

THE CONSTITUTIONALITY OF VOUCHER LEGISLATION UNDER THE U.S. AND UTAH CONSTITUTIONS

By Maxwell A. Miller¹

Clearly, the legal trend in the United States is to uphold the constitutionality of voucher and/or tuition tax credit legislation. There are sufficient and compelling precedents available from which to draw a confident conclusion that the voucher legislation as proposed herein passes constitutional muster under the United States Constitution and the Utah Constitution.² If enacted, the proposed voucher legislation, whose essential features are summarized below, would, and certainly should, survive any constitutional challenge, based upon a neutral and fair analysis and application of relevant law to the facts.

Under the proposed legislation, eligible parents would apply to a Utah state agency for a voucher in an amount determined by their income level. The state would then award the voucher to the parents who may use the voucher to offset tuition at a state-approved private school that the parents, and not the state, would chose. The voucher's dollar value would vary depending upon parents' financial status. From this brief summary, the proposed legislation is virtually indistinguishable in all *material* respects from the Ohio program the United States Supreme Court upheld in *Zelman v. Harris-Simmons* (2002)³ against an "Establishment Clause" challenge under the United States Constitution.

I. VOUCHER LEGISLATION IS CONSISTENT WITH THE "ESTABLISHMENT CLAUSE" OF THE UNITED STATES CONSTITUTION AND PARALLEL PROVISIONS OF THE UTAH CONSTITUTION.

In *Zelman*, the Court stressed that its "decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reached religious schools only as a result of the genuine and independent choices of private individuals."⁴ The former programs may violate the establishment clause of the United States Constitution, while the latter, as in *Zelman*, do not, even though parents eligible for state vouchers choose to enroll their children in religious

¹ Maxwell A. Miller is a senior attorney with Parsons Behle & Latimer.

² Some of my analysis is taken from the 1999 Sutherland Study, in which I wrote the chapter on constitutionality. The Study was written before *Zelman v. Harris*, 536 U.S. 639 (2002), which upheld Cleveland's voucher program against constitutional challenge. But it accurately predicts that *Mueller v. Allen*, 463 U.S. 388 (1983), upon which *Zelman* relied, would "stand as the most probable analysis the United States Supreme Court would undertake to uphold school choice against a federal constitutional challenge." Sutherland Study at 36.

³ *Zelman v. Harris-Simmons*, 536 U.S. 639 (2002).

⁴ *Id.* at 649 (citations omitted).

schools. Relying upon what the Court identified as controlling precedents, *Zelman* held “the [Ohio] program challenged here is a program of true private choice, consistent with *Mueller*,⁵ *Witters*⁶ and *Zobrest*.”⁷ *Id.* at 653.

The Utah Constitution includes three primary restrictions on church-state relations. Article I, Section 4 of the Utah Constitution provides in part, “The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; . . . [Further,] There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.”⁸ Article X, Section 1 provides, “The Legislature shall provide for the establishment and maintenance of the state's education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control.”⁹ Article X, Section 9 similarly provides that “Neither the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization.”¹⁰

The Utah Supreme Court has yet to decide whether vouchers and/or tuition tax credits are constitutional under these state constitutional provisions. If called upon to decide these issues, the Court has already declared it need not adhere to the United States Supreme Court’s analytical framework, noting that “federal rulings set the floor for federal constitutional protections,” not the Utah Constitution, which is less “cryptic” and, in some instances, unique. *Society of Separationists, Inc. v. Whitehead* (1993).¹¹ Nonetheless, the Utah Supreme Court’s interpretation of Utah’s constitutional provisions on state-church relations clearly adopts the same neutrality concepts that inhere in *Zelman*.

For instance, in *Separationists* the Court held that “public expenditures or use of property that provide any ‘direct’ [not indirect] benefit to religion run afoul of the ‘no public money or property’ ban of article I, section 4.”¹² This concept rests on “governmental neutrality,” which the Court found to underlie the Utah Constitution’s religion and conscience clauses.¹³ “When the state is neutral, any benefit flowing to religious worship, exercise, or instruction can be fairly characterized as indirect because the benefit flows to all those who are beneficiaries of the use of government money or property. . . .”¹⁴ In turn, satisfaction of constitutional neutrality depends

⁵ *Mueller v. Allen*, 463 U.S. 388 (1983).

⁶ *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1983).

⁷ *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993).

⁸ Utah Const. art. I, § 4.

⁹ Utah Const. art. X, § 1.

¹⁰ Utah Const. art. X, § 9.

