

Legal Challenges Will Not Stop School Choice

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KEY TAKEAWAYS

The principle that parents should be able to choose the best education for their children has long and deep roots in the United States.

Providing education assistance to parents rather than schools does not violate the First Amendment, but excluding religious schools does.

State constitutional prohibitions on aid to religious schools may still leave room for carefully drafted religious school choice options.

Merriam-Webster defines the term *school choice* as an option for students “to attend a school other than their district’s public school.”¹ A growing body of literature² shows that parents consider multiple factors when choosing the most appropriate school for their children, including academics, school safety, morals and values, character development, school reputation, and more. Unless parents have other options, however, compulsory education laws mean that where a child is educated is determined instead by geography alone.

Parents may send their children to a private school, but only if they can afford to both pay taxes that support a public school system they will not use *and* to pay private school tuition. School choice options make more affordable alternatives to traditional public schools by allowing parents to apply

This paper, in its entirety, can be found at <https://report.heritage.org/lm339>

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their child's share of public education funding to learning environments that better serve their educational needs.

Education policy, including establishing schools, curricula, general requirements for enrollment and graduation, and funding, is primarily under state and local government authority.³ School choice policies, therefore, are adopted and implemented by state or local government. This *Legal Memorandum* will first examine the philosophical foundation and historical development of school choice and outline the types of school choice options available today. It will then look at school choice litigation, concluding that school choice options will likely survive legal challenges as advocates work to broaden the availability of these policies.

The Roots of School Choice

The idea of maximizing parental choices in the education of their children has deep philosophical roots. In Thomas Paine's 1791 work *The Rights of Man*, he advocated for giving parents money to let them choose the type of education their children receive.⁴ Eight decades later, John Stuart Mill similarly advocated for "parents to obtain the education where and how they pleased."⁵ Paine and Mill both explained why parents should have choices in their children's education and suggested a framework for implementing such a policy.

The modern champion for school choice is Milton Friedman, who, as Paine and Mill had done, both explained the philosophical basis for school choice and offered an approach for implementing it. Friedman did this in two important essays and a book that, together, influenced the transition from philosophical ideas to concrete policies.

Friedman made his case for school choice in free-market terms. In his 1955 essay, "The Role of Government in Education," for example, he said that rather than being limited to schools run solely by the government, "parents could express their views about schools directly, by withdrawing their children from one school and sending them to another."⁶ He noted in another essay that "support for free choice of schools has been growing rapidly and cannot be held back indefinitely by the vested interests of the unions and educational bureaucracy."⁷

Friedman proposed an approach in which the government would provide "parents vouchers redeemable for a specified maximum sum per child per year if spent on 'approved' educational services. Parents would then be free to spend this sum and any additional sum on purchasing educational services from an 'approved' institution of their own choice."⁸ Vouchers,

Friedman argued, “are not an end in themselves; they are a means to make a transition from a government to a market system.”⁹

School Choice Options

This philosophical foundation for school choice has supported the development of concrete policies aimed at giving parents more options for their children’s education, often distinguished by the way schools are funded. Whereas public schools are supported by local, state, and—to a far lesser degree—federal funding, private education choice options include both public and private means of financial support.¹⁰

Private School Choice. States have adopted private education choice in various forms, including education savings accounts (ESAs), school vouchers, tax-credit ESAs, tax-credit scholarships, and individual tax credits and deductions. Below is a breakdown of private education choice options.

- *ESAs* are government-authorized savings accounts, in which the state deposits a portion of a child’s per-pupil funding from the state education formula into a private account that parents use to purchase education products and services¹¹ such as private school tuition, tutoring, learning programs, services, and materials.¹²
- *School vouchers* pay, in part or in full, for a student to attend a private school by directly sending the family a voucher for a portion of what would have been used for public school. Parents can use school vouchers for both religious and non-religious education options.¹³
- *Tax-credit ESAs* are for taxpayers who donate to nonprofits that fund and manage parent-directed K–12 ESAs to obtain either full or partial tax credits.¹⁴ In general, and similar to the accounts described above, the funds can be used for various educational needs ranging from paying for private school tuition, tutors, online learning programs, and higher education expenses. With some exceptions, ESAs and tax-credit ESAs allow parents to save unused funds from year to year.¹⁵
- *Tax-credit scholarships* provide full or partial tax credits for donating to nonprofit organizations that provide private school scholarships directly to students.¹⁶

- *Individual tax credits and deductions* grant parents state income tax relief for certain education expenses such as tuition, school supplies, tutors, and transportation.¹⁷

Public School Choice. Although private school choice options help make it financially possible to educate children outside of the public school system, public school choice diversifies the options within that system. In the traditional public school model, a child’s zip code determines which public school he or she will attend. Public school choice options such as charter schools, magnet schools, and open enrollment schools—which allow students to attend a public school that may be located elsewhere within a child’s school district or outside that district altogether—are described below.

