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Taxing the Establishment Clause: The Revolutionary Decision of the Arizona Supreme Court in *Kotterman v. Killian*

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Abstract

This article explores the nature and implications of a 1999 decision of the Arizona Supreme Court, upholding the constitutionality of a state tax credit statute. The statute offers a \$500 tax credit to taxpayers who donate money to non-profit organizations which, in turn, donate the money in grants to students in order to help defray the costs of attending private and parochial schools. The author concludes that the Arizona decision elevates cleverness in devising a statutory scheme above the substance of long-established constitutional doctrine.

This article is one of four on the Arizona Tax Credit Law:

- [Moses: Hidden Considerations of Justice](#)
- [Wilson: Effects on Funding Equity](#)
- [Rud: Moral Considerations](#)

Diverse Beliefs Within a Unitary System

Democracy, according to Chubb and Moe (1990), undermines American schooling. These authors point to a purported bureaucratic subversion of educational goals and efficiency. The market—individual choices by students and parents—would in their view drive more efficient and higher-quality schools.

While Chubb and Moe (1990) support their arguments by positively comparing Catholic schools to public schools, their book gives short-shrift to issues concerning how a market-based educational system might implicate issues of religious liberty. Ultimately, in discussing which existing private schools should be included among those eligible to participate in the government-funded market of schools, they parenthetically offer their “own preference ... to include religious schools ..., as long as their sectarian functions can be kept clearly separate from their educational functions” (p. 219).

But the issue of religious schools is inextricably intertwined with the market-based model. Simply put, many families would—all other factors being equal—choose a sectarian education for their children. Not surprisingly, then, the recent trend toward market-based educational policies, such as public-school choice, charters, magnets, and vouchers, has prompted a new series of disputes concerning how to best balance the conflicting religious protections in the First Amendment.

Federal courts have perpetually struggled to address the tension between the First Amendment's “establishment clause” (forbidding laws “respecting an establishment of religion”) and its “free exercise clause” (forbidding laws “prohibiting the free exercise thereof”). These two clauses can press courts to act in diametrically opposed directions. Such conflicting pressures are evident, for instance, in the governmental practice of exempting church property from taxation. If one's perspective is that this policy is a preference for religious institutions over secular institutions, then these exemption laws violate the establishment clause's dictate against government benefits for religion. However, if one's perspective is that the power to tax is the power to destroy, then these laws merely fulfill the free exercise dictate against burdening religious freedom.

Given this tension and the importance of the perspective of the policy-maker, government neutrality toward religion is an aspiration—a goal to strive for but one that is not realistically attainable. Stephan Carter (1993) gives the example of an Alabama law allowing schools to mandate a one-minute period of time, before the school day begins, for “meditation or voluntary prayer.” This law was held by the U.S. Supreme Court to violate the establishment clause (*Wallace v. Jaffree*, 472 U.S. 38 (1985)) because it created a coercive environment promoting student prayer. Carter writes:

And what are the likely classroom dynamics? I have nothing on which to base an empirical judgment, but I can hazard an educated guess. Many students *will* pray—we can take that as given—but if the effect on the dissenter of silent prayer during a moment when all students are silent is as coercive as the majority feared, then the Court is probably wrong to suggest that, in the absence of the moment of silence, nothing prevents those students who want to pray from doing so. After all, if the knowledge that many of one's classmates are praying during the moment of silence produces pressure to pray (and the Court may be right), then surely the knowledge that many of one's classmates are *not* praying as the school day opens will produce pressure *not* to pray. There is, in short, no neutral position (p. 191).

Faced with this dilemma, vouchers offer an attractive alternative. Instead of trying to fit all schools to all children, vouchers allow each child to select an appropriate school. This is particularly salient in the area of religious teaching, since the establishment clause clearly prohibits public schools from providing the religious education that many parents want for their children. Vouchers offer a loophole, allowing the government to assist all parents in funding their children's education, even if those parents' educational decisions are driven by religious beliefs.

But vouchers themselves are constitutionally suspect. As discussed in greater detail below, courts have placed substantial restrictions on state and local voucher plans, the more daring of which clearly run afoul of the establishment clause (as applied to the states through the due process clause of the Fourteenth Amendment).

The Arizona Law

Accordingly, given the legal instability of vouchers, Arizona's state government in 1997 passed legislation creating a non-voucher avenue of accomplishing the same goals—allowing a state tax credit of up to \$500 for donations to school tuition organizations (STOs), which would then allocate voucher-like grants to students. In full, the statute reads as follows:

A. For taxable years beginning from and after December 31, 1997, a credit is allowed against the taxes imposed by this title for the amount of voluntary cash contributions made by the taxpayer during the taxable year to a school tuition organization, but not exceeding five hundred dollars in any taxable year. The five hundred dollar limitation also applies to taxpayers who elect to file a joint return for the taxable year. A husband and wife who file separate returns for a taxable year in which they could have filed a joint return may each claim only one-half of the tax credit that would have been allowed for a joint return.

B. If the allowable tax credit exceeds the taxes otherwise due under this title on the claimant's income, or if there are no taxes due under this title, the taxpayer may carry the amount of the claim not used to offset the taxes under this title forward for not more than five consecutive taxable years' income tax liability.

C. The credit allowed by this section is in lieu of any deduction pursuant to §170 of the internal revenue code and taken for state tax purposes.

D. The tax credit is not allowed if the taxpayer designates the taxpayer's donation to the school tuition organization for the direct benefit of any dependent of the taxpayer.

E. For purposes of this section:

1. "Qualified school" means a nongovernmental primary or secondary school in this state that does not discriminate on the basis of race, color, sex, handicap, familial status or national origin and that satisfies the requirements prescribed by law for

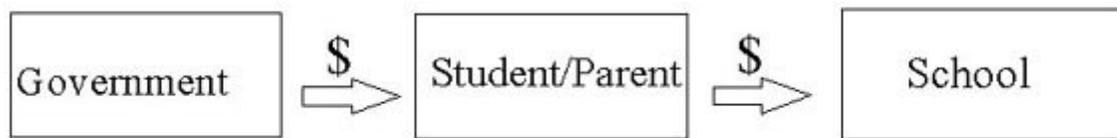
private schools in this state on January 1, 1997.

2. "School tuition organization" means a charitable organization in this state that is exempt from federal taxation under §501(c)(3) of the internal revenue code and that allocates at least ninety percent of its annual revenue for educational scholarships or tuition grants to children to allow them to attend any qualified school of their parents' choice. In addition, to qualify as a school tuition organization the charitable organization shall provide educational scholarships or tuition grants to students without limiting availability to only students of one school.

