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Education Vouchers: Constitutional Issues and Cases

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Summary

On February 25, 2004, in *Locke v. Davey*, the Supreme Court overturned a lower federal court decision which had held the free exercise clause of the First Amendment to be violated by a provision in a state constitution barring a state scholarship from being used for a theological major at a religious college. Such "no religious use" provisions exist in a number of state constitutions and have become the focus of a number of suits in the wake of the Supreme Court's 2002 decision in *Zelman v. Simmons-Harris.* In *Zelman* the Court, by a 5-4 margin, upheld the constitutionality under the establishment of religion clause of the First Amendment of a school voucher program that gave tuition assistance to poor children in failing public schools in Cleveland to enable them to attend private schools in the city, notwithstanding that most of the schools were religious in nature. In so doing the Court substantially loosened the constraints that previously applied to voucher programs under the establishment clause and shifted the attention of voucher advocates and opponents to state constitutional provisions that have been, or might be, construed to prohibit such programs.

Supreme Court decisions prior to *Zelman* had evaluated the constitutionality of voucher programs primarily on the basis of whether the recipients of the vouchers had a genuine choice among secular and religious options about where to use them. If the available educational choices were predominantly religious in nature, the Court held the program to violate the establishment clause. If there were a number of secular as well as religious options available, the Court held the programs to meet constitutional requirements. In *Zelman* the Court substantially loosened this genuine choice criterion by holding that the available universe of choice includes not only the private schools where the vouchers themselves can be redeemed but also the full range of public school options available to parents.

Following *Zelman*, legal questions remained with respect to the effect of the more strict church-state provisions of some state constitutions and whether those state limitations are consistent with either the free exercise or equal protection clauses of the U.S. Constitution. As noted, the Supreme Court addressed this issue in *Locke v. Davey* and found that Washington state's exclusion of the pursuit of a devotional theology degree from its otherwise inclusive scholarship aid program did not violate the Free Exercise Clause.

This report details the constitutional standards that currently apply to indirect school aid programs and summarizes all of the pertinent Supreme Court decisions, with particular attention to *Zelman*. It also summarizes the Court's decision in *Locke* and other selected state and lower federal court cases concerning vouchers. The report will be updated as events warrant.

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Education Vouchers: Constitutional Issues and Cases

Introduction

Whether government ought to provide assistance in the form of education vouchers or tax assistance to help some or all parents send their children to private schools, including sectarian institutions, has been a recurring and politically charged issue at both the federal and state levels for at least the past two decades.

A key issue in the debates on educational vouchers[1] has been whether the inclusion of sectarian schools in the universe of schools which students might attend violates the part of the First Amendment to the Constitution providing that "Congress shall make no law respecting an establishment of religion ...."[2] In a number of decisions between 1973 and 1993 addressing the constitutionality of programs indirectly aiding religious schools – *Committee for Public Education v. Nyquist, Sloan v. Lemon, Mueller v. Allen, Witters v. Washington Department of Social Services for the Blind,* and *Zobrest v. Catalina Foothills Public Schools* -- the Supreme Court had seemed to suggest that a voucher program would pass constitutional muster only if its benefits were made available on a religion-neutral basis and if the initial beneficiaries had a genuine choice between secular and religious schools about where to use the assistance. However, these criteria were not wholly transparent, and as a consequence, state and lower federal courts that subsequently wrestled with the issue often reached contradictory results. In the past decade, for instance, conflicting judicial decisions were handed down on the constitutionality of particular voucher and voucher-related programs under the establishment clause in the states of Wisconsin, Arizona, Maine, and Ohio.

The U.S. Supreme Court repeatedly bypassed opportunities to review these state and lower court decisions. But on June 27, 2002, the Court in *Zelman v. Simmons-Harris*[3] resolved most issues related to how the foregoing criteria ought to be applied. In that case the Court upheld as constitutional, 5-4, a voucher program providing assistance to poor children in Cleveland's public schools to enable them to attend private schools in the city. The Court did so notwithstanding the facts that most of the private schools in the city (more than 80%) were religious in nature and most of

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[1] This report uses the term "voucher" broadly to mean not only tuition subsidy and tuition grant programs but also tax benefit proposals.

[2] Although worded as limitations on what Congress can do, both the establishment and free exercise clauses of the First Amendment have been held to apply to the states as well as part of the liberty protected from undue state interference by the due process clause of the Fourteenth Amendment. *See* Everson v. Board of Education, 330 U.S. 1 (1947) and Cantwell v. Connecticut, 310 U.S. 296 (1941).

[3] 536 U.S. 639 (2002).

the voucher children (96%) attended those schools. In so doing the Court substantially loosened the strictures the establishment clause had previously been construed to place on public aid to religious institutions.

As a consequence, attention has now shifted to the provisions of a number of state constitutions which have been construed to prohibit voucher programs. Sometimes called "little Blaine amendments" (*see infra* n. 51), these state constitutional provisions are worded in various ways and are seemingly more strict than the establishment of religion clause. Indeed, voucher programs in Florida, Vermont, and Washington have been held to violate such provisions. But voucher advocates contend that these provisions violate the free exercise of religion and equal protection clauses of the U.S. Constitution.

The Supreme Court addressed the issue of these types of state constitutional provisions during the October 2003 Term. Earlier, U.S. Court of Appeals for the Ninth Circuit had held the free exercise clause to be violated by a provision of the Washington Constitution which had been construed to bar a student from using a state scholarship to pursue a degree in theology at a religious school.[4] On February 25, 2004, the Supreme Court reversed the lower court's decision holding that Washington state's exclusion of the pursuit of a devotional theology degree from its otherwise inclusive scholarship aid program did not violate the Free Exercise Clause of the First Amendment.[5]

The following sections summarize the standards articulated by the Supreme Court under the establishment of religion clause for public aid programs that provide assistance directly to sectarian schools and other religious entities and, in greater detail and with special attention to *Zelman*, for programs that provide assistance to sectarian schools indirectly (i.e., by means of voucher and tax benefit programs). The report also summarizes *Locke v. Davey* and other selected cases involving the constitutionality of state restrictions on voucher programs. This report will be updated as events warrant.