- *Charter schools* may have a physical location within a school district or, in some states, be operated virtually. Charter schools have their own school boards and are operated by a private entity, such as a nonprofit organization or corporation, according to a contract, or charter, established with the state. That charter outlines the school’s mission and includes operational, programmatic, and accountability requirements that may differ from those of traditional public schools.¹⁸
- *Magnet schools* emphasize specialized programs and/or curricula that may be only a small part of a traditional public school’s educational offerings—or may not be not available at all.¹⁹ Magnet schools are run by the public school system rather than private entities, but, unlike traditional public schools, typically require an application for admission.²⁰
- *Open enrollment* allows parents to choose a traditional public school other than the one to which their child would be otherwise be assigned. Inter-district open enrollment allows attendance at a school in another school district, while intra-district open enrollment allows attendance elsewhere within the district in which a child resides.²¹

School Choice Development in the United States

The importance of public support for education options is not a new concept. The Massachusetts Constitution of 1780, which was largely drafted by John Adams and served as a model for the U.S. Constitution, provides in Chapter V, Section II:

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools, and grammar-schools in the towns; to encourage private societies and public institutions...public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, and good humor, and all social affections and generous sentiments, among the people.²²

Since the Massachusetts Constitution, public support for education has evolved and developed into a variety of education options across the United States. The section below depicts a series of milestones in this development.

Vouchers. The first school choice program in America implemented the oldest school choice policy idea, the voucher. Vermont established the Town Tuitioning Program in 1869, the same year that Mill wrote about the subject. Some towns in Vermont lacked an elementary, middle, or high school,²³ and this program gave parents a voucher, in the amount allocated for their student by the state, to use at another school in Vermont, or even in a different state.²⁴ From the outset, vouchers could be used at both public and private nonsectarian schools. Vermont recently expanded this program following the 2022 Supreme Court’s ruling in *Carson v. Makin*²⁵ so that the vouchers can now be used at religious schools.²⁶

Magnet Schools. The first magnet school, opened in 1968 in Tacoma, Washington, was an elementary school with the goal of reducing racial isolation.²⁷ The school focused on “high caliber instruction, resources, and amenities, with an admissions policy based on a system of controlled choice.”²⁸ This magnet school allowed for public school choice in Washington by giving students an option to attend a school focused on advanced learning as opposed to their traditional public elementary schools’ standardized educational focus. The magnet school was considered a success and opened the door for other states, including Massachusetts, to launch their own magnet school programs the year after.²⁹

Charter Schools. In 1991, Minnesota was the first state to enact legislation providing for charter schools,³⁰ with City Academy opening in 1992. Today, 46 states provide for some form of charter schools.³¹

Tax-Credit Scholarships. Arizona pioneered school choice programs, enacting in 1997 the Arizona-Individual School Tuition Organization Tax

Credit Scholarship program.³² It provides tax credits for “charitable contributions to school tuition organizations (STOs).”³³ Those STOs, in turn, provide scholarships for attendance at qualified private schools.

Education Savings Accounts. In addition to different forms of vouchers, magnet schools, and charter schools, some states have recently enacted ESAs. In 2011, for example, Arizona launched the Empowerment Scholarship Account program,³⁴ which allows parents to use money that would have been spent on public education to pay, through an ESA, for a customized educational experience for their children. Unused money can be rolled over each year and used to pay for college.³⁵ A number of states have adopted similar options; as of 2023, 14 states have ESAs or ESA-style accounts enacted, in which three are tax credit-funded ESAs and six are completely universal.³⁶ ESAs appear to be following the same path as vouchers, implemented by direct grants to parents or by compensating them for educational expenses.

