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Will North Carolina Vouch for Zelman - Examining the Constitutionality of School Vouchers in North Carolina in the Wake of Zelman v. Simons-Harris

David Bryan Efird

Will North Carolina Vouch for *Zelman*? Examining the Constitutionality of School Vouchers in North Carolina in the Wake of *Zelman v. Simons-Harris*

June 7, 2002:

> In what President Bush hailed as a "landmark ruling" and a victory for the American family, the Supreme Court Thursday ruled that a school voucher program in Cleveland does not infringe upon the constitutional separation of church and state.[1]

August 5, 2002:

> Nearly one month after the U.S. Supreme Court ruled in favor of school vouchers and weeks before the start of the school year, a Florida judge ruled Monday the state's school voucher law is unconstitutional.[2]

With its recent decision in *Zelman v. Simmons-Harris*,[3] the United States Supreme Court cleared the way for states to implement private school voucher programs. While the Supreme Court's interpretation of the U.S. Constitution sets the outer boundaries for church-state relations, state courts may interpret their state constitutions to require an even greater degree of separation.[4] This Recent Development argues that if a voucher program introduced in North Carolina were to meet the criteria set forth by the United States Supreme Court in *Zelman*, it would likely survive scrutiny under the North Carolina Constitution.[5] The program would stand

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1. Terry Frieden, *Supreme Court Affirms School Voucher Program*, CNN.com, *at* http://www.cnn.com/2002/LAW/06/27/scotus.school.vouchers (June 27, 2002) (on file with the North Carolina Law Review).

2. Melanie Hunter, *Florida Judge Rules Against School Vouchers*, CNSNews.com, *at* http://www.aclj.org/news/education/020806_vouchers.asp (Aug. 5, 2002) (on file with the North Carolina Law Review).

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

4. The only example to date is Florida, which has declared a program factually similar to the one in *Zelman* unconstitutional according to the state constitution. *See supra* note 2; *infra* notes 28, 39–40 and accompanying text.

5. This Recent Development addresses only the *constitutionality* of vouchers at the state level. Of course, there is still much debate on the policy implications of vouchers.

for two reasons. First, North Carolina's constitution is more permissive than the constitutions of other states that have already struck down voucher programs (or are likely to strike down such programs in the future). Second, the Supreme Court of North Carolina's prior decisions clearly indicate an adherence to the U.S. Supreme Court's Establishment Clause jurisprudence.

To understand what type of program would be consistent with *Zelman*, one must first understand the facts of the Cleveland plan that the Court considered.[6] The State of Ohio established the Cleveland program in response to the realization that "Cleveland's public schools were in the midst of a 'crisis that [was] perhaps unprecedented in the history of American education.'"[7] The program provides two basic types of aid to parents: (1) tutorial aid for students who choose to remain in public school[8] and (2) tuition aid for students in kindergarten through third grade (expanding each year through

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See, e.g., Andrew J. Coulson, Myth*Conceptions About School Choice*, *at* http://www.schoolchoices. org/roo/myths.htm (1998) (on file with the North Carolina Law Review); *Private School Vouchers*, NATIONAL EDUCATION ASSOCIATION, *at* http://www.nea.org/lac/papers/vouchers.html (June 2001) (on file with the North Carolina Law Review); *Private School Vouchers: Myth v. Fact*, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, *at* http://www.au.org/vouch-bk.htm (2002) (on file with the North Carolina Law Review). This Recent Development does not advocate for or against a voucher plan. For a discussion of the constitutionality of vouchers in North Carolina and suggestions for how policy makers and voucher opponents might avoid educational programs that would provide public funding to parochial schools, see generally Mary Elizabeth Hill Hanchey, Note, *Resisting Efforts to Provide Public Funding for Parochial Education in the Wake of* Zelman v. Simmons-Harris, 1 FIRST AMEND. L. REV. 85 (2003) (assuming that school vouchers are constitutional in North Carolina, but concluding they are bad policy and presenting ideas for how policy-makers might work to avoid a voucher program within the *Zelman* framework).

6. The Cleveland voucher program discussed in this Recent Development is set forth in the Ohio Code. *See* OHIO REV. CODE ANN. §§ 3313.974–.979 (West 2003). The voucher program provides state assistance only to Ohio school districts that have been or are "under federal court order requiring supervision and operational management of the district by the state superintendent." *See id.* § 3313.975(A). According to the *Zelman* Court, the Cleveland district was the only district that fell within the statutory provision. *Zelman*, 536 U.S. at 645.

