PUBLIC FUNDING FOR NONPUBLIC EDUCATION: SCHOOL VOUCHER INITIATIVES

Kathleen G. Harris[*]

On June 27, 2002, in Zelman v. Simmons-Harris,[66] *the United States Supreme Court upheld Ohio's school voucher initiative, authorizing government aid for students in failing Cleveland public schools to attend, upon independent parental choice, private and parochial schools. Similar education reform initiatives may face distinct challenges in the Commonwealth. Significantly, traditional legal interpretation of Virginia constitutional provisions has been more restrictive than those of federal constitutional provisions addressing government entanglement with religion. While carefully crafted voucher initiatives aiding sectarian private schools may pass muster under the U.S. Constitution, application of the Commonwealth's constitutional requirements could warrant a different result.*

In recent years, education reform efforts nationwide have assumed a variety of forms, whether addressing accountability, school choice, or charter schools. Prompting intense judicial scrutiny in recent years, however, are those school choice initiatives-vouchers, tuition tax credits and deductions, and tuition reimbursement programs-involving private sectarian schools and potentially implicating federal, as well as specific state constitutional issues, regarding the separation of church and state. Called into question within the U.S. Constitution is the Establishment Clause of the First Amendment, providing that "Congress shall make no law respecting an establishment of religion...."[67]

In examining challenges to state statutes, creating these various school choice initiatives based on Establishment Clause issues, courts continue to invoke the three-prong test ("Lemon test") articulated by the U.S. Supreme Court in *Lemon v. Kurtzman*.[68] To withstand Establishment Clause scrutiny,

---

[*] Senior Attorney, Virginia Division of Legislative Services

66. 122 S.Ct. 2460 (2002).

67. U.S. CONST. amend. 1.

68. 403 U.S. 602 (1971) [hereinafter "the Lemon test"].

the initiative must have (i) a secular purpose, (ii) a primary effect that neither advances nor inhibits religion, and (iii) must not foster excessive government entanglement.[69]

The Lemon test is the primary tool of analysis in voucher, tuition tax credit, and tuition reimbursement cases. In 1973, the Supreme Court used the Lemon test to overturn a New York statute reimbursing nonpublic schools for state-mandated tests, as there was no way to determine that the "internally prepared" tests would not be used for religious instruction.[70]In 1975, the Court invalidated Pennsylvania's loans of instructional materials and provision of certain auxiliary services to nonpublic sectarian school pupils, but upheld textbook loans for nonpublic school students as a benefit to parents and children, rather than to the schools themselves.[71]

In 1980, further refinements to the *Lemon* constitutional analysis included a decision upholding the revised New York reimbursement statute, as the reimbursement covered actual costs for state-mandated testing in nonpublic schools; teacher-prepared tests were not reimbursable.[72] This particular decision has been noted as significant as the Court clearly stated that even *direct* aid to a sectarian institution did not necessarily violate the Establishment Clause.[73]

In 1983, the Supreme Court upheld Minnesota's tax deduction for parents of public school students, as well as nonpublic and parochial school students for tuition, textbook, and transportation expenses in *Mueller v. Allen*.[74] In a 5-4 decision, the Court noted its "consistent rejection of the argument that 'any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause," and stated that the tax deduction satisfied the "secular purpose" prong of the Lemon test, as it plainly assisted in developing an educated

69. *Id.* at 612.

70. Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480 (1973).

71. *See* Meek v. Pettenger, 421 U.S. 349 (1975). In 1977, however, the Court upheld Ohio's provision of certain auxiliary services to nonpublic school students, distinguishing its decision as these services were delivered at a neutral location under the Ohio statute, rather than at a nonpublic school, as the Pennsylvania statute had permitted. Wolman v. Walter, 433 U.S. 229 (1977). However, both of these decisions were revisited by the Court nearly a quarter of a century later and were declared "anomalies in our case law." Mitchell v. Helms, 120 S. Ct. 2530, 2539 (2000).

72. Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

73. *Id.* at 657.