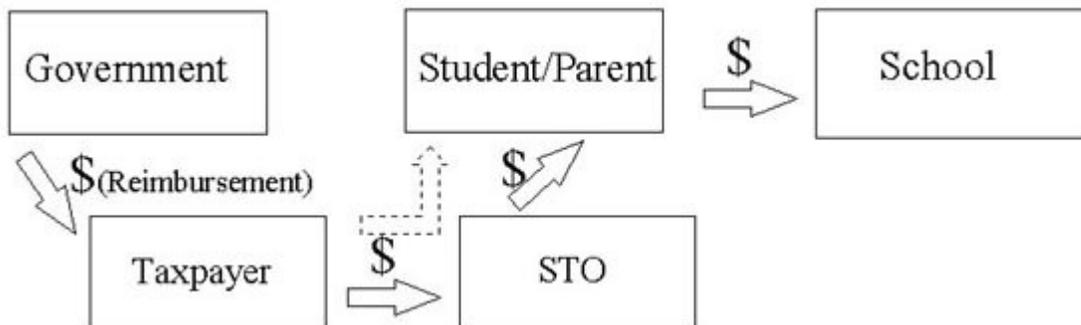
A.R.S. § 43-1089 (footnotes omitted).

In short, the mechanism created by the state of Arizona tells those who owe state taxes that they may reallocate that money from the state general fund to a scholarship-granting organization. (Note, however, that while the statute calls these grants "scholarships," they are not necessarily tied to either need or merit. (Note 1)) Whereas voucher plans entail granting state-allocated funds to schools through the private decisions of parents, the Arizona plan inserts two intermediate steps into the process. First, the grants are issued by privately-created, non-profit School Tuition Organizations (STOs), rather than directly by the government. Second, state allocation is achieved through a dollar-for-dollar tax credit given to donating taxpayers. The following flow charts illustrate the added steps:

Vouchers



Arizona Tax Credit



This Arizona system results in the government still footing the bill for all the scholarships—through directly foregone revenues (essentially reimbursing the taxpayer). But control over the funding is taken from the government and given to two other parties: (a) individual taxpayers, who can decide to which STOs they will allocate the funds, and who can earmark the funds to anyone who is not a dependent; and (b) individual STOs,

which can decide the grant recipients for any non-earmarked funds. The following table outlines differences between vouchers and the Arizona tax credit.

	Vouchers	Arizona Tax Credit
Funding Ultimately From:	Government	Government
Funding Allocation Decisions Made by:	Government Officials	Private Non-Profit Organizations and Donating Taxpayers
Grants Made by:	Government	Private Non-Profit Organizations
State Money Directly Allocated to:	Schools through Parents	Self-Selected Taxpayers
Level of Regulation:	Moderate	Low

The legal challenge to the Arizona tax credit law argued that this mechanism has the same practical effect as a direct grant of general fund money in the form of vouchers. Legally, the transformation from voucher to tax credit constitutes, the argument goes, *a distinction without a difference*. Consider the statement of John Huppenthal, the Republican chair of the Arizona Senate's Education Committee, who is a longtime voucher supporter: “This has turned into something so close to vouchers you almost can't tell the difference” (Bland, 2000, A22). Or, as stated by Trent Franks, the former Arizona legislator and activist who came up with the tax credit idea, “Why do we need vouchers at this point?” (Bland, 2000, A22).

The Kotterman Decision & Dissent

The Arizona Supreme Court's majority opinion (the court's five justices split on a 3-2 vote) rejected challenges based on the state constitution as well as the U.S. Constitution (*Kotterman v. Killian*, 972 P.2d 606 (1999)). Below, I briefly address the arguments and decision concerning the state provisions; I then focus on the establishment clause claims. For a more complete discussion of the Arizona constitutional issues, please see Professor Paul Bender's foreword to the *Arizona State Law Journal*, Volume 32, Number 1.

Arizona Constitution

The Arizona constitution provides that “no public money . . . shall be applied to any religious worship, exercise, or instruction or to the support of any religious establishment” (Article II, §12). It also prohibits any “tax . . . in aid of any . . . private or sectarian school . . .” (Article IX, §10). The court majority rejected arguments based on these provisions, holding instead that (a) the tax credit scheme does not give “public money,” nor does it levy any “tax;” and (b) tax credits are no different from tax deductions, which have long been allowed for charitable contributions to religious institutions.

The majority's assertion that the credit does not implicate “public money” hinges on a rather formalistic definition of the term. The opinion points out that “no money ever enters the state's control or is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials” (972 P.2d at

618). Because the state never gains actual possession or immediate control over the funds involved, these tax credits were held to not constitute public money.

The dissent calls this a “dangerous doctrine that permits the state to divert money otherwise due the state treasury and apply it to uses forbidden by the state's constitution” (972 P.2d at 640). Certainly, the state exercises a substantial degree of effective control over this money, and this control arises out of the state's power to tax. (Without the tax, the state could not direct taxpayer donations to STOs.) This aspect of the dissent relies on a line of scholarship that explains how tax credits are analogous to government expenditures. This “tax expenditure” doctrine looks at the practical effect of the credits and determines that they are the equivalent of direct government grants (both are charges made against the state treasury).

The majority rejects the tax expenditure approach, which it argues assumes “that the tax return's purpose is to return state money to taxpayers” (972 P.2d at 618):

For us to agree that a tax credit constitutes public money would require a finding that state ownership springs into existence at the point where taxable income is first determined, if not before. The tax on that amount would then instantly become public money. We believe that such a conclusion is both artificial and premature. It is far more reasonable to say that funds remain in the taxpayer's ownership at least until final calculation of the amount actually owed to the government, and upon which the state has a legal claim. (972 P.2d at 618, footnotes omitted.)

The majority also defends the tax credit based on an analogy to tax *deductions* for charitable contributions to religious institutions, the constitutionality of which have never been seriously questioned. “If credits constitute public funds,” the court argues, “then so must other established tax policy equivalents like deductions and exemptions” (972 P.2d at 618). In response, the dissent points to “very significant differences between valid tax benefits and the Arizona tax credit” (972 P.2d at 642). The latter, the dissent asserts, “is not an inducement to charitable giving; there is no philanthropy at all because the credit provided is dollar-for-dollar” (972 P.2d at 642). Because a taxpayer's \$500 donation is rebated in full as a credit against the tax that otherwise would be paid to the state, the dissent views the donation more as an allocation of state money than of private money. “Unlike neutral deductions [available for all charitable giving], the credit is not the state's passive approval of taxpayers' general support of charitable institutions” (972 P.2d at 643).