Direct Aid

A basic tenet of the Supreme Court's interpretation of the establishment clause is that the clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."[6] Thus, the Court has held that public assistance which flows **directly** to religious institutions in the form of grants or cooperative agreements must be limited to aid that is "secular, neutral, and nonideological...."[7] That is, under the establishment clause government can provide direct support to secular programs and services sponsored or provided by religious entities but it cannot directly subsidize such organizations' religious

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[4] *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002).

[5] 540 U.S. 712 (2004).

[6] Grand Rapids School District v. Ball, 473 U.S. 373, 385 (1985).

[7] Committee for Public Education v. Nyquist, 413 U.S. 756, 780 (1973).

activities or proselytizing.[8] Direct assistance, the Court has held, cannot be used for religious indoctrination.[9]

Thus, religious schools and other entities are not automatically disqualified from participating in direct public aid programs. But the no-religious-indoctrination restriction on such aid means that a religious organization's secular functions and activities must be separable from its religious functions and activities. As a consequence of that requirement, the Court until recently had held that "pervasively sectarian" entities, i.e., entities so permeated by a religious purpose and character that their secular functions and religious functions are "inextricably intertwined," were generally ineligible to receive direct government assistance.[10] That construction of the establishment clause was a particular obstacle for direct aid to religious elementary and secondary schools, because the Court generally deemed such schools to fall within the pervasively sectarian category.[11] For other entities such as

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[8] In most of the cases involving aid to religious institutions, the Court has used what is known as the Lemon test to determine whether a particular aid program violates the establishment clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster "an excessive entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The secular purpose prong of this test has rarely posed an obstacle to public aid programs benefiting private sectarian schools, but the primary effect and entanglement prongs have operated, in Chief Justice Rehnquist's term, as a "Catch-22" for such programs. Under the primary effect test a direct aid program benefiting religious schools which is not limited to secular use has generally been held unconstitutional because the aid can be used for the schools' religious activities and proselytizing. But if a direct program is limited to secular use, it has often still foundered on the excessive entanglement test, because the Court has held the government's monitoring of the secular use restriction to intrude it too much into the affairs of the religious schools. See Lemon v. Kurtzman, *supra*. The Court has for some time been sharply divided on the utility and applicability of the tripartite test and particularly of the entanglement prong. Nonetheless, the Court still uses the Lemon test; and, although it is no longer the only test the Court uses in establishment clause cases, the Court reaffirmed its applicability in its most recent school aid cases. The Court has, however, made both the primary effect and entanglement tests less stringent. The primary requirements now are that the aid itself be secular in nature, that it be distributed on a religiously neutral basis, that it not subsidize religious indoctrination, and that it not lead to excessive entanglement. *See* Agostini v. Felton, 521 U.S. 203 (1997) and Mitchell v. Helms, 530 U.S. 793 (2000).

[9] Mitchell v. Helms, 530 U.S. 793 (2000).

[10] Committee for Public Education v. Nyquist, *supra*; Lemon v. Kurtzman, *supra;* Bowen v. Kendrick, 487 U.S. 589 (1988).

[11] See, e.g., Committee for Public Education v. Nyquist, *supra* (maintenance and repair grants to sectarian elementary and secondary schools held unconstitutional); Lemon v. Kurtzman, *supra* (public subsidy of teachers of secular subjects in sectarian elementary and secondary schools held unconstitutional); and Wolman v. Walter, 433 U.S. 229 (public subsidy of field trip transportation for children attending sectarian schools held unconstitutional).

religiously affiliated hospitals, social welfare agencies, and colleges, the Court presumed to the contrary and, consequently, allowed a greater degree of direct aid.[12]

But the Court has recently abandoned that presumption regarding sectarian elementary and secondary schools.[13] Pervasive sectarianism, in other words, is no longer a constitutionally preclusive criterion for direct aid to such entities. The basic constitutional standards governing direct public assistance to religious entities, including schools, now appear to be that the aid must be "secular, neutral, and nonideological" in nature, distributed on a religion-neutral basis, not be used for religious indoctrination, and not precipitate excessive entanglement between government and the institution benefitted (although the Court has left open the possibility that other as-yet-unspecified constitutional requirements may exist as well).[14]

Indirect Aid

Public aid that is received only **indirectly** by sectarian institutions — i.e., assistance that is received initially by a party other than the religious entity itself in such forms as tax benefits or vouchers — has, on the other hand, been given greater leeway by the Court. Such programs still must be religiously neutral in their design and have been held unconstitutional by the Court where their structure has virtually guaranteed that the assistance flows largely to pervasively sectarian elementary and secondary schools. However, where the design of the programs has not dictated where the assistance is channeled but has given a genuine private choice between

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[12] See, e.g., Bradfield v. Roberts, 175 U.S. 291 (1899) (public grant to Catholic hospital to provide medical care to the poor upheld); Tilton v. Richardson, 403 U.S. 672 (1971) (grants for the construction of academic buildings at institutions of higher education, including ones religiously affiliated, upheld); and Bowen v. Kendrick, 487 U.S. 589 (1988) (grants to religiously affiliated agencies to provide pregnancy prevention and care services to adolescents upheld).

[13] Agostini v. Felton, *supra*, and Mitchell v. Helms, *supra*.