74. 463 U.S. 388 (1983).

citizenry.[75]

Subsequently invoking *Lemon v. Kurtzman*,[76] the U.S. Supreme Court construed the Establishment Clause to uphold a state vocational scholarship used in a seminary in *Witters v. Washington Dept. of Services for the Blind;*[77] to support the application of federal grant moneys for a sign language interpreter in a parochial school in *Zobrest v. Catalina Foothills School District;*[78] and to permit public school teachers to provide remedial education in parochial schools in *Agostini v. Felton*.[79] The *Agostini* decision overturned a previous injunction, upheld under *Aguilar v. Felton*[80] twelve years before, in finding that public school teachers might provide federally-funded (Title I) remediation services for private and public schools students as the initiative did not "advance religion."[81]

From the *Mueller* decision in 1983 until 1996, the U.S. Supreme Court considered seventeen Establishment Clause cases.[82] In ten decisions, the particular practice or initiative was found constitutional; of the seventeen, six were decided by one vote.[83] It has been noted by education law experts that "it does not appear that the Court, as an institution, is moving in any direction."[84] This contention is borne out in the U.S. Supreme Court's 4-2-3 decision (two justices concurring, three dissenting) in *Mitchell v. Helms,* issued on June 28, 2000, in which the Court upheld Louisiana's use of federal Chapter 2 funds (Elementary and Secondary Education Act of 1965) in public and private, including parochial, schools.[85] Using the Lemon test, the Court examined whether the statute in question had the primary effect of advancing religion, by considering whether the statute (i) results in governmental indoctrination; (ii) "defines its recipients by reference to religion"; or

75. *Id.* at 393-97.
76. Supra note 3.
77. 474 U.S. 481 (1986).
78. 509 U.S. 1 (1993).
79. 521 U.S. 203 (1997).
80. 473 U.S. 402 (1985).
81. *Educational Vouchers and the Religion Clauses Under Agostini: Resurrection, Insurrection and a New Direction*, 49 CASE W. RES. 747 at 748-756 (1999).
82. Julie F. Mead & Julie K. Underwood, *Establishment of Religion Analysis: The Lemon Test or Just Lemonade?* 25 J. L. & EDUC. 55, 73 (Winter 1996).
83. *Id.*
84. *Id.* at 72.
85. Mitchell v. Helms, 530 U.S. 793 (2000).

(iii) "creates an excessive entanglement."[86]

In examining indoctrination that is "attributable to the State and indoctrination that is not," the Court revisited a "neutrality principle" that considers whether the aid to a religious entity "results from the genuinely independent and private choices of individual parents...."[87] The Court clearly stated that no such incentive exists where "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[88] In addition, the Court specifically rejected an argument that the government aid might be "divertible" to religious purposes.[89] The Court also clearly rejected the argument that "pervasively sectarian" schools should automatically be excluded from government aid initiatives.[90]

VOUCHER INITIATIVES

Under *Lemon v. Kurtzman*[91] analysis, voucher initiatives have typically achieved mixed judicial results. At the state court level, Florida's voucher statute was declared unconstitutional in March 2000 in *Holmes v. Bush*.[92] However, the U.S. Supreme Court denied certiorari to a challenge of the Wisconsin voucher initiative in 1998 in *Jackson v. Benson,*[93] thereby allowing the state Supreme Court ruling upholding the statute, without directly ruling on the merits of the case. Finally, on June 27, 2002, the U.S. Supreme Court addressed the voucher issue directly in *Zelman v. Simmons-Harris,*[94] upholding a Cleveland, Ohio, voucher initiative.

