School Choice:
Legal Obstacles to Expanded Educational Opportunities

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One of the great perversities of modern law and policy is that the federal constitution, which guarantees equal educational opportunities, and state constitutions, many of which establish a fundamental right to education, are regularly invoked by defenders of the status quo to thwart expanded educational options for children who desperately need them. Despite the landmark decision by the U.S. Supreme Court in 2002 upholding private school choice, legal challenges to such programs are likely to remain a permanent part of the education reform landscape.

At a debate in New York City over the constitutionality of school choice sponsored by the Manhattan Institute and hosted by New York Mayor Rudy Giuliani shortly before the U.S. Supreme Court ruling in 2002, National Education Association general counsel Robert Chanin vowed that regardless of the outcome of that case, the teachers’ union and its allies still would have plenty of weapons in its legal “toolbox” to challenge school choice programs. Primary among them are state constitutional provisions relating to religious establishment. Even beyond those, Chanin said that school choice opponents would resort to whatever “Mickey Mouse provisions” they might be able to find in particular state constitutions to achieve their goals. As ongoing lawsuits challenging school choice programs in Florida and Colorado suggest, there is nothing cartoonish about those provisions, which can wreak havoc upon good-faith efforts to

1 By private school choice, I mean efforts to enlist private schools to fulfill the goals of public education, including but not limited to scholarships or vouchers for school tuition (Milwaukee, Cleveland, Florida, Colorado, Vermont, Maine, and the District of Columbia); income tax credits or deductions for school tuition (Minnesota and Illinois); and income tax credits for contributions to private scholarship funds (Arizona, Florida, and Pennsylvania). Of course, such programs as the G.I. Bill and Pell Grants at the postsecondary level fit into the definition as well.

2 Given that Mickey Mouse, unlike the teachers’ unions, seems genuinely to care about children, I think the folks at Walt Disney ought to consider suing for defamation for this nefarious abuse of their noble character.
increase educational alternatives. School choice opponents usually challenge programs under every legal theory they can imagine; and only one of the theories has to succeed in order to bring a program down.

Each state constitution varies in terms of the provisions that can be tortured to thwart school choice. The fact that some of those provisions must be turned on their heads in order to use them in such fashion appears to concern the unions and their allies, as well as results-oriented judges, not at all. If only school choice opponents would apply their fertile imagination and vast resources instead to improve the quality of public education, perhaps we would not need to pursue school choice options so urgently as we do. But the appalling state of public education compels school choice efforts; and so long as those efforts continue to bear fruit, legal challenges will remain as inevitable—and as dismal—as death and taxes.

In the pages that follow, I will sketch the common legal obstacles that school choice proponents have encountered to date, and argue why they should not be interpreted to thwart the promise of equal educational opportunities guaranteed 50 years ago by Brown v. Board of Education.3

I. FEDERAL CONSTITUTION

In Zelman v. Simmons-Harris,4 the U.S. Supreme Court decisively—if only by a 5-4 vote—removed the First Amendment establishment clause from the arsenal of anti-choice activists.5 Though some observers such as U.S. Senator Arlen Specter (R-Pa.) have interpreted the decision narrowly, in fact the Court responded to the urgings of school choice advocates to issue a

5 For a more comprehensive analysis, see Bolick, Voucher Wars, pp. 189-98.
definitive ruling that would apply broadly to other school choice programs. Although the Court discussed at length the particular features of the Cleveland scholarship program, it emphasized that “such features of the program are not necessary to its constitutionality.”

Rather, the Court reiterated criteria that it had consistently applied to determine the constitutionality of educational benefits encompassing religious options, holding that “where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.”

All well-drafted school choice programs readily conform to those criteria. Indeed, shortly following the Zelman decision, the unions acknowledged reality by dismissing their First Amendment claim against the Florida opportunity scholarship program. A First Amendment challenge against any existing school choice program would be borderline frivolous.

The only hope for the education establishment in the First Amendment context is that the composition of the U.S. Supreme Court will change and that the Court will overturn Zelman. Even if an anti-school choice president is elected and appoints new justices, it does not necessarily follow that Zelman will fall. In applying its doctrine of stare decisis (i.e., respect for past precedents), the Court has established that it will not overturn liberties on which Americans have come to cherish. Moreover, much of the dissenting opinions was grounded in hysterical sky-is-falling predictions of religious strife that school choice programs supposedly would

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6 Id. at 654.
7 Id. at 652.
create— a premise that experience is proving to be almost laughably false.