7. *Zelman*, 536 U.S. at 644. The public school system in Cleveland was in such poor shape that a federal district court declared a "crisis of magnitude" in 1995 and placed the entire school district under state control. *Id.* At that time, only one in ten ninth graders passed a basic proficiency exam and more than two-thirds of the students in the Cleveland system either dropped out or failed out before graduation. *See id.* Even among the graduating students, few could read or write at levels comparable to students from similar Ohio school districts. *See id.*

8. *See* OHIO REV. CODE ANN. § 3313.975(A) (West 2003). In the tutorial aid portion of the program, parents arrange for registered tutors to provide assistance to their children. The parents then submit receipts for such services to the state for reimbursement. *See id.* § 3313.979(C).

eighth grade) to attend a participating *public or private* school of their parents' choosing.[9] Notably, the private schools do not receive voucher funds directly from the state. The participating child's parents receive the tuition aid in the form of a check, which is subsequently endorsed over to the public or private school of their choosing.[10]

Of the 3,700 students who participated in the plan, however, ninety-six percent chose to enroll in religiously affiliated private schools.[11] For this reason, some Ohio taxpayers argued that the plan violated the Establishment Clause of the U.S. Constitution.[12] But in a five to four decision, the Supreme Court held that this program was constitutional.[13] In so doing, the Court observed that Ohio's program was one of "true private choice," writing that:

> [W]here 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.[14]

In its analysis of the Ohio plan, the *Zelman* Court emphasized three criteria that made the program one of "true private choice": (1) the program was neutral toward religion;[15] (2) any money going to

9. For program requirements governing participating public and private schools, see generally sections 3313.976 through 3313.978 of the Ohio Code, listing, inter alia, rules for funding, non-discrimination, and means testing.

10. *See id.* § 3313.979(C).

11. *See Zelman*, 536 U.S. at 647.

12. *See id.* at 648.

13. *See id.* at 644.

14. *See id.* at 652.

15. In reaching its conclusion that "the Ohio program [was] neutral in all respects toward religion," the Court noted that there were "no 'financial incentive[s]' that 'ske[w]' the program toward religious schools." *See id.* at 653 (quoting Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487–88 (1986)). The Court also observed that the program actually created "financial *dis*incentives," noting the lower funding for private schools and the fact that parents must still copay a portion of their child's tuition at private schools, while parents who move their children to participating public schools pay nothing. *Id.* at 654. The *Zelman* Court expressly stated, however, that these disincentives are not *necessary* to a program's constitutionality, implying that this prong of the test does not require the disincentives toward private schools that the Ohio program included. *See id.* at 654 (noting that such disincentive features are not the *sine qua non* of constitutionality with regard to school vouchers, but they do clearly show that the program does not create financial incentives for parents to choose religious schools). The Pew Forum on Religion and the Public Life recently commissioned a team of distinguished constitutional and educational law scholars to draft a joint statement explaining the constitutional principles announced in *Zelman*. The scholars concluded that the neutrality requirement will be met if the program simply avoids "terms that formally give aid in greater amounts, or under

religious schools resulted from the decisions of individuals rather than from direct payments made by the state;[16] and (3) the program offered parents genuine secular options for their children's schooling.[17] Presumably, a program in another state meeting this three-prong test[18] would be permissible under the U.S. Constitution.[19]

Through the application of state constitutional provisions, however, individual states can still reject a program that meets the *Zelman* test. A Florida circuit court, for example, recently held that a program similar to the Ohio plan was unconstitutional according to the Florida Constitution.[20] The Supreme Court of North Carolina has not yet had the opportunity to make a ruling on school vouchers.[21] However, an examination of other state constitutions combined with the Supreme Court of North Carolina's respect for the United States Supreme Court's Establishment Clause jurisprudence indicates that a program consistent with *Zelman* would be held constitutional in North Carolina.