To illustrate, the dissent explains the effective difference between a tax credit and a tax deduction.

A couple with an income of \$60,000 per year sending \$500 to an STO would receive a tax credit of \$500 and would thus save \$500 in taxes. The “contribution” would cost them nothing. The same couple, contributing to almost any other qualified philanthropic cause, would receive a deduction from gross income. To reduce their state taxes by \$500, that couple would need to contribute approximately \$13,000. (972 P.2d at 643, n. 18.)

For the majority, however, this purported difference is simply a matter of degree—they see no principled basis to distinguish between the two types of benefits, given that they both amount to a reduction in amounts otherwise owed to the treasury.

Establishment Clause of U.S. Constitution

To determine whether the Arizona tax credit statute violates the federal establishment clause, the *Kotterman* court applies a three-pronged test set forth in a long-standing (although often-attacked) Supreme Court precedent: *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Pursuant to this *Lemon* test, a law does not violate the establishment clause if (1) it serves a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive government entanglement with religion. The second (primary effect) prong was the main point of dispute in the *Kotterman* case. This prong requires that a statute be “neutral on its face and in its application” and not have the “primary effect” of advancing the sectarian aims of nonpublic schools. (See *Mueller v. Allen*, 463 U.S. 388, 392 (1983); see also *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973).)

These latter cases, *Mueller* and *Nyquist*, are the touchstones for the majority and the dissent, respectively. The majority argues that the Arizona law is analogous to the Minnesota law upheld in *Mueller*; the dissent argues that the Arizona law is analogous to the New York law held unconstitutional in *Nyquist*. Below, I discuss those two cases, followed by a brief discussion of a second case relied upon by the *Kotterman* majority, *Jackson v. Benson*, 218 Wis.2d 835, *cert. denied*, 119 S.Ct. 467 (1998).

Mueller v. Allen

In *Mueller v. Allen*, 463 U.S. 388 (1983), the U.S. Supreme Court upheld a Minnesota tax deduction for school expenses incurred on behalf of children attending elementary or secondary schools. The antecedent to this Minnesota law was originally passed in 1955. That law allowed parents to claim a tax deduction of up to \$200. For public school students, these expenses included textbooks and transportation expenses. For private school students, these expenses also included tuition. Among the subsequent amendments to this law were occasional increases in the maximum deduction per child (e.g., in 1976, the maximum for elementary school expenses was raised to \$500, with \$700 allowed per child for secondary school expenses). (Note 2)

The *Mueller* Court held that these deductions benefitting parents of parochial school children did not violate the establishment clause. Applying the *Lemon* test, the *Mueller* Court held that the programs had the secular purposes of ensuring that Minnesota's citizenry is well-educated and that private and parochial schools' financial health remains sound. Further, the *Mueller* Court held that these deductions did not primarily advance the sectarian aims of parochial schools and did not excessively entangle the state in religion. As the *Kotterman* court notes, the *Mueller* Court focused heavily on distinct characteristics of the Minnesota law: (a) it was open to all parents incurring educational expenses, including those whose children attend public school; and (b) the funds did not go directly to the private schools but rather reached those schools as a result of the numerous private choices of individual parents.

In discussing this primary effect prong of *Lemon* as applied to the Arizona statute, the *Kotterman* majority draws parallels to these latter two characteristics—openness to all parents and private parental choices. Arguing that the Arizona benefits are open to all parents, the majority points to companion language in the Arizona code, which allows taxpayers to claim up to a \$200 tax credit for contributions to their neighborhood public school's extracurricular activities (§ 43-1089.01). Arguing that public funds do not go directly to the private schools, the majority contends that the “primary beneficiaries of this credit are taxpayers who contribute to the STOs, parents who might otherwise be deprived of an opportunity to make meaningful decisions about their children's educations, and the students themselves” (972 P.2d at 616). While acknowledging

“ripple effects ... viewed through a wide-angle lens, radiat[ing] to infinity,” the majority concludes that “[p]rivate and sectarian schools are at best only incidental beneficiaries of this tax credit, a neutral result that we believe is attenuated enough to satisfy *Mueller* and the most recent Establishment Clause decisions” (972 P.2d at 616). (Note 3)

The dissent, however, distinguishes *Mueller* as follows:

Under the provision upheld in *Mueller*, religious schools benefitted only as a result of true choice made among a wide selection of alternatives, both public and private [citation omitted]. Under the Arizona plan, there is no real choice—one may contribute up to \$500 to support private schools or pay the same amount to the Arizona Department of Revenue. In reality, this is not a choice but government action designed to induce taxpayers to direct financial support to predominantly religious schools. (972 P.2d at 629.)

The Arizona tax credit, the dissent also notes, “is available only to those who choose to support private, predominantly religious schools. Those who wish to contribute to public schools are allowed only a \$200 credit, and their contributions can be used only to reimburse fees paid for extracurricular activities” (972 P.2d at 628, citation omitted).

In response to the majority's contention that public schools do not need the same benefits, since public school students do not pay tuition, the dissent points to “deficiencies of state financing of public schools and the underfinanced and unfilled educational missions of those schools [citations omitted]. If we are to consider equality or neutrality of the two credits, we must bear in mind that public schools, like private schools, need assistance to perform their educational mission” (972 P.2d at 626). Provisions, the dissent asserts, “could have been made for a tax credit for contributions supporting the educational mission of the public school system” (972 P.2d at 626).

Committee for Pub. Educ. & Religious Liberty v. Nyquist

Instead of *Mueller*, the dissent argues, the controlling precedent for the *Kotterman* case is *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). The U.S. Supreme Court in *Nyquist* struck down a New York law providing (a) tuition grants to low- income families (vouchers redeemable only at private schools) and (b) tax deductions for tuition payments, varying by income level. The law provided no benefits aimed at families with children in public schools. Noting that the private schools in New York were predominantly religious, the *Nyquist* Court stated that grants “offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them [violate] the Establishment Clause ... whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same.” 413 U.S. at 786.