The best way to protect *Zelman* is to create more school choice programs and to help them succeed, so that school choice becomes an entrenched and ubiquitous (if not defining) feature of our public education system in America, relied upon by millions of American schoolchildren.

**II. STATE CONSTITUTION RELIGION PROVISIONS**

Forty-seven state constitutions contain provisions that are more explicit than the First Amendment in their proscription against religious establishment. More than 30 constitutions include so-called “Blaine amendments,” which typically prohibit the use of state funds for the “aid,” “benefit,” or “support” of religious schools. Many others have “compelled support” provisions, which provide that taxpayers cannot be forced to support religion or religious institutions. A number of state constitutions contain both types of provisions. Several of the newer states were forced to include Blaine amendments as a condition of admission into the Union.

Such provisions often evoke panic among school choice advocates. Generally there is no need for panic. Although the First Amendment speaks in more generally terms, it too would proscribe public aid for the benefit or support of religious schools. What the U.S. Supreme Court has determined is that funds placed at the disposal of parents or students to use toward either religious or secular education does not constitute aid or support of religious schools; it is

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9 The states lacking such provisions are Maine, North Carolina, and Louisiana; along, of course, with the District of Columbia, which has no state constitution.

aid or support of students. A number of state courts have interpreted their own state constitutional provisions in precisely that same commonsense fashion.

Making the case for a narrow construction of those provisions even more compelling is the sordid pedigree of the Blaine amendments, which trace their origin to nativist efforts in the late 19th Century to preserve Protestant hegemony over public schools by preventing the diversion of public funds to religious schools started by Catholic immigrants.\footnote{See, e.g., Viteritti.} That contemporary anti-school choice activists would cloak themselves in such a bigoted doctrine speaks volumes about their ends-justifies-the-means mentality.

Unfortunately, the U.S. Supreme Court rejected recently an opportunity to remove the Blaine Amendment from the anti-school choice arsenal. In \textit{Locke v. Davey},\footnote{124 S.Ct. 1307 (2004).} the Court reviewed the Washington Supreme Court’s interpretation of its Blaine Amendment to exclude theology students from postsecondary aid programs that are available to all other students. The U.S. Court of Appeals for the Ninth Circuit struck down the exclusion as a violation of the First Amendment prohibition of discrimination against religion. Had the Supreme Court affirmed the Ninth Circuit, it would have meant that states could not exclude religious schools from the range of available educational options.

The Court never reached that question, issuing a narrow holding limited to government funding of the ministry. Writing for a 7-2 majority, Chief Justice William Rehnquist (who also authored the majority opinion in \textit{Zelman}) described the case as falling within the “‘play in the joints’” of the First Amendment, involving a program that is “permitted by the Establishment
Clause but not required by the Free Exercise Clause.”¹³ Reassuringly, the majority declared that “there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology.”¹⁴ The Court found that in light of its history, the Washington Constitution was not a Blaine Amendment, and therefore the Court did not consider the impact of its bigoted history. Moreover, the Court considered the special concern exhibited about government funding of the pulpit in state constitutions.¹⁵ Hence, the Court left open the questions of whether a true Blaine Amendment, or the exclusion of religious schools from a broad school choice program, might be unconstitutional.

Until a case reaches the U.S. Supreme Court raising the broader questions left unaddressed in Davey, school choice advocates will have to continue fighting the Blaine Amendment battle on a state-by-state basis. In most states, such battles are winnable by making essentially the same arguments as we have in the First Amendment context, as cases upholding the Milwaukee Parental Choice Program and the Arizona scholarship tax credit illustrate.

The successful defense of the Milwaukee Parental Choice Program demonstrates that school choice advocates can overcome Blaine Amendment challenges. The Milwaukee program provides full-tuition scholarships to low-income students attending private nonsectarian or religious schools. The scholarship value is limited to the schools’ tuition or per-pupil costs, up to a prescribed amount. The schools must accept students on a random admissions basis, and provide an opt-out from religious activities. Most of the children in the program attend religious schools.

