every child deserves a chance

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School Choice and State Constitutions • A Guide to Designing School Choice Programs • April 2007

School Choice and State Constitutions

A Guide to Designing School Choice Programs

reference guide

A joint publication of
The Institute for Justice and
The American Legislative Exchange Council

50 states

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foreword

Whenever school choice legislation is considered, the stakes are enormous. Children, parents, teachers and taxpayers all stand to benefit dramatically from well-designed programs.

That's why it is so important for all school choice legislation to be very carefully crafted, starting with an eye toward its constitutionality under relevant state constitutional provisions. Not only is this sound and responsible drafting, it also assures that when a choice program is enacted and then challenged in court it has the greatest likelihood of being upheld.

This guide to the key constitutional provisions of all 50 states is designed to provide a convenient reference for legislators and advocates. As the reader will see, school choice programs are constitutional in nearly every state. The key is to design the right kind of program, and this guide is meant to help legislators do just that.

Any state summary in this report should be a starting point only. We encourage legislators to obtain copies of the American Legislative Exchange Council's model legislation listed in this guide and to contact the Institute for Justice for the more in-depth analysis that will be necessary in crafting specific legislation.

We look forward to working with you to secure the future of school choice in your state.

William H. Mellor
President and General Counsel
Institute for Justice

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Executive Director
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School Choice and State Constitutions

A Guide to Designing School Choice Programs

Is school choice constitutional? In most states, if a program is designed properly, the answer should be yes.

Since the birth of the modern school choice movement in 1990, with the creation of a scholarship program for inner-city children in Milwaukee, members of the entrenched education establishment have fought to stop school choice, often through legal attack.

Meanwhile, public support for school choice has grown, and seventeen years later, K-12 school choice flourishes in Milwaukee (after two unsuccessful legal challenges) and 10 other states, plus the District of Columbia. On February 12, 2007, Utah became the first state to offer universal school vouchers, marking an important watershed for the school choice movement. And in 2002, the U.S. Supreme Court vindicated school choice under the federal Constitution as it upheld Cleveland's voucher program.

Yet the legal battle continues. Lacking any federal constitutional claims, school choice opponents now rely solely on state constitutions in their quest to maintain the educational status quo.

But their arguments are mostly red herrings, and in nearly every state, the question is not *whether* there can be school choice, but how best to achieve it. This guide—the first-ever state-by-state breakdown of state constitutional provisions relevant to school choice—demonstrates that a well-crafted school choice program is viable in just about every state in the union. The key for policymakers is to understand the legal environment of their individual states and draft school choice legislation accordingly.

The guide provides policymakers with the facts about the state of the law on school choice and arms them with the tools to create programs most likely to survive legal scrutiny.

SCHOOL CHOICE

The term "school choice" describes any policy designed to enable parents to choose the best educational opportunity for their children, including public school transfer options, charter and magnet schools, home schooling, scholarships, vouchers and tax credits/deductions. This guide focuses on the two forms of school choice that bring private schools into the mix of available educational options for parents of all financial means—vouchers and tax credits.

Vouchers are simply state-funded scholarships for K-12 students that enable them to select the school

of their choice, just like the various scholarships that most states and the federal government provide for college students. Tax credit programs come in several varieties. Tax-credit-funded scholarship programs enable individuals or corporations to receive a tax credit for donating a portion of their state tax liability to private scholarship-granting organizations. Personal tax credits and deductions give parents a tax break for approved educational expenses.

SCHOOL CHOICE AND THE FEDERAL CONSTITUTION

The U.S. Supreme Court delivered a resounding victory for school choice when it upheld Cleveland's school voucher program in 2002 in *Zelman v. Simmons-Harris*. Rejecting a challenge under the Establishment Clause of the U.S. Constitution, the Court held that publicly funded K-12 voucher programs may include both religious and non-religious options, just as college aid programs like Pell Grants and the GI Bill have always done. The essential characteristics of a constitutional school voucher program, according to the Supreme Court, are:

- "Religious neutrality"—providing aid to a broad group of recipients identified without reference to religion, and offering a wide array of options, again without regard to religion.
- "True private choice"—*parents*, not the government, choose the school, and the government itself does nothing to influence the choice of religious or non-religious options one way or the other.

A program with those two features is constitutional because it aids *families* seeking a better education for their children, not the schools they happen to choose. Because the aid flows to individuals instead of institutions, programs may include both religious and non-religious options without violating the federal Constitution.

SCHOOL CHOICE, STATE CONSTITUTIONS AND RELIGION

After the U.S. Supreme Court eliminated the federal Establishment Clause as a potential barrier to school choice in 2002, opponents were left with state constitutions as their only avenue for attacking school choice programs. Primarily, they rely on the religion and education provisions of state constitutions.

COMPELLED SUPPORT CLAUSES

"Compelled Support" Clauses are provisions in 29 state constitutions that were originally intended to prevent the establishment of an official state religion and to ensure that people were not forced to pay for things like churches and ministers' salaries. Generally, Compelled Support Clauses require that no one shall be compelled to attend or support a church or religious ministry without his or her consent. They were simply meant to protect religious minorities from the colonial-era practice of requiring church attendance and support for a colony's established church.

School choice is an altogether different policy. Well-designed voucher programs are *religiously neutral*: they neither favor nor disfavor the choice of religious schools over other

This guide—the first-ever state-by-state breakdown of state constitutional provisions relevant to school choice—demonstrates that a well-crafted school choice program is viable in just about every state in the union.

educational options. Parents participating in voucher programs who select religious schools *freely and independently choose* them from a host of religious and non-religious alternatives because they believe those schools provide the best educational opportunity for their children.

As a result, no public money supports a particular church or religious institution; instead, the aid supports families in their attempts to secure high quality education for their children—just like college scholarships are understood to support students rather than the schools they happen to attend. Parental choice is key. Voucher and tax credit programs support parents and children—no matter which schools they choose.

BLAINE AMENDMENTS

The notorious Blaine Amendments, found in 37 state constitutions, grew out of a well-documented atmosphere of anti-immigrant and anti-Catholic bigotry in the latter half of the 19th century. At the time, most public schools were thoroughly Protestant in orientation and pedagogy, and distinctly inhospitable to Catholics. Catholics sought funding for their own schools, but a resulting anti-immigrant, anti-Catholic backlash led to a proposed amendment to the U.S. Constitution by Maine Sen. James G. Blaine (hence the title "Blaine Amendment") that would have prohibited the funding of any "sectarian" schools or institutions. In the parlance of the times, "sectarian" was code for "Catholic." Blaine's attempt to amend the U.S. Constitution failed, but it was picked up by many states and even became a requirement for entry into the union for many Western states.

The U.S. Supreme Court has recognized the Blaine Amendments' "shameful pedigree" of religious and anti-immigrant discrimination, and the Arizona Supreme Court described them as "a clear manifestation of religious bigotry" in upholding a tax-credit scholarship program.

As their history makes clear, Blaine Amendments were intended to prevent the government from directly funding Catholic school systems—again, a policy very different from modern school choice programs.

Neither voucher nor tax credit programs involve the kinds of special grants to private religious schools that Blaine Amendments sought to prohibit. Voucher programs provide scholarships to *families*—not schools—who can choose to use them at the school of their choice, religious or not. Similarly, tax credits and deductions allow parents to keep more of their own money, while tax-credit scholarship programs simply encourage individuals or corporations to donate their money to private scholarship funds.

Whether through vouchers, tax credits or tax deductions, any money that happens to reach a religious school does so as the incidental result of the free and independent choices of parents empowered by the government to take charge of their children's education—instead of leaving that decision to government officials.

AVOIDING BLAINE AND COMPELLED SUPPORT PROBLEMS

To avoid running afoul of state constitutions' Compelled Support Clauses and Blaine Amendments, the most important decision a lawmaker can make is the choice between vouchers and tax credits.

State court interpretations of religion clauses vary widely, and only a handful of states have addressed them in the context of school choice. But many state courts have interpreted these provisions in analogous cases, such as programs that provide benefits like free transportation or secular textbooks to families using private schools. These cases—described in this guide—can provide guidance to lawmakers about how state courts may apply state religion clauses to education issues.

For example, if a state supreme court has already ruled that its Blaine Amendment or Compelled Support Clause prohibits using tax dollars to provide educational aid to families using private schools, then tax credit plans are likely a better approach. Since forgone tax revenue does not constitute public money, most state supreme courts do not or should not regard tax-credit-funded scholarships as subject to Blaine Amendment or Compelled Support limitations. For each state, we provide a recommendation of the best approach.

STATE CONSTITUTIONS AND EDUCATION

Every state constitution has provisions dealing with education, which can be relevant for lawmakers considering school choice proposals.

So-called "uniformity" clauses are provisions within state constitutions that require the state government to fund a "uniform system of free public education," or words to that effect. Wrenching those words from their proper context, school choice opponents have begun arguing, illogically, that such provisions do not simply require the government to establish public schools for all children within the state, but forbid the government from going beyond that baseline requirement by providing education through means other than the traditional public school system.

This argument requires constitutional and linguistic gymnastics that few state supreme courts are likely to accept and that almost no state's legal precedents support.[1] Uniformity clauses were never intended to impose a limit on educational innovation and creativity in the way legislators fulfill their obligation to provide children

1 The Wisconsin Supreme Court twice considered the argument and rejected it. The Florida Supreme Court, in an unprecedented and widely criticized opinion, accepted it.

Parents, not the government, choose the school and the government itself does nothing to influence the choice of religious options one way or the other.

with a basic education. Rather, they were simply intended to ensure that the public school system has certain minimal characteristics. If a state chooses to go above and beyond that constitutional requirement, a uniformity provision should not be not a bar.

The education articles of a few state constitutions have language that explicitly reserves all educational expenditures for public schools. For those states, tax credit programs are the only available school choice option in the absence of a constitutional amendment.[2] Other states have "state school funds," and expenditures from those funds may only be used for public schools. In those states, vouchers should be funded from the general fund or some other source besides the state school fund.

Most state constitutions' education articles include a provision creating a Common Schools Fund. Such funds contain the proceeds derived from federal lands given to the state for the purpose of establishing public schools, and limit the use of the Fund to public schools. In such states, school choice programs must be funded from other state revenue sources.

A FINAL NOTE

This guide is intended to arm policymakers and advocates with the essential background needed to craft constitutional school choice legislation—and to forge ahead with confidence in delivering equal educational opportunity to all families, regardless of their means. But the analysis and recommendations in this report are very general and should be just the beginning of your effort to understand school choice and your state constitution. The Institute for Justice is eager to provide expert legal review of school choice proposals. Such review, ideally at the earliest possible stage in the process, is essential.

2 Michigan is the only state whose constitution explicitly forbids both voucher and tax benefit programs, although the Massachusetts Supreme Court has interpreted its constitution broadly to the same effect. In such states, constitutional amendment is probably necessary to permit effective school choice.

How to Use This Report

This report, for the first time ever, provides a state-by-state breakdown of the key elements a policymaker needs in order to understand the legal environment for school choice in any given state—and to craft appropriate legislation to expand educational opportunity.

CONSTITUTIONAL PROVISIONS

We provide the text of and citations for state constitutional provisions most relevant to school choice, including Blaine Amendments, Compelled Support Clauses, any educational provisions that may impact how a school choice program is designed, and other provisions as necessary to help policymakers craft good legislation.

RELEVANT CASE LAW

This section lists and describes any federal and state cases interpreting key constitutional provisions. First, we list any cases from federal courts that arose out of that state. Sometimes these cases include or draw on interpretations of state constitutions in addition to any ruling based on the U.S. Constitution, so they can provide some useful information. They may also address an existing school choice program.

Next, we list cases from state courts. For both federal and state cases, we start with decisions from the highest court (for example, the U.S. Supreme Court for federal cases, and a state supreme court for state cases) and list the most recent cases first. These are followed by lower court cases, again, most recent first.

Finally, the report describes any official advisory opinions from state supreme courts and attorneys general that are relevant to school choice. Such opinions are not binding precedent and courts are not required to follow them, but they can be persuasive in future litigation.

All cases and opinions include full legal citations so those interested in learning more can find the original sources.

EXISTING SCHOOL CHOICE PROGRAMS

Here we provide a snapshot of school choice in a state: whether the state provides Public School Choice, Charter Schools, or Private School Choice—and if so, what kind of program that is. We also provide citations to the statutes themselves.

It is important for policymakers to understand what kinds of schooling options children in a state already enjoy. New school choice programs should be designed to enhance these options as a matter of good policy and of good law. Also, existing school choice programs that include private school options provide evidence that the further expansion of school choice in that state is constitutional.

ANALYSIS AND RECOMMENDATIONS

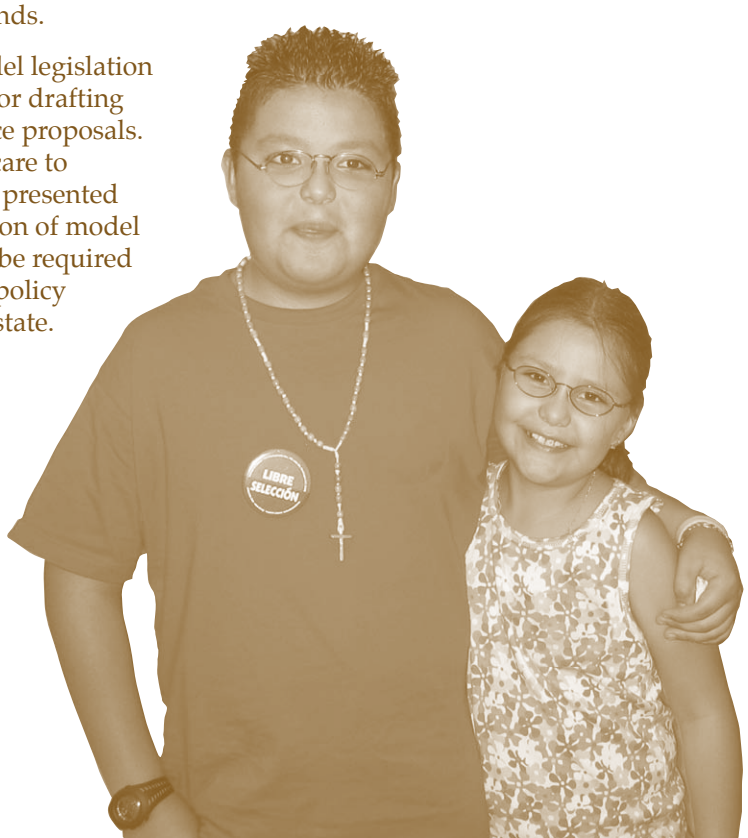
This section brings together the key elements—state constitutional provisions, relevant case law, and existing school choice programs—to provide a brief analysis of the legal environment for school choice in a state. This is the Institute for Justice's opinion about the safest approach to implementing school choice in a state and avoiding constitutional problems.

The key decision a policymaker must make is the choice between a voucher approach and a tax credit approach (or both), and we offer a recommendation for each state. We also point out, where applicable, other means of satisfying state constitutional requirements, such as avoiding the use of common school funds.

Finally, we list ALEC's model legislation to provide a framework for drafting state-specific school choice proposals. Lawmakers should take care to consider the many issues presented in the drafting notes section of model bills. Modifications may be required to best suit the legal and policy environments of a given state.

RESOURCES

At the back of the report (beginning on page 93), we provide descriptions of ALEC's model school choice bills, a glossary to explain the legal jargon that is sometimes necessary when explaining constitutional case law, and information about national organizations that can help in the fight for equal educational opportunity.



ALABAMA

YES VOUCHERS

YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"That no one shall be compelled by law to attend any place of worship; nor to pay any tithes, taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or ministry …." Alabama Const. Art. I, § 3.

Blaine Amendments

"No appropriation shall be made to any charitable or educational institution not under the absolute control of the state, other than normal schools established by law for the professional training of teachers for the public schools of the state, except by a vote of two-thirds of all the members elected to each house." Alabama Const. Art. IV, § 73.

"No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school." Alabama Const. Art. XIV, § 263.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice:	No
Charter Schools:	No
Private School Choice:	No

RELEVANT CASE LAW

Alabama Education Association v. James, 373 So. 2d 1076 (Ala. 1979)

After a change in U.S. Supreme Court Establishment Clause jurisprudence, the Alabama Supreme Court held that tuition grants to students attending private schools are constitutional under the First Amendment of U.S. Constitution and Alabama's Blaine Amendment (Article XIV, Section 263) because the aid goes to the student, not the school.

Opinion of Justices, 280 So. 2d 547 (1973)

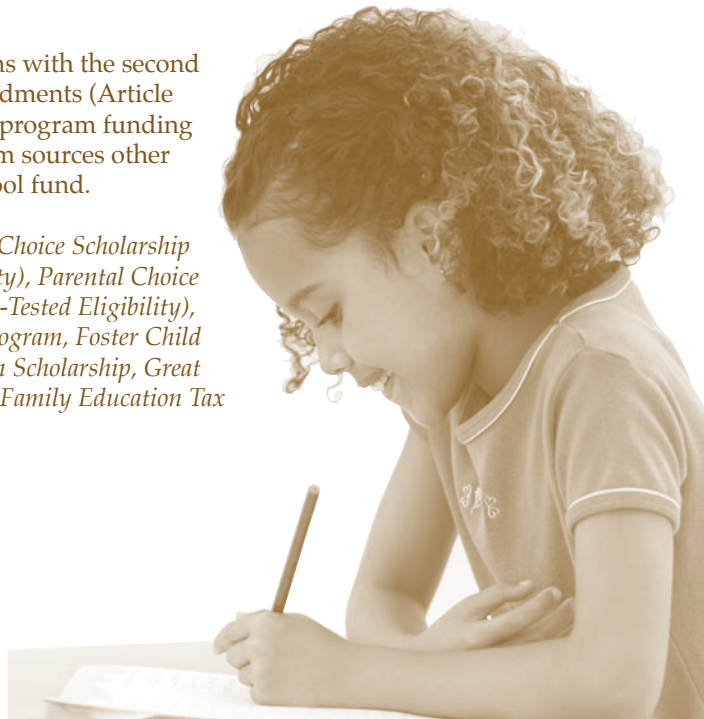
Following then-current U.S. Supreme Court Establishment Clause precedent, the Alabama Supreme Court opined that tuition grants to students attending "church colleges" would violate both the First Amendment of U.S. Constitution and one of Alabama's Blaine Amendments (Article XIV, Section 263) because they would excessively entangle the state and religion.

ANALYSIS AND RECOMMENDATIONS

Tax credit programs and vouchers are both school choice options for Alabama. Although the Alabama Constitution contains both a Compelled Support Clause and Blaine Amendment language, the Alabama courts are unlikely to interpret these clauses expansively to prohibit school choice. Additionally, Alabama courts tend to follow federal Establishment Clause precedent in interpreting the Alabama Constitution, and the U.S. Supreme Court's decision in *Zelman v. Simmons-Harris* upheld school choice programs.

To avoid potential problems with the second of Alabama's Blaine Amendments (Article XIV, Section 263), voucher program funding should explicitly come from sources other than the state's public school fund.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program



ALASKA

NO VOUCHERS | YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Blaine Amendments

"The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution." ALASKA CONST. Art. VII, § 1.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

4 Alaska Administrative Code 06.855

Charter Schools: Yes

Alaska Statutes Sections 14.03.250 to 14.03.290; 4 Alaska Administrative Code 33.110

Private School Choice: No

RELEVANT CASE LAW

Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979)

The Alaska Supreme Court held that tuition assistance grants for students attending private colleges violates its Blaine Amendment because (1) only private colleges benefit from the program, (2) the money effectively subsidizes private education, (3) the benefit provided is substantial, and (4) there is no distinction between giving money to the student and giving money to the school.

Matthews v. Quinton, 362 P.2d 932 (Alaska 1961), *cert. denied*, 368 U.S. 517 (1962)

Viewing its Blaine Amendment as more restrictive than the federal Constitution, the Alaska Supreme Court held that transportation of private school students at public expense violates the Alaska Constitution.

ANALYSIS AND RECOMMENDATIONS

Tax credit programs are Alaska's best option for a school choice initiative. They are consistent with the Alaska Constitution and relevant case law.

A voucher program, however, would be problematic. Alaska courts have interpreted the state's Blaine Amendment restrictively. Although its actual terms only ban "direct" aid, Alaska courts have rejected the distinction between aiding students and aiding the institutions those students choose to attend, thereby limiting the use of public funds to public educational institutions.

Model Legislation: Great Schools Tax Credit Program, Family Education Tax Credit Program

ARIZONA

YES VOUCHERS

YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Blaine Amendments

"No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." Arizona Const. Art. II, § 12.

"No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." Arizona Const. Art. IX, § 10.

Other Relevant Sections

"Neither the State, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation …." Arizona Const. Art. IX, § 7.

"Section 1. A. The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system, which system shall include: 1. Kindergarten schools; 2. Common schools; 3. High schools; 4. Normal schools; 5. Industrial schools; 6. Universities, which shall include an agricultural college, a school of mines, and such other technical schools as may be essential, until such time as it may be deemed advisable to establish separate state institutions of such character." Arizona Const. Art. XI, § 1.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict and Interdistrict/mandatory
Arizona Revised Statutes Sections 15-816 to 15-816.07

Charter Schools: Yes

Arizona Revised Statutes Sections 15-181 to 15-189.03

Private School Choice: Yes

Displaced Pupils Choice Grants for foster children
Arizona Revised Statutes Sections 15-817.01 to 15-817.02

Scholarships for Pupils with Disabilities
Arizona Revised Statutes Sections 15-891 to 15-891.06

Individual Tax Credit Scholarships
Arizona Revised Statutes Sections 43-1089 to 43-1089.02

Corporate Tax Credit Scholarships
Arizona Revised Statutes Section 43-1183

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RELEVANT CASE LAW

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (U.S. 1993)

The U.S. Supreme Court held that the First Amendment's Establishment Clause did not prevent an Arizona school district from furnishing a student with a sign-language interpreter to facilitate his education at a religious school.

Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999)

The Arizona Supreme Court held that tuition tax credits are constitutional under both the U.S. Constitution and the Arizona Constitution. They are part of a religiously neutral government program available to a large spectrum of citizens and do not have the primary effect of advancing or inhibiting religion. Additionally, they do not overly entangle the

ARIZONA

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government with religion because the state does not distribute funds or monitor their application. The court recognized that the scholarships benefit children, not schools. In refusing to apply its Blaine Amendments broadly, the Arizona Supreme Court recognized the bigotry and prejudice underlying their enactment.

Hull v. Albrecht, 950 P.2d 1141, 1145 (Ariz. 1997)
The Arizona Supreme Court held that the "general and uniform requirement" of the Arizona Constitution's education article applies only to the state's constitutional obligation to fund a public school system that is adequate and that defining adequacy is a legislative task. A district may then choose to go above, but not below, the statewide minimum standards, and this will not run afoul of the general-and-uniform requirement.

Pratt v. Arizona Board of Regents, 520 P.2d 514, 516 (Ariz. 1974)
The Arizona Supreme Court held that the state did not violate the first of Arizona's Blaine Amendments (Article II, Section 12) when it leased a state university's football stadium for prayer worship at a fair market value. The court noted that "[w]e believe that the framers of the Arizona Constitution intended by [Article II, Section 12] to prohibit the use of the power and the prestige of the State or any of its agencies for the support or favor of one religion over another, or of religion over nonreligion."

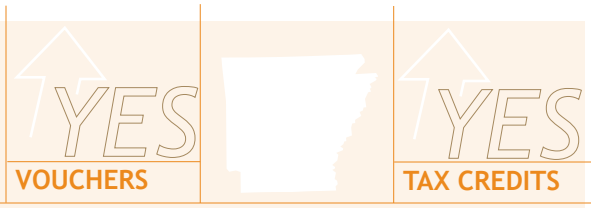
Community Council v. Jordan, 432 P.2d 460, 466 (Ariz. 1967)
The Arizona Supreme Court held that by contracting with the Salvation Army, the state is not providing "aid" in violation of the second of Arizona's Blaine Amendments (Article IX, Section 10). The court noted, "The 'aid' prohibited in the constitution of this state is, in our opinion, assistance in any form whatsoever which would encourage or tend to encourage the preference of one religion over another, or religion per se over no religion."