¹¹ *Separationists, Inc. v. Whitehead*, 870 P.2d 916, 930 (Utah 1993).

¹² *Id.* at 936.

¹³ *Id.* at 937.

¹⁴ *Id.* (emphasis added).

upon two “requirements,” (1) the benefits must be provided “on a nondiscriminatory basis;” and (2) “the public money must be easily accessible to all.” Satisfaction of these tests means all individuals must be eligible for the benefit which is disbursed in a non-discriminatory manner.¹⁵ While perhaps rephrased to embrace the intent of Utah’s founders, these concepts are identical to those found in recent United States Supreme Court and other state supreme court decisions on the same subject matter.

Applying these criteria, the Utah Supreme Court concluded in *Separationists* that the Salt Lake City Council’s practice of permitting opening prayer during council meetings did not offend the Utah Constitution because the practice was applied neutrally. “The expenditures [permitting prayer] were not for the religious exercise itself, but for the meeting and that portion of the agenda that consists of generic opening thoughts, some of which may include prayers. Furthermore, . . . the City Council [had not] favored particular religions or religion in general in scheduling participants.”¹⁶ Most important for present purposes, the Court held that the Utah Constitution, like the United States Constitution, forbids only direct, not indirect, benefits to religions institutions. Said the Court, “When the state is neutral, any benefit flowing to religious worship, exercise, or instruction can be fairly characterized as indirect because the benefit flows to all those who are beneficiaries of the use of government money or property, which may include, but is not limited to, those engaged in religious worship, exercise, or instruction.”¹⁷

Some have made the argument that *Separationists* cannot be used to support voucher legislation in Utah because those sitting in city council meetings are presumably over eighteen and could, if they so choose, disregard the opening prayers. In other words, city council meeting attendees are not coerced, whereas school children whose tuition was paid in part through publicly funded vouchers would be indoctrinated in private religious schools. The short and wholly dispositive answer to that argument is that the parents, not the state, will make a choice to use or not use the voucher however the parents deem appropriate. Under established law, parents may decide to foster whatever influences they wish for their under-age children.¹⁸ The state’s role is simply to make vouchers available to parents using neutral distribution criteria, not to replace parents in deciding what educational opportunities are best for their children.

Under the *Zelman-Separationists* concepts of neutrality, the proposed voucher legislation, if adopted in Utah, should be upheld against any challenge that the program violates Utah constitutional separation of church and state, given the following facts:

- The voucher could be provided, for example, to families qualifying for the federal reduced lunch program, not the school that may be the indirect recipient of the

¹⁵ *Id.*

¹⁶ *Id.* at 938.

¹⁷ *Id.* at 937. (emphasis added).

¹⁸ The relationship between parent and child is a fundamental right and liberty protected by the United States Constitution, and the Utah Constitution, so that a parent may not be permanently deprived of his or her parental rights absent clear and convincing evidence showing unfitness, abandonment, or substantial neglect. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *State in Interest of J.R.T. v. Timperly*, 750 P.2d 1234 (Utah Ct. App. 1988).

voucher. The requirements for private schools eligible for voucher payments would neither favor nor disfavor, nor even mention religion.

- The voucher would be based on financial need, not upon religious affiliation or any other forbidden distribution criterion.

II. VOUCHER LEGISLATION IS CONSISTENT WITH THE “EQUAL PROTECTION” CLAUSE OF THE UNITED STATES CONSTITUTION AND PARALLEL PROVISIONS OF THE UTAH CONSTITUTION.

The Fourteenth Amendment to the United States Constitution provides in part that “nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The equal protection guarantee of the Fourteenth Amendment, by its own terms, applies to state and local governments, even though the same analysis has been applied to federal action under the due process clause of the Fifth Amendment. The United States Supreme Court has explained that “[t]he purpose of the equal protection clause is to secure every person within the state’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution.” *Sunday Lake Iron Co. v. Township of Wakefield* (1918).¹⁹ The equal protection clause guarantees that government will treat similarly situated individuals in a similar manner.