Tax-Credit ESAs. In 2021, Kentucky established the first tax-credit ESA as part of its Education Opportunity Account Program. This program allows for people who donate to groups that fund education savings accounts to receive tax credits for their donations.³⁷

Private School Choice Litigation

Alexis de Tocqueville, the French diplomat and political philosopher, famously wrote in 1835 that “there is hardly a political question in the United States that does not sooner or later turn into a judicial one.”³⁸ Significant social and cultural changes have followed this pattern. Abortion advocates, for example, turned to litigation after having little success persuading state legislatures to change or repeal their long-standing pro-life laws. The Supreme Court’s 1973 decision in *Roe v. Wade*³⁹ effectively invalidated those laws, severely limiting legislative efforts to protect the unborn until the Court overruled *Roe* in 2022.⁴⁰

The pattern is similar in the school choice context. The *Wall Street Journal* declared 2011 the “Year of School Choice” when 13 states enacted school choice legislation.⁴¹ That title was eclipsed in 2021 when “18 states enact[ed] seven new educational choice programs and expand[ed] 21 existing ones.”⁴² As of May 2023, 32 states provide some form of private school choice option, including:

- 21 states have tax-credit scholarships;⁴³

- 15 states, Puerto Rico, and Washington, D.C., have voucher programs;⁴⁴
- 11 states have education savings accounts;⁴⁵
- Nine states have tax-credit or deduction programs;⁴⁶ and
- Three states have tax-credit education savings accounts.⁴⁷

Litigation over private school choice options, which focuses on the inclusion of religious schools, falls into three categories.

1. School choice opponents argue that providing for a religious school choice option is an “establishment of religion” prohibited by the First Amendment to the U.S. Constitution.
2. Opponents also argue that providing for a religious school choice option violates a ban, appearing in different forms in many state constitutions, on using public funds to aid religious schools.
3. School choice supporters have challenged the prohibition of any religious school choice option under these no-aid constitutional provisions, arguing that such provisions violate the First Amendment’s Free Exercise Clause.

The following analysis examines each of these categories, concluding that school choice programs are likely to survive these legal challenges.

Establishment Clause Challenges to School Choice Options

School choice opponents argue that any form of government aid that, even indirectly, benefits a religious school violates the Constitution. Specifically, opponents argue that the Establishment Clause requires excluding religious schools from school choice programs. The Supreme Court has rejected this view.

The First Amendment provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Few areas of Supreme Court jurisprudence are as confusing as its Religion Clause cases. Stanford Law Professor Michael McConnell, a noted First Amendment scholar, writes that “a more confused and often counterproductive mode of interpreting the First Amendment would have been difficult to

devise.”⁴⁸ Justice Clarence Thomas agrees, writing that “our Establishment Clause jurisprudence is in hopeless disarray”⁴⁹ and “in shambles.”⁵⁰

The Metaphorical Wall. The Supreme Court has chosen, and then abandoned, several different approaches to interpreting and applying the Establishment Clause. The first was simply a metaphor.

In a letter to the Danbury, Connecticut, Baptist Association dated January 1, 1802, President Thomas Jefferson stated the view that the First Amendment built “a wall of separation between Church & State.”⁵¹ The Supreme Court mentioned this metaphor only once, in 1872, before making it First Amendment doctrine in its 1947 decision in *Everson v. Board of Education*. Quoting from that single precedent, Justice Hugo Black wrote for the majority that the Establishment Clause “was intended to erect ‘a wall of separation between Church and State’”⁵² that “must be kept high and impregnable. We could not approve the slightest breach.”⁵³

Especially as an interpretation of the Constitution, however, this metaphorical wall could not bear any weight. Its multiple problems included: (1) Jefferson used the metaphor in expressing his personal views—not as a substantive interpretation of the Establishment Clause; (2) Jefferson expressed those views in 1802, more than a decade after the First Amendment had been ratified; (3) Jefferson was not involved in writing either the Constitution or the Bill of Rights because he was the United States Minister to France at the time; and (4) a mere metaphor cannot yield a sound interpretation capable of consistent application.⁵⁴

The wall of separation began a long and slow crumble almost immediately after the Supreme Court built it.

- Writing just one year after the wall went up, Justice Robert Jackson warned against judges using “our own prepossessions” to interpret the Establishment Clause. In doing so, “we are likely to make the legal ‘wall of separation between church and state’ as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded.”⁵⁵
- Justice Potter Stewart wrote in 1962 that constitutional adjudication “is not responsibly aided by the uncritical invocation of metaphors like ‘the wall of separation,’ a phrase nowhere to be found in the Constitution.”⁵⁶
- Justice William Rehnquist wrote in 1985 that “[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding

of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor for nearly 40 years.”⁵⁷

The *Lemon* Test. Twenty-four years after building the wall of separation, the Supreme Court created a new test for identifying Establishment Clause violations. *Lemon v. Kurtzman*⁵⁸ involved Establishment Clause challenges to two state laws. A Rhode Island statute authorized a salary supplement for teachers of secular subjects in private schools. A Pennsylvania statute reimbursed private schools for secular educational services such as teacher salaries and instructional materials. In both cases, the large majority of eligible schools were religiously affiliated.