[14] In both Agostini v. Felton, *supra*, and Mitchell v. Helms, *supra*, the Court upheld the aid programs in question as constitutional on the basis not only that the aid was secular in nature, made available on a religion-neutral basis, and barred from use for purposes of religious indoctrination but also that it was subject to other statutory and regulatory restrictions. In Agostini the Court noted that the aid program did not result in any government funds actually reaching religious schools' coffers and that it supplemented rather than supplanted school expenditures. Similarly, in Mitchell the concurring (and decisive) opinion of Justice O'Connor noted that the aid program had not only the foregoing characteristics but also that there was no evidence that aid had actually been diverted to religious use and that there were a number of state and local monitoring activities to guard against that possibility. It also seemed important in Mitchell that the direct aid in question was of an in-kind nature (educational materials and equipment). There was no majority opinion in that case, but the three opinions filed all expressed doubt about the constitutionality of direct money grants to pervasively sectarian institutions. In any event, both Agostini and Mitchell held such additional factors as those cited, along with the nature of the aid, its mode of distribution, and the prohibition on its use for religious indoctrination, to be "sufficient" to render the program constitutional, although it specifically refrained from saying the additional factors were constitutionally "necessary."

secular and religious providers to the immediate beneficiary (the taxpayer or voucher recipient), the Court has held the programs to be constitutional even though pervasively sectarian institutions have benefited. Moreover, in the recent decision of *Zelman v. Simmons-Harris*, *supra*, the Court legitimated most school voucher programs by holding that, for constitutional purposes, the universe of choices available to voucher recipients is not limited to the entities where the vouchers can be used but includes the full range of educational choices available to them, i.e., a voucher program can be constitutional even if most of the private schools where they can be redeemed are religious in nature.

(1) Precursors to Zelman v. Simmons-Harris. Prior to its decision on June 27, 2002, in *Zelman v. Simmons-Harris*, *supra*, the Court had handed down seven decisions relevant to the question of the constitutional parameters governing indirect assistance. In two decisions particular programs of indirect assistance were struck down; in five others particular programs were upheld.

In *Committee for Public Education v. Nyquist*, *supra*, and *Sloan v. Lemon*[15] in 1973 the Court found tax benefit and tuition grant programs that were available **only** to children attending private elementary and secondary schools to have a primary effect of advancing religion and, thus, to violate the establishment clause. In *Nyquist* a state tuition grant program provided specified amounts of tuition reimbursement to low-income parents of children who incurred tuition costs in sending their children to private elementary or secondary school, while in *Sloan* tuition reimbursements were provided to **all** parents who incurred tuition costs in sending their children to such schools. In addition, a related program in *Nyquist* permitted higher-income parents of children attending such schools to take an amount specified in the statute as a tax deduction for each attendee without regard to the parents' actual expenditures; the specified deduction gradually declined as income increased.

In both cases the Court found that most of the private schools attended were religiously affiliated (85-90%), that those schools were pervasively sectarian in nature, and that the aid was not limited to secular use either by its nature or by statutory restriction. As a consequence, it concluded that "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions."[16] "In both instances," it said in *Nyquist*, "the money involved represents a charge made upon the state for the purposes of religious education."[17] Rather than providing a *per se* immunity from constitutional challenge, the Court said, "the fact that the aid is disbursed to parents rather than to the schools is only one among many factors to be considered."[18] In these cases the tuition grant and tax subsidy programs, the Court asserted, were both an encouragement to parents to send their children to nonpublic, mostly religious schools and a reward for doing so. Moreover, it said, to allow the factor that the aid was disbursed to the parents rather than directly to the schools to have controlling significance would "provide a basis for approving

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[15] 413 U.S. 825 (1973).

[16] Committee for Public Education v. Nyquist, *supra*, at 783.

[17] *Id.*, at 791, quoting from the lower court decision at 350 F.Supp. 655, 675 (1972).

[18] *Id.* at 783.

through tuition grants the *complete subsidization*" of all religious schools ... – a result wholly at variance with the Establishment Clause."[19]

In a pregnant footnote in *Nyquist*, however, the Court stated that "we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[20] Several subsequent cases presented the Court with precisely that kind of public assistance, and in each instance the Court found the program in question to be constitutional. In the process it refined the criteria governing the constitutionality of indirect aid programs.

Mueller v. Allen[21] concerned a Minnesota tax deduction given to the parents of **all** elementary and secondary schoolchildren, both public and private, for a variety of educational expenses, including private school tuition. *Witters v. Washington Department of Services for the Blind*[22] involved a vocational rehabilitation grant by Washington to a blind applicant who wanted to use the grant for study at a Bible college to prepare for a religious vocation; the program provided similar grants to other blind applicants for a wide variety of job training and educational purposes. *Zobrest v. Catalina Foothills School District*,[23] in turn, involved a Tucson school district's subsidy of a sign-language interpreter under the federal "Individuals with Disabilities Education Act"[24] for a deaf student attending a sectarian secondary school; similar assistance was available to disabled students in public schools and nonsectarian private schools. The Court held all three forms of assistance not to violate the establishment clause.

The Court differentiated the tax benefit program in *Mueller* from the one it had held unconstitutional in *Nyquist* by emphasizing that it was a genuine tax deduction and that

> the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools.[25]

The Court further stressed that any aid received by sectarian schools in Minnesota became "available only as a result of numerous, private choices of individual parents

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[19] *Id.* at 782, n. 38.

[20] *Id.*

[21] 463 U.S. 388 (1983).

[22] 474 U.S. 481 (1986).

[23] 509 U.S. 1 (1993).

[24] 20 U.S.C.A. §§ 1401 *et seq*.

[25] Mueller v. Allen, *supra*, at 397.

of school-age children."[26] Moreover, it rejected the argument that the tax deduction was unconstitutional because it disproportionately benefited religious institutions. Parents of children attending private schools, most of which were religious, could deduct tuition while parents of public school children could not; and thus, it was contended, the tax deduction served primarily to subsidize attendance at such schools. The Court said that it "would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."[27] The decision was 5-4.