The constitutional guarantee of equal protection does not prevent government from drawing lines or making classifications, but it does prevent arbitrary or irrational classifications, or classifications that burden what the United States Supreme Court has identified as “suspect criteria” (e.g. race, national origin, alienage), or “fundamental rights” (e.g. marriage, procreation, travel), absent a compelling reason for making a distinction. Given this framework of analysis, most government classifications are constitutional because they relate to a legitimate governmental purpose and make reasonable or rational distinctions between individuals. For example, a zoning ordinance, which effectively classifies and discriminates among property owners, will nonetheless be upheld against constitutional challenge if there is a rational basis for making a distinction. On the other hand, a classification that burdens a “suspect” class, say zoning laws motivated by racial concerns, are most likely unconstitutional, unless the state can demonstrate a compelling reason (such as redress of identifiable discrimination) to make racial distinctions.²⁰

The Utah Supreme Court has explained that “the principles and concepts embodied in the federal equal protection clause and the state uniform operation of laws provision [Utah Const. art. 1, § 24] are substantially similar.” Under the Utah Constitution, an “examination into the reasonableness of economic legislation is at least as vigorous as that required by the federal

¹⁹ *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352-352 (1918).

²⁰ See generally Rex E. Lee, *A Lawyer Looks at the Constitution* 146-155 (1981); see also *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

constitution, and probably more so.” *Amax Magnesium Corp. v. Utah State Tax Comm’n* (1990).²¹

School choice programs generally classify the population into two broad categories—those who receive vouchers or tax credits, and those who do not. Initially, therefore, the question arises whether such classifications violate federal or state equal protection clauses.²² Can the government confer vouchers upon or extend tax credits to some and not others? In short, can the government limit its largesse?

The logical and necessary answer to these questions is that government must be permitted to limit its financial outlays, since government resources are finite. Restating the obvious as a matter of law, the United States Supreme Court has recognized that “a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a state may not accomplish such a purpose by invidious distinctions between classes or its citizens.” *Shapiro v. Thompson* (1969).²³ Within the guidelines of this principle, government distinctions in the disbursement of benefits are constitutional provided there is a rational basis for making them, and the criteria by which funds are disbursed do not include “suspect criteria” or impact “fundamental rights.” Utah could, consistent with the Utah Constitution’s equal protection guarantee, limit the number of vouchers available based upon income level, or give more vouchers to public school students rather than private school students, provided race, religion, sex, etc. are not distribution criteria.

To my knowledge, there are no reported decisions which invalidate vouchers or tax credits as a violation of equal protection. There are no persuasive equal protection arguments against them since Utah has broad discretion in meeting its obligation to educate its children.²⁴ But if one were to concoct such an argument, it would likely be that “education” is a fundamental right, and that disbursement of vouchers or credits to some, but not all, denies educational choice to those denied. This argument is superficially analogous to *Shapiro v. Thompson* (1968) in which the United States Supreme Court held that restricting welfare benefits to state residents adversely and unconstitutionally impacted a “fundamental right” to travel.

Obviously, the critical differences between *Shapiro* and any similar challenge to a voucher or tax credit system are that (1) “Education, of course, is not among the rights afforded explicit protection under our Federal Constitution.” *San Antonio School District v. Rodriguez* (1973)²⁵; and (2) education, if deemed a fundamental right under the Utah Constitution,²⁶ is not

²¹ 796 P.2d 1256, 126, quoting *Blue Cross and Blue Shield v. State*, 779 P.2d 634 (1989).

²² The Utah Constitution has no state “Equal Protection Clause” as such. Article IV, section 1 of the Utah Constitution guarantees equal civil, political and religious rights and privileges from abridgment “on account of sex.” By its terms, this clause prevents arbitrary classifications based upon sex and thus would not apply to the voucher proposal, which makes no such distinctions.

²³ *Shapiro v. Thompson*, 394 U.S. 618 (1969).

²⁴ The requirement for a uniform system of public schools is met where the regular curriculum of the school is open to all eligible children. *Starkey v. Board of Educ.*, 381 P.2d 718 (Utah 1963).

²⁵ *San Antonio School District v. Rodriguez*, 411 U.S. 1, 35 (1973).

denied because someone must attend public school. The Utah Constitution guarantees a “uniform system of public schools,” not a particular quality of education or education delivery system.

The proposed legislation does not violate federal or state equal protection analysis, given the following facts:

- The proposed legislation would classify potential recipients, according to their financial need. In other words, the credit against tuition the vouchers provide would be set along a continuum. Such a classification is not based upon race, sex, or any other forbidden criteria.
- The proposed legislation would classify potential recipients by “families.” Although this is an undefined term, any rational definition should pass constitutional muster provided it is not based upon suspect criteria.