Wisconsin

Home of the oldest state-funded voucher initiative, created in 1990, Wisconsin limits its Milwaukee Parental Choice Program (MPCP) to a

86. *Id.* at 808.
87. *Id.* at 809-10.
88. *Id.* at 813 (citing Agostini v. Felton, 521 U.S. 203, 231 (1997).
89. Mitchell, 530 U.S. at 820.
90. *Id.* at 826-29.
91. *Supra* note 3.
92. No. CV 99-3377, 2000 WL 527694, at *1 (Fla. Cir. Ct. May 2, 2000).
93. 578 N.W.2d 602 (Wis. 1998), cert. denied, 525 U.S. 997 (1998).
94. 122 S.Ct. 2460 (2002).

pilot project in the City of Milwaukee.[95] The MPCP permits any pupil in grades kindergarten to twelve residing in the City to attend any participating Milwaukee private school, free of charge, if (i) the pupil's family income does not exceed 1.75 times the poverty level determined pursuant to federal office of management and budget criteria; and (ii) for the previous school year, the pupil was enrolled in Milwaukee public schools, in a private school pursuant to the voucher initiative, in grades K-3 in a Milwaukee private school not pursuant to a voucher, or was not enrolled in school at all.[96] Significantly, there is no requirement in the MPCP that participating private schools be nonsectarian.[97]

Surviving a number of state constitutional challenges in the early 1990s, the Wisconsin Supreme Court reviewed the MPCP in 1998 in *Jackson v. Benson*.[98] Carefully dissecting *Lemon v. Kurtzman*[99] and other U.S. Supreme Court precedents, the Jackson Court found that the MPCP did not have the primary effect of advancing religion-despite providing aid to sectarian and nonsectarian schools-as state aid was provided "(1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children."[100] Crucial to the Court's decision to uphold the initiative were provisions directing payment to the parents, rather than the schools, and providing for the selection of pupils and participating private schools on a religion-neutral basis.[101]

Having established that the MPCP passed federal constitutional muster, the Jackson Court then addressed state constitutional compliance and stated that "the crucial question...is 'not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."[102] Key to the Court's conclusion that the MPCP did not violate the Wisconsin Constitution were the program's "neutrality and

95. Eric Hirsh & Shelby Samuelson, Turning Away from Public Education, ST. LEGISLATURES, Sept. 1999, at 12.

96. Michael E. Hartmann, *Spitting Distance: Tents Full of Religious Schools in Choice Programs, the Camel's Nost of State Labor Law Application to Their Relations with Lay Faculty Members, and the First Amendment Tether*, 6 CORNELL J.L. & PUB. POL'Y 553, 602 (1996-1997).

97. *Id.*

98. *Supra* note 27.

99. *Supra* note 3.

100. Jackson, 578 N.W.2d at 617.

101. *Id.* at 618.

102. *Id.* at 621 (citing Tilton v. Richardson, 403 U.S. 672, 679 (1971).

indirection of state aid."[103] In ruling that the MPCP did not "compel" taxpayers to support religious institutions, the Court noted that attendance at a sectarian private school is not required, but simply remains an option for parents to choose.[104] In addition, an "opt out" provision in the MPCP statute prohibited the sectarian schools from compelling voucher students to participate in religious activities.[105] After the Wisconsin Supreme Court ruled the program was constitutional, the decision was subsequently challenged. However, the U.S. Supreme Court denied certiorari, thus the Wisconsin Supreme Court's finding that the MPCP passes constitutional muster stands.[106]

Florida

On April 30, 1999, the Florida legislature adopted the nation's first statewide public school voucher initiative as part of a comprehensive "A+ Plan for Education."[107] These vouchers, or "Opportunity Scholarships," would be available to students attending "failing" public schools, and may be valued at more than $4,000 a year for education in a private school; the initiative also permitted students to attend another public school.[108]

In March 2000, a Florida trial court ruled that the initiative violated

103. *Id.*

104. *Id.* at 623.

