

# Vouchers and Tuition Tax Credits are Constitutional In Utah

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# BETTER EDUCATION FOR ALL STUDENTS

**VOUCHERS AND TUITION TAX CREDITS ARE CONSTITUTIONAL IN UTAH** BY MAX MILLER, J.D., PARSONS, BEHLE & LATIMER, SHAREHOLDER, LITIGATION AND CORPORATE AND TAX DEPARTMENTS AND RICHARD D. KOMER, J.D., SENIOR LITIGATION ATTORNEY, INSTITUTE FOR JUSTICE

School choice for parents has become the civil rights issue of our time. An ever-increasing number of parents, particularly poor and minority parents in failing inner city schools throughout the United States, have chosen to enroll their children in private schools when given the opportunity through state-funded vouchers or tuition tax credits. As documented in many independent studies, everyone benefits from choice in education, not only parents choosing a private school for their children, but also parents who elect to keep their children in public schools. Public schools could actually have more money per student if vouchers or tax credits are worth less than what is currently spent to educate that same student in a public school. The difference represents a savings to taxpayers, part of which could go to enhance public schools.

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Nonetheless, public school monopolies have invariably fought against parental choice in education, typically claiming that conferring government benefits on parents who choose private religion-affiliated schools for their children violates the "Establishment Clause" of the United States Constitution. The Establishment Clause and similar state constitutional restrictions forbid government sponsorship or endorsement of religion. In a landmark case called *Zelman v. Harris* (2002), the United States Supreme Court decided that voucher programs that give parents the right to choose public or private schools for their children did not violate the Establishment Clause. State supreme courts have likewise decided that schoolchoice programs do not violate the Establish Clauses of state constitutions.

The Utah Supreme Court's analysis of the Utah Constitution's Establishment Clause in *Separationists, Inc. v. Whitehead* (1993) reflects the same rationale the United States Supreme Court adopted nearly ten years later in deciding *Zelman*. From these cases, and express language in the Utah Constitution vesting the Utah Legislature with complete authority to designate whatever educational programs it deems appropriate, one can draw a confident conclusion that voucher or tuition tax credit legislation in Utah, similar to that in *Zelman*, would, and certainly should, be upheld as constitutional. This conclusion demonstrably and necessarily follows if one views the issues with an objective and open mind.



## United States Constitution

### **THE UNITED STATES CONSTITUTION PERMITS STATES TO FUND VOUCHERS AND TUITION TAX CREDITS FOR PARENTS WHO CHOOSE PUBLIC OR PRIVATE SCHOOLS FOR THEIR CHILDREN.**

In *Zelman v. Harris*, the United States Supreme Court upheld Ohio's Pilot Project Scholarship that gave tuition money (vouchers) to parents in the Cleveland City School District, who could choose to enroll their children in public or private schools, both religious and non-religious schools. In the 2000 school year, 96% of parents using vouchers chose religious schools for their children. The teachers unions sued to stop the program, claiming that taxpayer funded choice for parents violated the Establishment Clause of the United States Constitution.

In rejecting the union's arguments, the United States Supreme Court in *Zelman* 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." The former programs that directly fund religious private schools likely violate the federal Establishment Clause, while the latter, as in *Zelman*, do not, even though parents eligible for school choice may choose to enroll their children in religious schools. Chief Justice Rehnquist explained the key concept in upholding school choice against the federal Establishment Clause challenge: "The Ohio program is entirely neutral with respect to religion...It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of


true private choice." Likewise, legislation that has been proposed in Utah directly provides vouchers to lower income parents, not schools, who may then enroll their children in the school of their "true private choice." If Zelman were not the law, the constitutionality of veterans benefits, Pell grants and other government aid paid to or on behalf of those who choose to attend private schools and colleges, like Brigham Young University, would be in jeopardy. Even before Zelman was decided, the Wisconsin Supreme Court in *Jackson v. Benson* (1998) and the Arizona Supreme Court in *Kotterman v. Killian* (1999) upheld their respective state voucher programs against state and federal Establishment Clause challenge using similar rationales.