When compared to other state constitutions, the North Carolina Constitution appears to allow a voucher program meeting the *Zelman* test. An article written by Professor Frank Kemerer provides a useful framework for making the comparison. Professor Kemerer classifies all fifty states into three categories with respect to voucher permissibility under the state constitutions.[22] He labels each state as

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more favorable criteria, to religious entities." PEW FORUM ON RELIGION AND PUBLIC LIFE, SCHOOL VOUCHERS: SETTLED QUESTIONS, CONTINUED DISPUTES 4 (2002) [hereinafter PEW FORUM].

16. The *Zelman* majority sharply distinguished between programs that provide government aid *directly* to religious schools and those programs in which government aid reaches religious schools only as a result of "the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649. The Cleveland program was one of "true private choice," and the *Zelman* opinion is limited to programs of this type.

17. This three-prong analysis comes from PEW FORUM, *supra* note 15, at 4–5. In determining that the Cleveland program provided genuine secular options for the parents using the vouchers, the Court noted the availability of tutorial aid, the provision for students to use adjacent public schools, and the availability of non-religious private schools. *Zelman*, 536 U.S. at 645–48.

18. Hereinafter "the *Zelman* test."

19. *See* PEW FORUM, *supra* note 15, at 7.

20. *See* Holmes v. Bush, No. CV 99–3370, 2002 WL 1809079, at *3 (Fla. Cir. Ct. Aug. 5, 2002). For a discussion of the voucher program in *Holmes*, see *infra* notes 28–32 and accompanying text.

21. In fact, the North Carolina General Assembly has never passed a school voucher plan. *See* Helen F. Ladd, *Claims for School Voucher Success in Florida Not Justified, at* http://www.pps.aas.duke.edu/centers/child/debate.html (2000) (stating "North Carolina . . . doesn't have a voucher program.") (on file with the North Carolina Law Review).

22. Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 EDUC. L. REP. 1 (1997). Other studies have reached the same or similar results. *See, e.g.*, Emily F.

restrictive, permissive, or uncertain.[23] The most restrictive state is Michigan, which explicitly forbids vouchers.[24] Other restrictive states have constitutional provisions specifically forbidding any public aid from going to support or benefit religious schools.[25] The remainder of the restrictive states have constitutional provisions prohibiting both "direct" and "indirect" aid to sectarian private schools.[26] Taken together, these "restrictive" states are the most likely to declare even a *Zelman*-style voucher program unconstitutional.[27]

Thigpen, *Public Vouchers and the Private School System*, 23 AM. J. TRIAL ADVOC. 425, 427–29 (1999) (noting states with prohibitive and favorable climates for voucher programs based on constitutional language and judicial precedent); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 127 (2000) (discussing the empirical validity of Kemerer's classification scheme).

23. Kemerer, *supra* note 22, at 4.

24. The Michigan Constitution provides:

> 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.

MICH. CONST. art. VIII, § 2.

25. For example, the California state constitution provides:

> Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever . . . .

CAL. CONST. art. XVI, § 5. Several other state constitutions contain very similar prohibitions. *See, e.g.*, COLO. CONST. art. IX, § 7 (forbidding any public money from going towards the benefit of religiously affiliated schools); DEL. CONST. art. 10, § 3 (forbidding the use of public funds for the support of sectarian schools but allowing a property tax exemption for any zero-tuition school); HAW. CONST. art. X, § 1 (prohibiting public funds from being appropriated for the benefit of any sectarian or private school); IDAHO CONST. art. IX, § 5 (prohibiting use of public funds for religious schools in virtually identical language as the California constitution); MINN. CONST. art. XIII, § 2 (stating "In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught."); MO. CONST. art. IX, § 8 (prohibiting public funds from being appropriated for the benefit of any sectarian or private school); N.D. CONST. art. VIII, § 5 (same); S.D. CONST. art. VI, § 3 (same); WYO. CONST. art. 7, § 8 (same).

26. *See, e.g.*, FLA. CONST. art. I, § 3 (prohibiting public funds from being appropriated for the benefit of any sectarian or private school); GA. CONST. art. I, § II, ¶ VII ("No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution."); MONT. CONST. art. X, § 6 (prohibiting both "direct" and "indirect" state aid to sectarian private schools); N.Y. CONST. art. XI, § 3 (prohibiting both "direct" and "indirect" state aid to sectarian private schools); OKLA. CONST. art. II, § 5 (same).