105. *Id.* In addition, the Court concluded the MPCP complied with the state constitutional and procedural requirements, which preclude adoption of private or local bills embracing "more than one subject." The Court concluded that the MPCP complied with these requirements as well. The MPCP's limitation in targeting only students in the Milwaukee school system-a seemingly "private" or "local" purpose-was deemed germane to the legislative purpose of "an experiment intended to address a perceived problem of inadequate educational opportunities for disadvantaged children." Jackson at 625. Because a city such as Milwaukee, with its marked "socio-economic and educational disparities" was the "best location" to conduct such an education experiment in public education, the MPCP did not constitute a private or local bill under the state constitution. Id. at 627. Also prompting judicial review was the state constitution's "uniformity clause," which required the establishment of a free public school system that "shall be as nearly uniform as practicable...." Id. The Court ruled that the MPCP's use of tax dollars to support private schools neither rendered the participating private schools subject to the uniformity clause, nor did it violate the uniformity clause by permitting "certain disadvantaged children to take advantage of alternative educational opportunities...." Id. at 628. The uniformity clause contemplates "not a ceiling but a floor upon which the legislature can build additional opportunities for school children"; the clause did not require the state to ensure that students receive a free uniform basic education, but rather that the state provide the opportunity. Id. at 628 (citing WIS. CONST. art. X, § 3).

106. Jackson v. Benson, 578 N.W.2d 602 (Wis 1998), cert. denied, 525 U.S. 997 (1988).

107. *School Reform Blooms: Review & Outlook*, WALL ST. J., May 5, 1999, at A22.

108. *Id.*

the Florida Constitution in *Holmes v. Bush*.[109] In October 2000, the district court of appeals upheld the voucher initiative, concluding the program was not "facially unconstitutional," as the trial court had found, and that the state constitutional language ensuring the "provision for the education of all children" did not limit the state to "a single, specified engine, that being the public school system."[110] The court remanded the case to the trial court for consideration of "alternative" state constitutional claims.[111] Holmes subsequently appealed to the Florida Supreme Court; the court declined to accept jurisdiction and denied the petition for review.[112]

Ohio

The Ohio voucher initiative was created on a pilot project basis. It addressed only school districts that "are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent."[113] To date, only the Cleveland public schools meet this description.[114] The Ohio initiative provides for a number of students from low-income families (residing in Cleveland) to receive scholarships for attendance at alternative schools-specifically, a "registered" private school located in Cleveland or a public school in an adjacent school district-and for an equal number of Cleveland public school students to receive "tutorial assistance grants."[115]

In 1999, the Ohio Supreme Court upheld the Ohio School Voucher Program in Simmons-Harris v. Goff on federal and various state constitutional grounds, but found the program to be in violation of state constitutional provisions addressing certain procedural requirements.[116] In examining the federal Establishment Clause challenge, the Court noted that the Cleveland voucher program did not "create an

109. *Supra* note 27. An appeal of this final judgment effectuated an automatic stay of the ruling pending appellate review. A motion to vacate this automatic stay was denied on May 2, 2000, as the court acknowledged it could only vacate a stay under "the most compelling circumstances." *Id.* at *1 (quoting St. Lucie v. N. Palm Dev. Corp., 444 So.2d 113, 135 (Fla. Dist. Ct. App. 1983)). The court specifically noted, however, that reconsideration of its final judgment was not at issue, and that its denial of the motion to vacate did not require consideration of the appeal's likelihood of success. Id.

110. Bush v. Holmes, 767 So.2d 668, 675 (Fla. Dist. Ct. App. 2000).

111. *Id.* at 677.

112. Holmes v. Bush, 790 So.2d 1104 (Fla. 2001).

113. OHIO REV. CODE ANN. § 3313.975(A) (Anderson 2000).

114. Simmons-Harris v. Goff, 711 N.E.2d 203, 213-214 (Ohio 1999).

115. OHIO REV. CODE ANN. §§ 3313.974(F), 3313.974(G), 3313.975(A) (Anderson 2000).

116. Simmons-Harris, 711 N.E.2d at 207.

unconstitutional link between the government and religion...[nor] involve the state in religious indoctrination," and concluded that any link between government and religion was "indirect," as government moneys might reach sectarian schools only through the "independent and private choices" of parents, reasoning echoed in the Jackson decision.[117]