In *Witters*, a unanimous decision, the Court again emphasized that in the vocational rehabilitation program "any aid provided is `made available without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited'" and that "any aid provided ... that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."[28] The program, the Court stated, did not have the purpose of providing support for nonpublic, sectarian institutions; created no financial incentive for students to undertake religious education; and gave recipients "full opportunity to expend vocational rehabilitation aid on wholly secular education."[29] "In this case," the Court found, "the fact that the aid goes to individuals means that the decision to support religious education is made by the individual, not by the State."[30] Finally, the Court concluded, there was no evidence that "any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education."[31]

Finally, in *Zobrest* it underscored that the program at issue was "a general government program that distributes benefits neutrally to any child qualifying as `handicapped' under the IDEA without regard to the `sectarian-nonsectarian or

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[26] *Id.* at 399.

[27] *Id.* at 401.

[28] Witters v. Washington Department of Services for the Blind, *supra*, at 487.

[29] *Id.* at 488.

[30] *Id.*

[31] *Id.* Notwithstanding the unanimity of the decision, five of the Justices authored or joined in concurring opinions that disclaimed the constitutional significance of the amount of aid that ended up in the coffers of religious schools. Justice Marshall, who wrote the opinion of the Court in this case, cited the absence of any evidence that "any significant portion of the aid expended ... will end up flowing to religious institutions" as an additional factor supporting the program's constitutionality. But all of the concurring opinions stressed instead that this case was controlled by the Court's decision in Mueller v. Allen, *supra*, for the reason that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second prong of the Lemon v. Kurtzman test, because any aid to religion results from the private choices of individual beneficiaries." Witters, *supra*, at 491 (Powell, J., concurring). They placed no reliance on the factor of the substantiality of the aid flowing to religious institutions cited by Justice Marshall. Justice Marshall, it might be noted, had been one of the dissenters in Mueller and made virtually no reference to that case in his opinion for the Court in Witters.

public-nonpublic nature' of the school the child attends." It further reiterated the factor it had found important in both *Mueller* and *Witters* — that "a government-paid interpreter will be present in a sectarian school only as a result of the private decisions of individual parents."[32] The IDEA, the Court said, "creates no financial incentive for parents to choose a sectarian school; and as a consequence, it concluded, "an interpreter's presence there cannot be attributed to State decisionmaking."[33] As in *Mueller*, the Court's decision was 5-4.

In addition to these full decisions subsequent to *Nyquist* and *Sloan,* the Court also summarily affirmed two lower federal court rulings upholding education grants to college students, including those attending religious colleges, that helped them defray the cost of attendance. Both *Smith v. Board of Governors of the University of North Carolina*[34] and *Americans United for the Separation of Church and State v. Blanton*[35] involved the federal "State Student Incentive Grant" program.[36] Under that program the federal government makes matching grants to the states to subsidize scholarship grants to undergraduate students "on the basis of substantial financial need." Both North Carolina and Tennessee allowed the grants to be used at public and private colleges, including religiously affiliated colleges. In addition, North Carolina, but not Tennessee, barred the grants from being used to train for a religious vocation. In both instances the programs were held not to violate the establishment clause by three-judge federal district courts, and the Supreme Court summarily affirmed. The district courts reasoned that the scholarship grant programs did not directly aid the sectarian purposes and activities of the religiously affiliated colleges attended by some of the students but did so only incidentally as the result of the choices of the students and their parents. In summarily affirming these decisions, of course, the Supreme Court adopted only the lower courts' conclusions regarding the constitutionality of the programs and not their reasoning.

Thus, prior to *Zelman* the critical elements distinguishing indirect assistance programs that were held constitutional from those struck down under the establishment clause appear to have been that the purpose of the programs was not to provide aid to sectarian schools, that the initial recipients of the vouchers or other benefits were not selected on a religious basis, and that they had a genuine choice about whether to apply the vouchers or other assistance to education at religious or secular schools. In other words, if the government designed a voucher program so that the initial beneficiaries were selected on the basis of a religious criterion or a related proxy (such as enrollment in private elementary or secondary schools, most of which were sectarian), or if the universe of choices available to the initial beneficiaries was dominated by sectarian schools, the Court would hold the program unconstitutional on the grounds it had a primary effect of advancing religion. But if the class of initial beneficiaries included public as well as private schoolchildren and

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[32] Zobrest v. Catalina Foothills School District, *supra,* at 10.

[33] *Id.*

[34] 429 F.Supp. 871 (W.D.N.C.), *aff'd mem.*, 434 U.S. 803 (1977).

[35] 433 F.Supp. 97 (M.D. Tenn.), *aff'd mem.*, 434 U.S. 803 (1977).

[36] 20 U.S.C.A. § 1070c *et seq*.

their parents and if they had a genuine choice among religious and secular schools about where to use the assistance, the Court would hold the program **not** to have an unconstitutional primary effect of advancing religion even though religious schools benefited, and sometimes disproportionately.[37]

Justice Powell seemed to capture the critical factors governing the constitutionality of indirect aid programs prior to *Zelman* in his concurring opinion in *Witters*:

> *Mueller* makes the answer clear: state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries. Thus, in *Mueller*, we sustained a tax deduction for certain educational expenses, even though the great majority of beneficiaries were parents of children attending sectarian schools. We noted the State's traditional broad taxing authority ..., but the decision rested principally on two other factors. First, the deduction was equally available to parents of public school children and parents of children attending private schools. Second, any benefit to religion resulted from the "numerous private choices of individual parents of school-age children."[38]