ANALYSIS AND RECOMMENDATIONS

Both tax credit programs and vouchers are school choice options for Arizona. The Arizona Constitution contains Blaine Amendment language in two separate provisions, but Arizona state courts have interpreted neither expansively. In *Kotterman*, the Arizona Supreme Court definitively upheld the constitutionality of tuition tax credits. Given its strong adherence to federal precedent on Establishment Clause issues, the court is also likely to uphold a religiously neutral voucher program. It has already held that the state can contract with a religious organization for public services without improperly aiding the organization's religious mission. In addition, the Arizona Supreme Court has viewed the "uniformity" language of its education article (Article XI, Section 1) as establishing a floor for adequacy below which districts may not go, but permitting programs that go further.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

ARKANSAS



CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"[N]o man can, of right, be compelled to attend, erect, or support any place of worship; or to maintain any ministry against his consent." ARKANSAS CONST. Art. II, § 24.

Education Articles

"Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education." ARKANSAS CONST. Art. XIV, § 1.

"No money or property belonging to the public school fund, or to this State, for the benefit of schools or universities, shall ever be used for any other than for the respective purposes to which it belongs." ARKANSAS CONST. Art. XIV, § 2.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict/mandatory
Arkansas Code Annotated 6-18-227
Interdistrict/mandatory
Arkansas Code Annotated 6-18-206

Charter Schools: Yes

Arkansas Code Annotated 6-23-101 to 6-23-601

Private School Choice: No

RELEVANT CASE LAW

Lendall v. Cook, 432 F. Supp. 971, 978 (E.D. Ark. 1977)

A federal district court concluded that a State higher education scholarship program that permitted students to choose religious or non-religious colleges did not violate the Arkansas Constitution's Compelled Support Clause.

ANALYSIS AND RECOMMENDATIONS

Both tax credit programs and vouchers are school choice options for Arkansas. Its Constitution does not contain a Blaine Amendment and its Compelled Support Clause, while receiving little judicial attention, does not forbid religiously neutral school choice programs, provided funds allotted for the public schools are not used.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

CALIFORNIA

NO VOUCHERS | YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Blaine Amendments

"No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State." California Const. Art. IX, § 8.

"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; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI." California Const. Art. XVI, § 5.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict/mandatory
California Education Code Section 35160.5
Intradistrict and Interdistrict/voluntary
California Education Code Sections 46600 to 46611

Charter Schools: Yes

California Education Code Sections 47600 to 47660, California Education Code Sections 41365 to 41367

Private School Choice: No

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RELEVANT CASE LAW

California Teachers Association v. Riles, 632 P.2d 953, 960 (Cal. 1981)
The California Supreme Court held that lending textbooks to private schools violated the state Constitution's Blaine Amendments.

Bowker v. Baker, 167 P.2d 256 (Cal. 1946)
The California Supreme Court held that transporting private school students at public expense is constitutionally acceptable because it is aimed at child safety not education, and any benefit to the school is "incidental."

California Statewide Communities Development Authority v. All Persons Interested etc., 14 Cal. Rptr. 3d 811 (2004), *review granted, California Statewide Communities Development v. All Persons Interested*, 2006 Cal. LEXIS 9088 (Cal. 2006) (unpublished decision) (appeal pending; lower court decision depublished)
A California Court of Appeals held that proposals for the issuance

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of tax-exempt bonds for the benefit of "pervasively sectarian" religious schools violated the state's Blaine Amendments.

Wilson v. State Board of Education, 89 Cal. Rptr. 2d 745 (Ct. App. 1999)
A California Court of Appeals held that charter schools are considered "public schools" for the purpose of California's first Blaine Amendment (Article IX, Section 8).

Woodland Hills Homeowners Organization v. Los Angeles Community College District, 266 Cal. Rptr. 767, 774 (Ct. App. 1990)
A California Court of Appeals upheld a community college's temporary lease of surplus land to a religious organization at fair market value under California's second Blaine Amendment (Article XVI, Section 5).

Board of Trustees v. Cory, 145 Cal. Rptr. 136, 139 (Ct. App. 1978)
Citing *Bowker*, a California Court of Appeals held that direct payment of federal funds to private medical schools violates the first of California's Blaine Amendments because it does not fit within the "incidental" or "indirect benefit exception," and provides funds to schools "not under the exclusive control of officers of the public schools."

ANALYSIS AND RECOMMENDATIONS

Tax credits are California's best option for school choice. Vouchers are problematic given California's very restrictive interpretation of its Blaine Amendments. That interpretation prevents any public body from the state down to the local school board from allowing any public money from any source whatsoever to go to a religious or private school. California courts have explicitly rejected the distinction between aiding students versus aiding schools.

Model Legislation: Great Schools Tax Credit Program, Family Education Tax Credit Program

COLORADO

YES VOUCHERS | YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship." COLORADO CONST. Art. II, § 4.

Blaine Amendments

"No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association." COLORADO CONST. Art. V, § 34.

"Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any 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 whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose." COLORADO CONST. Art. IX, § 7.

Education Articles

"The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state …." COLORADO CONST. Art. IX, § 2.

"The public school fund of the state shall, except as provided in this article IX, forever remain inviolate and intact and the interest and other income thereon, only, shall be expended in the maintenance of the schools of the state, and shall be distributed amongst the several counties and school districts of the state, in such manner as may be prescribed by law." COLORADO CONST. Art. IX, § 3.

"The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts." COLORADO CONST. Art. IX, § 15.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict and Interdistrict/mandatory
Colorado Revised Statutes Sections 22-36-101 to 22-36-106
Interdistrict/mandatory and Intradistrict/voluntary
Colorado Revised Statutes Sections 22-1-122

Charter Schools: Yes

Colorado Revised Statutes Sections 22-30.5-101 to 22-30.5-115

Private School Choice: No

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RELEVANT CASE LAW

Owens v. Colorado Congress of Parents, 92 P.3d 933 (Colo. 2004)

The Colorado Supreme Court held that a pilot voucher program violated the Colorado Constitution's "local control" provision (Article IX, Section 15) because it required school districts to pass a portion of their locally raised funds to nonpublic schools over whose instruction the districts had no control.

COLORADO

YES VOUCHERS

YES TAX CREDITS

continued from previous page

Americans United for Separation of Church & State Fund, Inc. v. State, 648 P.2d 1072 (Colo. 1982)

The Colorado Supreme Court upheld the Colorado higher education grant program against a challenge brought under one of its Blaine Amendments (Article IX, Section 7) because the program benefits students, not their schools, because it is available to private as well as public school students, and because it eliminates any danger of indirectly supporting religious missions by attaching statutory conditions on the use of the money.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Colorado. Although Colorado's Constitution contains a Compelled Support Clause and two Blaine Amendments, Colorado state courts have interpreted them narrowly. In an important 1982 case rejecting a Blaine Amendment challenge to Colorado's higher education grant program, the Colorado Supreme Court explicitly noted that such scholarships aid students, not the schools they happen to attend, religious or otherwise.

Future voucher legislation should note the Colorado Supreme Court's decision in *Owens* and fund the program exclusively through state rather than local revenues.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

CONNECTICUT

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"It being the right of all men to worship the Supreme Being, the Great Creator and Preserver of the Universe, and to render that worship in a mode consistent with the dictates of their consciences, no person shall by law be compelled to join or support, nor be classed or associated with, any congregation, church or religious association. No preference shall be given by law to any religious society or denomination in the state. Each shall have and enjoy the same and equal powers, rights and privileges, and may support and maintain the ministers or teachers of its society or denomination, and may build and repair houses for public worship." Connecticut Const. Art. VII.

Education Articles

"There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." Connecticut Const. Art. VIII., § 1.

"The fund, called the SCHOOL FUND, shall remain a perpetual fund, the interest of which shall be inviolably appropriated to the support and encouragement of the public schools throughout the state, and for the equal benefit of all the people thereof. The value and amount of said fund shall be ascertained in such manner as the general assembly may prescribe, published, and recorded in the comptroller's office; and no law shall ever be made, authorizing such fund to be diverted to any other use than the encouragement and support of public schools, among the several school societies, as justice and equity shall require." Connecticut Const. Art. VIII, § 4.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Interdistrict/mandatory
Connecticut General Statutes Sections 10-266aa
Intradistrict/voluntary
Connecticut General Statutes Sections 10-221e
Intradistrict/voluntary and Interdistrict/voluntary
Connecticut General Statutes Sections 10-226h

Charter Schools: Yes

Connecticut General Statutes Sections 10-66aa to 10-66gg

Private School Choice: No

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RELEVANT CASE LAW

Johnson v. Sanders, 319 F. Supp. 421 (D. Conn. 1970), *aff'd*, 403 U.S. 955 (1971)

A federal district court held that a Connecticut statute authorizing the state board of education to contract with operators of certain private nonprofit sectarian elementary and secondary schools for public purchase of secular educational services was unconstitutional because it excessively entangled the state with religion in violation of the Establishment Clause.

Board of Education v. State Board of Education, 709 A.2d 510 (Conn. 1998)

The Connecticut Supreme Court held that a law requiring transportation of private school students at public expense, even on days when the public schools were not

CONNECTICUT

YES VOUCHERS

YES TAX CREDITS

continued from previous page

in attendance, did not violate the Connecticut Constitution's Compelled Support Clause. It had the secular purpose of ensuring child safety and was for the benefit of the students riding the buses rather than the schools to which they were being transported.

Snyder v. Newtown, 161 A.2d 770, 775 (Conn. 1960)

The Connecticut Supreme Court held that transporting private school students using public money is constitutionally acceptable as long as money does not come from the public school fund because such transportation is for the health, safety and welfare of Connecticut citizens and only parents and children benefit.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Connecticut. They are consistent with the Connecticut Constitution and relevant Connecticut state court decisions.

The Connecticut Constitution contains no Blaine Amendment, and the Connecticut Supreme Court has twice ruled that transportation programs that include private school students benefit children, not schools. To avoid potential problems with Connecticut's education article (Article VIII, Section 4), voucher program funding should come from sources other than the state's public school fund.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

DELAWARE

NO VOUCHERS | YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"[Y]et no person shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his or her own free will and consent …." Delaware Const. Art I, § 1.

Blaine Amendment

"No portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school; provided, that all real or personal property used for school purposes, where the tuition is free, shall be exempt from taxation and assessment for public purposes." Delaware Const. Art X, § 3.

Education Articles

"The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, not physically or mentally disabled, shall attend the public school, unless educated by other means." Delaware Const. Art X, § 1.

"No part of the principal or income of the Public School Fund, now or hereafter existing, shall be used for any other purpose than the support of free public schools." Delaware Const. Art X, § 4.

"The General Assembly, notwithstanding any other provision of this Constitution, may provide by an Act of the General Assembly, passed with the concurrence of a majority of all the members elected to each House, for the transportation of students of nonpublic, nonprofit Elementary and High Schools." Delaware Const. Art X, § 5.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict/mandatory
14 Delaware Code Annotated 414
Interdistrict/mandatory
14 Delaware Code Annotated 401 to 413

Charter Schools: Yes

14 Delaware Code Annotated 501 to 516

Private School Choice: No

RELEVANT CASE LAW

State ex rel. Traub v. Brown, 172 A. 835 (Del. Super. Ct. 1934)

The Superior Court of Delaware held that transporting private school students at public expense would "help build up, strengthen and make successful" religious schools in violation of the state's Blaine Amendment.

Opinion of Justices, 216 A.2d 668 (Del. 1966)

The Justices of the Delaware Supreme Court opined in an advisory opinion that a bill for transporting private school students at public expense would violate the Delaware Constitution because even incidental aid violates the language of the state's Blaine Amendment.

ANALYSIS AND RECOMMENDATIONS

A tax credit program is Delaware's best option for school choice. The Delaware Constitution contains both a Compelled Support Clause and a Blaine Amendment. The restrictive interpretation of the latter by Delaware state courts makes a general voucher program problematic.

In 1934, a Delaware Superior Court ruled in *Traub v. Brown* that transporting private school students at public expense violated the state's Blaine Amendment. In a 1966 advisory opinion in response to a legislative busing proposal, the Delaware Supreme Court opined that the *Traub* decision was correct. Voters passed a constitutional amendment to overcome this restrictive interpretation of the state's Blaine Amendment, but it is likely that vouchers would require a similar amendment.

Model Legislation: Great Schools Tax Credit Program, Family Education Tax Credit Program

FLORIDA

NO VOUCHERS | YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Blaine Amendment

"No 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." FLORIDA CONST. Art. I, § 3.

Education Articles

"The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a 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 …." FLORIDA CONST. Art. IX, § 1 (a).

"The school board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein …." FLORIDA CONST. Art. IX, § 4(b).

"The income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools." FLORIDA CONST. Art. IX, § 6.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict/mandatory
Florida Statutes Section 1002.38
Interdistrict/voluntary
Florida Statutes Section 1002.31

Charter Schools: Yes

Florida Statutes Section 1002.33

Private School Choice: Yes

McKay Scholarships for Students With Disabilities
Florida Statutes Section 1002.39
Voluntary Pre-kindergarten Education Program
Florida Statutes Section 1002.53
Corporate Tax Credit Scholarships
Florida Statutes Section 220.187

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RELEVANT CASE LAW

Bush v. Holmes, 919 So. 2d 392 (Fla. 2006)
The Florida Supreme Court held that the state Constitution's education article (Article IX, § 1(a)) mandates the provision of education only through a "uniform" public school system. In an unprecedented ruling, the court held that the state may use public funds only for traditional public schools and may not provide additional educational opportunities outside the traditional pubic system.

Bush v. Holmes, 886 So. 2d 340 (Fla. 1st DCA 2004), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006)
The *en banc* Florida First District Court of Appeal held that Florida's publicly funded voucher program violated the state's Blaine Amendment.

Scavella v. School Board, 363 So. 2d 1095 (Fla. 1978)
The Florida Supreme Court held that a statute capping reimbursement expenses for districts educating special needs students at private schools did not violate the uniformity provision of the state Constitution's education article.

School Board v. State, 353 So. 2d 834 (Fla. 1977)
In one of its most searching analyses of the phrase "uniform system of free public schools," the Florida Supreme Court

FLORIDA

NO VOUCHERS | YES TAX CREDITS

continued from previous page

held that it does not require that each county's school board have the exact same number of board members.

Nohrr v. Brevard County Educational Facilities Authority, 247 So. 2d 304 (Fla. 1971)
The Florida Supreme Court held that providing tax-exempt revenue bond proceeds to public and private universities, including religious colleges, does not violate the U.S. or Florida constitutions. The bonds were issued for the secular purpose of expanding educational facilities, any aid to religious or sectarian organizations was incidental, and issuing bonds was not the same as expending public funds from the treasury.

Johnson v. Presbyterian Homes of Synod of Florida, Inc., 239 So. 2d 256, 261 (Fla. 1970)
The Florida Supreme Court held that a statute exempting from taxation church-run retirement homes was constitutional under Florida's Blaine Amendment because it had the secular purpose of improving care for the elderly and any benefit flowing to religious interests was incidental.

Southside Estates Baptist Church v. Board of Trustees, 115 So. 2d 697 (Fla. 1959)
The Florida Supreme Court held that a school board's policy of allowing religious groups to use school facilities for religious services during non-school hours provides only an incidental benefit to the religion itself and therefore does not violate Florida's Blaine Amendment.

Koerner v. Borck, 100 So. 2d 398 (Fla. 1958)
The Florida Supreme Court upheld a will that gave a parcel of land to a county for a park but required that religious groups be allowed to continue using an adjacent lake for baptismal purposes. The court held that county-funded improvements to the lake's docking area did not constitute aid to religious groups in violation of Florida's Blaine Amendment because the improvements benefited all users of the lake.

Fenske v. Coddington, 57 So. 2d 452 (Fla. 1952)
The Florida Supreme Court held that having a chapel for religious worship in a public school did not violate the Florida Blaine Amendment because the chapel was maintained with funds from a private trust.

ANALYSIS AND RECOMMENDATIONS

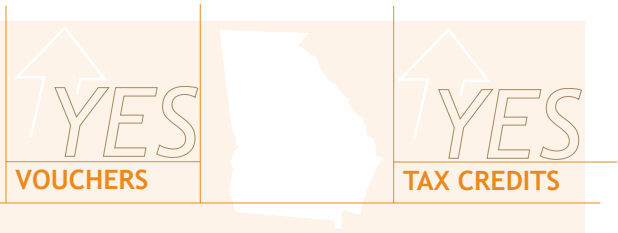
The status of school choice in Florida is unclear. Unfortunately, in an unprecedented decision, the Florida Supreme Court struck down the state's groundbreaking Opportunity Scholarships voucher program for children in chronically failing public schools. The court declared that the program violated the state Constitution's education article, specifically the requirement to provide a "uniform" public education. Contrary to state supreme courts in Wisconsin and Ohio, the Florida court decided that the Legislature may not provide educational options beyond those in the public schools. Still, the court limited its decision to Opportunity Scholarships only, leaving untouched Florida's other school choice programs.

Earlier in the same case, a Florida appellate court struck down Opportunity Scholarships under the state's Blaine Amendment. That ruling ran counter to years of Florida Supreme Court rulings on the Blaine Amendment permitting "incidental" benefits to religious organizations as the by-product of programs designed to advance the general welfare. The Florida Supreme Court did not review that issue, and the validity of the appellate court's holding is unclear under Florida law.

Despite the uncertainties surrounding vouchers, tax credit programs are completely consistent with the Florida Constitution, even as interpreted by *Holmes*, because they involve private rather than public funds.

Model Legislation: Great Schools Tax Credit Program, Family Education Tax Credit Program

GEORGIA



CONSTITUTIONAL PROVISIONS

Blaine Amendment

"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." Georgia Const. Art. I, § II, Para. VII.

Education Articles

Pursuant to laws now or hereafter enacted by the General Assembly, public funds may be expended for any of the following purposes: (1) To provide grants, scholarships, loans, or other assistance to students and to parents of students for educational purposes." Georgia Const. Art. VIII, § VII, Para. I.

"Authority is granted to county and area boards of education to establish and maintain public schools within their limits …. No independent school system shall hereafter be established." Georgia Const. Art. VIII, § V, Para. I.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict/mandatory
Official Code of Georgia Annotated Section 20-14-41
Intradistrict/mandatory and Interdistrict/mandatory
Official Code of Georgia Annotated Section 20-2-294 and
Interdistrict/voluntary
Official Code of Georgia Annotated Section 20-2-293

Charter Schools: Yes

Official Code of Georgia Annotated Sections 20-2-2060 to 20-2-2071

Private School Choice: No

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RELEVANT CASE LAW

Taetle v. Atlanta Independent School System, 625 S.E.2d 770, 771 (Ga. 2006)

In refusing to void a lease agreement between a local school district and a church, the Georgia Supreme Court held that "[a] political subdivision of this state cannot give money to a religious institution in such a way as to promote the sectarian handiwork of the institution. But that is not to say that a political subdivision of the state cannot enter into an arms-length, commercial agreement with a sectarian institution to accomplish a non-sectarian purpose."

Richter v. Savannah, 127 S.E. 739 (Ga. 1925)

With no analysis, the Georgia Supreme Court reinstated a taxpayer suit seeking to stop the city of Savannah from paying for the services of a Catholic hospital.

Bennett v. La Grange, 112 S.E. 482 (Ga. 1922)

The Georgia Supreme Court held that a city's contract with a Christian service organization to provide care for the city's poor violated the precursor to Georgia's current Blaine Amendment because the organization could not separate its religious and secular missions.

2000 Ga. AG LEXIS 11 (2000 Opinion Attorney Gen. Ga. No. 2000-5)

The Georgia Attorney General opined that the

GEORGIA

YES VOUCHERS

YES TAX CREDITS

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federally-funded Georgia Reading Challenge Program grants could not be made directly to churches and other religious institutions for the provision of after-school care, opportunities to improve student reading skills, and enhancement of student interest in reading without violating Georgia's Blaine Amendment.

1988 Ga. AG LEXIS 35 (1988 Opinion Attorney General Ga. 126)

In an unofficial opinion expressing the views of the author and not the Attorney General's Office, the senior assistant attorney general for Georgia opined that allowing a religious organization to generate income through use of school property under a lease arrangement at less than the fair market rental rate would violate the indirect aid language of Georgia's Blaine Amendment.

1988 Ga. AG LEXIS 11 (1988 Opinion Attorney General Ga. 94)

In an unofficial opinion expressing the views of the author and not the Attorney General's Office, the senior assistant attorney general for Georgia opined that a county school system can contract with a religious organization to provide after-school programs for its students if the arrangement does not involve a flow of public or school funds from the school system to the religious organization.

1972 Ga. AG LEXIS 146 (1972 Opinion Attorney Gen. Ga. 266)

The Georgia Attorney General opined that legislation providing $400 per academic year to Georgia students attending religious institutions of higher learning that were not primarily for religious training is consistent with Georgia's Blaine Amendment.

1969 Opinion Attorney Gen. No. 69-125 (copy available from the Institute for Justice)

The Georgia Attorney General opined that the Georgia Supreme Court would consider unconstitutional a contract for goods or services between a public elementary or secondary school and a private religious school.

1945-47 Opinion Attorney General p. 222 (copy available from the Institute for Justice)

The Georgia Attorney General opined that a county board of education may not expend public school funds to transport children to schools other than those operated by the public school system.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Georgia. The Georgia Constitution contains a Blaine Amendment, but it also contains an education provision (Article VIII, Section 7, paragraph 1) that explicitly authorizes the General Assembly to provide grants and scholarships to students and parents for educational purposes, such as those of voucher programs.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

HAWAII

NO VOUCHERS | YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Blaine Amendment

"The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control… nor shall public funds be appropriated for the support or benefit of any sectarian or nonsectarian private educational institution, except that proceeds of special purpose revenue bonds authorized or issued under section 12 of Article VII may be appropriated to finance or assist: 1. Not-for-profit corporations that provide early childhood education and care facilities serving the general public; and 2. Not-for-profit private nonsectarian and sectarian elementary schools, secondary schools, colleges and universities." HAWAII CONST. Art. X, § 1.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice:	**Yes**

Hawaii Revised Statutes Section 302A-1143

Charter Schools:	**Yes**

Hawaii Revised Statutes Sections 302A-1181 to 302A-1188

Private School Choice:	**No**

RELEVANT CASE LAW

Spears v. Honda, 449 P.2d 130 (Haw. 1969)

The Hawaii Supreme Court held that a statute authorizing the transportation of private school students at public expense violated the state's Blaine Amendment.

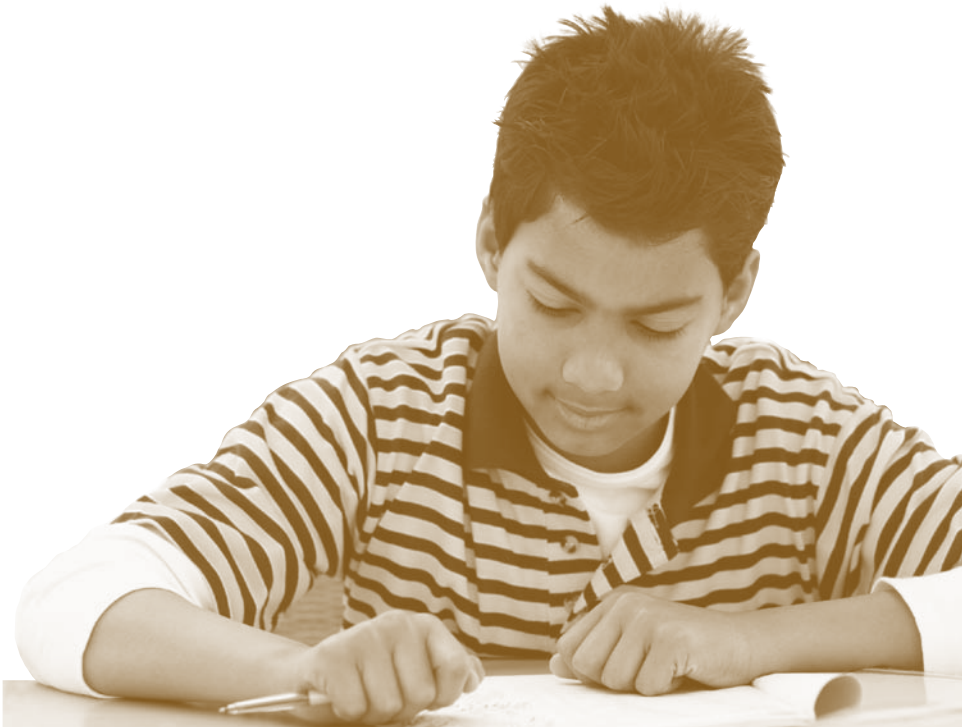
Opinion Attorney General Hawaii No. 03-01 (2003) (copy available from the Institute for Justice)

Hawaii's Attorney General concluded that a publicly-funded Hawaii school voucher program would violate Hawaii's Blaine Amendment, given the Hawaii Supreme Court's broad interpretation of that provision.