Turning to state constitutional provisions, the Court reiterated much of its federal Establishment Clause analysis and found neither an "impermissible legislative purpose" nor any excessive government entanglement with religion in the Cleveland voucher program.[118] The Court was careful to note, however, that while the Cleveland voucher program did not "undermine the state's obligation to public education" at its current funding level, an expanded voucher initiative "could damage public education" and "might be subject to a renewed constitutional challenge."[119] The Court found that the School Voucher Program and Ohio law created "considerable disunity" in violation of the state constitution's "one subject" rule for legislation.[120]

Unlike the state Supreme Court, the federal district court ruled the program did indeed violate the Establishment Clause by requiring public support for sectarian schools.[121] Citing the U.S. Supreme Court's 1973 decision in *Nyquist*,[122] the federal district court noted," 'direct aid [from states to sectarian schools] in whatever form is invalid."[123] The Cleveland voucher money directed to private schools was not restricted to secular educational purposes and, therefore, arguably advanced religion. Specifically addressing the argument that state funds are sent to sectarian institutions only as a result of an intervening, independent parental choice, the federal district court found that, in reality, parents had limited choices in voucher schools.[124] While the program permitted the use of vouchers at public, as well as private schools, no public

117. *Id.* at 209. However, the Ohio Supreme Court found that the voucher admissions criterion giving preference to students whose parents are affiliated with an organization supporting the private school failed to satisfy the Agostini requirement that selection criteria not advance religion or encourage parents to modify religious beliefs or practices. *Id.* at 209. The Court severed the offending admissions criterion and found that the voucher program might stand without it. *Id.*

118. *Id.* at 211.

119. *Id.* at 212.

120. *Id.* at 215.

121. Simmons-Harris v. Zelman, 54 F.Supp.2d 725 (N.D. Ohio 1999).

122. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973).

123. *Supra* note 56, at 733.

124. Simmons-Harris, 54 F.Supp.2d at 741.

schools had in fact registered to participate and parochial schools dominated.[125] Thus, the court reasoned, parents did not have a "significant choice between public and private schools."[126]

Following a series of stays and other proceedings, the U.S. District Court permanently enjoined the administration of the Ohio voucher initiative in December, 1999.[127] The Court focused on the fact that vouchers were only available for schools that registered for the program, and that the great majority of participating schools were indeed sectarian.[128] In addition, because the application of voucher money was unrestricted and might not be used for secular purposes, the initiative resulted in government-sponsored indoctrination.[129] The Court rejected the arguments that the voucher program was simply one of an array of educational options and that students had no meaningful choice between attending sectarian or nonsectarian schools.[130]

On December 11, 2000, the United States Court of Appeals for the Sixth Circuit affirmed the district court ruling, stating that the "alleged choice afforded both public and private school participants in this program is illusory" since no public schools had registered to participate, and of the participating private schools, 82 percent were sectarian.[131] Students effectively had little choice under the program, which, the court opined, "has the impermissible effect of promoting sectarian schools."[132]

On June 27, 2002, reversing the Sixth Circuit's ruling, the U.S. Supreme Court acknowledged the voucher initiative's "valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system" and focused instead on any "forbidden 'effect' of prohibiting or advancing religion."[133] The Court, in a 5-4 decision (with separate consenting opinions by two justices, and three separate dissenting opinions, in which one, four, and three justices aired or "joined" their views), relied heavily on case precedent distinguishing between direct government aid to religious schools and aid

125. *Id.* at 737.
126. *Id.*
127. Simmons-Harris v. Zelman, 72 F.Supp.2d 834 (N.D. Ohio 1999).
128. *Id.* at 847.
129. *Id.* at 849.
130. *Id.* at 855.
131. Simmons-Harris v. Zelman, 234 F.3d 945, 959 (6th Cir. 2000).
132. *Id.*
133. Zelman v. Simmons-Harris, 122 S.Ct. 2460, 2465 (2002).

that "reaches religious schools only as a result of the genuine and independent choices of private individuals."[134]