(2) Zelman v. Simmons-Harris.[39] In *Zelman v. Simmons-Harris*, as noted above, the Court upheld as constitutional the Ohio Pilot Scholarship Program. That program had been enacted in partial response to a 1995 federal district court decision directing the state to take control of Cleveland's failing public schools. The program had two components. The main component provided scholarships to families with children in grades K-8 in Cleveland's public schools to enable those who chose to do so to send their children to private schools in the city or to public schools in the adjoining suburbs. Preference was given to students from families with incomes below 200%of the poverty line, and the scholarship could pay could pay 90% of the private or out-of-district public school's tuition charge up to a maximum of $2250. For students from families with higher incomes, the scholarship was capped at $1875

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[37] The Court gave little discussion and no apparent reliance to the entanglement aspect of the Lemon test in these cases. It addressed the issue only in Mueller, and there it found the tax benefit program not to precipitate any excessive entanglement between the government and the religious institutions that ultimately benefited from the program. In general the Court has not found excessive entanglement to exist except where a secular use restriction on a direct public aid program has required the government to engage in a "comprehensive, discriminating, and continuing...surveillance" of publicly funded activities on the premises of pervasively sectarian institutions. See, e.g., Lemon v. Kurtzman, *supra* and Meek v. Pittenger, 421 U.S. 349 (1975). But the Court has held such secular use restrictions and the consequent close monitoring not to be constitutionally necessary in indirect assistance programs. In addition, even in direct aid programs the Court has recently de-emphasized the risk that religious institutions receiving public aid will use the aid for religious purposes and, as a consequence, has de-emphasized the need for intrusive government monitoring of the institutions' use of the aid. *See* Mitchell v. Helms, *supra*.

[38] Witters v. Washington Department of Services for the Blind, *supra*, at 490-91 (Powell, J., concurring).

[39] 536 U.S. 639 (2002).

and could pay up to 75% of the tuition charge. In the second component of the program, eligible students who chose to remain in public school could receive up to $360 to pay for special tutorial assistance.

In the 1999-2000 school year 3761 students participated in the voucher program, and more than 2000 chose to receive tutorial assistance grants. Because no suburban public schools chose to participate in the voucher program, all of the voucher students attended private schools in the city. Forty-six of the 56 private schools participating in the program that year (82%) were religiously-affiliated; and 96 %of the scholarship students were enrolled in those schools.

The program had previously been held by the Ohio Supreme Court to pass muster under the establishment clause but to have been enacted in violation of a procedural requirement of the Ohio Constitution.[40] After it was re-enacted without the procedural flaw, two new suits — *Simmons-Harris v. Zelman* and *Gatton v. Zelman* — were filed challenging the constitutionality of the program, this time in federal district court rather than state court. Both the federal district court and, on appeal, the U.S. Court of Appeals for the Sixth Circuit held the program to violate the establishment clause.[41]

The Sixth Circuit said "*Nyquist* governs our result." Although the program invited public schools outside of Cleveland to participate, the court stated, none had chosen to do so. Moreover, it said that the low level of the scholarship amount – $2500 – "limited the ability of nonsectarian schools to participate in the program" but encouraged sectarian schools to do so, because the latter often had lower tuition needs. As a consequence, it said, the "choice" afforded the public and private school participants in the program was "illusory," and "the program clearly has the impermissible effect of promoting sectarian schools":

> We find that when, as here, the government has established a program which does not permit private citizens to direct government aid freely as is their private

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[40] Simmons-Harris v. Goff, 86 Ohio St. 3d 1, 711 N.E.2d 203 (1999).

[41] Simmons-Harris v. Zelman, 72 F.Supp.2d 834 (N.D. Ohio 1999), *aff'd*, 234 F.3d 945 (6th Cir. 2000), *reversed*, 536 U.S. 639 (2002). The case proceeded in a somewhat tortured fashion. The two suits were filed on July 20 and July 29, 1999, and were consolidated by the trial court. On August 24, 1999, the day most private schools opened for the fall term, the trial court granted the plaintiffs' motion for a preliminary injunction, stating in a lengthy opinion that "the Plaintiffs have a substantial chance of succeeding on the merits." Simmons-Harris v. Zelman, 54 F.Supp.2d 725 (N.D. Ohio Aug. 24, 1999) (order granting preliminary injunction). But a public outcry about the hardship the injunction placed on the voucher children who were already enrolled in private schools and on the public schools that suddenly had to accommodate several thousand new students led the trial court on August 27, 1999, to partially stay the injunction and permit students who had been enrolled in the scholarship program in the last school year to continue but new voucher students to continue for only one semester. Simmons-Harris v. Zelman, 54 F.Supp.2d 725 (N.D. Ohio Aug. 27, 1999) (order modifying preliminary injunction). An emergency request by Ohio to the U.S. Supreme Court resulted in a stay of the preliminary injunction in its entirety on November 5, 1999. Zelman v. Simmons-Harris, 528 U.S. 943 (1999). That decision was by the same 5-4 margin as the Court's ultimate decision on the merits.

> choice, but which restricts their choice to a panoply of religious institutions and spaces with only a few alternative possibilities, then the Establishment Clause is violated .... There is no neutral aid when that aid principally flows to religious institutions; nor is there truly "private choice" when the available choices resulting from the program design are predominantly religious.