The Supreme Court announced a new three-part test for analyzing whether a law violates the Establishment Clause: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”⁵⁹ The Court found that both the Rhode Island and Pennsylvania statutes were unconstitutional because they violated the second *Lemon* prong by impermissibly advancing religion.

Applying *Lemon* to School Choice. Thus begins the story of school choice litigation. In the first chapter, the Supreme Court applied *Lemon* to strike down government programs that provided aid directly to religious schools. *Committee for Public Education and Religious Liberty v. Nyquist*,⁶⁰ decided two years after *Lemon*, involved a challenge to a New York state law that created three aid programs for private schools. These included direct grants to schools for the maintenance and repair of facilities and equipment, reimbursement to parents for a portion of private school tuition, and a tax benefit for those who did not qualify for the reimbursement.

The Supreme Court held that all three programs violated one or more parts of the *Lemon* test. The maintenance and repair program “inevitably... subsidize[d] and advance[d] the religious mission of sectarian schools.”⁶¹ Even though the tuition reimbursement went to parents instead of directly to schools, a distinction that would become more important in later cases, “the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.”⁶² And the tax benefit program suffered the same fate for the same reason.⁶³

*Aguilar v. Felton*⁶⁴ challenged a federal program that allowed funds to be used to pay the salaries of public school teachers who provided remedial instruction in private schools. Those instructional activities used

government-provided materials and equipment, minimized interaction with private school personnel, and eliminated any visible religious symbols. The Supreme Court held that, even with these safeguards, this program failed the *Lemon* test because the necessary supervision and management amounted to “excessive entanglement of church and state.”⁶⁵ It appeared that the effort to avoid advancing religion, *Lemon*’s first prong, required entanglement that violated *Lemon*’s third prong.

In a second group of decisions, the Supreme Court applied *Lemon* but upheld programs that provided aid to parents rather than directly to religious schools. *Mueller v. Allen*⁶⁶ involved a challenge to a 1955 Minnesota law that allowed taxpayers to claim a state income tax deduction for a portion of expenses incurred in educating their children. Applying *Lemon*, the Supreme Court voted 5–4 that this tax deduction program did not violate the Establishment Clause. The Court emphasized the distinction between “public funds...available only as a result of numerous, private choices of individual parents of school-age children” and “direct transmission of assistance from the state to the schools themselves.”⁶⁷

*Witters v. Washington Dept. of Services for the Blind*⁶⁸ involved a challenge to a state agency policy excluding religious schools from a program providing vocational rehabilitation assistance. The Washington constitution provided that “no public money or property shall be appropriated or applied to any religious worship, exercise or instruction, or the support of any religious establishment.”⁶⁹ Citing this provision, the Washington Commission for the Blind had a policy “forbid[ding] the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas.”⁷⁰ On this basis, the Commission denied Larry Witters’ application for vocational rehabilitation assistance because he was preparing for the ministry at a private Christian college.

The Supreme Court unanimously reversed, holding that the Washington program provides assistance “directly to the student”⁷¹ rather than as a “direct subsidy to the religious school.”⁷² As a result, aid reaches a religious school “only as a result of the genuinely independent and private choices of aid recipients”⁷³ and “the link between the State and [a religious] school [is] highly attenuated.”⁷⁴

***Lemon*’s Demise.** The Supreme Court’s 1993 decision in *Lamb’s Chapel v. Center Moriches Union Free School District*⁷⁵ showed how badly *Lemon* had distorted Establishment Clause jurisprudence. This case involved a challenge to a school district policy allowing school facilities to be used for “social, civic, or recreational” but not “religious” purposes.⁷⁶ The school

district argued that allowing any religious use of its facilities would violate the Establishment Clause. *Lemon's* “effects” prong, in particular, had led to the unusual argument that the Establishment Clause effectively required violating the Free Exercise Clause by categorically discriminating against religious organizations.⁷⁷

Justice Antonin Scalia opened his concurring opinion with this indictment of *Lemon*:

As to the Court’s invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our establishment Clause jurisprudence.... When we wish to strike down a practice it forbids, we invoke it...when we wish to uphold a practice it forbids, we ignore it entirely.... Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.⁷⁸

In *Zelman v. Simmons Harris*,⁷⁹ the Supreme Court applied these precedents in the contemporary school choice context. After a federal judge in 1995 placed the Cleveland, Ohio, public school district under state control, an audit found that it had failed to meet any of the state’s 18 standards for minimum acceptable performance. The Ohio legislature responded by enacting the Pilot Project Scholarship Program to provide tuition aid to parents in a school district, like Cleveland, that had been placed by court order under the state’s supervision and operational management. In this program, where the aid is spent “depends solely upon where parents who receive tuition aid choose to enroll their child.”⁸⁰ The program included all private schools within a designated district that met state educational and non-discrimination standards, more than 80 percent of which at the time had a religious affiliation.⁸¹