Emphasizing "true private choice" and all educational options-not just those available under the voucher initiative-the majority flatly rejected arguments that the Cleveland program created a ''perception" of government endorsement of religion and that the high participation of religious schools in practice limited parental choice.[135] Significantly, the Court found that "[t]he constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."[136]

THE ZELMAN RULING: IMPLICATIONS FOR VIRGINIA

The constitutionality of school voucher initiatives in the Commonwealth will likely hinge on the Virginia judiciary's application of the *Lemon*,[137] *Nyquist*,[138] *Mueller*,[139] and, of course, the *Zelman* decisions.[140] While the decisions and dicta offered in other state court cases may prove illuminating, they would certainly not be binding on a Virginia court. Also bearing consideration is the traditional interpretation of Virginia constitutional provisions-specifically, Article I, § 16 (providing for free exercise of religion);[141] Article IV, § 16 (prohibiting appropriations to religious or charitable bodies);[142] and Article VIII, § 10 (prohibiting aid to schools not under public control)[143] - by the Virginia judiciary and Attorney General as more restrictive than those federal constitutional provisions addressing government entanglement with religion.[144]

Article I, § 16 parallels the federal Establishment and Free Exercise

134. *Id.*
135. *Id.* at 2468.
136. *Id.* at 2470.
137. *Supra* note 3.
138. *Supra* note 57.
139. *Supra* note 9.
140. *Supra* notes 56, 59-71.
141. VA. CONST. art. I, § 16.
142. VA. CONST. art IV, § 16
143. VA. CONST. art VIII, § 10.
144. 1994 Op. Va. Att'y Gen. 21, 24-25 (opinion to Delegate G.C. Jennings).

Clauses of the First Amendment.[145] When examining this state provision, the Virginia judiciary has typically mirrored the federal reasoning in First Amendment cases.[146] It has been noted, however, that the Virginia courts have turned to the Virginia Constitution, rather than the federal First Amendment, more often in cases involving religious freedom issues; the federal constitution is more frequently cited in Virginia cases involving freedom of speech and press.[147]

Article IV, § 16 prohibits the General Assembly from appropriating funds, personal property, or real estate to "any church or sectarian society, or any association or institution...which is entirely or partly, directly or indirectly, controlled by any church or sectarian society."[148] This section supported the Virginia Supreme Court's 1955 decision to strike down a tuition grants initiative, and to support loans to students in public or private, nonsectarian institutions of higher education in 1973.[149] Constitutional scholars see the section as figuring prominently, along with Article VIII, § 10, in Virginia cases addressing "aid to parochial schools."[150]

Finally, Article VIII, § 10 was created to generally prohibit the appropriation of public funds-state or local-for nonpublic education.[151] As interpreted by the Virginia Supreme Court in 1955, the section was largely designed to "prohibit... [the] diversion of public funds from the public school system to the aid or benefit of private schools."[152] This section has witnessed changes reflecting massive resistance to desegregation and subsequent court challenges.[153] The section was cited in 1959 in *Harrison v. Day*, in which the Virginia Supreme Court upheld the authority of the legislature to make grants for students in nonsectarian private schools, but ruled that these tuition grants could not be funded by state dollars withheld from the closed public schools; to

145. A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 296 (1974).

146. *Id.*

147. *Id.*

148. *Supra* note 77.

149. Almond v. Day, 89 S.E.2d 851 (1955).

150. *Supra* note 80, at 550-552.

151. Hullihen W. Moore, In Aid of Public Education: An Analysis of the Education Article of the Virginia Constitution of 1971, 5 U. RICH. L. REV. 263, 299-302 (1971).

152. *Supra* note 83, at 854.