The *Kotterman* dissent characterizes the Arizona law as similarly providing benefits aimed only at private school contributions, doing so in an unregulated manner likely to lead to abuse:

Because Arizona's tax credit statute does not require that grant use be restricted to the secular aspects of education, the STOs' grants to private schools may be used in any manner the recipient school wishes. Nor does the statute prevent an STO from directing all of its grant money to schools that restrict enrollment or education to adherents of a particular religion or

sect. Moreover, there is no limit on the dollar amount the STO can give to a school on behalf of a student. Thus, an STO could pool several contributions and then pay the full tuition for any student, group of students, or for that matter, all students in any group of schools of a single religious faith. (972 P.2d at 630.)

In contrast, the majority perceives “safeguards built into the statute,” such as “the way in which an STO is limited, the range of choices reserved to taxpayers, parents, and children,” and the system’s “neutrality” (972 P.2d at 620). These safeguards, the court reasons, result in an attenuation of any benefits received by religious schools and “ensure that the benefits accruing from this tax credit fall generally to taxpayers making the donation, to families receiving assistance in sending children to schools of their choice, and to the students themselves,” rather than to those schools (972 P.2d at 620).

The dissent, in comparing *Mueller* and *Nyquist*, first notes that *Nyquist*, like *Mueller*, involved a scheme whereby the state funds went initially to parents and then to schools of the parents’ choosing. The dissent then focuses on a point of contrast:

In *Mueller*, the Court upheld a Minnesota law allowing a deduction, in part because it was “available for educational expenses incurred by all parents including those whose children attend public schools.” Making the benefit available to this neutral and “broad class” is an “important index of secular effect.” The Court said the Establishment Clause does “not encompass the sort of attenuated financial benefit . . . that eventually flows to parochial schools from the neutrally available tax benefit at issue” Indeed, the *Mueller* Court described *Nyquist*’s unconstitutional, nonneutral, private school program in words directly applicable to the Arizona: “thinly disguised ‘tax benefits,’ actually amounting to tuition grants, to the parents of children attending private schools,” the majority of which were sectarian” (972 P.2d at 627-28, citations omitted).

The dissent then notes that at least seventy-two percent of private schools in Arizona are sectarian, and it concludes that the Arizona law “is everything *Nyquist* held unconstitutional—a direct stipend that has the primary effect of advancing religion by tuition grants to religious schools” (972 P.2d at 628).

In contrast, the majority’s primary basis for distinguishing *Nyquist* focuses on the “broad class of citizens” to whom the Arizona tax credit is available (972 P.2d at 613). That is, while the New York benefits were available only to parents who sent their children to private school, the Arizona benefits are available to all taxpayers. The Arizona credit is not limited only to parents, let alone just those parents of private school students. “Thus, Arizona’s class of beneficiaries is even broader than that found acceptable in *Mueller*, and clearly achieves a greater level of neutrality” (972 P.2d at 613).

Jackson v. Benson

As briefly mentioned above, the *Kotterman* majority supplemented its reliance upon *Mueller* with a discussion of the recent opinion of the Wisconsin Supreme Court in *Jackson v. Benson*, 218 Wis.2d 835, 578 N.W.2d 602 (1998). The Wisconsin court upheld the constitutionality of a voucher plan directed at low-income students in the Milwaukee Public Schools (MPS). (Note 4)

The Milwaukee Parental Choice Program (MPCP), which began in 1989, includes

the following provisions: (1) students may use the voucher at the private or parochial school of their choice; (2) the amount of the voucher is the lesser of two numbers: the private or parochial school's operating and debt service cost per pupil or the state's per-pupil aid to the MPS (about \$4,900); (3) students qualify for vouchers if their family income is not greater than 1.75 times the poverty level and if they meet certain enrollment requirements (e.g., during the previous school year, they were enrolled either in the MPS, in a private school in Milwaukee, in grades K-3 in a private school outside of Milwaukee, or were not enrolled in any formal school); (4) Wisconsin sends a check directly to the school but made out to the parents, who endorsed it over to the educational institution; (5) participating schools must notify Wisconsin of their intention to participate in the program, comply with certain laws and meet at least one of four legislatively-established performance standards; and (6) no more than 15% of the school district's enrollment may attend participating schools in any school year. As of the 1998-1999 school year, 6,194 students were participating in the program, far below the ceiling of approximately 15,000 students technically allowed to participate.

In 1998, the Wisconsin Supreme Court upheld the program as constitutional (*Jackson v. Benson*, 218 Wis.2d 835, 578 N.W.2d 602 (1998)), and the U.S. Supreme Court denied a *writ of certiorari* (119 S.Ct. 467 (1998)), meaning that the state supreme court opinion was allowed to stand, but without the U.S. Supreme Court's approval (or rejection). (Note 5) While a Wisconsin state opinion is not binding precedent upon an Arizona court, such an opinion may prove persuasive. The *Kotterman* majority found the following language particularly persuasive:

In our assessment, the importance of our inquiry here is not to ascertain the path upon which public funds travel under the amended program, but rather to determine who ultimately chooses that path. As with the programs in *Mueller* and *Witters*, not one cent flows from the State to a sectarian private school under the amended MPCP except as a result of the necessary and intervening choices of individual parents. *Jackson v. Benson*, 578 N.W.2d at 618.

In Arizona, the *Kotterman* majority reasons, the decision-making process preceding the scholarship allocation is “completely devoid of state intervention or direction” (972 P.2d at 614):

Arizona's statute provides multiple layers of private choice. Important decisions are made by two distinct sets of beneficiaries—taxpayers taking the credit and parents applying for scholarship aid in sending their children to tuition-charging institutions. The donor/taxpayer determines whether to make a contribution, its amount, and the recipient STO. The taxpayer cannot restrict the gift for the benefit of his or her own child. A.R.S. § 43-1089(D). Parents independently select a school and apply to an STO of their choice for a scholarship. Every STO must allow its scholarship recipients to “attend any qualified school of their parents' choice,” and may not limit grants to students of only one such institution. A.R.S. § 43-1089 (E) (2) (emphasis added). Thus, schools are no more than indirect recipients of taxpayer contributions, with the final destination of these funds being determined by individual parents. (972 P.2d at 614).