Applying *Lemon*, the U.S. Court of Appeals for the Sixth Circuit held that the program violated the Constitution because it “has the primary effect of advancing religion, and...constitutes an endorsement of religion and sectarian education in violation of the Establishment Clause.”⁸² The Supreme Court reversed. Writing for the majority, Rehnquist noted that the Court’s precedents “have drawn a consistent distinction between government programs that provide aid directly to religious schools...and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.”⁸³ Such a program of “true private choice,” Rehnquist explained, breaks “the circuit between government and religion.”⁸⁴

Lemon has now gone the way of the “wall of separation.” As problems with the wall mounted, the Supreme Court soon described it as merely a “useful signpost.”⁸⁵ Just two years after *Lemon* appeared, the Court similarly described its three prongs as “no more than helpful signposts.”⁸⁶ By 2019, the Court acknowledged that the *Lemon* test had been “harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars.”⁸⁷ Three years later, in *Kennedy v. Bremerton School District*, the Court stated that it had “long ago abandoned *Lemon*,”⁸⁸ and, in *Groff v. DeJoy*,⁸⁹ simply declared *Lemon* “abrogated.”

Despite the confusion and jurisprudential detours, these Supreme Court decisions at least establish that school choice programs, such as tuition assistance through vouchers or tax benefits, that include religious schools do not violate the Establishment Clause if the aid or benefit is provided to parents, reaching a religious school solely by their independent and private decisions.

State Constitution Challenges to School Choice Options

Thirty-eight state constitutions⁹⁰ include a provision that, in different forms, explicitly prohibits or restricts government aid to religious schools or institutions. School choice opponents argue that providing for a religious school choice option violates these no-aid constitutional provisions. This category of litigation, however, is complicated by the fact that no-aid provisions, like school choice options, come in different forms. As a result, it may be possible for state legislatures to provide a religious school choice option crafted in a way that can pass muster under a particular no-aid provision.

No-Aid Provisions Were “Born of Bigotry.” Using state constitutions to exclude religious schools from government benefit programs was a strategy “born of bigotry.”⁹¹ Professor, and later U.S. Circuit Judge, Jay Bybee and author David Newton explain⁹² that its roots lay in anti-Catholic cultural and political prejudice dating back to the early 19th century. At its founding, the United States was “overwhelmingly Protestant” and religious tolerance often did not extend to other religious bodies or faiths.⁹³ As a result, Catholics viewed public schools as Protestant schools⁹⁴ because they “routinely required pupils to pray, sing hymns, and read from the Bible.”⁹⁵

By the mid-19th century, however, Catholics’ share of the American population, as well as their political influence, were on the rise. “Perhaps the greatest source of friction between the Protestant majority and the Catholic minority,” Bybee and Newton write, “was the public school system.”⁹⁶ Catholic demands for “public funding for their own schools”⁹⁷ only intensified as states, starting with Massachusetts in 1852, began enacting compulsory education laws.⁹⁸

The Protestant reaction included 19 states amending their constitutions between 1835 and 1875 to prohibit government aid or support for “sectarian” institutions. In 1838, for example, Florida added a constitutional provision which today reads: “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.”⁹⁹

“Not One Dollar” for Sectarian Schools. This movement to change state constitutions gained momentum after Congress nearly proposed a similar exclusionary amendment to the U.S. Constitution. Members of Congress had begun calling for such a constitutional amendment in 1871,¹⁰⁰ and the effort drew national attention four years later. In a September 1875 speech, President Ulysses S. Grant called for “free schools” and argued that “not one dollar, appropriated for their support, [should] be appropriated to the support of any sectarian schools.”¹⁰¹ Neither “the State nor Nation [should] support institutions of learning other than those sufficient to afford to every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan, or atheistical dogmas.”¹⁰²

Grant took the next step in his final address to Congress on December 7, 1875.¹⁰³ He recommended amending the U.S. Constitution to require that states “maintain free public schools...forbidding the teaching in said schools of religious, atheistic, or pagan tenets; and prohibiting the granting of any school funds or school taxes, or any part thereof...for the benefit or in aid, directly or indirectly, of any religious sect or denomination.”¹⁰⁴

A few days later, Representative James G. Blaine (R-ME), who had been Speaker of the House for the previous six years, introduced a resolution to amend the Constitution along these lines. It would prohibit “money raised by taxation in any State for the support of public schools or derived from any public funds therefor” from “ever be[ing] under the control of any religious sect or denomination.”¹⁰⁵ The House of Representatives in August 1876 voted 180–7 in favor of this resolution, far more than the two-thirds required by the Constitution for proposing constitutional amendments,¹⁰⁶ but fell four votes short of that threshold in the Senate.¹⁰⁷ Even though the movement began before Blaine’s campaign, these no-aid provisions are often referred to collectively as “Blaine amendments.”