ANALYSIS AND RECOMMENDATIONS

A tax credit program is the best school choice option for Hawaii given the history and restrictive interpretation of the state's Blaine Amendment.

Model Legislation: Great Schools Tax Credit Program, Family Education Tax Credit Program



IDAHO

NO VOUCHERS

YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent …." IDAHO CONST. Art. I, § 4.

Blaine Amendment

"Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose; provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, leases, or other transactions." IDAHO CONST. Art. IX, § 5.

Education Articles

"The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools." IDAHO CONST. Art. IX, § 1.

"No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian or religious tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color. No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article, nor shall any teacher or any district receive any of the public school moneys in which the schools have not been taught in accordance with the provisions of this article." IDAHO CONST. Art. IX, § 6.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict/mandatory
IDAPA 08.02.03
Intradistrict/mandatory and interdistrict/voluntary
IC 33-1401 to 33-1408

Charter Schools: Yes

IC 33-5201 to 33-5212, IDAPA 08.02.4

Private School Choice: No

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RELEVANT CASE LAW

Doolittle v. Meridian Joint School District, 919 P.2d 334 (Idaho 1996)

The Idaho Supreme Court held that although Idaho's Blaine Amendment prohibits paying for a special education student's placement in a religious school with public funds, the federal special education grant program (IDEA) preempts the state law and requires parents to be reimbursed when a "free and appropriate education" is not offered in public schools as required by the IDEA.

IDAHO

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Epeldi v. Engelking, 488 P.2d 860 (Idaho 1971)
The Idaho Supreme Court held that the state could not subsidize the transportation of private school students without violating Idaho's Blaine Amendment.

1997 Ida. AG LEXIS 2 (1997 Opinion Attorney General Idaho 13)
Idaho's Attorney General concluded that a bill to provide tax credits to parents who do not use public schools would likely be constitutional under Idaho's Blaine Amendment because "[t]he credit is not dependent upon payment of money to a sectarian school, and any benefits to parochial schools are tenuous at best."

He distinguished an earlier Attorney General's opinion by noting that under the tax credit proposal "there is no requirement that the taxpayer pay any money to a private or church affiliated school before being able to claim the credit. The benefit flows to the taxpayer/parent, not to the school." The credit provides a benefit to parents for the stated purpose of relieving the burden on the state's public school system.

1989 Ida. AG LEXIS 6, 10 (1989 Opinion Attorney General 42)
Idaho's Attorney General opined that the Idaho College Work Study Program, which uses public funds to pay for students' on-campus jobs at public or private universities, violates Idaho's Blaine Amendment because it would aid "postsecondary institutions controlled by churches, sectarian or religious denominations."

1995 Idaho Attorney General Annotated Report 74 (copy available from the Institute for Justice)
An Attorney General's Guideline concluded that a tax credit for tuition paid to non-public schools would be a "grant or donation of…money" in violation of Idaho's Blaine Amendment.

ANALYSIS AND RECOMMENDATIONS

Tax credit programs are a viable school choice option for Idaho. Because of the restrictive interpretation of Idaho's Blaine Amendment, the tax credit should be available to parents regardless of whether they have already paid funds to a private or parochial school. In that way, it will be clear that the credit is a refund of money for government services not used and that it is a benefit to the parent, not the school, as outlined by the Attorney General's 1997 opinion.

The Idaho Supreme Court is unlikely to uphold a voucher program that includes religious schools given that the court struck down a statute allowing transportation of private school students at public expense as a violation of the state's Blaine Amendment.

Model Legislation: Great Schools Tax Credit Program, Family Education Tax Credit Program

ILLINOIS

YES VOUCHERS

YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"No person shall be required to attend or support any ministry or place of worship against his consent ...." ILLINOIS CONST. Art. I, § 3.

Blaine Amendment

"Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay 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; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose." ILLINOIS CONST. Art. X, § 3.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: **Yes**

105 Illinois Compiled Statutes 5/10-21.3a

Charter Schools: **Yes**

105 Illinois Compiled Statutes 5/27a-1 to 5/27a-13

Private School Choice: **Yes**

Tax Credits for Educational Expenses
35 Illinois Compiled Statutes 5/201m

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RELEVANT CASE LAW

Board of Education v. Bakalis, 299 N.E.2d 737 (Ill. 1973)

The Illinois Supreme Court held that a statute requiring public school buses to transport private school students did not violate Illinois' Blaine Amendment because it was primarily a health-and-safety measure for the benefit of all students and any aid to religious schools chosen by families was incidental.

People ex rel. Klinger v. Howlett, 305 N.E.2d 129 (Ill. 1973)

The Illinois Supreme Court held that the state cannot provide tuition grants to private elementary schools with no restrictions on the use of public funds because it could lead to public subsidization of religious services. Such subsidization would violate Illinois' Blaine Amendment and the federal Establishment Clause, which the court held impose identical restrictions on the establishment of official religions. In addition, the court held that the state could not treat private school students

ILLINOIS

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and public school students differently with respect to textbooks and nursing services.

Cecrle v. Illinois Educational Facilities Authority, 288 N.E.2d 399 (Ill. 1972)
The Illinois Supreme Court held that the state could make tax-exempt bonds available to private, religious institutions without violating the federal Establishment Clause or the Illinois Constitution.

Trost v. Ketteler Manual Training School, 118 N.E. 743 (Ill. 1918)
The Illinois Supreme Court held that the state can use public funds to pay for child care services at religious institutions because the children are not required to attend religious services and the schools receive no reimbursement for expenses associated with religious instruction.

Nichols v. School Directors, 93 Ill. 61 (1879)
The Illinois Supreme Court held that allowing public school buildings to be used for religious ceremonies when the schools are not in session does not compel a person to support a religion in violation of Illinois' Compelled Support Clause.

Toney v. Bower, 744 N.E.2d 351 (Ill. App. 4th Dist. 2001), *appeal denied*, 195 Ill. 2d 573 (Ill. 2001); and *Griffith v. Bower*, 747 N.E.2d 423 (Ill. App. 5th Dist. 2001), *appeal denied*, 258 Ill. Dec. 94, 755 N.E.2d 477 (Ill. 2001).
Two Illinois courts of appeals held that Illinois' tax credit for educational expenses is constitutional because it has a clearly secular legislative purpose of ensuring a well-educated citizenry and relieving public expense, has the primary effect of effectuating those purposes, and involves no more government entanglement with religion than many other state tax laws. The program is constitutional under both Illinois' Blaine Amendment and the federal Establishment Clause. Illinois courts interpret the state Blaine Amendment consistently with federal Establishment Clause case law.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Illinois. In the most recent cases, the Institute for Justice successfully defended Illinois' tax credit program from challenges under both the Establishment Clause and Illinois' religion clauses. Two state appellate courts upheld the program in *Toney* and *Griffith*, and the Illinois Supreme Court let those decisions stand without reviewing them.

The Illinois Constitution contains both a Compelled Support Clause and a Blaine Amendment, but the Illinois Supreme Court has only found direct, unrestricted payments of public funds to religious schools unconstitutional. It approved the transportation of private school students at public expense and the use of public funds to pay for childcare services at religious institutions. In *Board of Education v. Bakalis* and *Trost v. Ketteler Manual Training School*, the Illinois Supreme Court permitted some public support for children attending religious schools, which suggests the court understands that such aid supports children, not schools.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

INDIANA

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"[A]nd no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent." INDIANA CONST. Art. 1, § 4.

Blaine Amendment

"No money shall be drawn from the treasury, for the benefit of any religious or theological institution." INDIANA CONST. Art. 1, § 6.

Education Article

"[I]t shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." INDIANA CONST. Art. 8, § 1.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict/mandatory
Indiana Code Annotated Sections 20-3.1-4-1 to 20-3.1-4-2
Interdistrict/voluntary
Indiana Code Annotated Sections 20-8.1-6.1-2 to 20-3.1-6.1-3

Charter Schools: Yes

Indiana Code Annotated Section 20-24-1 to 20-24-11

Private School Choice: No

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RELEVANT CASE LAW

Embry v. O'Bannon, 798 N.E.2d 157, 166-167 (Ind. 2003)

The Indiana Supreme Court upheld dual-enrollment programs that allow private school students to also enroll in public schools and to receive publicly provided services in their private schools. The court said the programs do not violate either Indiana's Blaine Amendment or its Compelled Support Clause because they "do not confer substantial benefits upon any religious or theological institution, nor directly fund activities of a religious nature." The court went on to note that "'incidental benefits' to religious sects or societies do not invalidate an otherwise constitutional statutory program plainly intended and formulated to serve a public purpose"—in this case, education.

State ex rel. Johnson v. Boyd, 28 N.E.2d 256 (Ind. 1940)

The Indiana Supreme Court held that neither Indiana's Compelled Support Clause nor Indiana's Blaine Amendment were violated when a Catholic church closed its parish school and donated the old school buildings

INDIANA

YES VOUCHERS

YES TAX CREDITS

continued from previous page

to the state, which subsequently used the building as a public school and employed priests as teachers Rejecting the contention that the church or religion were benefited by the school board's retention of the priests, the court noted that Indiana's religion clauses are concerned with donations to religious schools that further their religious missions, not incidental benefits that may flow to a religious institution as a result of private choices – in this case the board's decision that the priests were qualified to teach the material provided by the public school curriculum.

1967 Ind. AG LEXIS 68 (1967 Opinion Attorney General Ind. 9); *see also 1980 Ind. AG LEXIS 12* (1980 Opinion Attorney General Ind. 96) (school board cannot deny free transportation to parochial students living along established bus routes but attending schools outside the school district)

The Indiana Attorney General wrote that providing free bus transportation for parochial school students on the same basis as public school students does not violate Indiana's Blaine Amendment because any benefit to parochial schools is incidental to the protection and education of children.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Indiana. The reasoning of the Indiana Supreme Court's 2003 decision upholding dual-enrollment programs provides strong support for school choice. Specifically, the opinion suggests that a state program plainly intended to serve a public purpose like educating its citizens' children would be upheld regardless of whether it indirectly benefited a religious organization.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

IOWA

YES VOUCHERS

YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"[N]or shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry." Iowa Const. Art. I § 3.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: **Yes**

Iowa Code Section 282.18

Charter Schools: **Yes**

Iowa Code Section 256F

Private School Choice: **Yes**

Tax Credits for Educational Expenses
Iowa Code Section 422.9, 12

Educational Opportunities Act (Individual Tax Credit Scholarships)
Iowa Code Section 422.11M

RELEVANT CASE LAW

Luthens v. Bair, 788 F. Supp. 1032 (S.D. Iowa 1992)
A federal district court in Iowa held that a state tax deduction for school expenses, including private school tuition, does not violate the Establishment Clause because it is available to parents regardless of whether their child attends a public, private or religious school, neither advances nor inhibits religion, and does not entangle the state with religion. Additionally, the court held that the benefits stemming from the deduction go to the parents of the children, not the schools they choose.

Rudd v. Ray, 248 N.W.2d 125 (Iowa 1976)
The Iowa Supreme Court held that a law providing for chaplains and religious facilities at state penitentiaries does not violate Iowa's Compelled Support Clause or the Free Exercise Clause of the federal Constitution because prisoners retain the ability to reasonably exercise their faith.

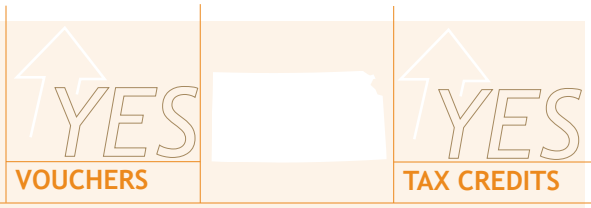
Knowlton v. Baumhover, 166 N.W. 202 (Iowa 1918)
The Iowa Supreme Court held that although it was called a "public school," educational instruction given in a church building by a Catholic priest constitutes a "sectarian school" and Iowa's Compelled Support Clause prohibits the local school board from supporting such a school with public funds.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Iowa. Iowa's Constitution contains a Compelled Support Clause, which the Iowa Supreme Court has interpreted as prohibiting direct payment of public funds to religious schools. In general, however, the court has noted that the Compelled Support Clause seeks to achieve the same end as the federal Establishment Clause and should be interpreted in line with federal Establishment Clause precedent. Therefore, a religiously neutral voucher program of true private choice that gives money directly to parents is likely to be upheld in accordance with the U.S. Supreme Court's decision in *Zelman v. Simmons-Harris*.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

KANSAS



CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"[N]or shall any person be compelled to attend or support any form of worship …." KANSAS CONST. B. OF R. § 7.

Blaine Amendment

"No religious sect or sects shall control any part of the public educational funds." KANSAS CONST. Art. 6, § 6(c).

Education Article

"Local public schools under the general supervision of the state board of education shall be maintained, developed and operated by locally elected boards. When authorized by law, such boards may make and carry out agreements for cooperative operation and administration of educational programs under the general supervision of the state board of education, but such agreements shall be subject to limitation, change or termination by the legislature." KANSAS CONST. Art. 6, § 5.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice:	**Yes**

Kansas Statutes Annotated Section 72-8233

Charter Schools:	**Yes**

Kansas Statutes Annotated Sections 72-1903 to 72-1911

Private School Choice:	**No**

RELEVANT CASE LAW

Americans United for Separation of Church & State v. Bubb, 379 F. Supp. 872 (D. Kan. 1974)

A federal district court held that a state statute providing tuition to students attending qualified private universities, where all the qualified schools in the state were church-related, had the valid secular purpose of promoting higher education, did not primarily advance religion because the colleges were not overtly sectarian, and did not overly entangle the state with religion.

Atchison, T. & S. F. R. Co. v. Atchison, 28 P. 1000 (Kan. 1892)

The Kansas Supreme Court held that the City of Atchison had no power to impose a property tax on its citizens to aid private, sectarian schools or to promote private interests and enterprises.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Kansas. The Kansas Constitution contains a Compelled Support Clause and a Blaine Amendment but neither has received much judicial attention. Relative to other states' variations, the scope of the Kansas Blaine Amendment is very limited; it only prevents religious sects from controlling public educational funds. As vouchers can be funded from any number of revenue sources and neither vouchers nor tax benefit programs give public money directly to religious schools, there is no possibility for religious control of the public education fund as a result of school choice programs. Additionally, Kansas' case law demonstrates a strong tendency for adhering to federal precedent on Establishment Clause issues. In *Zelman v. Simmons-Harris*, the U.S. Supreme Court upheld school choice programs under the federal Constitution.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

KENTUCKY

NO* VOUCHERS | YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"[N]or shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion ...." KENTUCKY CONST. § 5.

Blaine Amendment

"No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school." KENTUCKY CONST. § 189.

Education Articles

"No sum shall be raised or collected for education other than in common schools until the question of taxation is submitted to the legal voters, and the majority of the votes cast at said election shall be in favor of such taxation: Provided, The tax now imposed for educational purposes, and for the endowment and maintenance of the Agricultural and Mechanical College, shall remain until changed by law." KENTUCKY CONST. § 184.

"All funds accruing to the school fund shall be used for the maintenance of the public schools of the Commonwealth, and for no other purpose, and the General Assembly shall by general law prescribe the manner of the distribution of the public school fund among the school districts and its use for public school purposes." KENTUCKY CONST. § 186.

Other Relevant Provisions

"Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax ...." KENTUCKY CONST. § 171.

"Every act enacted by the General Assembly, and every ordinance and resolution passed by any county, city, town or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose." KENTUCKY CONST. § 180.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice:	Yes

703 Kentucky Administrative Regulations 5:120

Charter Schools:	No
Private School Choice:	No

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RELEVANT CASE LAW

Neal v. Fiscal Court, Jefferson County, 986 S.W.2d 907 (Ky. 1999)

The Kentucky Supreme Court held that the Jefferson County fiscal court's plan to allocate funds for the transportation of private elementary school students did not violate Kentucky's Blaine Amendment. Distinguishing the earlier *Brady* decision, the court noted that funds were paid to the transportation system administered by the board of education, not directly to individual schools, and benefits flowed "toward the safety and welfare of elementary age school children and not into the accounts of non-public schools."

KENTUCKY

NO* VOUCHERS | YES TAX CREDITS

continued from previous page

Fiscal Court of Jefferson County v. Brady, 885 S.W.2d 681 (Ky. 1994)
The Kentucky Supreme Court held that the Jefferson County fiscal court's direct payment of county tax revenues to private schools for school transportation subsidies violated the Kentucky Blaine Amendment.

Fannin v. Williams, 655 S.W.2d 480 (Ky. 1983)
The Kentucky Supreme Court held that a Kentucky statute that provided state-supplied textbooks to children in private schools violated the Kentucky Blaine Amendment.

Butler v. United Cerebral Palsy of Northern Kentucky, Inc., 352 S.W.2d 203 (Ky. 1961)
The Kentucky Court of Appeals, which was then the state's highest court, held that a statute authorizing public aid to private schools for exceptional children did not violate, among other constitutional provisions, Kentucky's Blaine Amendment because the funds were for children's "welfare" rather than "education."

Rawlings v. Butler, 290 S.W.2d 801 (Ky. 1956)
The Kentucky Court of Appeals held that (1) a county school board's rental of school buildings from a church, where the church did not attempt to influence or control the schools, did not violate the Kentucky Blaine Amendment; and (2) county fiscal courts may contribute tax funds to subsidize the transportation of private school students without violating the Kentucky Constitution, but may not use tax funds raised for public school purposes for the transportation of private school students.

Hodgkin v. Board for Louisville & Jefferson County Children's Home, 242 S.W.2d 1008 (Ky. 1951)
The state's highest court held that a shelter maintained by the city of Louisville and Jefferson County did not constitute a "common school" and was therefore not entitled to receive funds from the Common School Fund. However, the court specifically noted that nothing in the Kentucky Constitution prevented the state from funding such an institution through other sources of public money.

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KENTUCKY

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Sherrard v. Jefferson County Board of Education, 171 S.W.2d 963 (Ky. 1942)

The Kentucky Court of Appeals held that the portion of a Kentucky statute requiring that students attending private school be given the same transportation rights as students of public schools violated Kentucky's Blaine Amendment.

Pollitt v. Lewis, 108 S.W.2d (Ky. 1937)

The Kentucky Court of Appeals held that a statute purporting to give a private junior college organization the power to levy property taxes without submitting the question to the electorate violated Section 184, one of the Kentucky Constitution's education articles. The junior college was not a "public school" within the meaning of Section 184, and the statute contained no provision for submitting the proposed tax to the voters.

Williams v. Board of Trustees of Stanton Common School District, 191 S.W. 507 (Ky. 1917)

The Kentucky Court of Appeals ruled that an arrangement between a county board of education and a religious college, under which the college was paid tuition fees and building maintenance fees for the education of county high school students out of public school funds, violated Kentucky's Blaine Amendment.

Opinion of the Attorney General 83-184 (Ky. AG 1983)

The Kentucky Attorney General opined that parents of a disabled child are not entitled to reimbursement from a school district for the cost of a private school education until they demand and are refused accommodation by the local school district.

Opinion of the Attorney General 83-247 (Ky. AG 1982)

The Kentucky Attorney General concluded that parochial school students could not ride on public school buses even when they too were being transported to the local public school: "[I]f school district money in any respect and in any amount is used to transport nonpublic school children the Kentucky Constitution would be violated."

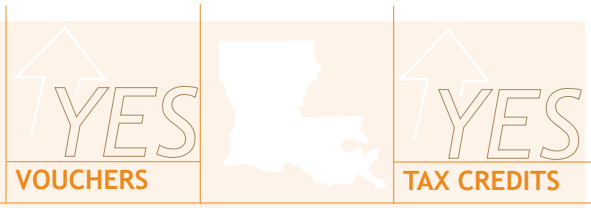
ANALYSIS AND RECOMMENDATIONS

Tax credit programs are a viable school choice option in Kentucky. The restrictive language of Kentucky's Constitution with respect to education funding and the more restrictive interpretation of Kentucky's state religion clauses make instituting a general voucher program difficult, if not impossible.

*The education funding provision, Section 184, appears to foreclose a general voucher option because it requires that all funds raised for educational purposes be spent on public schools, unless the voters approve the expenditure by referendum. *Butler*, however, may create a limited exception for programs directed to special education students. The funding for such a program should explicitly come from a source other than the "common school fund," and the money should be allotted to parents rather than schools. Most importantly, the program's purpose should be couched in language other than "education," such as child "safety" (the language of *Neal*) and child "welfare" (the language of *Butler*).

Model Legislation: Special Needs Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

LOUISIANA



CONSTITUTIONAL PROVISIONS

Religion Provision

"No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof." LA. CONST. Art. I, § 8..[1]

Education Article

"The Legislature shall provide for the education of the people of the state and shall establish and maintain a public education system." LA. CONST. Art. VIII, § 1.

1 Louisiana amended its Constitution in 1973 to delete two Blaine Amendments that dated to 1879.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Interdistrict/voluntary
Louisiana Revised Statutes Annotated Section 17:105

Charter Schools: Yes

Louisiana Revised Statutes Annotated Sections 17.3971 through 17.4001

Private School Choice: No

RELEVANT CASE LAW

Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930)

The U.S. Supreme Court held that students and the state were the beneficiaries under a program providing textbooks to parochial school students, not the school or the religious denomination with which the school is affiliated.

Helms v. Picard, 151 F.3d 347 (5th Cir. 1998)

The 5th U.S. Circuit Court of Appeals examined only federal Establishment Clause precedent and held that Louisiana's special education program did not offend the Establishment Clause because (1) the statute's purpose of improving educational opportunity for disabled students was secular, and (2) the statute did not have the effect of advancing religion because it provides no incentive for parents to select religious institutions.

Seegers v. Parker, 241 So. 2d 213 (La. 1970) (result overturned by subsequent constitutional amendment)

The Louisiana Supreme Court held that spending tax funds for secular educational services from teachers employed by private schools violated three provisions of the Louisiana Constitution: the prohibition against the enactment of any law respecting an establishment of religion and two Blaine Amendments subsequently repealed in 1973.

Borden v. Louisiana State Board of Education, 123 So. 655 (La. 1929)

Despite the presence of Blaine Amendments in the state Constitution at the time of its decision, the Louisiana Supreme Court upheld the constitutionality of a program in which public funds were used to purchase, among other things, textbooks for parochial schools. The court explicitly accepted the argument that the primary beneficiaries of the aid were the children rather than the schools they attend.

ANALYSIS AND RECOMMENDATIONS

The Louisiana Constitution now contains parallel language to the federal Constitution's religion clauses, and both tax credit and voucher programs are consistent with Louisiana's current Constitution. In *Seegers*, the Louisiana Supreme Court specifically noted: "The great similarity of the establishment clause of our Constitution and that of the United States Constitution allows us to use the United States Supreme Court interpretations of the federal clause as an aid for interpreting our own." Given that the U.S. Supreme Court's ruling in *Zelman* upheld school vouchers under the federal Establishment Clause, it is likely that Louisiana's Supreme Court would follow that decision.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

MAINE

YES VOUCHERS

YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Education Articles

"A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object, the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools; and it shall further be their duty to encourage and suitably endow, from time to time, as the circumstances of the people may authorize, all academies, colleges and seminaries of learning within the State; provided, that no donation, grant or endowment shall at any time be made by the Legislature to any literary institution now established, or which may hereafter be established, unless, at the time of making such endowment, the Legislature of the State shall have the right to grant any further powers to alter, limit or restrain any of the powers vested in any such literary institution, as shall be judged necessary to promote the best interests thereof." MAINE CONST. Art. VIII, Pt. 1, § 1.

"For the purpose of assisting the youth of Maine to achieve the required levels of learning and to develop their intellectual and mental capacities, the Legislature, by proper enactment, may authorize the credit of the State to be loaned to secure funds for loans to Maine students attending institutions of higher education, wherever situated, and to parents of these students. Funds shall be obtained by the issuance of state bonds, when authorized by the Governor, but the amount of bonds issued and outstanding shall not at one time exceed in the aggregate $4,000,000. Funds loaned shall be on such terms and conditions as the Legislature shall authorize." MAINE CONST. Art. VIII, Pt. 1, § 2.