For its part, the *Kotterman* dissent found the *Jackson* opinion to be of little persuasive value. The Wisconsin statute, the dissent notes, includes an “opt-out”

provision, pursuant to which students may be excused from the religious aspects of schooling at sectarian institutions. Similarly, Wisconsin requires schools receiving grants to admit applicants without regard to the applicants' religious or nonreligious preference. (Note 6) Wisconsin's statute also explicitly limits state support to private institutions' educational (as opposed to religious) programs. Finally, unlike Arizona's system, which is weighted in favor of wealthier taxpayers and provides no incentives for STOs to consider wealth as a scholarship criterion, the Wisconsin program is designed to provide greater choice to low-income families:

Arizona's statute . . . contains no religious instruction opt-out provision, appears to permit religious discrimination, permits funding of religious observance, and makes the tax credit available to all taxpayers, those who have children in school and those who do not, the rich and the poor. Further, our statute makes no limitation on the amount of funding a school can receive from an STO for a particular student. Wisconsin, in short, has made some attempt, successful or not, to limit the use of state subsidies for religious instruction and ceremony. Arizona's program, on the other hand, will inevitably and primarily benefit religious observance and instruction. (972 P.2d at 631).

Circumventing the Constitution?

The Arizona tax credit law provides a government subsidy for taxpayers who wish to support religious activities. The state supreme court upheld the law even though more direct support by the government is constitutionally forbidden. The circumventing nature of the law is pointed out by the *Kotterman* dissent, which warns that it allows private and religious STOs to provide scholarships to current private school parents, essentially turning the donated money into tuition rebates. "Further," the dissent adds, while the law prohibits the STOs "from making grants to 'only students of one school,' the statute does not prevent an STO from directing all of its grant money to a group of schools that restrict enrollment or education to a particular religion or sect" (972 P.2d at p. 626). That is, "nothing forbids an STO from limiting its grants or scholarships to students who adhere to a particular religion and will participate in the required religious observance" (972 P.2d at p. 626). This enables the formation of STOs devoted to the supports of a particular religious belief.

In fact, groups like the "Arizona Christian School Tuition Organization" (ACSTO) have formed in order to target donors interested in supporting scholarships to schools with particular beliefs (in this case, evangelical Christianity). In its first year (1998), the ACSTO raised over a half-million dollars, second in the state only to the Catholic Tuition Organization of Phoenix (CTOP), the STO formed by the Roman Catholic Diocese, which raised more than \$837,000 (Schnaiberg, 1999; Center for Market-Based Education and the Goldwater Institute, 2000). In 1999, these amounts increased dramatically, to over \$2.8 million for the ACSTO and almost \$4.7 million for the CTOP (Bland, 2000). Overall, \$1.8 million was raised in 1998 by a total of fifteen tuition organizations (Center for Market-Based Education and the Goldwater Institute, 2000), and over \$13.3 million was raised in 1999 by a total of twenty-nine STOs (Bland, 2000).

Even though the STOs cannot control parents' school choices, they can target parents based on their knowledge of those parents' inclinations. The president of the ACSTO, when asked if the group had ever had a parent not choose a Christian school, responded that this had never happened: "I don't know what we'll do when we see that,"

he said. “The people coming to us know who we are and that we're interested in giving scholarships to kids to go to these schools” (Schnaiberg, 1999).

Moreover, parents have found a huge loophole in the legislation, which prohibits donors only from earmarking money for their own dependents. According to article in the Arizona Republic, “parents are writing \$500 checks for their friends' kids and asking them to do the same for theirs” (Bland, 2000, A22). The newspaper identified one fund for which 96% of all donations were earmarked for specific private school students.

The troubling nature of this scheme does not escape the attention of the *Kotterman* dissent. It points out that the majority opinion's reasoning leaves no principled reason why the limit could not be increased far beyond \$500, to pay the full cost of private, sectarian education. (Note 7) Accordingly, the dissent attacks the tax credit as “directed so that it supports only the specific educational institutions the Arizona Constitution prohibits the state from supporting—predominantly religious schools”:

By reimbursing its taxpayers on a dollar-for-dollar basis the state excuses them from paying part of their taxes, but only if the taxpayers send their money to schools that are private and predominantly religious, where the money may be used to support religious instruction and observance. If the state and federal religion clauses permit this, what will they prohibit? Evidently the court's answer is that nothing short of direct legislative appropriation for religious institutions is prohibited. If that answer stands, this state and every other will be able to use the taxing power to direct unrestricted aid to support religious instruction and observance, thus destroying any pretense of separation of church and state. (972 P.2d at 645).

The Slippery Slope

The rationale of the *Kotterman* majority would seem to allow for the positive check-off system presently included on federal 1040 forms to fund the Presidential Campaign Fund. Using all the present Arizona STOs (see Bland, 2000, A22), I can envision something like the following potentially appearing on Arizona tax forms:

Would you like up to \$500 of your tax payment to be diverted to a School Tuition Organization?

Yes	No	Note: checking "yes" will not increase your taxes owed or reduce your refund. The amount allocated will simply be deducted from the funds that would otherwise go to the state general fund.

If yes, please allocate per your wishes among the following STOs:

Arizona Adventist Scholarships, Inc	\$
Arizona Christian School Tuition Organization, Inc.	\$
Arizona Episcopal Schools Foundation	\$
Arizona Scholarship Fund	\$
Arizona Independent Schools Scholarship Foundation	\$
Arizona Native Scholastic and Enrichment Resources	\$
Arizona Private Education Scholarship Fund	\$
Arizona School Choice Trust	\$
Brophy Community Foundation	\$
Catholic Tuition Organization of the Diocese of Phoenix	\$
Catholic Tuition Organization of the Diocese of Tucson	\$
Christian Scholarship Fund of Arizona	\$
Educare Scholarship Fund	\$
Florence Englehardt/Pappas Foundation	\$
Foundation for Montessori Scholarships	\$
High Education for Lutherans Program (HELP) Foundation, Inc.	\$
Institute for Better Education	\$
Jewish Community Day School Scholarship Fund	\$
Lutheran Education Foundation	\$
Maranath Christian Co_Op Tuition Fund	\$
Montessori School Tuition Organization	\$
Northern Arizona Christian School Scholarship Fund	\$
Patagonia Scholarship Fund	\$
Prescott Christian School Scholarship Foundation	\$
School Tuition Association of Yuma	\$
Schools with a Heart Foundation	\$
Southern Arizona Foundation for Education	\$
UVBC Christian Education Fund	\$

Such a form, of course, could become unwieldy as more STOs are created and if the form also included every public school (in connection with the \$200 option for extracurricular activities). But the logistics are hardly insurmountable.