Blaine Amendment Variations. On the surface, Blaine amendments appear to be absolute or all-encompassing prohibitions on aid to religious schools. A careful look at a particular no-aid provision’s text, though, might reveal some space that a current or future religious school choice option might occupy in order to pass constitutional muster.

As an example, consider the text of Blaine’s own amendment that nearly went before the states for ratification. It would apply only to “money raised... for the support of public schools.” This language suggests that a state government could, separately or independently from public school funding, appropriate money that could, in some way, benefit or aid religious schools. Similar scrutiny of no-aid provisions in state constitutions reveals that they use different language regarding several common features.

First, Blaine amendments identify the government funds or resources subject to religious exclusion. Some, for example, use narrow language similar to Blaine’s own proposal, such as “money raised for the support of the public schools”¹⁰⁸ or “funds for educational purposes.”¹⁰⁹ A restriction on money intended for public schools may not foreclose the legislature separately appropriating money to provide a religious school choice option. The West Virginia Supreme Court, for example, has held that the state constitution’s requirement that “free schools” be supported through an “invested school fund”¹¹⁰ does not contain “any prohibition on the Legislature using general revenue funds to support [other] educational initiatives.”¹¹¹

Other Blaine amendments use broader language such as “any public fund or moneys whatever,”¹¹² “money from the treasury,”¹¹³ or simply “public funds”¹¹⁴ or “public money.”¹¹⁵ Even this seemingly comprehensive language, however, may not foreclose all religious school choice options. The Nevada Constitution, for example, provides that “[n]o public funds of any kind or character whatever...shall be used for sectarian purpose.”¹¹⁶ In *Schwartz v. Lopez*,¹¹⁷ however, the Nevada Supreme Court held that funds deposited in an ESA established by parents to pay for their child’s educational expenses “are no longer public funds”¹¹⁸ but “belong to the parents.”¹¹⁹

Sectarian Exclusion. The second feature of state Blaine amendments is the government action being prohibited, with 24 of them applying their sectarian exclusion to money or funds that are “appropriated” or “drawn.” While this might apply to voucher programs that involve money appropriated for grants, the most common school choice program instead utilizes tax benefits such as deductions or credits.

The Alabama Constitution provides that “[n]o money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school.”¹²⁰ The Alabama Accountability Act provided tax credits for parents living in a “failing school” zone “who choose to send their children to a nonpublic school or a nonfailing public school.”¹²¹ In *Magee v. Boyd*,¹²² the Alabama Supreme Court held that, by utilizing tax credits rather than appropriated funds, the state was not actually collecting

income tax and spending that revenue to help private schools.¹²³ “The tax credit...merely allows the taxpayers to retain more of their earned income as an incentive to contributing to scholarship-granting organizations.”¹²⁴ As such, tax credits did not constitute appropriations for purposes of the state’s Blaine amendment.

Similarly, the Arizona Constitution provides that “[n]o public money... shall be appropriated for or applied to...the support of any religious establishment”¹²⁵ and that “[n]o...appropriation of public money [shall be] made in aid of any church, or private or sectarian school.”¹²⁶ In *Kotterman v. Killian*, however, the Arizona Supreme Court held that because “no money ever enters the state’s control as a result of this tax credit...we are not here dealing with ‘public money.’”¹²⁷ In addition, the court held that a tax credit is not the same as an appropriation simply because it “diverts...funds that would otherwise be state revenue.... It does not follow...that reducing a taxpayer’s liability is the equivalent of spending a certain sum of money.”¹²⁸ In *Arizona Christian School Tuition Organization v. Winn*,¹²⁹ the U.S. Supreme Court similarly explained that while “tax credits and governmental expenditures can have similar economic consequences,” utilizing tax credits means that “taxpayers...spend their own money, not money the State has collected from... other taxpayers.”¹³⁰