27. *See* Kemerer, *supra* note 22, at 4–9, 15–18. Another commentator reached similar results, finding that the courts in twelve states had indicated that their constitutional

A court in Florida, for example, recently held that a specific voucher program meeting the *Zelman* test was not constitutional under the Florida Constitution.[28] That program provided for voucher funds to be transferred from the state treasury to a separate fund, the "Opportunity Scholarship Fund," from which they were then dispersed to the child's parents.[29] The parents of participating children would then endorse the check over to the school.[30] The Florida court held this program unconstitutional because Article I, Section 3 of the Florida Constitution states, "[n]o revenue of the state or any political subdivision or agency 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."[31] The court held that the program provided impermissible, "indirect" aid to religious institutions.[32]

Clearly, North Carolina does not fall into the restrictive state category. Its constitution lacks the explicitly restrictive language of the Michigan and Florida constitutions,[33] and it does not specifically restrict government aid from reaching religious schools.[34] Restrictive

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standards were stricter than those of the Establishment Clause in the United States Constitution. *See* Heytens, *supra* note 22, at 127. North Carolina was *not* among these states.

28. *See* Holmes v. Bush, No. CV 99-3370, 2002 WL 1809079, at *2 (Fla. Cir. Ct. Aug. 5, 2002).

29. FLA. STAT. ANN. § 1002.38(f) (2002) ("[T]he Department of Education shall transfer from each school district's appropriated funds the calculated amount from the Florida Education Finance Program and authorized categorical accounts to a separate account for the Opportunity Scholarship Program for quarterly disbursement to the parents or guardians of participating students.")

30. *See* FLA. STAT. ANN. § 1002.38(g) (West 2002).

31. FLA. CONST. art. I, § 3 (emphasis added).

32. *See Holmes*, 2002 WL 1809079, at *2.

33. Compare the language of restrictive state constitutions in notes 24–26, *supra*, and 36, *infra*, with the language of the North Carolina Constitution in notes 37–38, *infra*.

34. In fact, the North Carolina Constitution actually encourages religion in the educational system. The section reads, "Education Encouraged. Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged." N.C. CONST. art. IX, § 1. Stated differently, "schools," "libraries," and other "means of education" are to *produce* "religion, morality, and knowledge." Notably, religion is listed before knowledge as an educational goal.

Further, Justice Thomas argues in *Zelman* that individual states should have more latitude under the Establishment Clause. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 678-81 (2002) (Thomas, J., concurring). He argues that the Fourteenth Amendment to the U.S. Constitution was passed to protect individual rights and choices, not to restrict them. Since the Fourteenth Amendment incorporated the First Amendment (which contains both the Establishment Clause and the Free Exercise Clause), Thomas states, "There would be a tragic irony in converting the Fourteenth Amendment's guarantee of individual liberty into a prohibition on the exercise of educational choice." *Id.* at 680.

states have constitutional provisions that prohibit *any* public money from benefiting religious schools.[35] For example, the Montana Constitution forbids "any direct or indirect appropriation or payment from any public fund or monies" to be used to aid any school that is "controlled in whole or in part by any church, sect, or denomination."[36]

In comparison, the only language in the North Carolina Constitution that may be construed to restrict aid to private schools comes from Sections 6 and 7 of Article IX and Section 2 of Article V. Section 6 of Article IX mandates that certain funds being paid to the state treasury *for the purposes of public education* must be "used exclusively for establishing and maintaining a uniform system of free public schools."[37] Section 7 of Article IX applies similar restrictions on county school funds.[38] Unlike states that have more restrictive constitutional provisions, these provisions only forbid money from the public education fund to go to purposes other than public education. There is no prohibition on "any public fund" going to religious schools. In fact, there is no mention of religious schools at all. Though Sections 6 and 7 of the North Carolina Constitution may prohibit private school voucher payments from money already given to public schools, they clearly do not forbid such payments from a separate fund that the legislature might create.

Some might further argue that a program like that which the Florida court addressed in *Holmes* would violate the North Carolina

35. *See supra* notes 24–26 (detailing the provisions of restrictive state constitutions).

36. MONT. CONST. art. X, § 6.

37. The full text of Section 6 reads as follows:

> State School Fund. The proceeds of all lands that have been or hereafter may be granted by the United States to the State, and not otherwise appropriated by this State or the United States; all moneys, stocks, bonds, and other property belonging to the State for purposes of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State or by the terms of the grant, gift, or devise, shall be paid into the State Treasury and, together with so much of the revenue of the State as may be set apart for that purpose, shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.