"The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act." MAINE CONST. Art. VIII, Pt. 2, § 1.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Maine Revised Statutes Annotated Title 20-A, Sections 5203-5205

Charter Schools: No

Private School Choice: Yes

Town Tuitioning Program (excludes religious schools)

Maine Revised Statutes Annotated Title 20-A, Sections 2915-2955, 5203-5204, 5804, 5806

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RELEVANT CASE LAW

Eulitt v. Maine Department of Education, 386 F.3d 344 (1st Cir. 2004)

The 1st U.S. Circuit Court of Appeals held that Maine's law excluding parents who choose religious schools from the state's "tuitioning" school choice system was still constitutional after *Zelman*.

Strout v. Commissioner, Maine Department of Education, 178 F.3d 57 (1st Cir. 1999)

The 1st U.S. Circuit Court of Appeals upheld Maine's law excluding parents who choose religious schools from the state's "tuitioning" school choice system.

MAINE

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Anderson v. Town of Durham, 895 A.2d 944 (Me. 2006)
The Maine Supreme Court upheld Maine's discriminatory tuitioning law as a valid exercise of state power, even though the original justification for that law—complying with the federal Establishment Clause—was rejected by the U.S. Supreme Court in *Zelman*.

Bagley v. Raymond School Department, 728 A.2d 127 (Me. 1999)
Prior to *Zelman*, the Maine Supreme Court held that denying tuition payments to parents in towns without a public high school who sent their children to religious schools did not violate the Free Exercise Clause of the First Amendment and actually was required to avoid violation of the First Amendment's Establishment Clause.

School Committee of York v. York, 626 A.2d 935 (Me. 1993)
The Maine Supreme Court held that the Legislature does not have exclusive control over education; municipalities retain some authority over education policy.

Opinion of Justices, 261 A.2d 58 (Me. 1970)
The justices of the Maine Supreme Court opined that when the state buys secular educational services from religious schools, it subsidizes the schools in violation of the First Amendment and Maine's education articles.

ANALYSIS AND RECOMMENDATIONS

Tax credit and voucher programs are school choice options for Maine. The Maine Constitution contains no prohibitions on public funding of parental choice programs and Maine already has one of the nation's oldest and most successful voucher programs – its "tuitioning" system. For nearly a century, parents in tuitioning towns were free to choose religious schools as well as public or private non-religious schools. In the early 1980s, Maine passed a law excluding parents who choose religious schools from the tuitioning program in the mistaken belief that it had to do so to comply with the federal Establishment Clause. Nonetheless, the Legislature faces no constitutional hurdle to removing its discriminatory ban on tuition payments for tuitioning students attending religious schools—or to offering broader school choice options to more Maine families.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

MARYLAND

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"[N]or ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry …." Maryland Decl. of Rights Art. 36.

Education Articles

"The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance." Maryland Const. Art. VIII, § 1.

"The School Fund of the State shall be kept inviolate, and appropriated only to the purposes of Education." Maryland Const. Art. VIII, § 3.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice:	No
Charter Schools:	Yes

Maryland Code Annotated, Education Sections 9-101 to 9-110

Private School Choice:	No

RELEVANT CASE LAW

Horace Mann League, Inc. v. Board of Public Works, 220 A.2d 51 (Md. 1966)

In upholding the constitutionality of state grants to colleges for academic buildings, the Maryland Court of Appeals, Maryland's highest court, held that "[t]hus it is seen that grants to educational institutions at a level where the state has not attempted to provide universal educational facilities for its citizens have never, in Maryland, been held to be impermissible under Article 36, even though the institutions may be under the control of a religious order."

Johns Hopkins University v. Williams, 86 A.2d 892 (Md. 1952)

Upholding a loan issued by the state to a private university against a challenge brought under Article III, Section 34, which prohibits the state from securing private debts, the Maryland Court of Appeals held "[t]here is no prohibition in the Constitution against making appropriations to private institutions, provided the purpose is public, or semi-public, and thousands and thousands of dollars are appropriated out of the annual receipts every year."

Board of Education v. Wheat, 199 A. 628 (Md. 1938), *see also Adams v. County Commissioners of St. Mary's County*, 26 A.2d 377 (Md. 1942)

The Maryland Court of Appeals held that using public money to provide transportation for children attending private or parochial schools does not violate Maryland's Compelled Support Clause because religious institutions would be aided only incidentally as the by-product of proper legislative action to secure the education of children.

St. Mary's Industrial School for Boys v. Brown, 45 Md. 310 (Md. 1876)

A Maryland Court of Appeals held that although the state could not appropriate money to an institution not under state control, it could contract with private and religious institutions for the care, training and education of state wards.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Maryland. The Maryland Constitution does not contain a Blaine Amendment and Maryland courts have a long tradition of reading its Compelled Support Clause narrowly. The Maryland Court of Appeals has upheld the constitutionality of transporting private school students at public expense and of contracting with religious institutions for the education of state wards. In more recent decisions, the court has noted that even direct grants to private educational institutions are acceptable when the state has not attempted to provide universal education at that level. Vouchers, which provide money directly to students and parents and only incidentally benefit the schools they choose to attend, are therefore likely to survive constitutional scrutiny.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

MASSACHUSETTS

NO VOUCHERS

NO TAX CREDITS

CONSTITUTIONAL PROVISIONS

Blaine Amendment

"No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both … and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society. Nothing herein contained shall be construed to prevent the Commonwealth from making grants-in-aid to private higher educational institution or to students or parents or guardians of students attending such institutions." MASSACHUSETTS CONST. Amend. Art. XVIII, § 2.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict/mandatory
Massachusetts Annotated Laws Chapter 71, Section 37D
Interdistrict/voluntary
Massachusetts Annotated Laws Chapter 76, Sections 12, 12A, 12B, 12C

Charter Schools: Yes

Massachusetts Annotated Laws Chapter 71, Section 89

Private School Choice: No

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RELEVANT CASE LAW

Wirzburger v. Galvin, 412 F.3d 271 (1st Cir. 2005)

The 1st U.S. Circuit Court of Appeals held that the Massachusetts Attorney General properly denied certification of a proposed initiative to amend the state's Blaine Amendment to allow public financial support to be directed to students attending private, religiously affiliated schools because a separate constitutional provision places the Blaine Amendment off-limits to the initiative process. The court further held that this other provision did not impair the free exercise of religion under the First Amendment because the exclusions did not discriminate on the basis of religious belief or status.

Matthew J. v. Massachusetts Department of Education, 989 F. Supp. 380 (D. Mass. 1998)

A Massachusetts federal district court held that the reimbursement of special education costs under the Individuals with Disabilities Education Act ("IDEA") for a mentally ill high school student in a Christian school outside the state did not violate the Massachusetts Blaine Amendment because the state was compensating a child to whom it had abdicated its responsibilities under IDEA.

Attorney General v. School Committee of Essex, 439 N.E.2d 770 (Mass. 1982)

The Massachusetts Supreme Court held that a statute requiring transportation of private school students on public school buses was a community safety measure not unlike police or fire protection. Any benefit

MASSACHUSETTS

NO VOUCHERS

NO TAX CREDITS

continued from previous page

provided to the private schools was remote and did not constitute substantial aid sufficient to violate the Massachusetts Constitution.

Commonwealth v. School Committee of Springfield, 417 N.E.2d 408 (Mass. 1981)
The Massachusetts Supreme Court held that using public funds to pay for special education services from private schools was not for the purpose of founding, maintaining, or aiding private institutions in violation of Massachusetts' Blaine Amendment. The court noted that paying for special education services in private schools was required only after it was first determined that a public school lacked the ability or desire to meet the needs of special education students and that this requirement was intended to benefit children, not to aid or promote private schools.

Bloom v. School Committee of Springfield, 379 N.E.2d 578 (Mass. 1978)
Seeing no difference between loaning textbooks to private school students and loaning them to the school, the Massachusetts Supreme Court held that Massachusetts' textbook lending law was unconstitutional. The court further observed that textbooks are of use only in the educational context and therefore are a "basic educational tool" to be distinguished from other basic government services like police and fire protection.

Opinion of Justices to Senate, 514 N.E.2d 353 (Mass. 1987)
The justices of the Massachusetts Supreme Court opined that proposed legislation that would provide tax deductions for certain educational expenses (tuition, textbooks and transportation) incurred by taxpayers whose dependents attended public or nonprofit private primary and secondary schools would violate Massachusetts' Blaine Amendment.

Opinion of Justices, 259 N.E.2d 564 (Mass. 1970)
The justices of the Massachusetts Supreme Court opined that purchase by the commonwealth of secular educational services from private schools would violate the Article 46, Section 2, of the Massachusetts Constitution, a precursor to Massachusetts' current Blaine Amendment.

Opinion of Justices, 236 N.E.2d 523 (Mass. 1968)
The justices of the Massachusetts Supreme Court opined that the state could help finance construction projects at private universities without violating the Massachusetts Constitution.

ANALYSIS AND RECOMMENDATIONS

Absent constitutional amendment, Massachusetts lacks any good school choice option. The Massachusetts Constitution contains an extremely restrictive Blaine Amendment, which cannot be altered via referendum. The Massachusetts Supreme Court has interpreted that Blaine Amendment broadly and allowed public funds to flow to private school students only under the federal IDEA and for transportation. In striking down a textbook loan program, the court refused to distinguish between aiding students and aiding the schools they attend. In addition, the Massachusetts high court has opined that education tax credits would also violate the state's Blaine Amendment, although its opinion is not considered binding precedent.

MICHIGAN

NO VOUCHERS | NO TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion …." MICHIGAN CONST. Art. I, § 4.

Blaine Amendments

"No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose." MICHIGAN CONST. Art. I, § 4.

"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, preelementary, 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…." MICHIGAN CONST. Art. VIII, § 2.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict/mandatory
Michigan Compiled Laws Section 380.1280
Interdistrict/voluntary
Michigan Compiled Laws Sections 380.140, 388.1705 to 388.1705c

Charter Schools: Yes

Michigan Compiled Laws Sections 380.501 to 380.507

Private School Choice: No

continued on next page

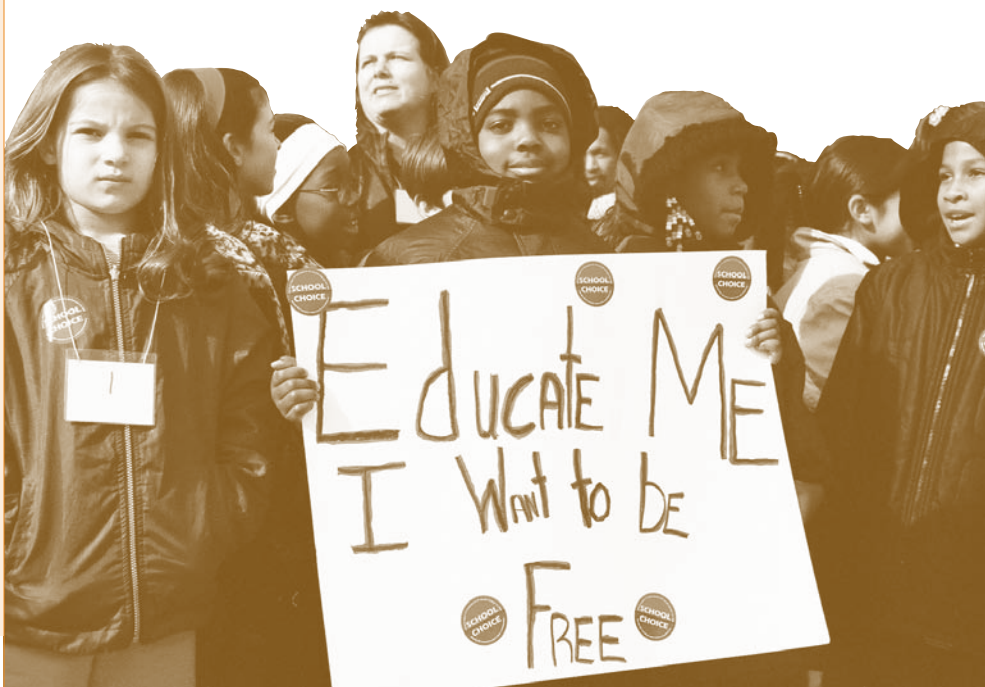
RELEVANT CASE LAW

Council of Organizations & Others for Education about Parochiaid v. Governor, 566 N.W.2d 208 (Mich. 1997)

The Michigan Supreme Court held that the state's charter school law does not violate Michigan's Blaine Amendment because the "academies" are "public." The state exercises control over the application-approval process and it controls the academies' finances in the same way it controls other public schools. Moreover, nothing in the Michigan Constitution requires the state to retain complete control over a school for it to be public.

Snyder v. Charlotte Public School District, 365 N.W.2d 151 (Mich. 1984)

The Michigan Supreme Court held that the incidental and indirect benefits flowing to religious schools as a result of a "shared time" statute did not violate Michigan's second Blaine Amendment (Article VIII, Section 2). "Shared time" programs allow students to leave their traditional classroom for part of the day and spend time at vocational schools.



MICHIGAN

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Advisory Opinion Constitutionality of 1974 PA 242, 228 N.W.2d 772 (Mich. 1975)

The Michigan Supreme Court advised that textbooks and supplies are essential aids that constitute a primary feature of the educational process and a primary element required for any school to exist. The court concluded that a Michigan Blaine Amendment (Article VIII, Section 2) bars public funding for such primary and essential elements of a private school's existence.

Traverse City School District v. Attorney General, 185 N.W.2d 9, 29-31 (Mich. 1971)

The Michigan Supreme Court held that one of the State's Blaine Amendments (Article VIII, Section 2 as amended) now prohibits the use of public funds "directly or indirectly to aid or maintain" a nonpublic school.

Scalise v. Boy Scouts of America, 692 N.W.2d 858 (Mich. Ct. App. 2005)

A Michigan Court of Appeals held that a school district's policy permitting a boys' group that endorsed religion to use its facilities during non-school hours did not violate Michigan's first Blaine Amendment (Article I, Section 4) or the federal Establishment Clause because many religious and secular groups used the facilities and the district did not endorse the boys' group over any other group.

Alexander v. Bartlett, 165 N.W.2d 445 (Mich. Ct. App. 1968)

A Michigan Court of Appeals held that a statute permitting local school districts to furnish transportation without charge for students of state-approved private schools did not violate Michigan's first Blaine Amendment (Article I, Section 4) because the statute's intended and actual effect was to assist parents in complying with state compulsory education laws while recognizing their right to send their children to religious schools.

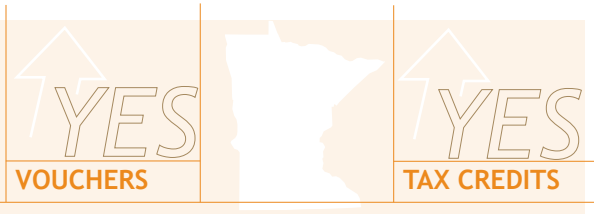
Advisory Opinion re Constitutionality of P.A. 1970, No. 100, 180 N.W.2d 265 (1970)

The Michigan Supreme Court advised the Legislature that the "State School Aid Bill" allowing the purchase of education services from private schools violates neither the First Amendment nor the first of Michigan's Blaine Amendments (Article I, Section 4) because any support given to religious institutions is tenuous at best.

ANALYSIS AND RECOMMENDATIONS

Having specifically precluded both tax credit and voucher programs by constitutional amendment, there are no school choice options for Michigan without a constitutional amendment.

MINNESOTA



CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"[N]or shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent ...." Minnesota Const. Art. I, § 16.

Blaine Amendments

"[N]or shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries." Minnesota Const. Art. I, § 16.

"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." Minnesota Const. Art. XIII, § 2.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: **Yes**

Minnesota Statutes Section 124D.03

Charter Schools: **Yes**

Minnesota Statutes Sections 124D.10 to 124D.11

Private School Choice: **Yes**

Tax Credits and Deductions for Educational Expenses
Minnesota Statutes Sections 290.01, 290.0674

continued on next page

RELEVANT CASE LAW

Mueller v. Allen, 463 U.S. 388 (1983)

The U.S. Supreme Court held that Minnesota's tax deduction for education expenses, including the cost of tuition, textbooks and transportation, does not violate the federal Establishment Clause despite overwhelmingly benefiting parents with students in parochial schools. The deduction has the secular purpose of advancing education, is religiously neutral on its face, provides only indirect support to the schools, and does not foster excessive entanglement between religion and the government.

Stark v. Independent School District, No. 640, 123 F.3d 1068 (8th Cir. 1997)

The 8th U.S. Circuit Court of Appeals held that although a public elementary school's students were all of one religion and the school adhered to its landlord's request that technology not be used in the building, the Minnesota Constitution was not violated because no religious instruction occurred at the school. Therefore, although public funds were used to support the school, no public funds were expended in support of religious belief or instruction.

Minnesota Higher Education Facilities Authority v. Hawk, 232 N.W.2d 106 (Minn. 1975)

The Minnesota Supreme Court held that bonds issued for the purpose of financing

MINNESOTA

YES VOUCHERS

YES TAX CREDITS

continued from previous page

construction projects at institutions of higher education do not constitute an expenditure of public funds, and accordingly do not violate the Minnesota Constitution's Compelled Support Clause or Blaine Amendments.

Minnesota Civil Liberties Union v. State, 224 N.W.2d 344 (Minn. 1974)

Applying now-outdated federal precedent, the Minnesota Supreme Court held that a statute allowing a tax credit for private education costs violated the federal Establishment Clause on the now-rejected premise that tax credits are the functional equivalent of unrestricted cash payments to parents for sending their children to religious schools.

Americans United v. Independent School District, 179 N.W.2d 146 (Minn. 1970)

The Minnesota Supreme Court upheld a busing statute allowing private school students to ride on public school buses against a challenge brought under one of Minnesota's Blaine Amendments (Article XIII, Section 2) because the program's primary purpose and effect was neither to benefit nor support religious schools, despite providing incidental and indirect encouragement of private school attendance.

Minnesota Federation of Teachers v. Mammenga, 500 N.W.2d 136 (Minn. Ct. App. 1993)

The Minnesota Court of Appeals held that a statute allowing high school students to enroll in classes at public or private colleges at state expense did not violate Minnesota's Compelled Support Clause or Blaine Amendments because any benefits flowing to religious colleges were indirect and incidental, students could attend either public or private colleges to take non-religious courses, the state reimbursed only 42 percent of actual costs, and religious colleges separated funds received to ensure that benefits were used for non-religious purposes.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Minnesota. The Minnesota Supreme Court's 1970 decision regarding bus transportation indicates that the court distinguishes between aiding students and aiding the schools they choose to attend. Significantly, more recently the Minnesota Supreme Court elected not to review a decision of the Minnesota Court of Appeals that held that neither the state's Compelled Support Clause nor its Blaine Amendment are violated by government programs aimed at helping students, even if those programs incidentally aid religious organizations.

Minnesota has already created school choice tax benefit programs, and U.S. Supreme Court upheld the tax deduction.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

MISSISSIPPI

CONSTITUTIONAL PROVISIONS

Blaine Amendment

"No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school." Mississippi Const. Art. VIII, § 208.

Other Relevant Provision

"No law granting a donation or gratuity in favor of any person or object shall be enacted except by the concurrence of two-thirds of the members elect of each branch of the Legislature, nor by any vote for a sectarian purpose or use." Mississippi Const. Art. IV, § 66.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice:	**Yes**

Mississippi Code Annotated Section 37-15-31

Charter Schools:	**Yes**

Mississippi Code Annotated Section 37-28-1 to 37-28-21

Private School Choice:	**No**

RELEVANT CASE LAW

Chance v. Mississippi State Textbook Rating & Purchasing Board, 200 So. 706, 713 (Miss. 1941)

The Mississippi Supreme Court held that loaning public textbooks to private school pupils does not violate Mississippi's Blaine Amendment because "[t]he books belong to, and are controlled by, the state; they are merely loaned to the individual pupil therein designated …." The court further held that any aid to religious schools is incidental and were the state to deny use of those books based on the student's choice of a religious school, it might well violate other parts of the Mississippi Constitution.

Otken v. Lamkin, 56 Miss. 758 (Miss. 1879)

The Mississippi Supreme Court held that a statute allotting part of the common school fund to students attending private schools violated the express terms of Mississippi's Blaine Amendment.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Mississippi. Its Constitution contains a Blaine Amendment but the Mississippi Supreme Court held that the state could provide textbooks to private and religious school students without violating its terms. By distinguishing between aiding students and aiding the schools they choose to attend, the Mississippi Supreme Court has provided strong support for a voucher program.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

MISSOURI

NO VOUCHERS | YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same." Missouri Const. Art. I, § 6.

Blaine Amendments

"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." Missouri Const. Art. I, § 7.

"Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever." Missouri Const. Art. IX, § 8.

Education Article

"The proceeds of all certificates of indebtedness due the state school fund, and all moneys, bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under the supervision of the state board of education, and sacredly preserved as a public school fund the annual income of which shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever." Missouri Const. Art. IX, § 5.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Interdistrict/mandatory
Missouri Revised Statutes Section 167.131
Interdistrict/voluntary
Missouri Revised Statutes Sections 162.1040 to 162.1059, 162.1060, 167.151

Charter Schools: Yes

Missouri Revised Statutes Sections 167.349 to 167.420

Private School Choice: No

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RELEVANT CASE LAW

Widmar v. Vincent, 454 U.S. 263 (U.S. 1981)
The U.S. Supreme Court held that the state's Blaine Amendments and Compelled Support Clauses cannot justify a state university's policy denying religiously affiliated student groups the right to meet in university buildings.

Barrera v. Wheeler, 531 F.2d 402 (8th Cir. 1976)
The 8th U.S. Circuit Court of Appeals held that children attending nonpublic schools in Missouri are entitled to receive federal funds for remedial education programs comparable in quality, scope and opportunity to children

MISSOURI

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in public schools, notwithstanding the Missouri Blaine Amendments.

Felter v. Cape Girardeau School District, 810 F. Supp. 1062 (D. Mo. 1993)
A federal district court held that using public funds to provide transportation for a disabled student from parochial to public school does not violate the Establishment Clause of the U.S. Constitution or the Missouri Constitution.

Luetkemeyer v. Kaufmann, 364 F. Supp. 376 (D. Mo. 1973), *aff'd by mem. op.*, 419 U.S. 888 (1974)
A three-judge federal district court held that the state's refusal to provide school bus transportation to religious school pupils did not violate the students' equal protection rights because the decision was not irrational.

Brusca v. Missouri, 332 F. Supp. 275 (D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972)
A federal district court held that a parent's right to choose a religious private school for his children did not mean that the state was compelled to finance his child's private school education, nor did he have a constitutional right to any credit for his taxes which supported the public schools simply because he would not or could not make use of them.

Americans United v. Rogers, 538 S.W.2d 711 (Mo. 1976)
The Missouri Supreme Court held that publicly funded higher education grants do not violate the Missouri Constitution because the public purpose of the statute, promoting higher education, overrides any incidental benefit to a private individual or private college.

Mallory v. Barrera, 544 S.W.2d 556 (Mo. 1976)
The Missouri Supreme Court held that use of any part of federal Title I education funds by the state to provide remedial education to elementary and secondary school children on the premises of parochial schools violates the Blaine Amendments of the Missouri Constitution.

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MISSOURI

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Paster v. Tussey, 512 S.W.2d 97 (Mo. 1974)
The Missouri Supreme Court held that requiring public school boards to provide textbooks to teachers in private schools violates the Compelled Support Clause of the Missouri Constitution, while requiring textbooks to be provided to pupils attending private schools violates a Blaine Amendment (Article IX, Section 8).

McDonough v. Aylward, 500 S.W.2d 721 (Mo. 1973)
The Missouri Supreme Court held that being required to pay taxes does not interfere with parents' constitutional right to send their children to religiously oriented schools.

Special District for Education & Training of Handicapped Children v. Wheeler, 408 S.W.2d 60 (Mo. 1966), *see also Harfst v. Hoegen*, 163 S.W.2d 609, 614 (Mo. 1942)
The Missouri Supreme Court held that the State may not use public school funds to send public school speech teachers into the parochial schools to provide speech therapy.

Berghorn v. Reorganized School District, 260 S.W.2d 573 (Mo. 1953)
The Missouri Supreme Court held that schools taught by Catholic nuns are not free public schools and therefore may not receive public funds.