The Kentucky Supreme Court, however, has come to the opposite conclusion on this issue. The Kentucky Constitution provides that “any sum which may be produced by taxation or otherwise for purposes of common school education, shall be appropriated to the common schools, and to no other purpose.”¹³¹ The Kentucky Supreme Court held that a school choice program utilizing tax credits violated this provision. “Taxpayers who owe Kentucky income tax owe real dollars to the state and when they are not required to pay those real dollars in the first instance or have them refunded because [a] tax credit reduces or eliminates their tax bill, the public treasury is diminished and the Commonwealth and other taxpayers must subsidize that taxpayer’s personal choice to send money...for use at nonpublic schools.”¹³²

The Kentucky court declined to follow the reasoning in *Magee* or *Kotterman* because the tax credits available in the Alabama and Arizona programs were “*de minimis* compared to the significant credits available...under the Kentucky [program].”¹³³ The court did not explain how the potential amount of a tax credit—rather than its nature or operation—determined whether it constituted a “sum” within the meaning of the Kentucky Constitution.

Government Objective. The third feature of state Blaine amendments is the purpose for which the prohibited government action would be taken. Examples of narrow language in this category include “for support of” or

“for the use of” religious schools, while broader language would include “for the benefit of.”¹³⁴ In either case, the language suggests a legislative intention to help or benefit religious schools.

The previous discussion of how the Establishment Clause applies to school choice is relevant here. Programs that, for example, give grants or reimbursements directly to religious schools might be said to have the purpose of supporting or benefitting those religious schools. Voucher or tax benefit programs, as well as educational savings accounts, however, benefit parents by making a broader range of educational choices more affordable. Those programs would have the same effect even if every parent used the assistance at secular private schools. At the same time, parents who would use that assistance at a religious school would be primarily motivated by the educational benefit for their children rather than by the school itself. Nonetheless, even if some parents wanted to benefit a religious school by using the tuition assistance they received at that institution, that purpose cannot be attributed to the government and, therefore, should not run afoul of a Blaine amendment.¹³⁵

Free Exercise Clause Challenges to Exclusionary School Choice Options

The previous section explored how Blaine amendments do not necessarily block every effort to provide religious school choice options. The third category of school choice litigation challenges these exclusionary constitutional provisions themselves. Three Supreme Court decisions have invalidated such exclusions and, in doing so, severely undermined the constitutionality of all Blaine amendments.

Trinity Lutheran v. Comer. In *Trinity Lutheran Church of Columbia v. Comer*,¹³⁶ a church applied for a reimbursement grant from the Missouri Department of Natural Resources for the cost of resurfacing its learning center playground. Under the program’s objective criteria, the church ranked fifth out of 44 applicants in 2012, when the government awarded 14 grants. The government, however, categorically excluded churches or religious schools from the program under the Missouri Constitution’s Blaine amendment, which prohibited any “money...taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion.”¹³⁷

The Supreme Court made clear that the “express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a Church—to compete with secular

organizations for a grant.... Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.... The rule is simple: No churches need apply.”¹³⁸

Requiring a church to “renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified...imposes a penalty on the free exercise of religion that must be subjected to the ‘most rigorous’ scrutiny.”¹³⁹ Under this “stringent standard,” the Court held, “only a state interest ‘of the highest order’ can justify the Department’s discriminatory policy.”¹⁴⁰ The government, however, “offers nothing more than Missouri’s policy preference for skating as far as possible from religious establishment concerns.”¹⁴¹ *Trinity Lutheran* thus rejected the notion that the Establishment somehow requires violating the Free Exercise Clause.

Espinoza v. Montana. *Espinoza v. Montana Department of Revenue*¹⁴² involved that state’s Blaine amendment, which prohibited any public entity from “mak[ing] any direct or indirect appropriation or payment from any public fund or monies...for any sectarian purpose.”¹⁴³ The legislature enacted a school choice program that granted tax credits for contributions to organizations that award scholarships for private school tuition. The Department of Revenue, asserted that the state constitution’s Blaine amendment required categorically excluding religious schools for the program.

Citing *Trinity Lutheran*, the Supreme Court held that this exclusion violated the Free Exercise Clause. The Montana Constitution, the Court held, “discriminates based on religious status just like the Missouri policy in *Trinity Lutheran*.”¹⁴⁴ The majority concluded that “[a] State need not subsidize private education. But once a state decides to do so, it cannot disqualify some private schools solely because they are religious.”¹⁴⁵