N.C. CONST. art. IX, § 6.

38. The following is Section 7 in its entirety:

> County School Fund. All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

N.C. CONST. art. IX, § 7.

Constitution. But this program would likely be constitutional in North Carolina as the language of Florida's constitution is more restrictive than the language in North Carolina's constitution. In making its decision to declare the voucher program unconstitutional in Florida, the *Holmes* court based its decision specifically on that state's constitutional prohibition of "indirect" aid to sectarian schools.[39] That decision likely would have been different if the word "indirect" did not appear in the Florida Constitution, as is the case with the North Carolina Constitution.[40] Like *Holmes*, the voucher plan in *Zelman* was "indirect" as it first gave the funds to the parents, then allowed them to choose the school.[41] If the presence of the word "indirect" was of such crucial importance to the Florida court's holding in *Holmes*, then surely its absence from the North Carolina Constitution suggests that this type of an indirect-aid voucher program would be permitted under the North Carolina Constitution.

On a different note, Section 2 of Article V of the North Carolina Constitution mandates that "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only . . . ."[42] One might argue that this language prohibits any taxes to be imposed for the purpose of benefiting private schools. Education, however, undeniably serves a "public purpose," whether received from a public or a private school.[43] In *Brown v. Board of Education*,[44] for example, the United States Supreme Court determined that education is "required in the performance of our most basic public responsibilities," and is "the very foundation of good citizenship."[45] Clearly, this section cannot be interpreted to conclusively prohibit the application of a voucher program in North Carolina.

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39. *See* Holmes v. Bush, No. CV 99-3370, 2002 WL 1809079, *1-3 (Fla. Cir. Ct. Aug. 5, 2002).

40. In fact, even with the express ban on using state education funds "indirectly" to benefit sectarian schools, the case is still in debate. The trial court originally held the program unconstitutional, but its decision was reversed by the Florida Court of Appeals. *See* Bush v. Holmes, 767 So. 2d 668 (Fla. Dist. Ct. App. 2000) (reversing the trial court's determination that the Opportunity Scholarship Program was facially unconstitutional according to Article 3, Section 1 of the Florida state constitution). On remand, the plaintiff was granted summary judgment, which was upheld on appeal. *See Holmes*, 2002 WL 1809079, at *1.

41. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 647-48 (2002).

42. N.C. CONST. art. V, § 2.

43. *See* San Antonio v. Rodriguez, 411 U.S. 1, 30 (1973) (holding "the grave significance of education both to the individual and to our society cannot be doubted," even though it is not a fundamental right); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (discussing the importance of education).

44. 347 U.S. 483 (1954).

45. *Id.* at 493.

Other states are more permissive.[46] Of the permissive states, four have no specific anti-establishment provisions.[47] Nine other states suggest a welcome climate for school vouchers, as each possesses "some combination of weak anti-establishment constitutional provisions, strong free exercise provisions, the presence of a constitutional override provision on restricting appropriations for public education only, or supportive state supreme court precedent."[48] These states would likely find a voucher program constitutional if it were to meet the *Zelman* test criteria.

North Carolina could potentially fall into the "permissive" category. Most significantly, it has no Establishment Clause in its state constitution.[49] The North Carolina Constitution once contained a specific provision for disestablishing the Church of England,[50] but that section soon became unnecessary and was dropped in 1868.[51] Today the state constitution "lacks a specific prohibition of 'an establishment of religion,' such as in the First Amendment of the U.S. Bill of Rights."[52] Secondly, there is little other restrictive language in the North Carolina Constitution indicating that a voucher program would be unconstitutional. As discussed above, Article IX, Sections 6 and 7, and Article V, Section 2, which place some restrictions on the ways in which educational appropriations may be raised and spent, might provide some basis to attack a program, but appear unlikely to prohibit it.

Under Kemerer's analysis, the remaining states are "uncertain" due to the presence of ambiguous constitutional terminology[53] or the lack of clear Establishment Clause precedent.[54] Additionally, Ohio and Wisconsin were "uncertain" due to pending litigation.[55] However, both of these cases were subsequently resolved in favor of

46. *See* Kemerer, *supra* note 22, at 20.

