

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." Because tuition tax credits and/or vouchers may indirectly

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fund religious schools "or instruction," depending 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 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 Exmrs.* (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 other "programs 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 public, not on an exclusive monopoly system of education, and appropriately vests

the Legislature in making decisions about education 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." 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 Florida Court's ruling was based on its conclusion that public schools are the "sole means" the state can provide for children's education. 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 on 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 has exercised its constitutionally vested authority to establish an educational program that includes private schools that eligible parents may freely choose for their children. Worldwide poll, 62% of Utah parents with children currently enrolled in public school would consider a private school if it were available within a 10 mile radius of their current residence and cost no more than \$1,100, the approximate difference between proposed scholarship amounts and average private school tuition in Utah.

# Vouchers and Tuition Tax Credits are Constitutional In Utah

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## BETTER EDUCATION FOR ALL STUDENTS

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 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.

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.

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 gave 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 school choice programs do not violate the Establish Clause 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 mind.

### United States Constitution

**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 Ohio Superintendent of Public Schools sued to stop the program, claiming that taxpayer funded choice for parents violated the Establishment Clause of the United States Constitution.

In rejecting the Superintendent'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

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- Chief Justice Rehnquist

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 state vouchers 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 those who choose to attend private 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 a state and federal Establishment Clause challenge using similar rationale.



### The Utah Constitution

**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 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