In a concurring opinion, Justice Samuel Alito explained how bigotry and prejudice not only explain the origin of these Blaine amendments, but might also be relevant to their constitutionality. He referenced *Ramos v. Louisiana*,¹⁴⁶ a case in which the Supreme Court held that laws in Louisiana and Oregon allowing non-unanimous verdicts in criminal cases violated the Sixth Amendment. In that case, the Court explained that “[t]hough it’s hard to say why these laws persist, their origins are clear”¹⁴⁷ as part of a strategy to undermine African American participation on juries. Alito dissented in *Ramos*, disagreeing that such discriminatory origins were relevant to those statutes’ constitutionality. In his *Espinoza* concurrence, however, Alito wrote that, on that point, “I lost and *Ramos* is now precedent. If the original motivation for the laws mattered there, it certainly matters here.”¹⁴⁸

Carson v. Makin. *Carson v. Makin*¹⁴⁹ involved a Maine school choice program that categorically excluded sectarian schools. The Maine Constitution requires towns to make “suitable provision, at their own expense, for the support and maintenance of public schools,”¹⁵⁰ and a Maine statute requires providing every school-age child in the state “an opportunity to receive the benefits of a free public education.”¹⁵¹ Because a majority of Maine counties have no public school,¹⁵² however, the state legislature enacted a program for paying the tuition “at the public or the approved private school of the parent’s choice at which the student is accepted.”¹⁵³ The program has no geographic limitation and, while “approved” private schools include single-sex schools, the program expressly excludes sectarian schools.

The Supreme Court reiterated that “a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits.”¹⁵⁴ Citing the application of this “unremarkable” principle in *Trinity Lutheran* and *Espinoza*, the Supreme Court came to the same conclusion in this case. The Court also rejected the distinction between discrimination against a religious school based on its “religious character” and whether it would put public assistance to a “religious use.” Either way, using such a religion-based criterion to condition availability of a widely available public benefit unconstitutionally burdens the exercise of religion. Finally, as it had in *Lamb’s Chapel* and in *Trinity Lutheran*, the Court again rejected the idea that religious discrimination that violates the Free Exercise Clause is, in some way, necessary to comply with the Establishment Clause.

The Supreme Court, therefore, has signaled in three different ways that Blaine amendments violate the Free Exercise Clause.

1. The Court has consistently come to that conclusion in individual cases.
2. The Court held in *Ramos v. Louisiana*¹⁵⁵ that the discriminatory origin of laws can undermine their constitutionality.
3. In deciding these cases, the Court has consistently applied the principle that excluding churches or schools from even being eligible for generally available public benefits solely because they are religious—the objective of every Blaine amendment—violates the Free Exercise Clause.

Conclusion

The principle that parents should be able to choose the best education for their children has long and deep roots. In the United States, nearly every state has implemented that principle by providing some form of school choice option. After failing to prevent legislative enactment of these programs, school choice opponents have turned to the courts either to eliminate all school choice options or, at least, to make religious school choice impossible.

These litigation strategies will likely fail. The Supreme Court has held that programs in which government assistance is provided to parents, rather than directly to religious schools, do not violate the First Amendment's Establishment Clause. At the state level, while 38 states have Blaine amendments in their constitutions, careful attention to their wording and judicial interpretations may identify how a school choice program can be crafted to withstand scrutiny while those provisions remain. Blaine amendments were "born of bigotry"¹⁵⁶ and, hopefully, will be eliminated through individual or collective invalidation by the Supreme Court or repeal by each state's citizens. And, finally, the Supreme Court has been clear that school choice programs that categorically exclude religious schools violate the Free Exercise Clause.

These legal challenges should not stop school choice advocates from working to expand ways give parents more choice in their children's education.

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Endnotes

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115. CAL. CONST. art. IX, § 10. See also N.Y. CONST. art. XI, § 3 (same).
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117. 132 Nev. 732 (2016).
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123. *Id.* at 128.
124. *Id.*
125. ARIZ. CONST. art. II, § 10.
126. ARIZ. CONST. art. IX, § 10.
127. 193 Ariz. 273, 285 (1999) (emphasis in original). See also *id.* at 284 (listing cases finding that money does not constitute “public funds” until actually deposited in the state treasury or in the state’s possession or control).
128. *Id.* at 287.
129. 563 U.S. 125 (2011).
130. *Id.* at 142. In this case, this distinction meant that the taxpayers did not have standing to challenge the program because they had not suffered the legal injury required by *Flast v. Cohen*, 392 U.S. 83 (1968).
131. KY. CONST. § 184.
132. *Commonwealth of Kentucky ex rel. Cameron v. Johnson*, 658 S.W.3d 25, 39 (Ky. 2022).
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139. *Id.* at 466 (quoting *Church of Lukumi Babaly Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993)).
140. *Id.* (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)).
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144. *Espinoza*, 140 S.Ct. at 2256.
145. *Id.* at 2261.
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