On June 27, 2002, the Supreme Court reversed the Sixth Circuit and upheld the scholarship program as constitutional, 5-4.[42] Chief Justice Rehnquist, writing for the Court, said that there was no dispute that the Pilot Scholarship Program served the "valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system." The key question, he stated, was whether it had the forbidden effect of advancing or inhibiting religion; and the pertinent criteria for that question, he said, had been established in three prior cases involving indirect assistance to sectarian schools -- *Mueller v. Allen*, *Witters v. Washington Department of Services for the Blind*, and *Zobrest v. Catalina Foothills School District.* In each of these cases, he asserted, the Court had asked whether the aid was distributed to the initial recipients on a religion-neutral basis and whether those beneficiaries had a "true private choice" about whether to use the aid at religious or secular schools:

> *Mueller*, *Witters*, and *Zobrest* ... make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.[43]

Applying these criteria to the Cleveland program, the Court held the Pilot Scholarship Program to provide "educational assistance directly to a broad class of individuals defined without reference to religion, i.e., any parent of a school-age child who resides in the Cleveland School District" (with a preference given low-income families).[44] It held as well that "the program challenged here is a program of true private choice."[45]

The latter ruling was the most controversial aspect of the decision and a major reason for the dissent by four Justices. In all of its prior cases concerning indirect assistance, the Court had analyzed the choice issue within the context of the challenged program, i.e., it had asked whether the initial recipients of the aid had a broad and unfettered choice among a number of religious and secular options about where to use the aid. In *Zelman* the Court broadened its analysis of the options available to include not only where the scholarships themselves could be used – i.e., private schools in Cleveland, most of which were religious – but **all** of the educational alternatives available to parents. The Chief Justice stated:

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[42] Joining in the majority were Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. Justices Souter, Stevens, Breyer, and Ginsburg dissented.

[43] Zelman v. Simmons-Harris, *supra*, at 650.

[44] *Id.*

[45] *Id.*

> There ... is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* of the options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.[46]

Consequently, the Chief Justice concluded for the Court:

> ...[T]he Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. 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. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.[47]

In dissent Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, termed the Court's decision a "dramatic departure from basic Establishment Clause principles" that reduced the criteria for evaluating the constitutionality of a voucher program to "verbal formalism" and undermined "every objective supposed to be served" by the establishment clause. In particular, he charged, the Court's analysis of the choice issue "ignores the reason for having a private choice enquiry in the first place." That enquiry properly asks, he said, whether the parent or student that initially receives the public aid is free to channel it in either a secular or religious direction. But the majority eliminated the utility of that enquiry, he claimed, by bringing into the equation public spending on public magnet and community schools "that goes through no private hands and could never reach a religious school under any circumstance":

> If "choice" is present whenever there is any educational alternative to the religious school to which vouchers can be endorsed, then there will always be a choice and the voucher can always be constitutional, even in a system in which there is not a single private secular school as an alternative to the religious school.[48]

Justice Souter further asserted that by allowing "substantial amounts of tax money" to be used to systematically underwrite religious practice and indoctrination, the Court's decision undermined the three major purposes of the establishment

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[46] *Id.* at 651.

[47] *Id.*

[48] *Id.* at 665 (Souter, J., dissenting).

clause. He claimed such aid violates respect for freedom of conscience by compelling individuals to subsidize religious instruction contrary to their own beliefs, compromises the integrity and independence of religious institutions by inevitably bringing government regulation in its wake, and threatens social conflict along religious lines as religious sects begin to compete for public subsidies and religious differences become the subject of public debate. "The reality," Justice Souter concluded, "is that in the matter of educational aid the Establishment Clause has largely been read away."[49]

(3) Current Standards. In sum, then, the Supreme Court now interprets the establishment of religion clause to place only limited restraints on voucher programs that indirectly benefit sectarian schools. Since *Nyquist* it has consistently asked whether such programs serve a secular purpose and whether they have a primary effect of advancing religion; and under the latter test it has consistently asked whether the aid is distributed to its initial beneficiaries on a religiously neutral basis and whether the initial beneficiaries have a genuine choice among religious and secular options in using the aid. But *Zelman* makes clear that the Court no longer examines the choice issue in terms of the range of options where the voucher aid itself can be used. Instead, the Court now analyzes whether the initial beneficiaries have a genuine, non-coerced choice among religious and secular options by looking at **all** of the educational options available. Given that universe of choice, Justice Souter's charge that *Zelman* legitimates voucher programs even in systems "in which there is not a single private secular school as an alternative to a religious school" may well be true.

Moreover, to the extent that any doubt still existed, *Zelman* makes clear that the amount of aid that finds its way to religious schools in a voucher program is of no constitutional relevance. That conclusion seemed first to be adopted by the Court in *Mueller* and was then affirmed by five Justices in concurring opinions in *Witters*. The majority in *Zelman* reiterated the point: "The constitutionality of a neutral educational aid program simply does not turn on whether and why ... most recipients choose to use the aid at a religious school."[50]

Voucher programs that are adopted for the purpose of providing financial assistance to private religious schools or that confine their benefits exclusively to the parents of children already in private religious schools, as in *Nyquist*, may still be unconstitutional under the Court's current standards. But *Zelman* seems to make clear that few other establishment clause inhibitions now apply to such programs.

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[49] *Id.* at 670.

[50] *Id.* at 652.

State Constitutional Limitations on Voucher Programs

(1) Overview. The constitutions of a number states contain church-state provisions that in many instances are more strict that the establishment clause of the First Amendment. Sometimes called "little Blaine amendments,"[51] these provisions express a "no aid to religion" principle in a variety of ways, as the following examples illustrate:

> "No money shall be paid from public funds for the direct benefit of any religious or other private educational institution." Alaska Constitution, Art. I, § 7.
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> "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school ...." Arizona Constitution, Art. 9, § 10.
>
> "No revenue of the state or any political subdivision thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." Florida Constitution, Art. I, § 3.
>
> "No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school ...." Michigan Constitution, Art. 8, § 2.
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> "No public funds of any kind or character whatever, State, County, or Municipal, shall be used for sectarian purpose." Nevada Constitution, Art. 11, § 10.