47. These states are Maine, Maryland, Rhode Island, and Vermont. *See id.*

48. These states include: Alabama, Arizona, Mississippi, Nebraska, New York, Pennsylvania, South Carolina, Utah, and West Virginia. *See id.* at 23. *See also* Heytens, *supra* note 22 at 126–27 (noting that states are classified as " 'permissive' by Kemerer either because their state constitution lacks a provision concerning church/state relations or because of a supportive legal climate").

49. JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE 49 (1993).

50. *See id.* at 49.

51. *See id.*

52. *Id.*

53. For a discussion of states with constitutional ambiguities, see Kemerer, *supra* note 22, at 27–30. These states include: North Carolina, New Mexico, Connecticut, New Jersey, New Hampshire, Illinois, and Minnesota. *See id.*

54. These states include: Texas, Louisiana, Iowa, Oregon. *See id.* at 31–32.

55. *See id.* at 3–7, 27–28.

the voucher programs at issue.[56]

Professor Kemerer classified North Carolina as "uncertain" because he thought the state likely would follow the Supreme Court's lead.[57] After the Supreme Court's decision in *Zelman*, we can predict how the North Carolina courts will respond. Case law demonstrates that the North Carolina courts strictly adhere to federal Establishment Clause jurisprudence when addressing questions of validity under the state constitution.[58] This strongly indicates that the North Carolina courts will follow the *Zelman* Court's application of the Establishment Clause and uphold a program of this type under the North Carolina Constitution.

The principal case on North Carolina's Establishment Clause jurisprudence is *Heritage Village Church & Missionary Fellowship, Inc. v. State*.[59] In *Heritage Village*, the court examined section 108-75.7 of the General Statutes of North Carolina, which was intended to achieve " 'full public disclosure of facts relating to persons and organizations who solicit funds from the public for charitable purposes . . . .' "[60] To accomplish this, the statute required charitable organizations to apply for a license from the Department of Human Resources before soliciting donations within the state.[61] The statute specifically exempted religious organizations from this licensing requirement, except for those groups receiving a majority of their funding from donations.[62] The plaintiff religious organizations, which received a majority of their funds from donations and thus could not claim the exemption, challenged this section as unconstitutional under the First and Fourteenth Amendments of the U.S. Constitution and Sections 1, 13, 14, and 19 of Article I of the North Carolina Constitution.[63]

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56. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Jackson v. Benson, 578 N.W.2d 602 (Wisc. 1998) (holding that a school choice program did *not* violate the state constitution's Establishment Clause provisions).

57. *See* Kemerer, *supra* note 22, at 2–8. The Supreme Court had not yet decided *Zelman* at the time of the article's publication. *See also* Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 TEX. F. ON C.L. & C.R. 137, 155 n.116 (1998) (stating in an earlier article that the Supreme Court of North Carolina "has explicitly indicated that the anti-establishment clause in the state constitution is coextensive with the religion clauses of the First Amendment [of the U.S. Constitution] . . . .").

58. *See infra* notes 59–79 and accompanying text.

59. 299 N.C. 399, 263 S.E.2d 726 (1980).

60. *See id.* at 401, 263 S.E.2d at 727.

61. *See id.* at 402, 263 S.E.2d at 728.

62. *See id.* at 403, 263 S.E.2d at 728–29.

63. *Id.* at 404–05, 263 S.E.2d at 729.

In its analysis, the Supreme Court of North Carolina showed its proclivity for federal Establishment Clause jurisprudence in resolving religious questions under the North Carolina Constitution. The court first examined Article I, Section 13 of the North Carolina Constitution, which states, "[a]ll persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience."[64] The court also cited Article I, Section 19, which mandates that no person shall be "subject to discrimination by the State because of . . . religion . . . ."[65] After citing the Federal Establishment Clause, the court continued by stating that, "[t]aken together, these provisions may be said to coalesce into a singular guarantee of freedom of religious profession and worship, 'as well as an equally firmly established principle of separation of church and state.' "[66] In so doing, the court appears to merge North Carolina's constitution with the United States Constitution's Establishment Clause in its analysis.[67]

Going even further, the court wrote, "[w]e proceed to examine the Act for aspects of religious partiality. Since the contours of the

64. N.C. CONST. art. I, § 13.

65. *Id.* § 19.