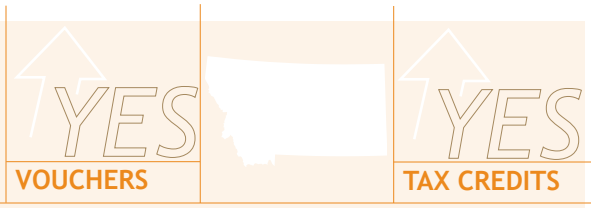
McVey v. Hawkins, 258 S.W.2d 927 (Mo. 1953)
The Missouri Supreme Court held that use of state and school district funds for transportation of parochial school students violated one of Missouri's education provisions (Article IX, Section 5), which required that all funds earmarked for public schools be used to maintain free public schools and for no other purposes.

ANALYSIS AND RECOMMENDATIONS

Tax credit programs are Missouri's best option for a school choice program. A voucher program would require a state constitutional amendment to overturn the restrictive interpretations given to its Blaine Amendments by the Missouri Supreme Court.

Model Legislation: Great Schools Tax Credit Program, Family Education Tax Credit Program

MONTANA



CONSTITUTIONAL PROVISIONS

Blaine Amendment

"(1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination. (2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education." Montana Const. Art. X, § 6.

Education Articles

"The public school fund shall forever remain inviolate, guaranteed by the state against loss or diversion." Montana Const. Art. X, § 3.

"The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law." Montana Const. Art. X, § 8.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice:	Yes

Interdistrict/voluntary
Montana Code Annotated Sections 20-5-320, 20-5-322 to 20-5-324
Interdistrict/mandatory
Montana Code Annotated Sections 20-5-321 to 20-5-324

Charter Schools:	No
Private School Choice:	No

RELEVANT CASE LAW

Montana State Welfare Board v. Lutheran Social Services, 480 P.2d 181, 186 (Mont. 1971)

The Montana Supreme Court held that "payment of public assistance to indigent expectant mothers is not an unconstitutional 'appropriation,' 'loan,' 'donation,' or 'grant' in violation of the Montana Constitution, simply because such persons may request the counseling and assistance of [religious] private adoption agencies." The court went further and held that "[i]n no way do we find that [religious] private adoption agencies are directly or indirectly benefited by payments to or on behalf of a qualified recipient, nor have they ever received such funds."

State ex rel. Chambers v. School District, 472 P.2d 1013 (Mont. 1970)

The Montana Supreme Court held that a special tax to pay for teachers at a local Catholic school violates the explicit terms of Article IX, Section 8 (the predecessor of the current Blaine Amendment, Article X, Section 6) because it uses public money to aid a sectarian school by paying for its teachers.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Montana. The state Constitution contains a Blaine Amendment on which the Montana Supreme Court premised its 1970 decision striking down a special tax for generating funds to pay teachers in private schools, which, unlike school choice programs, constitutes a direct appropriation to private schools. The Amendment has received little subsequent attention. The Montana Supreme Court showed an inclination in *Montana State Welfare Board v. Lutheran Social Services* to recognize a distinction between aiding students and aiding the schools they choose to attend.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

NEBRASKA

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"No person shall be compelled to attend, erect or support any place of worship against his consent ...." Nebraska Const. Art. I, § 4.

Blaine Amendment

"1. Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof; *Provided*, that the Legislature may provide that the state or any political subdivision thereof may contract with institutions not wholly owned or controlled by the state or any political subdivision to provide for educational or other services for the benefit of children under the age of twenty-one years who are handicapped, as that term is from time to time defined by the Legislature, if such services are nonsectarian in nature.
2. All public schools shall be free of sectarian instruction.
3. The state shall not accept money or property to be used for sectarian purposes; *Provided*, that the Legislature may provide that the state may receive money from the federal government and distribute it in accordance with the terms of any such federal grants, but no public funds of the state, any political subdivision, or any public corporation may be added thereto.
4. A religious test or qualification shall not be required of any teacher or student for admission or continuance in any school or institution supported in whole or in part by public funds or taxation." Nebraska Const. Art. VII, § 11.[1]

1 This provision was amended in 1976. Previously, it prohibited the appropriation of public funds "in aid of" any sectarian or denominational school or college, or any educational institution that is not exclusively owned and controlled by the state or a governmental subdivision thereof.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice:	Yes

Nebraska Revised Statutes Sections 79-232 to 79-246

Charter Schools:	No
Private School Choice:	No

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RELEVANT CASE LAW

Father Flanagan's Boys Home v. Department of Social Services, 583 N.W.2d 774 (Neb. 1998)

The Nebraska Supreme Court rejected the state's attempt to invoke its Blaine Amendment to avoid paying private schools for educating special needs students under a contract signed by the state. The court held that payments under such a contract are not the type of appropriations prohibited by Nebraska's Blaine Amendment.

Cunningham v. Lutjeharms, 437 N.W.2d 806 (Neb. 1989)

The Nebraska Supreme Court held that lending textbooks to private schools does not violate the First Amendment's Establishment Clause because it merely makes available to all children the benefits of a general program to lend schoolbooks free of charge. The court found that the textbooks were secular in nature and the program would not require excessive monitoring.

State ex rel. Creighton University v. Smith, 353 N.W.2d 267, 272 (Neb. 1984)

The Nebraska Supreme Court held that the fact that

NEBRASKA

YES VOUCHERS

YES TAX CREDITS

continued from previous page

a private institution derives indirect benefits from a contract with the state does not "transform payments for contracted services into an appropriation of public funds proscribed by article VII, § 11, of the Nebraska Constitution [the Blaine Amendment]." The court ordered the State Director of Health to consider an application for a public research grant filed by a religious university. The Director had previously refused, citing the Blaine Amendment.

State ex rel. Bouc v. School District, 320 N.W.2d 472 (Neb. 1982)

The Nebraska Supreme Court held that any benefit accruing to private school as a result of publicly supported busing of its students is incidental and therefore not a violation of Nebraska's Blaine Amendment.

Lenstrom v. Thone, 311 N.W.2d 884 (Neb. 1981)

The Nebraska Supreme Court held that nothing in the Nebraska Constitution prevents the state from creating a scholarship program to provide financial assistance to students attending public and private postsecondary educational institutions in Nebraska.

Gaffney v. State Department of Education, 220 N.W.2d 550, 557 (Neb. 1974)

Interpreting the Nebraska Blaine Amendment when it still prohibited appropriation of public funds "in aid of" any private school (language that has since been removed), the Nebraska Supreme Court held that a statute requiring the loan of textbooks by public schools to nonpublic schools for students in grades 7 to 12 was unconstitutional. Giving free textbooks "lends strength" to the school that, in turn, "lends strength and support to the sponsoring sectarian institution."

State ex rel. Rogers v. Swanson, 219 N.W.2d 726 (Neb. 1974)

Striking down a student aid statute, the Nebraska Supreme Court held that using public money to fund a tuition grant program violated the state's Blaine Amendment. According to the court, no attempt was made to restrict the use of funds and, as a result, some of the funds invariably paid for sectarian instruction.

State ex rel. Freeman v. Scheve, 93 N.W. 169, 172 (Neb. 1903)

The Nebraska Supreme Court held that reading from the Bible does not constitute sectarian instruction. Thus, when public school teachers require Bible reading, public funds are not going to sectarian institutions in violation of the precursor to the state's current Blaine Amendment.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Nebraska. Its Constitution contains a Blaine Amendment that was changed in 1972 and 1976, which created a large divide in the state's case law. As altered, it prohibits only appropriations "to" rather than "in aid of" sectarian schools. Applying the updated Blaine Amendment, the Nebraska Supreme Court has held that the state can supply textbooks to private school students at public expense and can contract with religious schools without violating the Nebraska Constitution. School choice programs intended to help students and having only incidental effects on the schools they attend are therefore likely to be constitutional.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

NEVADA

CONSTITUTIONAL PROVISIONS

Blaine Amendment

"No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose [sic]." NEVADA CONST. Art. 11, § 10.

Education Article

"The legislature shall provide for a uniform system of common schools … any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction …." NEVADA CONST. Art. 11, § 2.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice:	No
Charter Schools:	Yes

Nevada Revised Statutes Sections 386.500 to 386.610

Private School Choice:	No

RELEVANT CASE LAW

State v. Hallock, 16 Nev. 373 (Nev. 1882)

The Nevada Supreme Court held that public money given to a Catholic orphanage violates the Blaine Amendment of the Nevada Constitution.

Attorney General Opinion 276 (11-5-1965) (copy available from the Institute for Justice)

The Nevada Attorney General opined that "[t]he requirement of a federal statute that a school district which receives a grant for special aid to educationally deprived children make such aid available to pupils of private schools does not violate Nevada's Blaine Amendment … if federal moneys are kept separate."

Attorney General Opinion 67 (9-5-1963) (copy available from the Institute for Justice)

The Nevada Attorney General opined that "[t]he prohibition of expenditures of public funds for sectarian purposes, as contained in Nevada's Blaine Amendment, was primarily included for the purpose of preventing sectarian religious instruction in public schools, as indicated by Const., Art. 11, § 9, which prohibits sectarian instruction in any school or university established under the state Constitution."

Attorney General Opinion 209 (9-12-1956) (copy available from the Institute for Justice)

The Nevada Attorney General opined that "[h]ome instruction of a private or parochial school student by public school teachers when such student is ill is an unconstitutional expenditure of public funds for sectarian purpose. However, if such student enrolls in the public school during his illness he may then receive such home instruction."

Attorney General Opinion B-40 (2-11-1941) (copy available from the Institute for Justice)

The Nevada Attorney General opined that "[s]tate funds may be used to hospitalize crippled children in a sectarian hospital where no instruction of any kind is imparted, and such use does not violate Nevada's Blaine Amendment."

ANALYSIS AND RECOMMENDATIONS

Despite a few inauspicious attorney generals' opinions from the 1960s and 70s, both voucher and tax credit programs are school choice options in Nevada. The only case discussing Nevada's Blaine Amendment is from 1882 when the Nevada Supreme Court disallowed a direct appropriation of public funds to a Catholic orphanage in *State v. Hallock*. No more recent constitutional interpretations exist, let alone any addressing programs aiding students.

Standing alone, the *Hallock* decision would not bar the use of educational vouchers, as those funds would aid parents who would choose among an array of educational options. Although Nevada's Legislature passed a law requiring that money allotted for public schools be used exclusively for public schools, Nevada Revised Statutes Section 387.045, other public money—general revenues or lottery proceeds, for instance—could support a voucher program.

Alternatively, tax benefits aimed at offsetting the cost of private education are another possible school choice option. They fully comply with the Uniform and Equal Tax clause of Nevada's Constitution (Article X, Section 1) and the seminal case interpreting that provision, *State v. Eastabrook*, 3 Nev. 173, 178 (Nev. 1867).

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

NEW HAMPSHIRE

NO VOUCHERS

YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"But no person shall ever be compelled to pay towards the support of the schools of any sect or denomination …." New Hampshire Const. Pt. FIRST, Art. 6.

Blaine Amendment

"*Provided, nevertheless*, that no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination." New Hampshire Const. Pt. SECOND, Art. 83.

Other Relevant Provisions

"Every member of the community … is therefore bound to contribute his share in the expense of such protection …." New Hampshire Const. Pt. FIRST, Art. 12.

"[A]nd to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state …." New Hampshire Const. Pt. SECOND, Art. 5.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice:	**Yes**

New Hampshire Revised Statutes Annotated 194-B:1 to 194-B:22

Charter Schools:	**Yes**

New Hampshire Revised Statutes Annotated 194-B:1 - 194-B:22

Private School Choice:	**No**

RELEVANT CASE LAW

Trustees of Phillips Exeter Academy v. Exeter, 27 A.2d 569 (N.H. 1940)

The New Hampshire Supreme Court held that aid to educational institutions by exempting them from taxation is a proper exercise of the legislative power.

Opinion of the Justices, 616 A.2d 478 (N.H. 1992)

The justices of the New Hampshire Supreme Court opined that a proposed voucher program violated the New Hampshire Constitution because it contained no safeguard to prevent use of public funds for religious purposes.

Opinion of the Justices, 233 A.2d 832 (N.H. 1967)

The justices of the New Hampshire Supreme Court opined that appropriating money from a sweepstakes fund directly to parochial institutions violates the Establishment Clause of the First Amendment.

Opinion of the Justices, 113 A.2d 114 (N.H. 1955)

The justices of the New Hampshire Supreme Court opined that nursing education scholarships do not violate the New Hampshire Constitution because they were religiously neutral and intended to further the teaching of the science of nursing.

ANALYSIS AND RECOMMENDATIONS

A tax credit program is New Hampshire's best option for school choice. It is well-established within New Hampshire case law that tax exemptions aimed at promoting education for all New Hampshire citizens but incidentally affecting religious institutions are constitutionally acceptable. They serve a legitimate public purpose and comport with New Hampshire's "uniform and reasonable" and "fair share" tax laws as interpreted by New Hampshire's state courts.

The New Hampshire Supreme Court has not ruled on the constitutionality of vouchers under its Blaine Amendment, but it did suggest in its 1992 Advisory Opinion that they would violate the Blaine Amendment. While Advisory Opinions are not binding legal precedent, they can be persuasive to courts in subsequent cases. One potential way of avoiding the Blaine Amendment would be to use a non-tax source such as lottery proceeds to fund the program.

Model Legislation: Great Schools Tax Credit Program, Family Education Tax Credit Program

NEW JERSEY

YES VOUCHERS

YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"[N]or shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform." New Jersey Const. Art. I, ¶ 3.

Education Provisions

"The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." New Jersey Const. Art. VIII, § IV, ¶ 1.

"The fund for the support of free public schools … shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of free public schools, and for the equal benefit of all the people of the State; and it shall not be competent, except as hereinafter provided, for the Legislature to borrow, appropriate or use the said fund or any part thereof for any other purpose, under any pretense whatever." New Jersey Const. Art. VIII, § IV, ¶ 2.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Interdistrict/voluntary
New Jersey Statutes Sections 18A:36B-1 to 18A:36B-13, 18A:38-3

Charter Schools: Yes

New Jersey Statutes Section 18A:36A

Private School Choice: Yes

As mandated by *Abbott v. Burke*, the New Jersey Commissioner of Education must provide vouchers for pre-school programs for all 3 and 4 year olds, who may attend public or private programs.

RELEVANT CASE LAW

Everson v. Board of Education, 330 U.S. 1 (1947)
The U.S. Supreme Court held that the First Amendment does not prohibit New Jersey from spending public funds to pay the bus fares of parochial school pupils as a part of a general program under which it paid the fares of students attending public schools.

Resnick v. East Brunswick Township Board of Education, 389 A.2d 944 (N.J. 1978)
The New Jersey Supreme Court held that state could allow religious groups who fully reimbursed school boards for related out-of-pocket expenses to use school facilities on a temporary basis for religious services without violating the federal or New Jersey constitutions.

Clayton v. Kervick, 285 A.2d 11 (N.J. 1971)
Applying federal Establishment Clause precedent, the New Jersey Supreme Court held that supplying public funds for the construction of dorms at private colleges passes constitutional scrutiny as long as the buildings are not used for religious instruction and the school does not discriminate on the basis of religion in its admissions.

Everson v. Board of Education, 44 A.2d 333, 337 (N.J. 1945)
New Jersey's highest court held that the transportation of private school students at public expense was designed to help parents comply with mandatory attendance laws, which is a public purpose, and therefore does not violate the New Jersey Constitution.

ANALYSIS AND RECOMMENDATIONS

Both tax credit programs and vouchers are school choice options for New Jersey. Its Constitution does not contain a Blaine Amendment, and its Compelled Support Clause, while receiving little judicial attention, does not appear to preclude the use of funds other than those allotted for the public schools to support educational vouchers.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

NEW MEXICO

YES VOUCHERS

YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"No person shall be required to attend any place of worship or support any religious sect or denomination …." New Mexico Const. Art. II, § 11.

Blaine Amendments

"[N]o part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university." New Mexico Const. Art. XII, § 3.

"Provision shall be made for the establishment and maintenance of a system of public schools which shall be open to all the children of the state and free from sectarian control, and said schools shall always be conducted in English." New Mexico Const. Art. XXI, § 4.

Other Relevant Provisions

"No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state ...." New Mexico Const. Art. IV, § 31.

"Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person …." New Mexico Const. Art. IX, § 14.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict/mandatory
New Mexico Statutes Annotated Sections 22-1-4, 22-2A-7
Intradistrict and Interdistrict/voluntary
New Mexico Statutes Annotated Section 22-12-5

Charter Schools: Yes

New Mexico Statutes Annotated Sections 22-8B-1 to 22-8B-15

Private School Choice: Yes

Voluntary Pre-K (with choice of public and private providers)
New Mexico Statutes Annotated Section 32A-23)

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RELEVANT CASE LAW

Miller v. Cooper, 244 D.2d (N.M. 1952)
The New Mexico Supreme Court reaffirmed that religious groups cannot use public school facilities to disseminate religious material but refused to enjoin religious individuals from teaching in public schools.

Zellers v. Huff, 236 P.2d 949 (N.M. 1951)
The New Mexico Supreme Court concluded that public school teachers may not dress in religious "garb" and a church may not operate a school system within the public school system.

Attorney General Opinion No. 99-01 (1999)
This opinion of the New Mexico Attorney General found that vouchers present serious constitutional problems, notwithstanding earlier attorney general opinions to the contrary, because they constitute a "donation" to a private individual in violation of the state Constitution's "anti-

NEW MEXICO

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donation" clause (Article IX, Section 14).

Attorney General Opinion No. 79-7 (1979)
In this opinion, the New Mexico Attorney General concluded that proposed legislation appropriating state money for tuition grants to students attending private colleges and universities appeared to be an outright gift to students in violation the "anti-donation" clause (Article IX, Section 14) because the state received no consideration or benefit in exchange.

Attorney General Opinion No. 76-6 (1976)
In this opinion, the New Mexico Attorney General declared that a voucher program under which the parents of exceptional children whose needs were not being met by the public schools could use the funds the school district would otherwise have spent on the children to purchase special education at private, nonsectarian institutions would be consistent with the New Mexico Constitution.

ANALYSIS AND RECOMMENDATIONS

Both vouchers and tax credits appear to be consistent with the New Mexico Constitution.

There is very little case law interpreting either New Mexico's Blaine Amendment or Compelled Support Clause, and non-binding attorney general opinions concerning their effects on vouchers are contradictory.

The New Mexico Constitution also has an "anti-donation" clause (Article IX, Section 14) that prohibits the government from giving gifts of money, property or credit to private parties. This could be an obstacle to vouchers, but New Mexico courts have not yet addressed it in a voucher context.

New Mexico school choice advocates should note New Mexico's current pre-K voucher program, established in 2005. By having the Children, Youth and Families Department reimburse eligible private providers and by creating a separate voucher fund from which those payments are made, the pre-K program avoids New Mexico's Blaine Amendments and its public school funding clause.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

NEW YORK

CONSTITUTIONAL PROVISIONS

Blaine Amendment

"Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning." New York Const. Art XI, § 3.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Interdistrict/voluntary
New York Consolidated Law Service Educational Provisions Section 3202

Charter Schools: Yes

New York Consolidated Law Service Educational Provisions Sections 2850 to 2857

Private School Choice: No

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RELEVANT CASE LAW

Board of Education v. Allen, 392 U.S. 236 (1968)

The U.S. Supreme Court held that New York's textbook loan program does not violate the First Amendment by including children in religious schools because it was intended to aid students, not to benefit parochial schools as such. Any benefit parochial schools received was minimal and therefore not an establishment of religion.

Grumet v. Pataki, 720 N.E.2d 66 (N.Y. 1999)

The New York Court of Appeals, New York's highest court, held that a statute creating a separate school district for members of a specific religious denomination had the primary effect of advancing religion and therefore constituted an impermissible accommodation to a single religious group in violation of the First Amendment.

Greve v. Board of Education, 351 N.Y.S.2d 715 (N.Y. App. Div. 1974), *aff'd*, 325 N.E.2d 168 (N.Y. 1975)

The New York Court of Appeals held that providing a deaf student with a translator at public expense does not violate the New York Blaine Amendment if the translator does not teach the student religion.

Board of Education v. Allen, 228 N.E.2d 791 (N.Y. 1967), *aff'd*, 392 U.S. 236 (1968)

The New York Court of Appeals held that New York's textbook loan program does not violate the state's Blaine Amendment because the amendment was never intended to prohibit state policies that might ultimately entail some benefit to parochial schools. The court explicitly rejected the reasoning and conclusion of the *Judd* case, which forbade inclusion of religious school students in a transportation program, and the *Smith* case,

NEW YORK

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which prohibited providing free textbooks to students in religious schools.

Judd v. Board of Education, 15 N.E.2d 576 (N.Y. 1938), *overruled by Board of Education v. Allen*, 228 N.E.2d 791 (N.Y. 1967)
The New York Court of Appeals held that although busing all students to their schools was primarily for the benefit of the child, it still had the effect of giving an incidental benefit to religious schools and thus violated New York's Blaine Amendment prohibiting indirect aid.

Sargent v. Board of Education, 69 N.E. 722 (N.Y. 1904)
The New York Court of Appeals held that using public funds to pay Catholic nuns to educate orphans does not violate the New York Blaine Amendment because the orphanage was not a "school," and other provisions within the New York Constitution explicitly allow for this type of expenditure.

Matter of Richard K. v. Petrone, 815 N.Y.S.2d 270 (N.Y. App. Div. 2006)
The Appellate Division held that pursuant to specific legislation and the deep concern for child safety and welfare evinced in New York's Constitution, local school boards must provide nursing services to parochial school students or reimburse parents for acquiring those services on their own.

Cook v. Griffin, 364 N.Y.S.2d 632 (N.Y. App. Div. 1975)
The Appellate Division held that a school board cannot transport private school students on public buses for field trips without some statutory authority and that while parents have the right to send their children to private or parochial schools, there is no corresponding right to equal state aid once they make that decision.

College of New Rochelle v. Nyquist, 326 N.Y.S.2d 765 (N.Y. App. Div. 1971)
The Appellate Division of the New York Supreme Court held that State aid could go to a school that was founded and administered by a religious order but was not directly controlled by that order and did not teach any particular religious doctrine to the exclusion of other religious denominations.

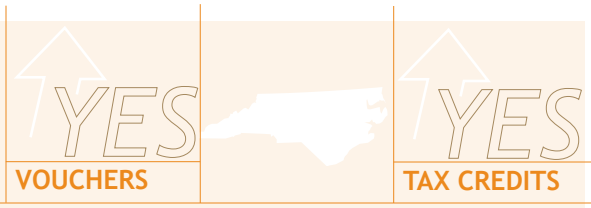
Smith v. Donahue, 195 N.Y.S. 715(N.Y. App. Div. 1922), *overruled by Board of Education v. Allen*, 228 N.E.2d 791 (N.Y. 1967)
In holding that providing textbooks to parochial school students at public expense violated the U.S. and New York constitutions, the Appellate Division held that furnishing books and ordinary school supplies to the pupils of religious schools aids those schools.

ANALYSIS AND RECOMMENDATIONS

Despite an initially restrictive interpretation of its Blaine Amendment, New York courts have abandoned that approach and both tax credit and voucher programs are school choice options for New York. New York's highest state court held in *Board of Education v. Allen* that the Blaine Amendment was never intended to bar government programs providing incidental benefits to parochial schools.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

NORTH CAROLINA



CONSTITUTIONAL PROVISIONS

Religion Provision

"All 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." North Carolina Const. Art. I, § 13

Education Articles

"The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." North Carolina Const. Art. I, § 15.

"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." North Carolina Const. Art. IX, § 1.

"The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools …." North Carolina Const. Art. IX, § 2.

"The proceeds of all lands that have been or hereafter may be granted by the United States to this 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 faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools." North Carolina Const. Art. IX, § 6. (Section 7 repeats this text with respect to the County Education Fund)

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice:	**No**
Charter Schools:	**Yes**

North Carolina General Statutes Sections 115C to 238.29A to 238.29K

Private School Choice:	**No**

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RELEVANT CASE LAW

Smith v. Board of Governors of University of North Carolina, 429 F. Supp. 871 (W.D.N.C. 1977), *aff'd*, 434 U.S. 803 (1977)

A federal district court held that state tuition assistance to students at colleges did not constitute excessive entanglement of state with religious activities because the colleges were not pervasively sectarian and, although there was a religious presence, inculcation of religion was not the colleges' primary purpose.