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[51] In 1875 Rep. James Blaine (R.-Me.) proposed an amendment to the U.S. Constitution to make the religion clauses of the First Amendment applicable to the states and to bar public funds from being made available to private sectarian schools, as follows:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

The proposal occurred at a time of heated debate about the conduct of religious exercises in the public schools and demands for the public funding of private Catholic schools and in a political atmosphere which was often virulently anti-Catholic. A modified version of the Blaine amendment was adopted by the House, but a different version failed to receive the necessary two-thirds majority in the Senate in 1876. Nonetheless, similar no-aid provisions were added to, or were already part of, the constitutions of several states; and Congress also subsequently required a number of territories newly admitted as states to include such provisions in their constitutions as a condition of statehood. It is these "little Blaine amendments" that have now become the focus of litigation.

> "All schools maintained or supported in whole or in part by the public funds shall be forever free from sectarian control and influence." Washington Constitution, Art. 9, § 4.

Some courts have construed these provisions permissively not to bar voucher programs.[52] But in recent years such provisions have been held to prohibit voucher programs in Maine,[53] Vermont,[54] Washington,[55] and Florida.[56]

Voucher proponents contend that these restrictive interpretations of state constitutional provisions violate the free exercise and equal protection provisions of the U.S. Constitution, and in the wake of *Zelman* a number of suits have been initiated in an effort to advance that proposition. On February 25, 2004, in *Locke v. Davey*, the Supreme Court reversed a lower court opinion that had held the free exercise clause to be violated by a provision in the Washington Constitution that had been construed to bar a student from using a state scholarship to pursue a theology degree at a religious college.

The following sections provide a more thorough description of *Locke v. Davey*, and summarize other selected cases that addressed the same issue.

(2) Locke v. Davey.[57] On February 25, 2004, the Supreme Court overturned a decision by the U.S. Court of Appeals for the Ninth Circuit that had held the free exercise clause of the First Amendment to be violated by a statute and a constitutional provision in the state of Washington that were applied to deny a college scholarship to an eligible student simply because he planned to pursue a

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[52] *See, e.g.*, Jackson v. Benson, 218 Wis.2d 835, 578 N.W.2d 602, *cert. den.*, 525 U.S. 480 (1998) (holding Milwaukee's voucher program not to be violated by sections of Art. I, § 18, of Wisconsin's Constitution prohibiting any money from being drawn from the state treasury "for the benefit of religious societies, or religious or theological seminaries" and stating that no person "shall ... be compelled to ... support any place of worship, or to maintain any ministry, without consent") and Toney v. Bower, 318 Ill. App.3d 1194, 744 N.E.2d 351 (Ill. App. 4th Dist.), *appeal denied*, 195 Ill.2d 573, 754 N.E.2d 1293 (2001) (holding a state statute allowing parents an income tax credit of up to $500 for "qualifying education expenses" not to violate provisions in Art. 10, § 3, of the Illinois Constitution barring state and local legislatures from making "any appropriation or pay[ing] from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever ....").

[53] Bagley v. Raymond School Department, 1999 Me. 60, 728 A.2d 127, *cert. den.*, 528 U.S. 947 (1999).

[54] Chittenden Town School District v. Vermont Department of Education, 738 A.2d 539 (Vt.), *cert den. sub nom.* Andrews v. Chittenden Town School District, 528 U.S. 1066 (1999).

[55] Witters v. Washington Department of Services for the Blind, 711 P.2d 1119 (Wash. 1989).

[56] The trial court decision of August 5, 2002, in Holmes v. Bush has not been reported.

[57] 540 U.S. 712 (2004).

degree in theology at a religious college.[58] Article I, § 11, of the Washington Constitution provides in part that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." Reflecting that stricture, a state statute providing college scholarships for in-state, low and moderate income college students included a provision stating that "[n]o aid may be awarded to any student who is pursuing a degree in theology."[59] As a consequence, the state denied a Promise Scholarship to a student enrolled in a religious college who sought to pursue a double major in Pastoral Ministries and Business Management and Administration.

Upon suit a federal district court granted summary judgment for the state. But a panel of the Ninth Circuit reversed. The court held that the state's statutory and constitutional restrictions could not survive strict scrutiny under the free exercise clause of the First Amendment.

The Supreme Court reversed the decision of the Ninth Circuit finding that Washington state's exclusion of the pursuit of a devotional theology degree from its otherwise inclusive scholarship aid program did not violate the Free Exercise Clause of the First Amendment. The Court rejected Davey's argument that the program was presumptively unconstitutional because it is not facially neutral with respect to religion.[60] Davey's claim was based on the Court's decision in *Church of Lukumi Babalu Aye, Inc. v. Hiaheah* where the Court determined that a city ordinance making it a crime to engage in certain types of animal slaughter violated the Free Exercise rights of those who practice the Santeria religion.[61] The Court distinguished the present case from *Lukumi*, and others in that line of cases, by noting that the state law in question imposed no civil or criminal penalties on any type of religious service or rite, nor did it require the student to choose between their religious beliefs and receipt of a government benefit.[62]

The Court went on to note that the Promise Scholarship Program went "a long way toward including religion in its benefits" by allowing students to attend pervasively religious schools, so long as they are accredited, and allowing students to take devotional theology courses.[63] Without any evidence to suggest animus towards religion, there existed no presumption of unconstitutionality.[64] The Court found that since the state's interest in not funding the pursuit of devotional degrees

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[58] 299 F.3d 748 (9th Cir. 2002).

[59] Wash. Rev. Code § 28B.10.814.

[60] 540 U.S. at 720. The Court also rejected Davey's argument that the Promise Scholarship Program is an unconstitutional viewpoint restriction on speech, finding that the Program was not a forum for speech. *Id*. at 721.

[61] 508 U.S. 520 (1993).

[62] 540 U.S. at 720, citations omitted.

[63] *Id*. at 724.

[64] *Id*. at 725.

was substantial and the burden placed on Promise Scholars by the exclusion of such programs was minor, the program survived constitutional scrutiny.[65]

(3) Other recent cases. Prior to the Supreme Court's decision in *Locke*, cases challenging the constitutionality of restrictive state provisions were also brought in several other states. The issue of whether these provisions violate the Free Exercise clause appears to have been settled in *Locke*, and, in general, these cases appear to have been resolved based on the Supreme Court's decision. Two of these cases are discussed below.