Mitchell v. Helms

Many scholars who follow the U.S. Supreme Court are guessing that a case arising out of Ohio (see the Appendix to this paper for a description of this case, called *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, N.D. Ohio, 1999), will eventually end up before the Court. If this happens, much of the uncertainty surrounding the constitutionality of vouchers (and, perhaps, voucher-like alternatives) might finally be resolved. For the immediate future, however, onlookers are closely reading the Justices' three opinions *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), decided on June 28, 2000.

The Mitchell case arose out of a challenge to Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, which allows state education agencies to distribute "secular, neutral, and nonideological services, materials, and equipment" to students who are enrolled in private nonprofit elementary and secondary schools. In 1994, Congress enacted the "Improving America's Schools Act," which provides for loans of, among other things, taxpayer-funded computers to parochial schools (20 U.S.C. § 7301-73). This legislation was challenged by parents in Louisiana, and a federal appeals court agreed that the provision of computers violated the establishment clause (*Helms v. Picard*, 151 F. 3d 347, 5th Cir. 1998).

Although the facts of Helms are not directly connected to vouchers, the Supreme Court's deliberations were watched closely by those concerned about vouchers' constitutionality. Voucher supporters filed an amicus brief, urging the court to use the case to pave the way for vouchers to pass First Amendment muster. Justice Thomas obliged, writing an opinion clearly implying vouchers' constitutionality; but he was able to get only three other Justices to join in his opinion. (Thomas' opinion goes so far as to equate a refusal to aid religious schools with hostility toward religion.) Two concurring justices refused to go along with this judicial activism, issuing a much narrower opinion. (In addition, three Justices dissented.)

The concurrence, written by Justice O'Connor, upheld the law on the narrow ground that it does not define recipients by reference to religion, instead using neutral and secular criteria to allocate aid to students enrolled in religious and secular schools alike. O'Connor pointed out that, like the law challenged in *Agostini v. Felton*, 521 U.S. 203 (1997), Chapter 2 allocates aid on the basis of neutral, secular criteria; it is supplementary to, and does not supplant, non-federal funds. She concludes, "no Chapter 2 funds reach the coffers of religious schools; the aid is secular; evidence of actual diversion is *de minimis*; and the program includes adequate safeguards" (p. 133 of the Court's slip opinion).

Because O'Connor's opinion represents the "swing votes" on the present Court, it sets forth the governing law for the moment. Whether the Thomas position is eventually joined by the one additional vote needed to constitute a majority will likely depend upon who is appointed to the Court by the nation's next President.

Federal Court Challenge

On February 15, 2000, the Arizona chapter of the ACLU filed, in the federal district court in Arizona, a new and separate challenge to the tax credit statute (*Winn v.*

Killian, case no. civ00-0287-phx-che). Because federal courts have ultimate authority and responsibility for interpreting the federal Constitution, this district court is in no way bound to follow the Arizona Supreme Court’s decision as regards the First Amendment’s Establishment Clause.

The state has moved to dismiss this federal lawsuit, putting forth claims asserting sovereign immunity and purported protection provided by a federal statute (the Federal Tax Injunction Act). To date, this dismissal motion is pending—and denial of the sovereign immunity argument may prompt an interlocutory (i.e., immediate) appeal. This federal action, therefore, may not be resolved for many years.

Conclusion

Imagine a law establishing the Gideons' religious organization as the “Official Church of the U.S.A.” Such a law would strike at the heart of the constitutional prohibition against laws “respecting an establishment of religion.” Upon challenge, it would be declared unconstitutional. Now imagine a law providing government grants to religious organizations that provide reading materials for hotel rooms. This law, too, would quickly be seen as violating the establishment clause, because its principal or primary effect advances religion. (See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), discussed in greater detail below.) Finally, imagine a law that provides a dollar-for-dollar tax credit to individuals who donate money to organizations that then grant the money to those who provide reading materials for hotel rooms. Although the Gideons would almost surely be the main beneficiary of this law, the reasoning of the majority in *Kotterman*, would seem to allow this last law to withstand a constitutional challenge.

The fact that Arizona's government might create a mechanism to encourage (actually, reimburse) targeted giving to religious organizations did not trouble the court. Yet, viewed in terms of effects, the practical distinction between the tax credits and a direct allocation (vouchers) is that the latter allocation is through representative democracy and the former is through direct democracy—with *the wealthy entitled to more votes*. Consequently, the tax credit mechanism results in the allocation of presumptive tax dollars to support those institutions (religious or otherwise) that are most popular with the state's wealthiest residents.

The hypothetical hotel-reading-material law is distinguishable from the Arizona tax credit law in at least two important ways. First, it does not necessarily serve a secular purpose. The *Kotterman* court found the Arizona law to serve the legitimate secular purpose of “bring[ing] private institutions into the mix of educational alternatives open to the people of this state,” assuring the continued financial health of private schools, and producing “healthy competition” for public schools (972 P. 2d at 611). If a law does not have a secular purpose, then it violates the establishment clause whether or not its primary effect advances religion (recall that a law must have a secular purpose, as an independent “prong” of the *Lemon* test).

Second, the hypothetical hotel-reading-material is more difficult to characterize as an attempt to treat religious institutions in a neutral, accommodating way. Neutrality toward religion has long been a guiding principle of First Amendment jurisprudence. The evolution of Supreme Court decisions—and its recent modifications—can be understood as an evolution in how the Court's majority defines that neutrality. Three decades ago, the Arizona tax credit law would almost surely have been considered by the Supreme Court to provide an unconstitutional and extraordinary benefit to private, religious schools. Now, the Court may view that same law as a reasonable

accommodation for the beliefs and needs of residents who feel ill-served by the public schools.

The Arizona Supreme Court grounds its *Kotterman* decision in such a neutrality argument: Basic education is compulsory for children in Arizona, but until now low-income parents may have been coerced into accepting public education. These citizens have had few choices and little control over the nature of their children's schooling because they could not afford a private education more compatible with their values and beliefs. Arizona's tax credit achieves a higher degree of parity by making private schools more accessible and providing alternatives to public education (972 P. 2d at 615). The court also notes that helping to pay for private school tuition helps to balance out the fact that the state already pays the cost of students' attendance at public schools. Such rationales (i.e., such definitions of "neutrality") if carried to their logical conclusion will carry the nation toward the privatization ideals of Milton Friedman (1963, 1990). As the *Kotterman* dissent points out, if the majority's interpretation of the First Amendment holds, then the government can use its taxing power (through tax credits) to direct unrestricted aid to support churches and other religious organizations. This could lead to a revolution in American schooling, and it is one that many fear will wipe out the educational and equity gains of the last century.