Heritage Village Church & Missionary Fellowship, Inc. v. State, 263 S.E.2d 726, 730 (N.C. 1980)

In striking down a statute imposing more burdensome licensing requirements on religious organizations than others, the North Carolina Supreme Court explicitly linked interpretation of the religion clauses in the North Carolina Constitution to

NORTH CAROLINA

YES VOUCHERS

YES TAX CREDITS

continued from previous page

interpretations of the First Amendment to the U.S. Constitution.

State Education Assistance Authority v. Bank of Statesville, 174 S.E.2d 551, 559 (N.C. 1970)
The North Carolina Supreme Court held that a state agency could issue tax-exempt bonds to acquire student loan debt without violating the North Carolina Constitution because advancing education is a public purpose. The court went on to hold that "[s]ubject to constitutional limitations, methods to facilitate and achieve the public purpose of providing for the education or training of residents of this State in institutions of higher education or post-secondary schools are for determination by the General Assembly."

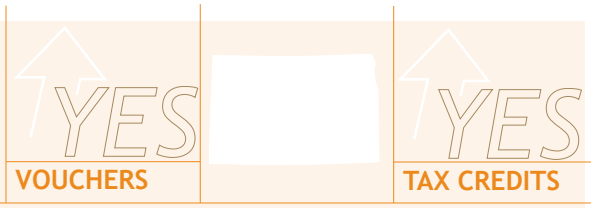
ANALYSIS AND RECOMMENDATIONS

Both tax credits and vouchers are school choice options for North Carolina. The North Carolina Constitution does not have a Blaine Amendment or a Compelled Support Clause and state cases look to federal Establishment Clause precedent. In *Zelman v. Simmons-Harris*, the U.S. Supreme Court upheld school choice programs under the federal Constitution.

To avoid any potential problems with Article IX, sections 6 and 7 of the North Carolina Constitution, voucher program funding should explicitly come from sources other than the state's public school fund.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

NORTH DAKOTA



CONSTITUTIONAL PROVISIONS

Blaine Amendment

"All colleges, universities, and other educational institutions, for the support of which lands have been granted to this state, or which are supported by a public tax, shall remain under the absolute and exclusive control of the state. No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school." North Dakota Const. Art VIII, § 5.

Education Articles

"A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota." North Dakota Const. Art VIII, § 1.

"The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education." North Dakota Const. Art VIII, § 2.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice:	Yes

Interdistrict voluntary transfer
North Dakota Century Code Sections 15.1-31-01 to 15.1-31-07

Charter Schools:	No
Private School Choice:	No

RELEVANT CASE LAW

D'Errico v. Lesmeister, 570 F. Supp. 158, 162 (D.N.D. 1983)

A federal district court held that North Dakota's higher education tuition assistance program violated the First Amendment's Establishment Clause because "[t]he net effect is that students attending two sectarian religious schools in North Dakota operated for express religious purposes are receiving state financial assistance."

Gerhardt v. Heid, 267 N.W. 127 (N.D. 1936)

The North Dakota Supreme Court held that wearing religious garb while teaching in a public school does not violate North Dakota's Blaine Amendment because it merely identifies the religion of the teacher rather than attempting to convert the students.

Todd v. Board of Education, 209 N.W. 369, 371 (N.D. 1926)

The North Dakota Supreme Court held that the requirement of a "uniform system of free public schools" does not mean "that school facilities provided in any district by means of taxes imposed therein shall be available to pupils from other districts without charge."

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for North Dakota. Although its constitution contains a Blaine Amendment, a voucher program funded from sources other than the public school fund complies with its terms. It is unclear whether North Dakota adheres to federal precedent on Establishment Clause issues, and the uniformity clause within its education provisions has received very little judicial attention.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

OHIO

YES VOUCHERS

YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent ...." OHIO CONST. Art. I, § 7.

Education Articles

"The principal of all funds, arising from the sale, or other disposition of lands, or other property, granted or entrusted to this State for educational and religious purposes, shall be used or disposed of in such manner as the General Assembly shall prescribe by law." OHIO CONST. Art. VI, § 1.

"The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state." OHIO CONST. Art. VI, § 2.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict/mandatory
Ohio Revised Code Annotated Section 3302.04e1ab
Intradistrict/mandatory
Ohio Revised Code Annotated Section 3313.97
Interdistrict/voluntary
Ohio Revised Code Annotated Sections 3313.98 - 3313.981

Charter Schools: Yes

Ohio Revised Code Annotated Section 3314.02

Private School Choice: Yes

Cleveland Scholarship & Tutoring Program
Ohio Revised Code Annotated Sections 3313.974 to 3313.975
Autism Scholarship Program
Ohio Revised Code Annotated Section 3310.41
Ohio Educational Choice Scholarships
Ohio Revised Code Annotated Section 3310.02

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RELEVANT CASE LAW

Zelman v. Simmons-Harris, 536 U.S. 639 (2002)
The U.S. Supreme Court held that Cleveland's Scholarship and Tutoring Program does not violate the Establishment Clause because the program is neutral with respect to religion, provides benefits directly to a wide spectrum of individuals, and allows those individuals to freely choose between religious and non-religious schools.

Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972), *aff'd sub nom., Grit v. Wolman*, 413 U.S. 901 (1973)
The U.S. Supreme Court held that state statutes that provided tax credits to parents of pupils in predominantly religious schools, who incurred educational expenses in excess of those borne by parents generally in securing approved primary and secondary schooling for their children, violated the Establishment Clause of the First Amendment.

Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999)
The Supreme Court of Ohio held the Cleveland

OHIO

YES VOUCHERS

YES TAX CREDITS

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Scholarship and Tutoring Program does not violate either the federal Establishment Clause or the state Constitution's Compelled Support or education clauses, but struck down the program after concluding it violated the single-subject rule contained in the state Constitution because it was passed as part of the state budget. The Legislature quickly re-authorized the program as stand-alone legislation.

Protestants & Other Americans United for Separation of Church & State v. Essex, 275 N.E.2d 603 (Ohio 1971)
The Ohio Supreme Court held that allotting federal money and equipment to private schools to compensate them for testing or educating deaf and disabled students does not violate the Ohio Constitution because the aid to the school is incidental at best.

Findley v. Conneaut, 62 N.E.2d 318 (Ohio 1945)
The Ohio Supreme Court held that a will providing for the establishment of a private polytechnic industrial school in which the teaching of Protestant religion is to be a prominent feature authorizes the creation of a religious school, for which municipalities are not allowed to issue bonds or expend funds raised by taxation.

Board of Education v. Minor, 23 Ohio St. 211 (Ohio 1872)
In refusing to enforce resolutions passed by the state board of education that would prohibit the reading of all religious materials in public schools, the Ohio Supreme Court held that the state Constitution neither prohibits nor requires religious instruction, or the reading of religious books, in the public schools of the state.

Honohan v. Holt, 244 N.E.2d 537 (Ohio Ct. Com. Pl. Franklin County 1968)
An Ohio Court of Common Pleas held that the indirect benefits flowing to religious schools from the transportation of their pupils at public expense do not constitute the support prohibited by the Compelled Support Clause of the Ohio Constitution.

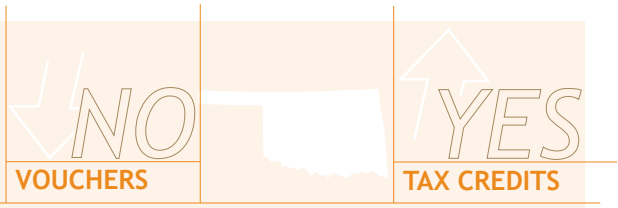
Moore v. Board of Education, 212 N.E.2d 833 (Ohio Ct. Com. Pl. Mercer County 1965)
An Ohio Court of Common Pleas held that religious segregation of students in public schools is not per se invalid, nor is the wearing of religious garb by teachers impermissible. The court did hold, however, that the particular "release time" program, which allowed to students to leave class for religious instruction in adjacent classrooms or buildings, amounted to the use of public funds for operation of parochial schools and was therefore unconstitutional.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Ohio. The Ohio Supreme Court upheld Cleveland's voucher program under both the state and federal constitutions, and the Ohio Legislature has since enacted two more voucher programs, one for children with autism and another for children in failing public schools.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

OKLAHOMA



CONSTITUTIONAL PROVISIONS

Blaine Amendment

"No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such." Oklahoma Const. Art. II, § 5.

Education Articles

"Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control; and said schools shall always be conducted in English: Provided, that nothing herein shall preclude the teaching of other languages in said public schools." Oklahoma Const. Art. I, § 5.

"Section thirteen in every portion of the State, which has been granted to the State, shall be preserved for the use and benefit of the University of Oklahoma and the University Preparatory School, one-third; of the normal schools now established, or hereafter to be established, one-third; and of the Agricultural and Mechanical College and Colored Agricultural and Normal University, one-third. The said lands or the proceeds thereof as above apportioned to be divided between the institutions as the Legislature may prescribe: Provided, That the said lands so reserved, or the proceeds of the sale thereof, or of any indemnity lands granted in lieu of section thirteen shall be safely kept or invested and preserved by the State as a trust, which shall never be diminished, but may be added to, and the income thereof, interest, rentals, or otherwise, only shall be used exclusively for the benefit of said educational institutions. Such educational institutions shall remain under the exclusive control of the State and no part of the proceeds arising from the sale or disposal of any lands granted for educational purposes, or the income or rentals thereof, shall be used for the support of any religious or sectarian school, college, or university, and no portion of the funds arising from the sale of sections thirteen or any indemnity lands selected in lieu thereof, either principal or interest, shall ever be diverted, either temporarily or permanently, from the purpose for which said lands were granted to the State." Oklahoma Const. Art. XI, § 5.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict/mandatory
Oklahoma Statutes Title 70 Section 1210.541 and Oklahoma Administrative Code Section 210:10-13-18

Interdistrict/mandatory
Oklahoma Statutes Title 70 Sections 8-101.1 to 8-112

Charter Schools: Yes

Oklahoma Statutes Title 70 Sections 3-130 to 3-162

Private School Choice: No

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RELEVANT CASE LAW

Burkhardt v. City of Enid, 717 P.2d 608 (Okla. 1989)
The Oklahoma Supreme Court held that a municipality's purchase of a local community college and subsequent lease of the college back to its original owners did not violate Oklahoma's Blaine Amendment because the college was not religious. The court noted that, even if it were, the city could still enter into the arrangement assuming it received sufficient consideration.

Meyer v. City of Oklahoma City, 496 P.2d 789 (Okla. 1972)
The Oklahoma Supreme Court held that maintenance by Oklahoma City of a cross on the city's fairgrounds, at a slight but continuing public expense, did not violate Oklahoma's Blaine Amendment because it was not operated for the use or benefit of any particular religion

OKLAHOMA

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or sect and its religious symbolism was obscured by the commercial atmosphere in which it was placed.

Board of Education for Independent School District No. 52 v. Antone, 384 P.2d 911, 913-14 (Okla. 1963) *see also Gurney v. Ferguson*, 122 P.2d 1002 (Okla. 1941)

The Oklahoma Supreme Court held that transporting pupils of parochial schools at public expense aided the schools and was forbidden by Oklahoma's Blaine Amendment.

State ex rel. Town of Pryor v. Williamson, 347 P.2d 204 (Okla. 1959)

The Oklahoma Supreme Court held that the state's Blaine Amendment did not prohibit the building and maintenance of a non-denominational, non-sectarian chapel on state grounds at public expense.

Murrow Indian Orphans Home v. Childers, 171 P.2d 600 (Okla. 1946)

The Oklahoma Supreme Court held that the state's Blaine Amendment did not prohibit the state from contracting with religious orphanages to provide care for needy children.

Sharp v. Guthrie, 152 P. 203, 408 (Okla. 1915)

In upholding a city's ability to sell a public park to a religious university for a dollar, the Oklahoma Supreme Court reasoned: "[t]he city having the right to sell the property, and the consideration being adequate, it would make no difference whether the grantee be a sectarian institution or not, for a sale upon a sufficient consideration would not be within the prohibition of section 5, art. 2 of the Constitution [Oklahoma's Blaine Amendment]."

Oklahoma Ry. Co. v. St. Joseph's Parochial School, 127 P. 1087 (Okla. 1912)

The Oklahoma Supreme Court held that a city franchise contract that required a tram line to provide half fare rides for all schoolchildren, whether they are public or parochial school students, does not violate the state's Blaine Amendment. In its reasoning, the court noted that children have a right to attend private school and that the reduced fares help promote education of children. In addition, the court stressed that the city could not discriminate on the basis of religion in a contract.

Connell v. Gray, 127 P. 417 (Okla. 1912)

The Oklahoma Supreme Court held that the president of a state college could not require students to pay for a Christian athletic association as a condition of their enrollment without violating the state's Blaine Amendment.

ANALYSIS AND RECOMMENDATIONS

Tax credit programs are the best school choice option for Oklahoma. Its Constitution contains a Blaine Amendment on which the Oklahoma Supreme Court premised its decision to strike down a private school transportation bill after the U.S. Supreme Court's decision in *Everson* upholding a transportation program in New Jersey under the Establishment Clause. This failure to distinguish between aiding students and aiding the schools they attend would probably foreclose voucher legislation.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

OREGON

NO VOUCHERS | YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Blaine Amendment

"No money shall be drawn from the Treasury for the benefit of any religious [sic], or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly." OREGON CONST. Art. I, § 5.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Interdistrict/voluntary
Oregon Revised Statutes Sections 339.125, 339.133

Charter Schools: Yes

Oregon Revised Statutes Sections 338.005 to 338.185

Private School Choice: No

RELEVANT CASE LAW

Dickman v. School District, 366 P.2d 533 (Or. 1961)

The Oregon Supreme Court held that secular textbooks could not be supplied to parochial school students at public expense under Oregon's Blaine Amendment.

Fisher v. Clackamas County School District, 507 P.2d 839 (Or. Ct. App. 1973)

Applying the reasoning of *Dickman*, the Oregon Court of Appeals held that Oregon's Blaine Amendment prevented the state from paying the salaries of teachers who teach secular subjects to parochial school students only.

ANALYSIS AND RECOMMENDATIONS

Tax credit programs are Oregon's best school choice option. Having refused to distinguish between aiding students and aiding the schools they choose to attend, the Oregon Supreme Court is unlikely to uphold voucher legislation.

Model Legislation: Great Schools Tax Credit Program, Family Education Tax Credit Program

PENNSYLVANIA

YES VOUCHERS

YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"[N]o man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent ...." PENNSYLVANIA CONST. Art. 1, § 3.

Blaine Amendment

"No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school." PENNSYLVANIA CONST. Art. 3, § 15.

Other Relevant Provisions

"No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association: Provided, That appropriations may be made for ... loans for higher educational purposes to residents of the Commonwealth enrolled in institutions of higher learning except that no scholarship, grants or loans for higher educational purposes shall be given to persons enrolled in a theological seminary or school of theology." PENNSYLVANIA CONST. Art. 3, § 29.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

24 Pennsylvania Code Section 13-1316

Charter Schools: Yes

24 Pennsylvania Code Sections 17-1701-A to 17-1751-A

Private School Choice: Yes

Education Improvement Tax Credits
24 Pennsylvania Code Sections 20-2001-B to 20-2008-B
Pre-K Tax Credits
24 Pennsylvania Code Section 24-2003-B

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RELEVANT CASE LAW

Christen G. v. Lower Merion School District, 919 F. Supp. 793 (E.D. Pa. 1996)

A federal district court held that in accordance with the IDEA a state could reimburse parents for private school tuition without violating either the U.S. or Pennsylvania constitutions because the payments do not advance religion.

Haller v. Department of Revenue, 728 A.2d 351 (Pa. 1999)

The Pennsylvania Supreme Court held that a tax exemption for the sale and use of "religious publications" sold by "religious groups" violates the First Amendment's Establishment Clause because it shows a preference for religious communications without some overarching secular purpose. The exemption's narrow focus makes it unconstitutional.

Springfield School District v. Department of Education, 397 A.2d 1154 (Pa. 1979)

The Pennsylvania Supreme Court held that free school bus transportation provided to parochial school children does not violate the federal or state constitutions because any benefit to a religious institution is indirect and incidental.

PENNSYLVANIA

YES VOUCHERS

YES TAX CREDITS

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Wiest v. Mt. Lebanon School District, 320 A.2d 362, 366-67 (Pa. 1974)
In holding that a religious invocation at the start of a public school graduation ceremony does not violate the First Amendment, the Pennsylvania Supreme Court also concluded that such an invocation would not offend Pennsylvania's Compelled Support Clause because it is coextensive with the First Amendment.

Rhoades v. School District, 226 A.2d 53 (Pa. 1967)
The Pennsylvania Supreme Court upheld the constitutionality of a statute authorizing transportation of private school students at public expense as a health and safety measure.

Schade v. Allegheny County Institution District, 126 A.2d 911 (Pa. 1956)
The Pennsylvania Supreme Court held that paying public funds to religious orphanages did not violate Pennsylvania's Blaine Amendment because they were not "appropriations," but rather payments for services rendered. Nothing in the Pennsylvania Constitution prevents the state from contracting with religious institutions and then paying its debts upon performance.

Collins v. Martin, 139 A. 122 (Pa. 1927)
In striking down a welfare appropriation in which public money would flow to private or religious hospitals, the Pennsylvania Supreme Court held that the Pennsylvania Constitution plainly stated that the people's money should not be given for charity, benevolence or education to persons or communities, or for any purpose to sectarian and denominational institutions, corporations or associations.

Collins v. Kephart, 117 A. 440 (Pa. 1921)
Under an earlier version of Pennsylvania's Blaine Amendment, the Pennsylvania Supreme Court held that religious hospitals were barred from receiving state funds despite their status as "worthy charities."

Giacomucci v. Southeast Delco School District, 742 A.2d 1165 (Pa. Commw. Ct. 1999)
The Pennsylvania Commonwealth Court held that a local school board lacked the statutory authority to institute a voucher program.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Pennsylvania. The Pennsylvania Constitution contains a Compelled Support Clause and a Blaine Amendment. The latter restricts the use of funds "raised for the public schools" but can be avoided entirely by funding vouchers from other government revenue. State case law demonstrates a strong adherence to federal Establishment Clause precedent and includes a distinction between "appropriations" and "payments for services rendered," which should ensure voucher legislation's compliance with the Blaine Amendment.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

RHODE ISLAND

YES VOUCHERS

YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"[N]o person shall be compelled to frequent or to support any religious worship, place, or ministry whatever, except in fulfillment of such person's voluntary contract ...." Rhode Island Const. Art. I, § 3.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: **Yes**

Rhode Island General Laws Section 16-2-19

Charter Schools: **Yes**

Rhode Island General Laws Sections 16-77-1 to 16-77-11

Private School Choice: **Yes**

Corporate Tax Credit Scholarships
Rhode Island General Laws Sections 44-62-1 to 44-62-7

RELEVANT CASE LAW

Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980)

The 1st U.S. Circuit Court of Appeals held that a Rhode Island statute allowing a tax deduction for educational expenses violated the Establishment Clause. The deduction was overwhelmingly claimed by parents of students in parochial schools, which meant it had more than an incidental effect on the advancement of religion, according to the court. In addition, ensuring that only secular materials were deducted would result in excessive entanglement. The U.S. Supreme Court later upheld a similar program in Minnesota in *Mueller v. Allen*.

Exeter-West Greenwich Regional School District v. Pontarelli, 460 A.2d 934 (R.I. 1983)

The Rhode Island Supreme Court held that a community was not required to pay for the education of resident students who chose to attend religiously affiliated high schools because the community had already provided for free education at certain public high schools outside the community.

Bowerman v. O'Connor, 247 A.2d 82 (R.I. 1968)

The Rhode Island Supreme Court upheld a textbook loan program challenged under the state's Compelled Support Clause. The court reasoned that Rhode Island's Compelled Support Clause is no more restrictive than the federal Establishment Clause and the U.S. Supreme Court had upheld a similar program in New York in *Board of Education v. Allen*.

General Finance Corp. v. Archetto, 176 A.2d 73 (R.I. 1961)

Examining federal Establishment Clause jurisprudence, the Rhode Island Supreme Court upheld a statute granting tax exemption for religious buildings against a First Amendment challenge.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Rhode Island. Given that Rhode Island courts adhere to federal Establishment Clause precedent when interpreting the state's Compelled Support Clause, it is likely that the *Zelman* decision, with its distinction between aiding students and aiding the schools they choose to attend, will be persuasive.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

SOUTH CAROLINA

YES VOUCHERS

YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Blaine Amendment

"No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution." South Carolina Const. Ann. Art. XI, § 4.[1]

Education Article

"The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable." South Carolina Const. Ann. Art. XI, § 3.

1 Prior to its amendment in 1973, the Blaine Amendment read: "The property or credit of the State of South Carolina, or of any county, city, town, township, school district, or other subdivision of the said State, or any public money, from whatever source derived, shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, directly or indirectly, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization." South Carolina Const. Ann. Art. XI, sec. 9. (repealed)

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Interdistrict/Voluntary
South Carolina Code Annotated Sections 59-63-45, 59-63-490

Charter Schools: Yes

South Carolina Code Annotated Sections 59-40-10 to 59-40-210

Private School Choice: No

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RELEVANT CASE LAW

Durham v. McLeod, 192 S.E.2d 202, 204 (S.C. 1972)[2]

The South Carolina Supreme Court held that using public money to guarantee student loans for students attending private schools did not violate South Carolina's Blaine Amendment because the program is religiously neutral and supports higher education, not institutions of higher education. It was on that basis that the court distinguished its holding in *Hartness*.

Hartness v. Patterson, 179 S.E.2d 907 (S.C. 1971)[3]

The South Carolina Supreme Court held that giving public tuition grants to students attending private schools violates South Carolina's Blaine Amendment because there

2 Decided under since-repealed version of the South Carolina Blaine Amendment that had prohibited "direct or indirect" aid to parochial schools.

3 Decided under since-repealed version of the Blaine Amendment that had prohibited "direct or indirect" aid to parochial schools.

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can be no distinction between giving money to students for tuition and giving money to institutions.

2003 S.C. AG LEXIS 3 (2003)
The South Carolina Attorney General concluded that distributing state lottery funds directly to "historically black colleges"—whether or not they were religious—violates South Carolina's Blaine Amendment because it is a "direct benefit [to] certain private educational institutions."

2003 S.C. AG LEXIS 42 (2003)
The South Carolina Attorney General concluded that using lottery funds to contract with private schools to provide education for low-income, educationally disadvantaged students complied with South Carolina's Blaine Amendment because the program was religiously neutral, was explicitly intended to help students, had findings to support that purpose, gave money through contracts rather than outright grants, and limited the manner in which the money could be spent.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for South Carolina. They are completely consistent with the South Carolina Constitution and relevant South Carolina state court decisions.

In 1973, South Carolina amended its Blaine Amendment by eliminating the ban on "indirect" funding of private educational institutions. According to the authoritative "West Committee,"[1] the change reflected the framers' intent to allow public funds to be used to assist students who independently choose to attend private educational institutions, but to prohibit direct government subsidization of those institutions.

From the school choice perspective, this change is important for two reasons. First, a voucher program represents precisely the type of funding the framers of the current version of its Blaine Amendment (Article XI, Section 4) wished to allow. Second, South Carolina Supreme Court cases like *Hartness v. Patterson* that reject the distinction between aid to students and aid to institutions are no longer valid, as they were premised on constitutional language that was later deleted in order to allow student benefit programs.

When crafting school choice legislation, South Carolina legislators may want to pattern it on the South Carolina Higher Education Excellence Enhancement Program,[2] which does an excellent job of adhering to the requirements of the South Carolina Constitution and the jurisprudence of South Carolina courts. The program includes a detailed legislative findings section that explicitly recognizes the role of private institutions in helping the state meet the needs of low-income and educationally disadvantaged students. Additionally, funds for the program are appropriated from the Education Lottery Account, and there are express rules governing their use.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

1 Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895.

2 SCCA 2-77-10 through SCCA 2-77-50.

SOUTH DAKOTA

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"[N]o person shall be compelled to attend or support any ministry or place of worship against his consent nor shall any preference be given by law to any religious establishment or mode of worship." South Dakota Const. Art. VI, § 3.

Blaine Amendments

"No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution." South Dakota Const. Art. VI, § 3.

"No appropriation of lands, money or other property or credits to aid any sectarian school shall ever be made by the state, or any county or municipality within the state, nor shall the state or any county or municipality within the state accept any grant, conveyance, gift or bequest of lands, money or other property to be used for sectarian purposes, and no sectarian instruction shall be allowed in any school or institution aided or supported by the state." South Dakota Const. Art. VIII, § 16.

