

139. *Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring) (emphasis added).

140. *Id.* at 827–828; *Zelman*, 234 F.3d at 973 (Ryan, J., dissenting).

141. *Kotterman*, 972 F.2d at 626 (Feldman, J., dissenting).

tax credit, donors can give to either alternative at their option, government is not in the position of favoring one goal at the expense of the other.