III. VOUCHER LEGISLATION IS CONSISTENT WITH THE “FREE SCHOOL” CLAUSE OF THE UTAH CONSTITUTION.

Another make-weight argument bantered about is that, because the state has a constitutional mandate to provide education under the Utah Constitution,²⁷ it is forbidden to fund anything but government schools. Such residue arguments seem deliberately obfuscatory and premised upon a fundamental misunderstanding of the Utah Constitution. There is absolutely nothing in Utah case law to support this argument. Indeed, the cases cut the other direction.

At the outset of any analysis under the Utah Constitution, it should be stressed, as the Utah Supreme Court did in *University of Utah v. Board of Exmrs.* (1956)²⁸, that the Utah Constitution is not one of grant (as is the United States Constitution), but one of limitation. This means that whatever is not proscribed is permitted. Because the legislature is not restricted expressly or by necessary implication from indirect funding of private alternatives to public schools, there is no legal restraint stopping it from doing just that.

As explained above, *Separationists* endorses the concept that the legislature may choose to stimulate education by providing funds to parents, who, in turn, choose to spend those funds

²⁶ Utah Const. art. X, § 1, termed the “Free and Equal Public Education Clause,” or the “Open Education Clause” provides that “The Legislature shall make laws for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and be free from sectarian control.” This section does not mandate any particular school funding mechanism, and does not mean that all public schools must be free, except “common schools,” defined to mean “grammar and primary grades.” The Utah Constitution thus forbids the exaction of a “charge or fee” for attendance at a public “common school.” However, “there is no inhibition in the Constitution against the Legislature prescribing or authorizing reasonable fees or charges for attendance at any of the other units of the public school system.” *Logan City School Dist. v. Kowallis*, 77 P.2d 348, 349 (Utah 1938).

²⁷ Utah Const. art. X, § 1 directs the legislature to establish a public school system which “shall be open to all children of the state.” Utah Const. art. X, § 5 establishes a “permanent State School Fund” which consists of revenues from specified sources.

²⁸ *University of Utah v. Board of Exmrs.*, 295 P.2d 348 (Utah 1956).

on private parochial schools. *Logan City School Dist. v. Kowallis* (1938)²⁹ holds that the Utah Constitution guarantees equal access to public education. The Constitution does not proscribe private education, nor does it preclude the legislature from using public funds for indirect funding of private education – even in sectarian schools. The Utah Supreme Court recently reaffirmed this concept in *Spackman v. Bd. of Ed. of Box Elder County* (2000).³⁰ Citing *Logan City*, the *Spackman* Court held the open education clause is self-executing (enforceable without enacting legislation), and forbids denial of “admission to the schools of the state based upon race, color, location, religion, politics, or any other bar or barrier which may be set up which would deny to such child equality of educational opportunities or facilities with all children of the state.”³¹ The open education clause has no relevance here because:

- The proposed legislation would deny admission to no one in public schools. Participation in the voucher program would be open to any student, obviously including boys and girls of any race, religion or ethnic origin, subject to a phase-out for higher income families.
- The Utah Constitution does not prescribe a particular funding mechanism for public education, only that there shall be a uniform school fund.
- Neither does the Utah Constitution compel Utah children to attend public school, as is obvious from the Utah Code’s recognition of “home schools,” and private schools as a viable alternative.³² Rather, the proposed legislation would simply permit Utah parents to exercise free choice and take advantage of an optional educational program.

IV. VOUCHER LEGISLATION IS CONSISTENT WITH THE FEDERAL “INDIVIDUALS WITH DISABILITIES EDUCATION ACT” AND THE PUBLIC SCHOOL FUNDING PROVISIONS UNDER THE UTAH CONSTITUTION.

On February 25, 2005 the Utah Legislature passed H.B. 249, entitled the “Carson Smith Scholarships for Students with Special Needs Act” (hereinafter “Carson Smith Act”). Governor John Huntsman Jr. signed the enacted Carson Smith Act on March 10, 2005 and the Carson Smith Act became law on May 2, 2005. The Carson Smith Act is codified at Utah Code Ann. § 53A-1a-701 et seq. and provides scholarships, similar to vouchers, for eligible disabled students in private schools. H.B. 249 was a second, and finally successful, attempt at passage and codification of the Carson Smith Act. In 2004, the Utah Legislature passed H.B. 115, virtually identical to H.B. 249 that passed the following year. The “Legislative Review Note” included at the footing of H.B. 115, dated 1/22/04, states, “A limited legal review of this legislation raises no

²⁹ See note 19, *supra*.

³⁰ *Spackman v. Bd. of Ed. of Box Elder County*, 16 P.3d 533 (Utah 2000).

³¹ *Id.* at 536.