## **The Utah Constitution**

**THE UTAH CONSTITUTION PERMITS UTAH TO FUND VOUCHERS OR TUITION TAX CREDITS FOR PARENTS WHO CHOOSE PUBLIC OR PRIVATE SCHOOLS FOR THEIR CHILDREN. Utah voucher opponents argue that parental choice in education violates state constitutional 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."**

The Utah Supreme Court's interpretation of Utah's constitutional restrictions on state-church relations clearly adopts the same neutrality concepts the United States Supreme Court explained in *Zelman*. In *Society of Separationists, Inc. v. Whitehead* (1993), the Utah Supreme Court decided that indirect funding of religion – for example, fire and police protection for churches – is constitutional. 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."



"The Ohio program is entirely neutral with respect to religion...It permits such individuals to exercise *genuine choice* among options public and private, secular and religious. The program is therefore a program of *true private choice*."

- Chief Justice Rehnquist

Because tuition tax credits and/or vouchers at most indirectly fund religious schools "or instruction," and depend upon free parental choice, they are constitutional following the Court's holding in *Separationists*.

Utah voucher opponents also assert that income tax dollars must be spent on traditional public schools. This argument misunderstands the scope of legislative powers

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Because the Utah Legislature is not restricted expressly or by necessary implication from indirect funding of private alternatives to public schools, *there is no legal restraint precluding vouchers.*

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under the Utah Constitution. Any analysis under the Utah Constitution must recognize, as the Utah Supreme Court did in *University of Utah v. Board of Examiners* (1956), 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 Utah Legislature is not restricted expressly or by necessary implication from indirect funding of private alternatives to public schools, there is no legal restraint precluding vouchers.

Article X, Section 2 of the Utah Constitution explicitly authorizes using income tax dollars on public schools and "such other schools and programs as the Legislature may designate." Similarly, Article X, Section 5 provides that "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." The Utah Constitution appropriately puts the emphasis on educating the state's children, not on an exclusive monopoly system of education, and appropriately vests the Legislature with authority to establish educational programs that it deems appropriate.

Other states, specifically Colorado and Florida, have invalidated vouchers under unique provisions of their respective state constitutions. In *Owens v. Colo. Cong. of Parents, Teachers and Students* (2004) the Colorado Supreme Court held that vouchers were unconstitutional under Article X, Section 15 of the Colorado Constitution, which provides that school districts "shall have control of instruction in the public schools of their respective districts." The Colorado Supreme Court held that the state's voucher program violated this provision because school districts were directed to remit some of their locally-raised funds to nonpublic schools, over whose instruction the districts had no control. In *Bush v. Holmes*, (2006) the Florida Supreme Court invalidated a voucher program under Article IX, Section 1 of the Florida Constitution, which states that "[a]dequate provision shall be made by law for a uniform, efficient, safe, secure and high quality system of free public schools." The underlying premise of the Florida Court's ruling is that Florida public schools are the "sole means" Florida can provide for children's education in Florida. There are no analogous provisions in the Utah Constitution, which stands in contrast to the Colorado and Florida constitutions. The Utah Constitution vests the Utah Legislature with authority to use income tax dollars to fund whatever educational programs it designates. In 2005, the Utah Legislature passed the "Carson Smith Scholarships for Students with Special Needs Act." This legislation provides scholarships, similar to vouchers, for eligible disabled students whose parents chose to enroll them in private schools. No lawsuit has ever been filed to challenge the constitutionality of the Carson Smith Act. Conceptually, the Carson Smith Act is the same as the voucher legislation proposed in the last session of the Utah Legislature. In each case, the Legislature exercises its constitutionality vested authority to establish an educational program in which eligible parents may freely choose private schools for their children.

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