153. *See* Griffin v. County Sch. Bd., 377 U.S. 218 (1964); Griffin v. State Bd. Of Educ., 239 F.Supp. 560 (E.D. Va. 1965), modified, 296 F.Supp. 1178 (E.D. Va. 1969); Harrison v. Day, 106 S.E.2d 636 (1959); *supra* note 37, at 950-53; *supra* note 85, at 300-01.

do so would violate the then-current state constitutional mandate for an "efficient system of free public schools."[154]

The Virginia Supreme Court revisited § 10 in 1973 in *Miller v. Ayres*, determining that the section supported not only grants or loans to undergraduates in public institutions of higher education, but also outright, as well as conditional grants to students in nonsectarian private schools.[155] In 1986, the Fourth Circuit Court of Appeals held that § 10 did not require the Commonwealth to fund a disabled student's enrollment at an out-of-state, church-affiliated school in *Phan v. Virginia*.[156] Scholars have noted that, in light of judicial precedent, § 10 could not support tuition grants at racially imbalanced or segregated schools.[157] However, by limiting aid to nonsectarian schools, the section might be interpreted to apply a stricter standard for state aid to educational institutions than might be required under the First Amendment of the United States Constitution.[158]

JUDICIAL INTERPRETATION OF VOUCHERS IN VIRGINIA

Precedent cases, Attorney General opinions, and constitutional scholars indicate that the Virginia Constitution "imposes greater restrictions than the establishment clause on governmental action that aids religion or church-sponsored education."[159] Therefore, carefully crafted voucher initiatives aiding sectarian private schools may pass muster under the U.S. Constitution, but application of the Commonwealth's constitutional requirements could warrant a different result.

Choosing to interpret the Virginia religious freedom statute by standards "even stricter" than those applied to the First Amendment, the Virginia Supreme Court struck down a provision in the 1954 Appropriation Act providing tuition vouchers for certain war orphans enrolled in public or private institutions in *Almond v. Day*.[160] Citing federal First Amendment cases as well as § 16 (then § 67) of the Virginia

154. Harrison, 106 S.E.2d at 648.
155. 198 S.E.2d 634 (1973).
156. 806 F.2d 516 (4th Cir. 1986).
157. *Supra* note 80, at 954-57.
158. *Id.*
159. 1991 Op. Va. Att'y. Gen. 49 (opinion to Senator Richard Saslaw).
160. *Supra* note 83

Constitution, the Court found the initiative unconstitutional as it "utilizes public funds to support religious institutions...[;] affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery,..., [and] compels taxpayers to contribute money for the propagation of religious opinions which they may not believe...."[161] The Court also noted the concession in the Attorney General's reply brief that the payment of sectarian school tuition violates the state and U.S. Constitutions, and rejected the contention that the issue was not properly raised before the Court.[162] The Court concluded that upholding the tuition payment initiative "would mean that by like appropriations the General Assembly might divert public funds to the support of a system of private schools which the Constitution now forbids."[163] Also figuring prominently in the Court's ruling was the state constitutional provision now found in Article VIII, § 10, prohibiting, with some significant exceptions, appropriations of public funds to any school not under public control.[164]

The Virginia judiciary has not considered any similar school voucher issues in recent years. However, in a 1994 opinion reviewing the propriety of tuition voucher programs, the Virginia Attorney General stated that, in creating any state policies aiding private education, the legislature should be "cognizant of its responsibility to the public school system and its obligation to provide a quality public education program."[165] Citing U.S. Supreme Court precedent in *Lemon* and *Mueller*, the Attorney General noted that, while government aid to certain voucher initiatives might pass federal constitutional muster, the Virginia Constitution places a "'higher wall' of church/state separation."[166]

While the Attorney General found that Article VIII, § 10 of the Virginia Constitution "did not prohibit tuition grants in furtherance of Virginia students in... nonsectarian private school," it clearly did not support similar aid to students in sectarian schools."[167] Although a Virginia voucher initiative might have a "secular purpose" of supporting

161. Almond, 89 S.E.2d at 858; *supra* note 80, at 302.
162. *Id.* at 856-57.
163. *Id.* at 859.
164. *Id.* at 854.
165. 1994 Op. Va. Att'y. Gen. 21 (opinion to Delegate G.C. Jennings).
166. *Id.*
167. *Id.* (emphasis added).