66. *See Heritage Village*, 299 N.C. at 406, 263 S.E.2d at 730 (quoting Braswell v. Purser, 282 N.C. 388, 393, 193 S.E. 2d 90, 93 (1972)).

67. Both of the above-cited provisions of the North Carolina Constitution (Article I, Sections 13 and 19) appear to deal more with the free exercise, rather than the "establishment," of religion. In fact, the plaintiffs in *Heritage Village* challenged the law in question under the "First and Fourteenth Amendments to the United States Constitution and Sections 1, 13, 14 and 19 of Article I of the Constitution of North Carolina." *Heritage Village*, 299 N.C. at 404, 263 S.E.2d at 729. The First Amendment to the U.S. Constitution includes the right to the "free exercise" of religion (as well as the prohibition of laws intended to establish it) and Article I, Sections 13 and 19 of the North Carolina Constitution have similar provisions. *See* U.S. CONST., amend. I. But in *Heritage Village* the Supreme Court of North Carolina wrote:

> We affirm the [North Carolina] Court of Appeals' holding that the partiality of the qualified exemption provided by section 75.7(a)(1) works an unconstitutional "establishment" of religion. That section's proviso, which excepts from the general exemption those religious organizations which derive financial support primarily from nonmembers, constitutes on its face a violation of Sections 13 and 19 of Article I of the North Carolina Constitution and the First Amendment to the Constitution of the United States. Since the proviso cannot be constitutionally applied to deny plaintiffs an exemption from the requirements of the Act, we find no occasion to address or pass upon the merits of the other holdings of the Court of Appeals.

Heritage Village, 299 N.C. at 405, 263 S.E.2d at 729 (1980). In other words, the court specifically did not decide any other issues in this case but the question of whether the disputed law "worked an unconstitutional 'establishment' of religion." The free exercise of religion was simply not at issue in the case.

neutrality requirement have been most thoroughly defined in the jurisprudence of the First Amendment's Establishment Clause, we may usefully turn to that body of law for analytical guidelines."[68] True to its word, the court proceeded to analyze the question of both state and federal constitutionality by applying *only* United States Supreme Court cases.[69] It expressly recognized "that the neutrality demanded by the First Amendment is also compelled by the conjunction of Sections 13 and 19 of Article I" of the North Carolina Constitution.[70] The court does not suggest that the North Carolina Constitution is more restrictive than the Federal Establishment Clause. In fact, its analysis specifically stated that both are to be treated the same.[71]

Appeal of Springmoor, Inc.[72] provides another example of the Supreme Court of North Carolina's fondness for the United States Supreme Court's Establishment Clause jurisprudence. In *Springmoor*, the North Carolina Court of Appeals examined a statute granting tax exemptions to homes for elderly, sick, or infirm citizens only if the homes were owned and operated by religiously affiliated organizations.[73] The court found this part of the statute unconstitutional under the North Carolina Constitution and the Establishment Clause of the U.S. Constitution.[74] The court emphasized that, "although the language of our State constitution differs from that of the federal constitution, the North Carolina Constitution provides *the same protection* in Article I, section 13."[75] On further appeal, the Supreme Court of North Carolina reversed the North Carolina Court of Appeals and allowed severance of the

68. *Id.* at 406, 263 S.E.2d at 730.

69. *See id.* at 406–10, 263 S.E.2d at 730–732.

70. *Id.* at 406 n.1, 263 S.E.2d at 730 n.1.

71. *See id.* Another North Carolina case, *State v. Pendleton*, 339 N.C. 379, 451 S.E.2d 274 (1994), supports these statements from *Heritage Village*. In *Pendleton*, the Supreme Court of North Carolina reversed a North Carolina Court of Appeals decision that held a statute constitutional according to both the North Carolina and the United States Constitutions. *Id.* at 383, 451 S.E.2d at 277. The lower court cited both state and federal constitutional law in making its ruling. *See* State v. Pendleton, 112 N.C. App. 171, 173–180, 435 S.E.2d 100, 102–06 (1993). The Supreme Court of North Carolina, however, reversed the decision with an analysis of only federal law, stating that the program violated the Federal Establishment Clause thus making an analysis of state constitutional precedent unnecessary. *Pendleton*, 339 N.C. at 383–84, 451 S.E.2d. at 277.

72. 125 N.C. App. 184, 479 S.E.2d 795 (1997), *aff'd in part, rev'd in part*, 348 N.C. 1, 498 S.E.2d 177 (1998).