(A) Holmes v. Bush. On August 5, 2002, the Circuit Court for Leon County, Florida, held the state's Opportunity Scholarship Program (OSP) to violate Article I, § 3, of the state Constitution, which bars public revenue from ever being used "directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."[66] The OSP, enacted in 1999, makes students in public schools graded by the state as "failing" eligible for vouchers to pay for their enrollment in private schools, including sectarian schools, or other higher-rated public schools. For the initial three years of the program, only two elementary schools in Excambia County were deemed to be failing, and only 57 students opted to accept vouchers. Fifty-three of the students enrolled in four sectarian private schools while the other four enrolled in a nonsectarian private school. For the 2002-2003 school year ten public schools have been rated as failing, and several hundred students have reportedly applied for vouchers.

Soon after the OSP was first enacted in 1999, two suits were filed challenging the constitutionality of the program under both the state and federal constitutions. On March 14, 2000, the Circuit Court for Leon County, after consolidating the cases and addressing only one of the constitutional claims, held the OSP to violate Art. IX, § 1, of the Florida Constitution,[67] which states that

> [i]t is ... the paramount duty of the state to make adequate provision for the education of all children residing within its borders. 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 learning and other public education programs that the needs of the people may require.

The trial court said that this section prescribes both the **objective** of making adequate provision for the education of all children within the state and the **exclusive manner** in which that duty is to be accomplished, namely, by means of a "uniform, efficient, safe, secure, and high quality system of free public schools."

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[65] *Id.*

[66] Holmes v. Bush, Case No. CV 99-3370 (Cir. Ct. Leon County, decided August 5, 2002).

[67] Holmes v. Bush, Case No. CV 99-3370 (Cir. Ct. Leon County, decided March 14, 2000).

On appeal the Florida Court of Appeal for the First District reversed,[68] finding that the trial court had misapplied the maxim *expressio unius est exclusio alterius* (to express or include one thing implies the exclusion of the alternative). Article IX, § 1, it said, mandates that the state "make adequate provision for the education of all children" in Florida. But the appellate court held that it does not prescribe an exclusive means: "[S]ection 1 does not unalterably hitch the requirement to make adequate provision for education to a single, specified engine, that being the public school system." In support of that conclusion, the court emphasized that Art. IX,§ 1, did not explicitly bar tuition subsidies or explicitly direct that its mandate could be carried out only by means of public schools. It further noted that prior judicial decisions had held findings of implicit prohibitions in the constitution to be generally disfavored and that the legislature had in the past provided subsidies for certain "exceptional" students to attend private schools when the public schools lacked the necessary facilities or personnel. Consequently, the appellate court overturned the trial court's decision on this issue and remanded the case to the trial court for further proceedings on the additional constitutional claims that had been raised against the program under other provisions of the Florida Constitution and the establishment clause.

On April 24, 2001, the Florida Supreme Court refused to hear an appeal of this decision.[69]

On remand, and after the U.S. Supreme Court decision in *Zelman*, the plaintiffs in the suit abandoned their establishment clause claim and concentrated their arguments on Article I, § 3, of the Florida Constitution. As noted above, that clause bars public revenue from ever being used "directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." On August 5, 2002, the circuit court held the OSP to violate that clause. Although "empathizing" with the purpose of the legislation, Judge Davey said that he could not "abandon the clear mandate of the people as enunciated in the constitution." The directive, he stated, was "clear and unambiguous" – no public aid may be provided to religious institutions. To accept the argument that the state did not provide any funds to sectarian schools under the OSP because parents made the choice of what schools their children would attend, he asserted, would represent "a colossal triumph of form over substance."

In November of 2004, the Court of Appeal of Florida affirmed holding that the OSP violated the no-aid provision of the Florida Constitution because OSP used state revenues to aid sectarian schools.[70] Using the Supreme Court's reasoning in *Locke*, the court also determined that the no-aid provision did not violate the federal Free Exercise Clause.[71]

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[68] Bush v. Holmes, 767 So.2d 668 (Fla. Dist. Ct. App. 2000), *review denied*, 790 So. 2d 1104 (Fla. 2001).

[69] Holmes v. Bush, 790 So.2d 1104 (Fla. 2001).

[70] Bush v. Holmes, 886 So. 2d 340 (Fla. App. 2004).

[71] *Id*.

(B) Becker v. Granholm. On February 3, 2003, a college student in Michigan filed suit against the state contending that its withdrawal of her state scholarship after she declared a major in theology violates the free exercise clause of the First Amendment. The state's Competitive Scholarship Program originated in 1964 and was amended in 1980 to bar aid to students majoring in theology, divinity, or religious education. The amendment was based on Article VIII, § 2, of the Michigan Constitution, which provides as follows:

> No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students.

In this case Becker received scholarships of $2750 and $1850 in her first two years of attendance at Ave Maria College in Ypsilanti, but the aid was withdrawn once she declared a major in theology.

On July 22, 2003, the United States District Court for the Eastern District of Michigan granted the plaintiff's motion for preliminary injunction after finding that the plaintiff was "substantially likely to prevail on the merits of her constitutional claims."[72] The court enjoined the defendants from continuing to enforce the theology, divinity, and religious education degree restrictions in the state's scholarship program until a final decision was made on the merits of the plaintiff's constitutional claims.[73] There is no indication that the court has revisited the case following the Supreme Court's decision in *Locke*. Presumably, based on the Court's decision, the state would be free to impose such restrictions on the scholarship program.

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[72] 272 F. Supp.2d 643, 649 (E.D. Mich. 2003).

[73] *Id*. at 650.