Other Relevant Provision

"Notwithstanding the provisions of section 3, Article VI and section 16, Article VIII, the Legislature may authorize the loaning of nonsectarian textbooks to all children of school age." South Dakota Const. Art. VIII, § 20.[1]

1 This provision was added to the South Dakota Constitution in 1986, and specifically negates the results in the *Elbe* and *McDonald* cases.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice:	**Yes**

Intradistrict and Interdistrict/mandatory
South Dakota Codified Laws Sections 13-28-30 to 13-28-49
Interdistrict/mandatory
South Dakota Codified Laws Sections 13-28-21 to 13-28-23

Charter Schools:	**No**
Private School Choice:	**No**

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RELEVANT CASE LAW

Elbe v. Yankton Independent School District, 372 N.W.2d 113 (S.D. 1985)

The South Dakota Supreme Court held that South Dakota's textbook loan program was a violation of South Dakota's Blaine Amendments and declined to overturn a similar earlier ruling in *McDonald*.

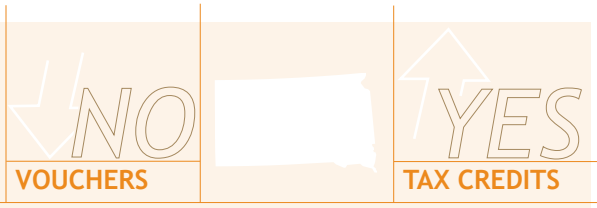
In re N. C. B. Careers, 298 N.W.2d 526 (S.D. 1980)

The South Dakota Supreme Court held that tax exemptions for religious institutions are not the functional equivalent of appropriations and therefore do not violate South Dakota's Blaine Amendments. Merely relieving the church of an obligation to support the state is not the same thing as the state supporting the church.

McDonald v. School Board, 246 N.W.2d 93 (S.D. 1976)

In holding that a textbook loan program was unconstitutional, the South Dakota Supreme

SOUTH DAKOTA



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Court concluded that South Dakota's Blaine Amendments were intended to prohibit in every form, whether as a gift or otherwise, the appropriation of the public funds for the benefit of or to aid any sectarian school or institution.

South Dakota High School Interscholastic Activities Association v. St. Mary's Inter-Parochial High School, 141 N.W.2d 477 (S.D. 1966)

In holding that private schools can join a public high school athletic association and play on public school fields, the South Dakota Supreme Court reasoned that the state's Compelled Support Clause and Blaine Amendments were not intended to permit government discrimination against its citizens based on religion.

State ex rel. Finger v. Weedman, 226 N.W. 348 (S.D. 1929)

The South Dakota Supreme Court held that the state school board may not compel students to read from the King James Bible because doing so violates religious freedom established by federal and South Dakota constitutions.

Synod of Dakota v. State, 50 N.W. 632 (S.D. 1891)

The South Dakota Supreme Court held that the state was not obligated to pay for educational services provided by a religious school because doing so would violate South Dakota's Blaine Amendments. The court provided a detailed analysis of what it means to "benefit" or "aid" a sectarian institution and explicitly rejected a distinction between aiding students and aiding schools.

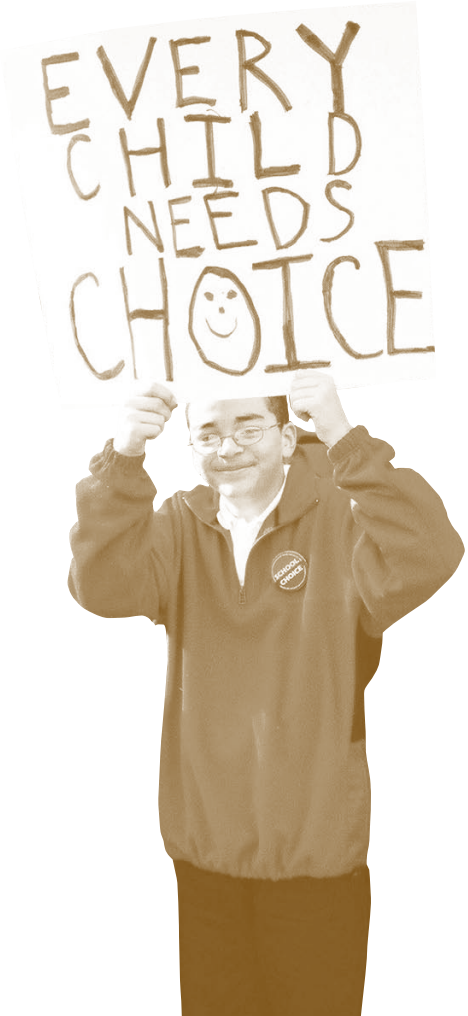
1992 Opinion Attorney General S.D. 69, Op. No. 92-04

South Dakota Attorney General opined that any statute requiring the transportation of private school students on public school buses would violate South Dakota's Blaine Amendments because the benefits received by the private schools would be more than "incidental."

ANALYSIS AND RECOMMENDATIONS

A tax credit program is the best school choice option for South Dakota given the restrictive interpretation of the state's religion clauses. The South Dakota Supreme Court has explicitly rejected the distinction between aiding students and aiding the schools they choose to attend. Although Article VIII, Section 20 was later enacted to authorize textbook loans to private school students, the South Dakota Supreme Court cases that prompted the amendment are still good law outside the context of textbook loan programs.

Model Legislation: Great Schools Tax Credit Program, Family Education Tax Credit Program



TENNESSEE

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"[T]hat no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent ...." TENNESSEE CONST. Art. I, § 3.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict/mandatory
Tennessee Code Annotated Section 49-1-602
Intradistrict and Interdistrict/voluntary
Tennessee Code Annotated Sections 49-6-3104 to 49-6-3105

Charter Schools: Yes

Tennessee Code Annotated Sections 49-13-101 to 49-13-127

Private School Choice: No

RELEVANT CASE LAW

Americans United for Separation of Church & State v. Blanton, 433 F. Supp. 97 (M.D. Tenn. 1977), *aff'd*, 434 U.S. 803 (1977)

A federal district court held that Tennessee's Student Assistance Program does not violate the Establishment Clause of the First Amendment because money is paid directly to the student rather than the institution and without reference to the public or private nature of the school.

Americans United for Separation of Church & State v. Dunn, 384 F. Supp. 714 (M.D. Tenn. 1974), *vacated, Blanton v. Americans United for Separation of Church & State*, 421 U.S. 958 (1975)

A federal district court held that Tennessee's Tuition Grant Program violates the Establishment Clause of the First Amendment because money is paid directly to the school a student chooses to attend with no limits on the manner in which that money can be used. While the case was on appeal to the U.S. Supreme Court, the Tennessee legislature amended the program, leading the Supreme Court to vacate the decision and remand it to the lower court. The legislature then repealed the whole statute and replaced it with the Tennessee Student Assistance Program, which was upheld by the U.S. Supreme Court in 1977 in *Americans United for Separation of Church & State v. Blanton*.

Carden v. Bland, 288 S.W.2d 718 (Tenn. 1956)

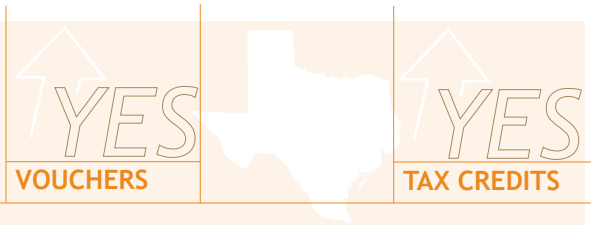
The Tennessee Supreme Court held that reading Bible passages and reciting the Lord's Prayer did not amount to the establishment of a state religion.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Tennessee. Its Constitution contains no Blaine Amendment and its Compelled Support Clause has received little judicial attention. In *Carden*, the Tennessee Supreme Court noted that Tennessee's Compelled Support Clause and the First Amendment were practically synonymous.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

TEXAS



CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent." Texas Const. Art. I, § 6.

Blaine Amendments

"No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes." Texas Const. Art. I, § 7.

"The permanent school fund and the available school fund may not be appropriated to or used for the support of any sectarian school." Texas Const. Art. VII, § 5(c).

Education Article

"A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Texas Const. Art. VII, § 1.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict/mandatory and Interdistrict/voluntary
Texas Education Code Annotated Sections 29.201 to 29.204
Intradistrict/voluntary
Texas Education Code Annotated Sections 25.031 to 25.034, 25.035 to 25.039

Charter Schools: Yes

Texas Education Code Annotated Sections 12.001 to 12.156

Private School Choice: No

RELEVANT CASE LAW

Church v. Bullock, 109 S.W. 115 (Tex. 1908)
The Texas Supreme Court held that reading from the King James Bible and reciting the Lord's Prayer did not turn a Texas public school into a "sectarian" institution because both are critical to developing students' moral faculties.

1975 Tex. AG LEXIS 285, Letter Advisory No. 105
The Texas Attorney General concluded that distribution of state-owned textbooks to private school pupils would not violate a Blaine Amendment (Article I, Section 7) of the Texas Constitution because it would provide only "minimal benefits to the sectarian activities of nonpublic schools."

1973 Tex. AG LEXIS 231, 15-16 Opinion No H-66
The Texas Attorney General concluded that providing public funds to parochial schools through tuition equalization grants under a religiously neutral program is not inherently unconstitutional under the Texas Constitution because although Texas' second Blaine Amendment (Article VII, Section 5) "prohibits aid to sects[,]" "not all denominational institutions are sectarian in the constitutional sense."

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Texas. The few interpretations of Texas' Blaine Amendments and its Compelled Support Clause that exist do no prohibit providing aid to parents to enable them to select public or private schools for their children. Such programs must be funded by sources other than the permanent and available school funds defined in the education article of the Texas Constitution.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

UTAH

YES VOUCHERS

YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Blaine Amendments

"[N]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment." UTAH CONST. Art. I, § 4.

"Neither the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization." UTAH CONST. Art. X, § 9.

Education Articles

"The Legislature shall provide for the establishment and maintenance of the state's educational system, including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control." UTAH CONST. Art. X, § 1.

"The public education system shall include all public elementary and secondary schools and such other schools and programs as the Legislature may designate ...." UTAH CONST. Art. X, § 2.

"(1) There is established a permanent State School Fund which shall consist of revenue from the following sources:
(a) proceeds from the sales of all lands granted by the United States to this state for the support of the public elementary and secondary schools;
(b) 5% of the net proceeds from the sales of United States public lands lying within this state;
(c) all revenues derived from nonrenewable resources on state lands, other than sovereign lands and lands granted for other specific purposes;
(d) all revenues derived from the use of school trust lands;
(e) revenues appropriated by the Legislature; and
(f) other revenues and assets received by the fund under any other provision of law or by bequest or donation.

(2) (a) The State School Fund principal shall be safely invested and held by the state in perpetuity.
(b) Only the interest and dividends received from investment of the State School Fund may be expended for the support of the public education system as defined in Article X, Section 2 of this constitution…

(3) There is established a Uniform School Fund which shall consist of revenue from the following sources:
(a) interest and dividends from the State School Fund;
(b) revenues appropriated by the Legislature; and
(c) other revenues received by the fund under any other provision of law or by donation.
(4) The Uniform School Fund shall be maintained and used for the support of the state's public education system as defined in Article X, Section 2 of this constitution and apportioned as the Legislature shall provide." UTAH CONST. Art. X, § 5.

"(5) All revenue from taxes on intangible property or from a tax on income shall be used to support the systems of public education and higher education as defined in Article X, Section 2." UTAH CONST. Art. XIII, § 5.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict/mandatory
Utah Code Annotated Section 53A-2-213
Interdistrict/mandatory
Utah Code Annotated Sections 53A-2-207 to 212

Charter Schools: Yes

Utah Code Annotated Sections 53A-1a-501 to 514

Private School Choice: Yes

Carson Smith Scholarships for Special Needs Students
Utah Code Annotated Sections 53A-1a-701 to 710
Parents for Choice in Education Act (universal vouchers)
Utah Code Annotated 1953 53A-1a-801 through 811

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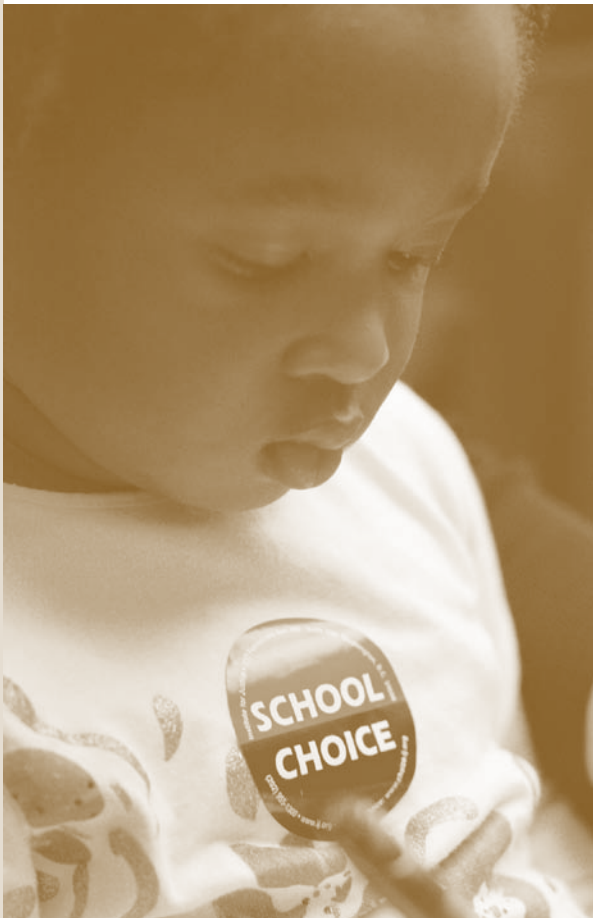

UTAH

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RELEVANT CASE LAW

Society of Separationists, Inc. v. Whitehead, 870 P.2d 916 (Utah 1993)

The Utah Supreme Court held that the Salt Lake City Council's policy of opening meetings with the Pledge of Allegiance and prayer does not offend the first Blaine Amendment (Article I, Section 4) of the Utah Constitution because public funds were not used to directly aid any particular religion.

ANALYSIS AND RECOMMENDATIONS

Both tax credits and voucher programs are school choice options for Utah. They are completely consistent with the Utah Constitution and relevant Utah state court decisions.

In its most thorough analysis of the more general of the Utah Constitution's Blaine Amendments (Article I, Section 4) to date, the Utah Supreme Court held in *Whitehead* that if public "money or property are provided on a nondiscriminatory basis" and they are "equally accessible to all," the government program at issue complies with the Utah Constitution. A voucher program, in which students use publicly funded scholarships to attend private, religious or public schools of their choice, undoubtedly satisfies those requirements.

Legislators should stress that the purpose of the voucher program is to expand educational opportunities on a non-discriminatory basis, and that the public funds used for vouchers are not for the benefit of the schools that children decide to attend, but for the children themselves. In addition, if funds derived from the income tax are used, the Legislature should be sure to state that publicly financed scholarship programs are a part of the public education system under the education article (Article X, Section 2).

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

VERMONT

NO VOUCHERS | YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"[A]nd that no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience …." VERMONT CONST. Ch. I, Art. 3.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Interdistrict/voluntary
Vermont Statutes Annotated Title 16, Section 1093

Charter Schools: No

Private School Choice: Yes

Town Tuitioning System (excludes religious schools)
Vermont Statutes Annotated Title 16, Sections 166, 821-836

RELEVANT CASE LAW

Chittenden Town School District v. Vermont Department of Education, 738 A.2d 539 (Vt. 1999), *cert denied*, 528 U.S. 1066 (1999)

The Vermont Supreme Court held that permitting parents in "tuitioning" towns—where the town pays tuition to the parent's school of choice instead of maintaining public schools—to choose religious schools violated the Vermont Constitution's Compelled Support Clause because there are no restrictions to ensure that state funds would not support religious worship.

Campbell v. Manchester Board of School Directors, 641 A.2d 352 (Vt. 1994)

Noting changes in First Amendment jurisprudence, the Vermont Supreme Court held the requiring a local school district to reimburse a parent who sent his child to a parochial school did not violate the First Amendment. The decision overrules *Swart v. South Burlington Town School District*, 167 A.2d 514 (Vt. 1961), which held the opposite.

Vermont Educational Buildings Financing Agency v. Mann, 247 A.2d 68 (Vt. 1968)

The Vermont Supreme Court held that a statute allowing a state agency to issue tax-exempt revenue bonds to finance construction of buildings on behalf of private colleges and universities neither advanced nor inhibited religion and therefore did not violate the First Amendment.

ANALYSIS AND RECOMMENDATIONS

Tax credits are Vermont's best school choice option. Its Constitution contains a Compelled Support Clause that the Vermont Supreme Court has read to exclude parents who choose religious schools from participating in the current voucher program.

Model Legislation: Great Schools Tax Credit Program, Family Education Tax Credit Program

VIRGINIA

NO* VOUCHERS | YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever ...." VIRGINIA CONST. Art. I, § 16.

Blaine Amendment

"The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society ...." VIRGINIA CONST. Art. IV, § 16.

Education Articles

"The General Assembly shall provide for the compulsory elementary and secondary education of every eligible child of appropriate age, such eligibility and age to be determined by law. It shall ensure that textbooks are provided at no cost to each child attending public school whose parent or guardian is financially unable to furnish them." VIRGINIA CONST. Art. VIII, § 3.

"The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law." VIRGINIA CONST. Art. VIII, § 7.

"No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; second, that the General Assembly may appropriate funds to an agency, or to a school or institution of learning owned or controlled by an agency, created and established by two or more States under a joint agreement to which this State is a party for the purpose of providing educational facilities for the citizens of the several States joining in such agreement; third, that counties, cities, towns and districts may make appropriations to nonsectarian schools of manual, industrial or technical training and also to any school or institution of learning owned or exclusively controlled by such county, city, town or school district." VIRGINIA CONST. Art. VIII, § 10.

"The General Assembly may provide for loans to, and grants to or on behalf of, students attending nonprofit institutions of higher education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education ...." VIRGINIA CONST. Art. VIII, § 11.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice:	No
Charter Schools:	No

Virginia Code Annotated Sections 22.1-212.5 to 22.1-212.16

Private School Choice:	No

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RELEVANT CASE LAW

Phan v. Virginia, 806 F.2d 516 (4th Cir. 1986)

The 4th U.S Circuit Court of Appeals held that nothing in the Virginia Constitution prevents the state from reimbursing a disabled

VIRGINIA

NO* VOUCHERS | YES TAX CREDITS

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student attending an out-of-state religious college for incidental living expenses.

Virginia College Building Authority v. Lynn, 538 S.E.2d 682 (Va. 2000)
The Virginia Supreme Court held that issuing bonds on behalf of religious institutions did not violate Virginia's Compelled Support Clause because it did not result in governmental indoctrination, it determined eligibility for aid neutrally, and any funds received stemmed from the private choices of investors, not the government.

Miller v. Ayres, 191 S.E.2d 261 (Va. 1972)
The Virginia Supreme Court questioned the continued validity of *Almond* given the 1956 and 1971 rewrites of the State's Blaine Amendment, which the court encouraged in *Almond*. Nevertheless, the court held that "loans" given to students without any requirement for repayment or public service amounted to "gifts" and gifts are not within the terms allowed by one of Virginia's education provisions (Article VIII, Section 11).

Almond v. Day, 89 S.E.2d 851 (Va. 1955)
The Virginia Supreme Court held that using public funds to pay the private school education costs for veterans' children violated the Virginia Constitution. By enabling the attendance of students who would likely not be there otherwise, the program provided impermissible support to the religious schools they choose.

1995 Va. AG LEXIS 61 (Va. AG 1995)
The Virginia Attorney General opined that nothing in the Virginia Constitution prohibits busing of private school students, including those attending religious schools.

1994 Va. AG LEXIS 1 (Va. AG 1994)
The Virginia Attorney General opined that the Virginia Constitution would permit a voucher program that included private schools, but not religious schools.

ANALYSIS AND RECOMMENDATIONS

Tax credit programs are Virginia's best school choice option.

*Virginia's Constitution contains an express provision allowing publicly funded vouchers at private, non-religious schools. However, the Institute for Justice regards excluding the choice of religious schools as questionable constitutionally under the First Amendment and Equal Protection Clauses.

Model Legislation: Great Schools Tax Credit Program, Family Education Tax Credit Program

WASHINGTON

CONSTITUTIONAL PROVISIONS

Blaine Amendments

"No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment ...." WASHINGTON CONST. Art. I, § 11.

"All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." WASHINGTON CONST. Art. IX, § 4.

Education Article

"The legislature shall provide for a general and uniform system of public schools." WASHINGTON CONST. Art. IX, § 2.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice:	**Yes**

Intradistrict/mandatory
Washington Revised Code Section 28A.225.270
Interdistrict/mandatory
Washington Revised Code Sections 28A.225.220 to 28A.225.240, 28A.225.280 to 28A.225.310

Charter Schools:	**No**
Private School Choice:	**No**

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RELEVANT CASE LAW

Locke v. Davey, 540 U.S. 712 (2004)

The U.S. Supreme Court upheld Washington state's exclusion of a theology major from a state-funded college scholarship program. The Court held that Washington could justify this exclusion as a way to avoid an unconstitutional establishment of religion under the state Constitution. Importantly, the Court carved out only a narrow exception—public funding for the religious training of clergy—to the general rule requiring equal treatment of religious and non-religious options. Indeed, the scholarship program allowed students to select religious schools, as well as public and non-religious private schools, much like K-12 school choice programs. It only excluded students actually training to be ministers.

Garnett v. Renton School District No. 403, 987 F.2d 641, 646 (9th Cir. 1993)

The 9th U.S. Circuit Court of Appeals held that the federal Equal Access Act provides religious student groups an equal right to use school grounds on the same basis as other clubs. Washington argued that its state Constitution would deny such equal access, but the court held that state law must yield to federal law.

State ex rel. Gallwey v. Grimm, 48 P.3d 274 (Wash. 2002)

The Washington Supreme Court held that a state educational grant program for "placebound" students—those who the state identified as not

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WASHINGTON

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likely to complete a four-year degree without public financial assistance—that included religious schools does not violate Washington's first Blaine Amendment (Article I, Section 11) because the program was not intended to aid religious schools. The program stipulates that participating students may not select schools that require religious instruction or worship. Additionally, the court held that Washington's other Blaine Amendment (Article IX, Section 4) did not apply to institutions of higher education.

Malyon v. Pierce County, 935 P.2d 1272 (Wash. 1997)
The Washington Supreme Court held that a sheriff's department's chaplaincy program does not violate Washington's first Blaine Amendment (Article I, Section 11) because the chaplains are not paid for their time.

Witters v. Commission for Blind, 717 P.2d 1119 (Wash. 1989)
The Washington Supreme Court held that Washington's first Blaine Amendment (Article I, Section 11) prevented the state from using public funds to pay for a handicapped student's seminary studies.

Higher Education Facilities Authority v. Gardner, 699 P.2d 1240 (Wash. 1985)
In accordance with its holding in *Spellman*, the Washington Supreme Court held that granting tax-exempt revenue bond proceeds to religious colleges did not transfer public funds or property to a sectarian institution. For that reason, Washington's first Blaine Amendment (Article I, Section 11) did not apply.

Health Care Facilities Authority v. Spellman, 633 P.2d 866 (Wash. 1981)
In upholding a statute that provided tax-exempt bond proceeds for nonprofit hospitals, the Washington Supreme Court held that although the bonds were enabled by a public body, "the money was not acquired either for or from the general public" and therefore did not violate Washington's first Blaine Amendment (Article I, Section 11).

Calvary Bible Presbyterian Church v. Board of Regents, 436 P.2d 189 (Wash. 1967)
The Washington Supreme Court held that when public school students read the Bible as a

WASHINGTON

NO VOUCHERS | YES TAX CREDITS

continued from previous page

piece of literature among other works in a class required for graduation, it does not violate either of Washington's Blaine Amendments. The class imposes no religious or sectarian message on its students.

Perry v. School District No. 81, 344 P.2d 1036 (Wash. 1954)

The Washington Supreme Court held that allowing religious groups to distribute attendance cards and make announcements about the released-time program on public school grounds is a use of school facilities supported by public funds for the promotion of a religious program and therefore violates Washington's first Blaine Amendment (Article I, Section 11).