¹³ Id. at 1311.
¹⁴ Id. at 1311-12.
¹⁵ Id. at 1313-14.
Wisconsin’s Constitution contains two religious establishment clauses. Article I, § 18 provides that “nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.” It also states that “nor shall any person be compelled to attend, erect or support any place of worship.”

The Wisconsin Supreme Court found that the values underlying those state provisions mirrored those of the First Amendment. As a result, “we focus our inquiry on whether the aid provided by the [program] is ‘for the benefit of’ such religious institutions. . . . The crucial question,” under both the state and federal constitutions, “is ‘not whether some benefit accrues to a religious institution as a consequence of a legislative program, but whether its principal or primary effect advances religion’.”

Under that standard, “this court has held that public funds may be placed at the disposal of third parties so long as the program on its face is neutral between sectarian and nonsectarian alternatives and the transmission of funds is guided by the independent decisions of third parties.” Applying that framework, the Court ruled that because the program “neither compels students to attend sectarian private schools nor requires them to participate in religious activities,” it was permissible under the Wisconsin Constitution.

Likewise, in Kotterman v. Killian, the Arizona Supreme Court upheld an income tax credit for contributions to private scholarship funds against a challenge under both the First Amendment and the state religion clauses (which were modeled after Washington State’s and similar to Wisconsin’s). In assessing the program under the First Amendment, Chief Justice Thomas Zlaket described characteristics of the tax credit program that would also prove relevant

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16 Jackson v. Benson, 578 N.W.2d 602, 621 (Wis. 1998) (citation omitted).

17 Id. at 621.

18 Id. at 623.
to the state constitutional analysis. The program did not provide direct aid to religious schools, the Court ruled. “Arizona’s statute provides multiple layers of private choice,” the Court wrote, to the effect that “schools are no more than indirect recipients of taxpayer contributions, with the final destination of these funds being determined by individual parents.” Accordingly, the “decision-making process is completely devoid of state intervention or direction and protects against the government ‘sponsorship, financial support, and active involvement’ that so concerned the framers of the Establishment Clause.”19 Moreover, the program’s principal beneficiaries were not private schools but taxpayers, “parents who might otherwise be deprived of an opportunity to make meaningful decisions about their children’s educations, and the students themselves.”20

Turning to the state constitution, the Court observed that “[l]egislative enactments are presumptively constitutional” and that “we resolve all uncertainties in favor of constitutionality.”21 As a threshold matter, the Court concluded that the tax credit program did not implicate the applicable state constitutional provisions at all, because “no money ever enters the state’s control as a result of this tax credit. . . . Thus, under any common understanding of the words, we are not here dealing with ‘public money’.”22 As a result, the tax credit did not trigger either of the two relevant constitutional provisions, which were aimed only at “public money” and “appropriations,” of which the tax credit was neither.

The Court’s commonsense emphasis on the nature of tax credits, which do not constitute

20 Id. at 616.
21 Id. at 617.
22 Id. at 618.
public money or legislative appropriations, may have led some observers to conclude that
vouchers would be more constitutionally problematic because they do involve public money and
legislative appropriations. Such a narrow reading of Kotterman ignores the fact that like the tax
credits, vouchers would not be appropriated for religious instruction but rather to expand
educational opportunities for children23; and it overlooks the remainder of the decision itself as
well. For as the Court went on to declare,

Even if we were to agree that an appropriation of public funds was implicated here, we would fail to see how the tax credit for donations to a student tuition organization violates this clause. The way in which an STO is limited, the range of choices reserved to taxpayers, parents, and children, the neutrality built into the system—all lead us to conclude that benefits to religious institutions are sufficiently attenuated to foreclose a constitutional breach.24

Combined with the fact that the principal beneficiaries of the program were taxpayers, parents, and students, the Court held that the tax credits did not violate the Arizona Constitution.25

In addition to those helpful constitutional guideposts, the Court provided an analysis of the Blaine Amendment that should be helpful to school choice advocates in future litigation. “The Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing ‘Catholic menace’, ” the Court observed. Though there was no evidence that the

23 Indeed, even Justice Feldman’s dissenting opinion, in distinguishing the Arizona tax credit from the Milwaukee school voucher program that was upheld by the Wisconsin Supreme Court, suggests that a voucher program that contains an opt-out from religious activities and a random admissions process, and is targeted to low-income students, is less constitutionally problematic than the tax credit program. Id., 193 Ariz. at 297, 972 P.2d at 630 (Feldman, J., dissenting).