73. *See id.* at 184, 479 S.E.2d at 797.

74. *See id.* at 190, 479 S.E.2d at 799.

75. *Id.* at 189, 479 S.E.2d at 798 (emphasis added).

unconstitutional portion of the statute.[76] More importantly, however, the supreme court reinforced the lower court's application of federal jurisprudence by affirming its application of the federal law.[77] Justice Lake (now Chief Justice) dissented in *Springmoor*, but even he did not argue that federal precedent should be separated from the state constitutional issue.[78] Justice Lake argued that the lower court had misinterpreted the federal cases' holdings.[79] As shown by these cases, the Supreme Court of North Carolina has historically exhibited a strong desire to merge the state constitution's church-state provisions with the federal Establishment Clause, and it is likely that it would readily accept *Zelman* and allow a voucher program of that type to operate in the state.

To summarize, a voucher program meeting the *Zelman* test clearly would be constitutional in North Carolina. As to the issue of indirect funding for sectarian schools, the North Carolina Constitution is remarkably unrestrictive in comparison to other states' constitutions. Additionally, the North Carolina court's strong tendency to follow federal precedent on the Establishment Clause when addressing questions of state permissibility indicates that the *Zelman* decision would be fully embraced.

As a practical matter, state legislators considering a voucher program in North Carolina should make it conform to the *Zelman* test to ensure that the program could withstand a constitutional challenge. Additionally, they should ensure that funding comes from a source other than the public school fund to avoid potential problems with Article IX, Sections 6 and 7 of the North Carolina Constitution.[80] If a constitutional challenge is raised, attorneys seeking to defend such a program should focus on the state's constitution's textual permissiveness and the rule of *Heritage Village*.[81]

Attorneys attacking a North Carolina voucher program, on the other hand, should attempt to demonstrate a lack of "true private choice," as defined by the *Zelman* Court, in order to invalidate a private school voucher program in North Carolina. Given the permissive language of the North Carolina Constitution and the existing judicial precedent, however, this argument will likely fail. As

76. *See* Appeal of Springmoor, Inc., 348 N.C. 1, 15, 498 S.E.2d 177, 185 (1998).
77. *See id.* at 12, 498 S.E.2d at 184.
78. *See id.* at 20, 498 S.E.2d at 188 (Lake, J., dissenting).
79. *See id.*
80. *See supra* notes 37–38 and accompanying text.
81. 299 N.C. 399, 263 S.E.2d 726 (1980).

a second point of attack, attorneys could focus their efforts on distinguishing the facts of the hypothetical program from those of *Zelman*. These opponents might argue that the *Zelman* program was appropriate only because Cleveland was experiencing a severe educational crisis in its public schools. According to such a theory, since North Carolina is not experiencing such a crisis,[82] a voucher program would be unconstitutional.

Further, opponents could make strong policy arguments against voucher programs. Some studies show that the primary problem in failing schools is a lack of resources—a problem that vouchers could potentially exacerbate by taking needed money away from disfavored schools.[83] Former North Carolina Governor James Hunt made a similar point when he argued that vouchers ignore the vast majority of children who would remain in public schools when private school vouchers are exercised.[84] Governor Hunt cites a study showing that with the advent of vouchers, "the worst schools grew worse."[85] Notwithstanding these policy implications, the law seems clear that a voucher program meeting the *Zelman* test would be held constitutional in North Carolina.

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82. In fact, North Carolina public schools are improving without vouchers. *See* Ladd, *supra* note 21 (showing that North Carolina school systems, which operate without vouchers, have attained levels of success comparable to those achieved by Florida school systems with voucher programs).

83. *See* Rob Boston, *Supreme Mistake*, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, *at* http://www.au.org/churchstate/cs7021.htm (Aug. 26, 2002) (on file with the North Carolina Law Review).

84. *See* James B. Hunt, *The Voucher Chorus is Off Key*, FLORIDIANS FOR SCHOOL CHOICE, *at* http://www.floridians.org/newsf/00/092000.html (Sept. 20, 2000) (on file with the North Carolina Law Review).

85. *Id.* Of course, additional policy arguments exist on both sides of the debate. Whether a voucher program is desirable from a policy perspective, however, is beyond the scope of this Recent Development.