Notes

1. In fact, the wealthiest students appear to be receiving the vast majority of the law's benefits (Bland, 2000; Wilson, 2000). This is as true of the \$200 donations to the public school fund as it is of \$500 donations to the private school funds (Bland, 2000). Some funds, however, including the Catholic Tuition Organization, do means-test for their scholarships.
2. Presently, the Minnesota law allows a maximum deduction of \$1,625 for elementary school expenses and \$2,500 for secondary school expenses. This amendment was passed in 1997, along with an expansion in the types of expenses that the deduction covers, adding academic summer camps, summer school and up to \$200 of the cost of a personal computer and education software. Further, persons who do not itemize deductions on their federal income tax form can now take the deduction. Perhaps most notably, the 1997 amendments created a refundable tax *credit* for families with incomes under \$33,500 (now \$37,500): up to \$1,000 per student or \$2,000 per family. (If a family owes no taxes or owes less than the amount of the credit, they receive the difference as a refund.) The credit is available for the same education expenses as the deduction (textbooks, transportation, academic summer camps, summer school and up to \$200 of the cost of computer hardware and education software), except that it does *not* cover tuition. Expenses that exceed the credit amount may be used as a tax deduction.
3. Consider the governmental activities that have been upheld by the Court. *Mitchell v. Helms* (2000), discussed in the main text, upheld funding of hardware and software loans to public and parochial schools. *Agostini v. Felton*, 521 U.S. 203, 222 (1997), upheld government-funded remedial instruction in parochial schools. Other past cases have upheld government aid for a sign language interpreter for a deaf student attending a Catholic high school (*Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)); government reimbursement to religious schools for the grading of tests that were prepared, mandated, and administered by the state

(*Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980); government reimbursement to the parents of parochial school students for the cost of public transportation to and from school (*Everson v. Board of Educ.*, 330 U.S. 1 (1947); and government aid in providing non-religious textbooks for students in parochial schools (*Meek v. Pittenger*, 421 U.S. 349 (1975); *Board of Educ. v. Allen*, 392 U.S. 236 (1968)).

4. The Milwaukee plan is the oldest surviving publicly funded voucher scheme. Several cities, however, including Washington D.C., New York City, Baltimore, and Dayton, Ohio, have privately-funded voucher plans. The most ambitious efforts are through the “Children's Scholarship Fund,” which has already provided more than 40,000 “scholarships.”
5. The U.S. Supreme Court similarly denied a *writ of certiorari* petition in the *Kotterman* case.
6. Arizona's laundering of state money through several intermediate steps certainly does serve to disentangle the government from those religious activities of parents and institutions that ultimately benefit from the government largess. Compare, on the one hand, the Milwaukee voucher program, which involves government monitoring to ensure that participating schools do not discriminate in admissions on the basis of religion and do not require vouchered students to participate in religious activities. The Arizona system, on the other hand, requires only that schools not “discriminate on the basis of race, color, sex, handicap, familial status, or national origin” (§43-1089(E)(1))—discrimination on the basis of religious adherence, preference, or observance is perfectly permissible.
7. The dissent notes that Arizona's tax credit statute actually has another loophole, allowing taxpayers a chance to make a profit: “After a taxpayer has contributed to the STO and received a dollar-for-dollar refund from the Arizona Department of Revenue, nothing in the Internal Revenue Code prevents him or her from reporting the contribution as a charitable deduction on the federal income tax return” (972 P.2d at 642, n. 17).
8. Some of the below discussion presents information provided on-line by the Educational Commission of the States (ECS) at <http://www.ecs.org/ecs/ecsweb.nsf>.
9. The unpublished opinion is available in pdf format at <http://www.ij.org/cases/index.html>.

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Appendix

Other Voucher and Tax Credit Plans and Proposals

The voucher and tax credit plans discussed in the main text amount to just a small sampling of the plans underway nationally. Moreover, the pace of reform has recently intensified; this year's legislative sessions feature at least 21 states with bills to start voucher programs and 18 considering proposals that would offer tax breaks to help cover the costs of private schooling (Bowman, 2000). Some of these follow usual voucher formats, some follow the Arizona model, and some tie vouchers to school performance—patterned after Florida's plan. This Appendix provides some context for the Arizona tax credit scheme by offering an overview of these other voucher and tax credit plans and proposals. (Note 8)

Florida

The nation's only statewide voucher program was approved in Florida in the summer of 1999, but it was almost immediately held by a state court to violate the Florida constitution (*Holmes v. Bush*, No. 99-3370, Fla. Cir. Ct., filed June 22, 1999). (Note 9) Under the plan, each public school was to receive a grade, from A to F. Students at schools that earn a grade of “F” from the state two years out of four would be eligible for an “opportunity scholarship” worth at least \$4,000 that could be used at a public, private, or religious school. In the first year, only two schools “qualified,” both of them in Pensacola (Bowman, 2000). Private and parochial schools that might have accepted these students would have been prohibited from collecting additional tuition and barred from requiring these students to participate in religious instruction, prayer or worship.

In its decision handed down on March 14, 2000, the Florida state court relied on the state's education clause (language passed by voters in 1998) in holding that vouchers supporting attendance at private schools would unconstitutionally undermine Florida's goal of providing a free public education. This education clause provides in part,

Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the

establishment, maintenance, and operation of institutions of higher and other public education programs that the needs of the people may require. (Florida Constitution, Article IX, section 1.)

The court's reasoning is expressly grounded in a long-established constitutional principle in Florida that, when the constitution directs “how a thing shall be done, [this direction] is itself a prohibition against a different manner of doing it” (*Holmes v. Bush*, at p. 7). That is, because the education clause directs that the state's educational goals shall be obtained through free public schools, the use of vouchers (to private schools) to achieve this same aim is implicitly prohibited. The court therefore concluded,

the statute provides that all students at designated schools who wish to do so may leave the public school system and instead receive their publicly funded education in private schools that offer the same services as do the public schools. This program supplants the system of free public schools mandated by the Constitution. (*Holmes v. Bush*, at p. 14.)

Given that most other states have education clauses similar to the above-quoted clause in the Florida constitution, this decision potentially has far-reaching ramifications.