³² See, e.g., Utah Code Ann. § 53A-11-102.5(1), which provides, “A person having control of a minor under this part who is enrolled in a regularly established private school or a home school may also enroll the minor in a public school for dual enrollment purposes.”

obvious constitutional or statutory concerns. Office of Legislative Research and General Counsel.”³³

Notwithstanding the opinion of Legislative Research that H.B. 115 raised “no obvious constitutional or statutory concerns,” then Governor Olene Walker vetoed H.B. 115, claiming reliance upon a legal opinion Utah Assistant Attorney General John McAllister issued in February of 2004. The McAllister opinion faults H.B. 115 for a number of perceived policy and legal flaws, only one of which is germane to this note.

Mr. McAllister asserts that an appropriation for Carson Smith scholarships, and presumably for vouchers, from the Uniform School Fund raises constitutional issues under Article X, Section 5(4) of the Utah Constitution.³⁴ While not entirely clear, the argument implies that the program contemplated under H.B. 115, and presumably voucher legislation, would not be a component of the “public education system,” which the state has a constitutional obligation to implement. This argument distorts the plain language of the Utah Constitution. There is, moreover, no Utah case law to support Mr. McAllister’s argument.

Article X, Section 2 of the Utah Constitution defines the “public education system” as all public schools plus “other schools and programs as the Legislature may designate.” (emphasis added). H.B. 115 clearly fit within this definition, as would any other legislatively authorized voucher program. Obviously, “other programs” can include those programs where students use benefits extended to parents who voluntarily choose to use them in private schools. It makes no legal difference, therefore, if voucher funding comes from a general fund or the uniform school fund. Whether the fund is a source of revenue for “public elementary or secondary schools” and/or “such other schools and programs as the Legislature may designate” is immaterial because both are constitutionally defined as inclusive in “the public education system.”

In attempted rebuttal of this conclusion - that income tax revenue can be used to fund vouchers – it has been argued that Article XIII, Section 5(5) of the Utah Constitution dedicates income tax revenue exclusively to public schools. This provision states, “All revenue from taxes on intangible property or from a tax on income shall be used to support the systems of public education and higher education as defined in Article X, Section 2.” Funding schools from taxation of intangibles should be a moot question because intangibles are not presently taxable.³⁵ Since income tax revenue must be devoted to “systems of public education,” however, the argument is that funding vouchers with income tax revenue violates Article XIII.

³³ It is understood this note does not constitute an endorsement of the Carson Smith Act. However, the note obviously contradicts and is inconsistent with the McAllister opinion, which argued against passage of the Act on what was perceived as constitutional grounds.

³⁴ Utah Const. art. X, § 5(4) provides:

The Uniform School Fund shall be maintained and used for the support of the state's public education system as defined in Article X, Section 2 of this constitution and apportioned as the Legislature shall provide.

³⁵ Utah Const. art. XIII, § 2 limits taxation to “all tangible property.” Art. XIII, § 2(5) vests the legislature with authority to tax intangibles or income from intangibles, but not both. Currently, Utah Code Ann. § 59-7-101 imposes a corporate franchise or income tax on corporate income, including income from intangibles.

The fatal flaw in this argument is its focus on the revenue source (income taxes) rather than revenue application (“systems of public education”). The “public education system” to which income tax revenue under Article XIII, Section 5 must be dedicated “include[s] all public elementary and secondary schools and such other schools and programs as the Legislature may designate.” The word “includes” is significant because its plain and ordinary definition means that the “public education system,” as constitutionally defined, is representative and not exhaustive. Stated differently, whatever schools the legislature designates fit within the Utah Constitution’s broad definition of a “public education system.” Equally important, the adjective “public” preceding the words “elementary and secondary schools” does not precede the words “other schools,” again suggesting that the “public education system” can include whatever schools the Legislature may “designate.” There is no language in the Utah Constitution that precludes revenue from income taxes as a source of voucher funding, provided the vouchers are used in schools the Legislature designates.

CONCLUSION

Based upon *Zelman* and its antecedent precedents, the Utah Supreme Court should uphold the proposed legislation against a federal constitutional challenge if confronted with the issues. Based upon the Utah Supreme Court’s analysis and holding in *Separationists* and *Logan City*, it should also hold the proposed legislation does not violate the Utah Constitution. Based upon the Utah Constitution’s definition of a “public school system,” funding for a voucher system could come from the uniform school fund, or any other revenue source, as the Legislature may choose to be used by parents in private schools the Legislature may designate.