Mitchell v. Consol. School District, 135 P.2d 79 (Wash. 1943); *see also Visser v. Nooksack Valley Sch. Dist.*, 207 P.2d 198 (Wash. 1949) (same)

The Washington Supreme Court struck down a transportation program for private school students. The court said the program violated Washington's Blaine Amendments because the public would incur some additional expense if private school students were transported on public school buses.

Saucier v. Employment Security Department, 954 P.2d 285 (Wash. Ct. App. 1998)

The Washington Court of Appeals held that although the Salvation Army should be treated as a church and its receipt of appropriated grants and its exemption from paying unemployment insurance taxes confer "appropriated" funds and benefits, such an appropriation does not violate Washington's first Blaine Amendment (Article I, Section 11) because the state's purpose in doing so is to fund a secular drug treatment program.

ANALYSIS AND RECOMMENDATIONS

A tax credit program is Washington's best school choice option. The Washington Constitution contains Blaine Amendment language in two provisions. Both have been interpreted by the Washington Supreme Court as being more restrictive than their federal Establishment Clause counterpart.

Model Legislation: Great Schools Tax Credit Program, Family Education Tax Credit Program

WEST VIRGINIA

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"[A]nd the legislature shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this State, to levy on themselves, or others, any tax for the erection or repair of any house for public worship, or for the support of any church or ministry, but it shall be left free for every person to select his religious instructor, and to make for his support, such private contract as he shall please." West Virginia Const. Art. III, § 15.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice:	**Yes**

Intradistrict/mandatory
West Virginia Code Section 18-2E-5k
Intradistrict/voluntary
West Virginia Code Section 18-5-16
Interdistrict/voluntary
West Virginia Code Section 18-5-16a

Charter Schools:	**No**
Private School Choice:	**No**

RELEVANT CASE LAW

Cooper v. Board of Education, 478 S.E.2d 341 (W. Va. 1996)
The West Virginia Supreme Court held that the 14th Amendment's Equal Protection Clause was not violated when the state stopped transporting private school students at public expense. The state may treat public and private school students differently when allotting state education funds if it has a valid financial reason for doing so.

Janasiewicz v. Board of Education, 299 S.E.2d 34 (W. Va. 1982)
Acknowledging changes in federal Equal Protection jurisprudence, the West Virginia Supreme Court held that failing to provide transportation to private school students was not a violation of the 14th Amendment. However, the court reaffirmed its earlier conclusion that school boards were required by statute to provide either transportation or an equivalent stipend to private school students and that doing so did not constitute a violation of the First Amendment and West Virginia's Compelled Support Clause.

State ex rel. Hughes v. Board of Education, 174 S.E.2d 711 (W. Va. 1970), *cert. denied*, 403 U.S. 944 (1971)
The West Virginia Supreme Court held that a county school board's refusal to transport Catholic school students on its buses violated the provisions of a West Virginia statute requiring it to transport "all children of school age." It then went further and held that the school board's policy deprives Catholic children and their parents of their right of religious freedom in violation of the provisions of the First Amendment and even more clearly in violation of the comprehensive provisions of the Compelled Support Clause.

Gissy v. Board of Education, 143 S.E. 111 (W. Va. 1928)
The West Virginia Supreme Court required a public school board to reimburse parents who complied with West Virginia's mandatory education statute by sending their children to a private, parochial school because no public high school existed in their district. The school board had argued that it was only required to reimburse for public school tuition.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for West Virginia. The West Virginia Supreme Court has generally interpreted its Compelled Support Clause in a parallel fashion to the First Amendment, and there is no indication in its case law that it would not apply *Zelman* to uphold a state voucher program.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program

WISCONSIN

YES VOUCHERS

YES TAX CREDITS

CONSTITUTIONAL PROVISIONS

Compelled Support Clause

"[N]or shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent ...." Wisconsin Const. Art. I, § 18.

Blaine Amendment

"[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." Wisconsin Const. Art. I, § 18.

Education Articles

"[As amended April 1972] The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein ...." Wisconsin Const. Art. X, § 3.

"Provision shall be made by law for the establishment of a state university... and no sectarian instruction shall be allowed in such university." Wisconsin Const. Art. X, § 6.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice: Yes

Intradistrict and Interdistrict/voluntary
Wisconsin Statutes Section 121.85
Interdistrict/mandatory
Wisconsin Statutes Sections 118.51, 118.52, 121.58

Charter Schools: Yes

Wisconsin Statutes Section 118.40

Private School Choice: Yes

Milwaukee Parental Choice Program
Wisconsin Statutes Section 119.23

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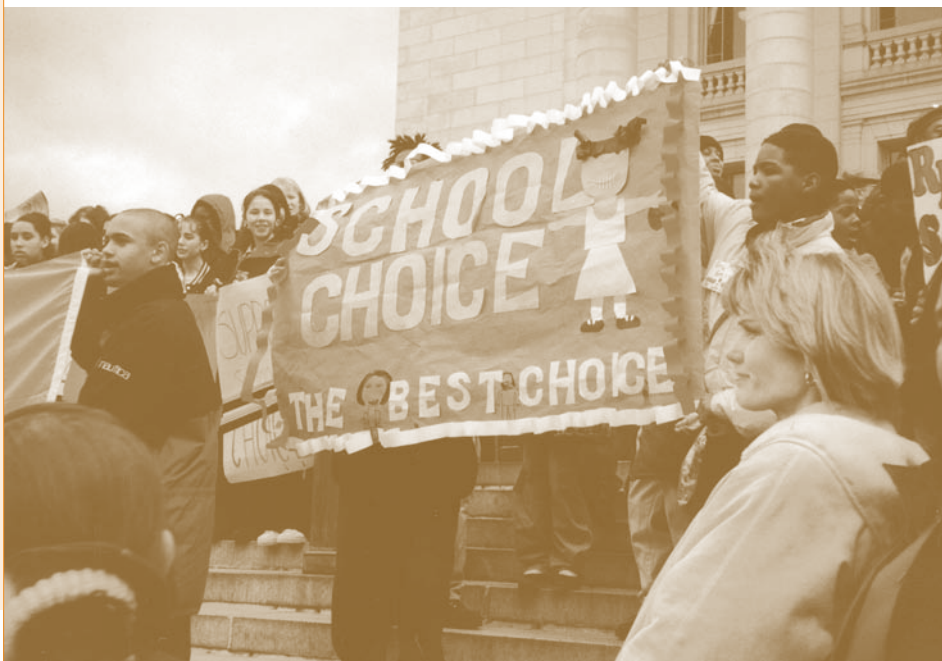
RELEVANT CASE LAW

Freedom from Religion Foundation, Inc. v. McCallum, 324 F.3d 880 (7th Cir. 2003)

The 7th U.S. Circuit Court of Appeals held that the state's contract with a Christian "halfway house" did not violate the Establishment Clause because prisoners were able to choose that particular program from a range of other, secular options and prisoners were not pressured to be Christian or convert to Christianity before participating. The court compared the "halfway house" program to the education vouchers at issue in *Zelman* and concluded that neither provided unconstitutional support to religion.

Freedom From Religion Foundation, Inc. v. Bugher, 55 F. Supp. 2d 962 (W.D. Wis. 1999)

A federal district court held that the state's subsidization of internet wiring at a religious school does not violate the Establishment Clause because all schools are eligible for subsidies, without regard to whether they are religiously affiliated, because the telecommunications conduits provided are neutral as to information passing through them, benefits flowing to religious schools are small relative to total program, and religious schools are not being relieved of burden they previously bore, as they would not be participating in this particular Internet linkage but for the availability of subsidy.



WISCONSIN

YES VOUCHERS

YES TAX CREDITS

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Vincent v. Voight, 614 N.W.2d 388 (Wis. 2000)
In a suit challenging the state's school finance system, the Wisconsin Supreme Court held that its education provision requiring uniform public schools (Article X, Section 3) related to the character of instruction offered in the public schools, and not the size, boundaries or composition of the school districts. The clause does not require absolute uniformity in either educational offerings or per-pupil expenditures among school districts.

Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998)
The Wisconsin Supreme Court held that the Milwaukee Parental Choice Program does not violate either the state's Compelled Support Clause or its Blaine Amendment because students are not compelled to attend religious schools and any benefits to such schools are incidental. The court also affirmed the conclusions of *Davis*, an earlier uniformity challenge to the school choice program.

Davis v. Grover, 480 N.W.2d 460 (Wis. 1992)
The Wisconsin Supreme Court upheld the Milwaukee Parental Choice Program from a legal challenge under Wisconsin's "uniformity provision" (Article X, Section 3). The court also rejected opponents' claim that the program violated Article 4, Section 18 of the Wisconsin Constitution, a prohibition on private or local bills.

State ex rel. Wisconsin Health Facilities Authority v. Lindner, 280 N.W.2d 773 (Wis. 1979)
The Wisconsin Supreme Court held that the Wisconsin Health Facilities Authority, which was created to improve healthcare services by providing tax-exempt bonds to Catholic hospitals, among others, does not violate Wisconsin's Compelled Support Clause or Blaine Amendment because the aid flows predominantly to the secular aspects of health care and therefore does not have the primary effect of advancing religion.

State ex rel. Holt v. Thompson, 225 N.W.2d 678 (Wis. 1975)
The Wisconsin Supreme Court held that a "released time statute," which allows students

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WISCONSIN

YES VOUCHERS

YES TAX CREDITS

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to leave school for part of the day to receive religious instruction, does not violate the Establishment or Equal Protection clauses of the U.S. Constitution or the freedom of worship or district school sections of the Wisconsin Constitution. Students only leave and pray if they want to and no public funds are used to accommodate those who do.

State ex rel. Warren v. Nusbaum, 219 N.W.2d 577 (Wis. 1974)

The Wisconsin Supreme Court held that the state may contract with private institutions to provide educational services for disabled children without violating the First Amendment or Wisconsin's Compelled Support Clause or Blaine Amendment because the primary effect of the contract was not the advancement of religion, but the provision of educational services to handicapped kids.

State ex rel. Reynolds v. Nusbaum, 115 N.W.2d 761 (Wis. 1962)

Seeing no difference between aiding students and aiding the institution those students choose to attend, the Wisconsin Supreme Court held that transporting private school students on public school buses violated Wisconsin's Blaine Amendment. Although the court conceded that the state may indirectly aid religious groups by providing fire and police protection, it struck this statute because, the court said, it had the practical effect of singling out a particular religious group for special benefits.

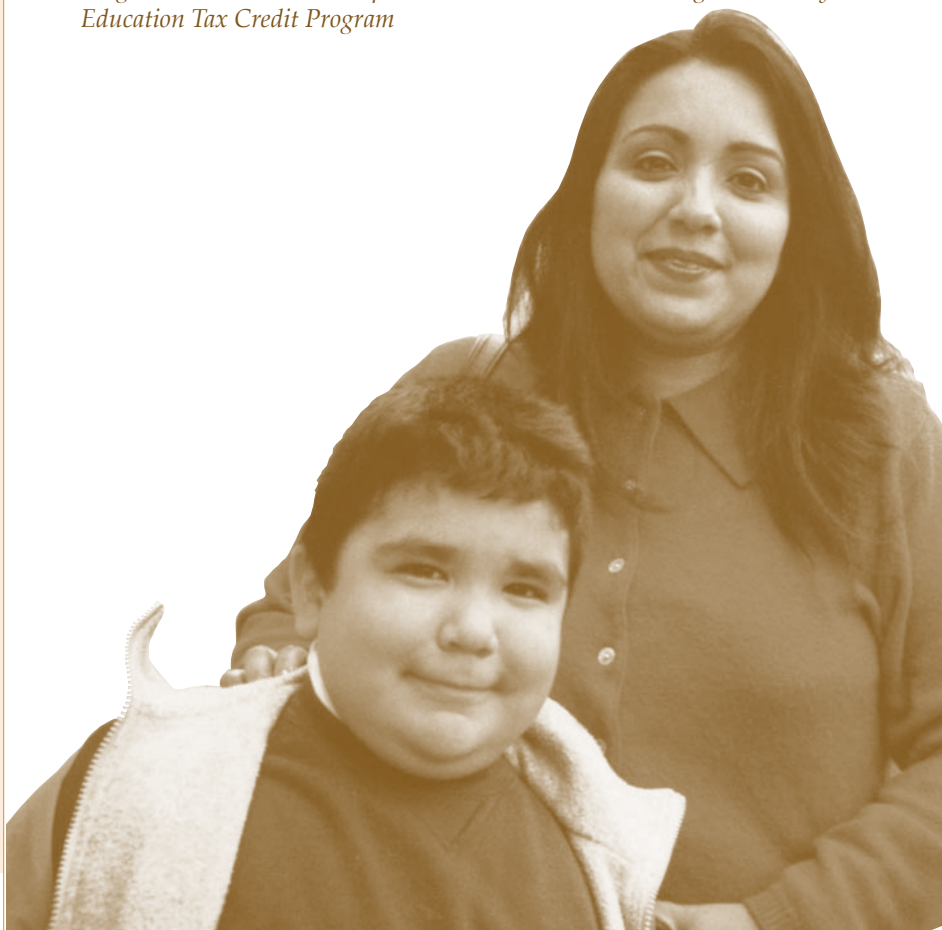
State ex rel. Conway v. District Board of Joint School District, 156 N.W. 477 (Wis. 1916)

The Wisconsin Supreme Court held that Wisconsin public schools may hold their graduation ceremonies in local churches without violating the state Constitution's religion clauses or its education provisions. Taxpayers were not compelled to pay for use of the church or the services of the priest who gave the nonsectarian introductory prayer. Additionally, no religious instruction occurred during the ceremony and no denomination was favored over others.

ANALYSIS AND RECOMMENDATIONS

Both tax credit and voucher programs are school choice options for Wisconsin. Its constitution contains a Compelled Support Clause and a Blaine Amendment, but the Wisconsin Supreme Court interprets both in accordance with federal Establishment Clause jurisprudence. Even before *Zelman*, the Wisconsin Supreme Court upheld the groundbreaking Milwaukee Parental Choice Program from a legal challenge under the First Amendment and Wisconsin's Compelled Support Clause and Blaine Amendment. The Wisconsin Supreme Court also rejected the first-ever "uniformity" challenge to a school choice program, holding that while the Legislature is required to provide public schooling to all, it can also offer additional educational opportunities outside the traditional public school system.

Model Legislation: Parental Choice Scholarship Program (Universal Eligibility), Parental Choice Scholarship Program (Means-Tested Eligibility), Special Needs Scholarship Program, Foster Child Scholarship Program, Autism Scholarship, Great Schools Tax Credit Program, Family Education Tax Credit Program



WYOMING

CONSTITUTIONAL PROVISIONS

Blaine Amendments

"No money of the state shall ever be given or appropriated to any sectarian or religious society or institution." WYOMING CONST. Art. 1, § 19.

"No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association." WYOMING CONST. Art. 3, § 36.

Education Article

"[N]or shall any portion of any public school fund ever be used to support or assist any private school, or any school, academy, seminary, college or other institution of learning controlled by any church or sectarian organization or religious denomination whatsoever." WYOMING CONST. Art. 7, § 8.

EXISTING SCHOOL CHOICE PROGRAMS

Public School Choice:	**Yes**

Wyoming Statutes Section 21-4-502

Charter Schools:	**Yes**

Wyoming Statutes Sections 21-3-301 to 21-3-314

Private School Choice:	**No**

RELEVANT CASE LAW

State ex rel. McPherren v. Carter, 215 P. 477 (Wyo. 1923)

The Wyoming Supreme Court held that a supplemental award of public funds to the widow of a sheriff killed in the line of duty does not violate Article 3, Section 36 as an unconstitutional gift to a private person. It is the functional equivalent of a "payment for service rendered" rather than an outright gift.

1982 Wyo. AG LEXIS 21 (Wyo. AG 1982)

The Wyoming Attorney General concluded that holding public school baccalaureate services inside a church where religious activities including prayer and singing of hymns may occur would violate neither the First Amendment nor the Wyoming Constitution.

ANALYSIS AND RECOMMENDATIONS

A tax credit program may be Wyoming's best choice for school choice. Its Constitution contains two Blaine Amendments, neither of which has received much judicial attention, but Article 3, Section 36, appears to explicitly forbid appropriating money to individuals for educational purposes.

Model Legislation: Great Schools Tax Credit Program, Family Education Tax Credit Program

model legislation

The American Legislative Exchange Council's Education Task Force has drafted several pieces of model legislation designed to provide a framework for crafting state-specific programs. For a copy of any of the model legislation listed below contact ALEC's headquarters in Washington, D.C. This list represents all school choice programs mentioned throughout this publication.

School Choice Legislation

Parental Choice Scholarship Program Act (Universal Eligibility)
This bill creates a scholarship program for all students to attend the public or non-public elementary or secondary school of their choice.

Parental Choice Scholarship Program Act (Means-Tested Eligibility)
This bill creates a scholarship program for students of low- and middle-income families to attend the public or non-public elementary or secondary school of their choice.

Special Needs Scholarship Program Act
This bill creates a scholarship program for students with special needs to attend the public or non-public elementary or secondary school of their choice.

Foster Child Scholarship Program Act
This bill creates a scholarship program for students in foster care to attend the public or non-public elementary or secondary school of their choice.

Autism Scholarship Act
This bill provides students with autism the option to attend the public or non-public school of their choice.

Great Schools Tax Credit Program Act
This bill authorizes a tax credit for individual or corporate contributions to organizations that provide educational scholarships to eligible students to attend the public or non-public elementary or secondary school of their choice.

Family Education Tax Credit Program Act
This bill authorizes a tax credit for individual families' educational expenses including tuition, fees and other related expenses.

Other ALEC Education Legislation

Charter Schools Act
This bill allows groups of citizens to seek charters from the state to create and operate innovative, outcome-based schools exempt from many of the state laws and regulations governing public schools.

Open Enrollment Act
This bill creates a process by which students would be able to attend the public school of their choice throughout the state.

glossary

Attorney General Opinion: Formal or informal responses of the state attorney general to legal questions. Such opinions are not binding on the courts but can be persuasive.

Blaine Amendment: Any state constitutional provision that, like the failed amendment to the federal Constitution of the same name, prohibits providing public funds to "sectarian" schools. These amendments were designed to retain a monopoly on state education funds for the then-generically Protestant public schools, while denying equal funding to Catholic (i.e., "sectarian") schools.

Charter Schools: Deregulated public schools usually operated by a board of directors independent of any school district.

Compelled Support Clause: Any state constitutional provision that provides that no one shall be compelled to support a church or ministry without his consent.

Education Provisions: The provisions in all state constitutions establishing a public education system.

Equal Protection Clause: A clause found in the U.S. Constitution and many state constitutions assuring people "the equal protection of the laws," usually understood to prohibit discrimination on the basis of race, color, national origin and religion.

Establishment and Free Exercise Clauses: The religion clauses of the First Amendment to the U.S. Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The U.S. Supreme Court made these clauses binding on state and local governments in the 1940s.

FAPE: Free and Appropriate Public Education, the basic entitlement the IDEA creates for children requiring special education.

IDEA: The federal Individuals with Disabilities Education Act, which provides special education funds to states in return for their meeting federal standards for services and procedures.

Parallel Interpretation: Interpreting similar language in the federal and state constitution in a similar way to arrive at a similar result.

Precedent: A legal concept referring to a case that has resolved a particular legal question that lower courts are bound to follow and that the deciding court will usually follow, absent a strong reason for concluding it is wrong or has become unworkable.

Public School Choice: Policies allowing students to enroll in schools they would not be assigned to based upon their residence. Intradistrict choice allows students to transfer to other schools within the same district, while interdistrict choice permits transfers to schools in other districts. Such programs can be voluntary, in which the receiving school or district may or may not agree to accept any transfer students, or mandatory, in which the receiving school or district cannot deny admittance to transfer students.

Released Time Programs: Public school programs that allow students to be released during school hours to receive religious instruction at off-campus private facilities.

School Choice: Broadly speaking, any sort of educational program allowing parents to choose which school for their attend. Narrowly speaking, an educational program that enables parents to choose a private school for their children.

Supreme Court Advisory Opinions: Answers to legal questions posed to the court by governors or state legislatures. They do not constitute binding precedent because they are not rendered in an adversarial setting like a lawsuit, but, as the personal opinions of the sitting justices of the state supreme court, they can be persuasive.

Tax Credit: Tax relief that permits parents to more easily fund a private education for their children either directly or by encouraging other taxpayers to contribute to charitable organizations providing scholarships.

Voucher: In the school choice context, a program that provides tuition funding to a family that allows them to choose a private school for their children—a publicly funded scholarship for K-12 students.

additional resources

Additional Resources for School Choice

Alliance for School Choice
www.allianceforschoolchoice.org

The Alliance for School Choice works to build support for and implement publicly funded school choice programs that provide low-income families with educational opportunity. In doing so, the Alliance not only protects those programs that are already serving families in need, but also expands and enhances them—and, most importantly—initiates new, larger and even more effective models.

Cato Institute's Center for Educational Freedom
www.cato.org/education

Cato's Center for Educational Freedom was founded on the principle that parents are best suited to make important decisions regarding the care and education of their children. The Center's scholars seek to shift the terms of public debate in favor of the fundamental right of parents and toward a future when state-run schools give way to a dynamic, independent system of schools competing to meet the needs of American children.

Milton and Rose D. Friedman Foundation
www.friedmanfoundation.org

The Milton and Rose D. Friedman Foundation, dubbed "the nation's leading voucher advocates" by *The Wall Street Journal*, is a non-profit organization established in 1996. The origins of the foundation lie in the Friedmans' long-standing concern about the serious deficiencies in America's elementary and secondary public schools. The best way to improve the quality of education, they believe, is to enable all parents with the freedom to choose the schools that their children attend. The Friedman Foundation builds upon this vision, clarifies its meaning to the public and amplifies the national call for true education reform through school choice.

Heartland Institute & School Reform News
www.heartland.org

The Heartland Institute is a national nonprofit research and education organization whose mission is to discover and promote free-market solutions to social and economic problems. School Reform News is the Heartland Institute's national monthly outreach publication for school reformers.

Heritage Foundation
www.heritagefoundation.org/schoolchoice

Founded in 1973, the Heritage Foundation is a research and educational institute—a think tank—whose mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense. The Foundation's State Profiles Web site for school choice provides snapshots of school choice options and an overview of the public and private education system in each of the 50 states, as well as research and commentary on school choice and other education reforms.

Manhattan Institute for Public Policy Research
www.manhattan-institute.org

The Manhattan Institute's Center for Civic Innovation conducts education research that focuses on improving two main reforms of public education: school choice and accountability.

about the author

Richard D. Komer

Richard D. Komer has served as a senior litigation attorney at the Institute for Justice since 1993. An expert on state and federal constitutional law on school choice, he served as counsel in IJ's successful defense of school choice programs in Milwaukee, Arizona, Illinois and Cleveland—including the landmark U.S. Supreme Court victory for school choice in *Zelman v. Simmons-Harris*. He has also authored numerous Supreme Court amicus briefs on constitutional issues surrounding school choice.

Prior to his work at the Institute, Komer worked as a civil rights lawyer for the federal government, working at the Departments of Education and Justice, as well as at the Equal Employment Opportunity Commission as a special assistant to the Chairman, Clarence Thomas. His most recent government employment was as Deputy Assistant Secretary for Civil Rights at the Department of Education.

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About the Institute for Justice

The Institute for Justice is a non-profit, public interest law firm that litigates to secure school choice, economic liberty, private property rights, freedom of speech and other vital individual liberties and to restore constitutional limits on the power of government. Founded in 1991, IJ is the nation's only libertarian public interest law firm, pursuing cutting-edge litigation in the courts of law and in the court of public opinion on behalf of individuals whose most basic rights are denied by government.

IJ helped secure the landmark U.S. Supreme Court victory for school choice in Cleveland in *Zelman v. Simmons-Harris,* and has successfully defended school choice programs nationwide, including in Milwaukee, Arizona and Illinois.

About the American Legislative Exchange Council

The American Legislative Exchange Council (ALEC) is the nation's largest non-partisan, individual membership organization of state legislators, with over 2,400 legislator members from all fifty states, and 87 former members serving in the U.S. Congress. ALEC works to advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty through a non-partisan, public-private partnership between America's state legislators and concerned members of the private sector, the federal government, and the general public.

ALEC supports efforts to offer parents more choices in education both as a matter of principle and as a promising solution to the increasing challenges facing America's K-12 education system. As a part of this commitment, ALEC continues to look for ways to better inform and engage its state legislative members and the general public regarding the legislative opportunities that may exist in their states.