24 Id. at 620 (majority opinion) (emphasis added).

25 Id. at 620-21.
Arizona provisions were enacted in direct response to Blaine’s crusade,26 the Court concluded, “In any event, we would be hard pressed to divorce the amendment’s language from the insidious discriminatory intent that prompted it.”27

The Arizona Supreme Court’s disdain for ugly history of the Blaine Amendment, combined with its articulation of a congenial framework for assessing the constitutionality of aid programs that include religious schools among their options, bodes extremely well for school vouchers in Arizona. Together, the Wisconsin and Arizona decisions show that the beast of Blaine can be beaten. However, some state constitutions may present more difficult challenges. A state trial court in Florida struck down the Opportunity Scholarship Program under that state’s Blaine Amendment, which prohibits the use of public funds “directly or indirectly . . . in aid of any sectarian institution.”28 That decision is currently on appeal, and we draw optimism from the more reasonable interpretation of the Blaine Amendment in other cases by higher Florida courts. Some states, especially Michigan, have more onerous constitutional provisions.

To the extent that state courts apply their own religious establishment provisions to strike down school choice, options for recourse seem to be three. First, school choice activists can focus on scholarship tax credits rather than vouchers, because credits are not “public funds,” as the Arizona Supreme Court recognized. Second, they can appeal to the U.S. Supreme Court a

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26 The Arizona provisions were taken from the Washington Constitution, which has applied its Blaine Amendment restrictively. See, e.g., *Witters v. Washington Comm’n for the Blind*, 771 P.2d 1119 (Wash. 1989). However, the *Kotterman* majority cautioned against relying on Washington jurisprudence in this context. *Kotterman*, 972 P.2d 624-25. Moreover, the Washington Supreme Court recently has taken a more moderate approach to the Blaine Amendment, interpreting it in a manner similar to the Arizona Supreme Court’s analysis in *Kotterman*. See, e.g., *Malyon v. Pierce County*, 935 P.2d 1272 (Wash. 1997).

27 *Kotterman*, 972 P.2d at 624.

state court decision that interprets its constitution to exclude religious school options. Finally, they can seek to amend their state constitution.

Let’s hope no such efforts are necessary. For a court to give effect to a doctrine borne of bigotry in order to destroy precious educational opportunities would constitute an obscene abuse of judicial power.

III. OTHER STATE CONSTITUTIONAL PROVISIONS

No less vexing are what Chanin referred to as “Mickey Mouse” provisions, which on their face do not appear to limit school choice, yet have been wielded (sometimes with success) by anti-choice activists. The trouble is that it is difficult in some instances to predict such challenges. Moreover, adverse decisions under such provisions are not appealable to the U.S. Supreme Court. The silver lining is that sometimes adverse decisions under these provisions can be fixed by legislative corrections.

So far, non-religion state constitutional challenges have included the following:

- Challenges under education guarantees;
- Arguments that the bill violates “special legislation” or “private or local law” prohibitions;
- Local control of education provisions.29

In Wisconsin, the program was challenged twice as a violation of the state’s “uniform education” guarantee; and because it was enacted as part of a budget bill but limited to a specific

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29 Additionally, school choice programs occasionally are enacted by city governments or local school boards. Municipal governments and school boards are creatures of the state, and their powers usually are limited to those expressly delegated by the state constitution or legislature. As a result, all locally enacted school choice programs so far have been struck down.
category of school districts, it was challenged under the prohibition against private or local bills. The Wisconsin Supreme Court reasoned that the guarantee of a uniform public education creates a minimum “floor” regarding educational opportunities below which the state’s efforts must not fall; but that the state was free to enact programs that go above and beyond such efforts. The court also upheld the program under the private or local bill challenge.\footnote{Davis v. Grover, 480 N.W.2d 460 (Wis. 1991); Jackson v. Benson, supra.}

The Ohio Supreme Court likewise sustained the Cleveland program against a challenge under the state’s guarantee of a “thorough and efficient” education; but it struck down the program, which was enacted as part of the state budget, under the “single subject” restriction applicable to legislation.\footnote{Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999).} Thereafter the legislature enacted the program as a separate bill, curing the constitutional violation.