Ohio

In 1995, Ohio created a scholarship and tutoring program in Cleveland. The program included the following provisions, which are similar to those of the MPCP: (a) the amount of the scholarship is the lesser of two numbers: the public, private or parochial school's tuition or a state-established amount not in excess of \$2,500; (b) students whose family income is below 200% of the maximum level (established by the state superintendent of public instruction) for low-income families qualify for 90% of the scholarship amount; (c) students whose family income is at or above 200% of that level qualify for 75% of the scholarship amount; (d) students may use the vouchers at the public, private or parochial school of their choice; (e) participating schools must register with the state superintendent of public instruction; and (f) no more than 25% of the scholarships can be awarded to students enrolled in a private or parochial school at the time they apply for a scholarship, although the enabling legislation allows that proportion to eventually rise to 50%.

This original legislation was struck down in 1999 by the Ohio Supreme Court as unconstitutionally enacted (i.e., a technical flaw, not directly concerning the constitutionality of the legislation's contents) (*Simmons-Harris v. Goff*, 711 N.E.2d 203, 1999). The Ohio court, however, also stated that the program did not breach the separation of church and state in either Ohio or federal law. Accordingly, the legislation was (properly) re-enacted, then challenged in federal court—following the same pattern that we now see in Arizona. This new lawsuit was successful. Just seven months after similar legislation was stated to be constitutional by the Ohio Supreme Court, the federal district court disagreed, ruling that it violates the federal establishment clause (*Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, N.D. Ohio, 1999). That decision is presently on appeal.

Illinois

In 1999, Illinois enacted legislation granting tax credits to parents of children in public, private or parochial schools. Under the law, parents may reduce their state income tax bill by 25 percent of whatever they spend for their children's tuition, book fees, and lab fees. In order to be eligible for the tax credit, parents must spend at least \$250, and the tax credit may not exceed \$500 per family. Illinois' tax credit program is presently being challenged in court (*Griffith v. Bower*, No. 99-CH-0049, Ill. Cir. Ct., filed July 12, 1999).

Iowa

In 1987, Iowa enacted a law that allowed parents with a net income of less than \$45,000 to claim a tax deduction of up to \$1,000 for each dependent's acceptable education expenses. These acceptable expenses include tuition and textbooks but exclude the costs of religious materials. The state has since shifted from a deduction to a tax credit, and the income ceiling has since been eliminated. All parents may now claim a tax credit of up to 25% of the first \$1,000 for each dependent's acceptable education expenses.

Puerto Rico

Pursuant to a 1993 Puerto Rico law, parents with annual incomes of less than \$18,000 may receive vouchers for up to \$1,500 toward tuition at the public, private or parochial school of their choice. However, the Puerto Rico Supreme Court ruled in 1994 that this voucher program violated Puerto Rico's constitution. In 1995, however, Puerto Rico established the "Educational Foundation for the Free Selection of Schools, Inc.," a nonprofit corporation which provides financial aid for elementary and high school students in public, private or parochial schools.

Donors to the Educational Foundation are eligible for a tax credit up to \$250 for individual taxpayers or \$500 for corporations and partnerships. The amount of donations in excess of the credit can be used as a tax deduction. The program includes the following provisions: (a) the annual income of a student's family cannot exceed \$18,000; (b) the amount of education financial aid cannot exceed \$1,500 per student; and (c) participating schools must be licensed by the General Council of Education and have an admission policy free of discrimination.

Vermont and Maine

Given their large areas containing small populations, Vermont and Maine have both enacted legislation allowing students with no nearby public school to attend private, non-parochial schools at state expense. Both programs have survived legal challenges to the exclusion of parochials from their programs.

In Maine, both the Supreme Judicial Court of Maine (*Bagley v. Raymond School Department*, 728 A.2d 127, 1999) and the U.S. Court of Appeals for the 1st Circuit (*Strout v. Albanese*, 178 F.3d 57, 1999), in two separate cases, have ruled that the exclusion does not violate parents' right of free exercise of religion and that the inclusion of religious schools in the program would violate the federal constitution's establishment clause. The Vermont case arose out of the 1996 decision by the town of Chittenden to pay the parochial school tuition for about a dozen families. In 1999, the Vermont Supreme Court ruled that Chittenden's program violated the clause of the Vermont constitution prohibiting "compelled support" of places of religious worship (*Chittenden Town School District v. Vermont Department of Education*, 738 A.2d 539 (1999)).

Pennsylvania

In 1998, the Southeast Delco School District, located near Philadelphia, Pennsylvania, adopted a voucher plan reimbursing—up to \$1,000 annual tuition per child—parents who send their children to private and religious schools. On December 23, 1999, the Commonwealth Court of Pennsylvania unanimously upheld a lower court's ruling that, under Pennsylvania law, a local school board has no authority to initiate such a plan (*Giacomucci v. Southeast Delco Sch. Dist.*, 742 A.2d 1165 (1999)).

Ballot Measures

Ballot initiatives designed to create statewide voucher systems have failed in Michigan (1978), Oregon (1990), Colorado (1992) and California (1993). However, similar efforts continue in all these states. In fact, a Michigan group called “Kids First! Yes!,” announced in February that it had collected the signatures necessary for a statewide vote in November on its initiative to allow vouchers for private and religious schools (Bowman, 2000).

Proposed Legislation

In Connecticut, a tuition tax credit bill has been referred to committee. In Virginia, the legislature recently tabled—until next year—a proposal that would allow parents of private school students to receive state income- tax credits, starting at \$500 in 2001 and increasing to \$2,500 over five years. Legislators in at least seven states—California, Colorado, Georgia, New Mexico, Pennsylvania, Vermont, and Washington—have proposed legislation similar to Florida's voucher law, although these efforts likely lost some steam after the Florida court's unfavorable decision. In New York City, Mayor Giuliani included \$6 million in this year's budget plan for an experimental voucher program.

In Congress, Republican leadership in both houses have, in every recent session, been pushing for vouchers. For instance, in the 106th Congress, Senator Jon Kyl (R-AZ) introduced a tuition tax credit bill (S.138) in the U.S. Senate for K-12 expenses. It would have given a tax credit to parents for their children's educational expenses and to other individuals who contribute to a nonprofit scholarship program to fund education for low-income students. The bill would phase in a credit up to \$250 per individual (or \$500 per joint return) by 2002. In the U.S. House of Representatives, Congressman Jim Rogan (R-CA) introduced a similar bill (H.R. 600) which allowed a much larger credit of \$1000 per individual. When last I checked (in March, 2000), the Senate bill had been referred to the finance committee; the House bill had been referred to the ways and means committee.

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