broader educational opportunities, the Virginia Attorney General has stated that even if a "legitimate secular purpose" has been established, an initiative might nonetheless be unconstitutional if "in actual practice, primarily benefited the sectarian schools."[168]

In 1991, the Attorney General also examined Article VIII, § 10 to conclude the provision of transportation for sectarian, as well as nonsectarian private school students, might pass state constitutional scrutiny if a public safety issue were demonstrated and parents bore the full cost of the transportation.[169] The opinion also cited Article I, § 16 and Article IV, § 16 in noting the Virginia Constitution's requirement of "governmental neutrality with respect to religion" and in stating that the public provision of free transportation to students in sectarian schools would clearly be unconstitutional.[170]

In a 1995 examination of a permissive version of this "Share the Ride" concept, the Attorney General stated the provision of public school buses to transport private school students-sectarian and nonsectarian-was not violative of the federal or Virginia Constitutions.[171] He further concluded that § 10 did not necessarily prohibit the use of public funds to provide transportation to these students under a "child-benefit" theory "'or some other approach.'"[172] Significantly, the opinion did distinguish between providing transportation and other "incidental" services and supporting tuition at private, sectarian schools.[173]

Although not targeting aid to nonpublic schools, the Virginia Supreme Court has recently examined the use of state aid in capital projects for nonpublic universities, as provided for in Virginia Code §20-30.39 *et seq.*, Educational Facilities Authority Act.[174] On November 3, 2000, the Virginia Supreme Court reviewed Article VIII, § 11 of the Virginia Constitution, addressing state aid for nonpublic higher, not K-12, education, and ultimately upheld the issuance by the Virginia College Building Authority (VCBA) of bonds benefiting Regent University in *Virginia College Building Authority v. Lynn*.[175] The case is instructive

168. *Id.*
169. *Supra* note 93.
170. *Id.*
171. 1995 Op. Va. Att'y. Gen. 149 (1995) (opinion to Delegate Robert F. McDonnell).
172. *Id.* (citing Phan, 806 F.2d at 524).
173. *Id.* (citing Phan, 806 F.2d at 525).
174. Virginia Coll. Bldg. Auth. v. Lynn, 538 S.E.2d 682 (2000).
175. *Id.*

not in its review of that particular constitutional provision, but in its application of cases often included in school voucher decisions nationwide.

The Educational Facilities Authority Act defined eligible institutions as those "whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education"[176] - language mirroring that found in Article VIII, § 11 of the Virginia Constitution, and specifically excluded from eligible projects those facilities to be used for "sectarian instruction or as a place of religious worship."[177] Although explicitly finding Regent University sectarian "in both policy and practice,"[178] the Court distinguished this characterization from its "primary purpose."[179] Also figuring prominently in the Court's decision was the unique nature of VCBA aid; the bond proceeds were comprised of "funds of private investors...[and were] not governmental aid received by the institution."[180] While ruling Regent's participation in VCBA bond issues appropriate under state law and the Virginia and U.S. Constitutions, the Court did, however, necessarily exclude Regent's School of Divinity from participation.[181]

CONCLUSION

Implementation of a Zelman-style voucher initiative in the Commonwealth may prove difficult. While the U.S. Supreme Court has clearly approved government aid via school vouchers for students in failing public schools to attend private and parochial schools through independent parental choice, application of pertinent Virginia Constitutional provisions may warrant different results in Virginia. While the Virginia judiciary would likely weigh carefully any indirect government aid a voucher might provide, whether the aid was restricted to nonsectarian purposes, and the secular purpose of expanding educational opportunities, provisions clearly prohibiting state funding for sectarian schools, and Attorney General opinions distinguishing incidental aid to sectarian schools, could support any decision by the

176. *Id.* at 687.
177. *Id.*
178. *Id.* at 689.
179. *Id.* at 691.
180. *Id.* at 698.
181. *Id.*

Virginia judiciary-and a higher court-to prohibit a voucher initiative benefiting sectarian schools in the Commonwealth.