In Florida, in an earlier proceeding predating the decision under the Blaine Amendment, the trial court reached the unprecedented decision that under the state constitution’s guarantee of education as a fundamental right, public funds could not be used in private schools.\footnote{Holmes v. Bush, slip op., No. CV 99-3370 (Leon Cty. Cir. Ct. Mar. 14, 2000).} Such a ruling would have eviscerated programs that exist in some form in every state that allow public funds to be used in private schools for disabled children, at-risk children, or other purposes. Fortunately, the ruling didn’t last long.\footnote{Neither did the judge. On our recusal motion, the judge was removed from the case after his son married the daughter of a high-ranking official of the teachers’ union, which is prosecuting the lawsuit.} The court of appeals overturned it, declaring that nothing in the state constitution “prohibits the Legislature from allowing the well-deliniated use of public funds for private school education, particularly where the Legislature finds such use is...
necessary.”

Most recently, a Colorado trial court struck down the state’s school choice program on grounds that it violated the “local control” provision of the state constitution. The decision is on appeal.

All of those remaining state constitutional issues indicate that such claims are far from “Mickey Mouse”—or, at least, that Mickey has grown malicious and far less sensitive to the needs of children. Though for now we have won the national legal battle, school choice opponents have shifted to guerilla warfare in the state courts—and threaten to slow the progress of this vital education reform.

IV. GOING ON THE LEGAL OFFENSIVE

Some of the same constitutional provisions under which school choice is challenged can be wielded in favor of choice. For instance, state constitutional provisions that have been wielded to secure spending equity could be used to secure a different remedy. Here is an analogy: if you purchased a defective car and sued the manufacturer in court, the court would not award money to the car company to manufacture a different car. It would give you your money back.

Likewise, if you sue to recover for the failure of the school district to provide schools that live up to the guarantees of the state constitution, it makes no sense for the court to award more money to the schools that have violated your children’s rights. Only a voucher—your child’s share of state educational expenditures—provides a real remedy to the real victim. Such a

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remedy is provided for disabled students to whom public schools fail to provide a “free and appropriate education.” The same remedy should apply under state constitutions.\footnote{For a more detailed explication of this approach, see Bolick, \textit{Voucher Wars}, pp. 205-07.}

Moreover, the No Child Left Behind Act requires school districts to provide students in failing schools with better-performing public schools within the district. The problem is that in many cities, there are far more children in failing schools than available slots in better public schools (in the Los Angeles Unified School District, there are 223,000 children in failing schools and zero slots in better-performing district schools.)\footnote{See Bolick, \textit{Voucher Wars}, pp. 201-02.} The U.S. Department of Education issued a rule that lack of capacity is no defense. To make the rights meaningful, either the courts or Congress must make available a voucher remedy for children who are left behind.

Tactics such as these that would allow school choice advocates to go on the offensive should be the subject of the movement’s attention. We must not merely play defense in the courts; we should use they courts, as they were intended, as bulwarks to protect fundamental rights.

\textbf{V. CONCLUSION}

It is painfully fitting that we discuss legal obstacles to school choice on the occasion of the 50\textsuperscript{th} anniversary of \textit{Brown v. Board of Education}. Just as the great civil rights advocates a half-century ago learned, \textit{Brown} was not the end of struggle, but only a fresh beginning. So too with \textit{Zelman}. As the modern-day Bull Connors and Orval Faubuses continue to block the doors
to opportunity with puerile legal maneuvers, so must the heirs of Brown seek to remove the barriers to equal educational opportunities that are every American child’s birthright.

I believe in the end we will prevail, for our goal is our nation’s goal. Our nation is doctrinally committed, to the depths of its soul, to equal educational opportunity. We need to recapture the appeal to shared principles and the ecumenical approach that Martin Luther King, Jr., embraced to win an earlier battle for civil rights. King declared,

One day we will win freedom, but not only for ourselves. We shall so appeal to your heart and conscience that we shall win you in the process, and our victory will be a double victory.38

One day we will look back upon the period in which we worked to remove legal obstacles to school choice as a time in which special-interest groups shamed themselves by trying to thwart the nation’s most promising education reform. Ultimately, America will remain true to its principles, and will vindicate the sacred promises of parental freedom and equal educational opportunities. Until that time, we must endure with whatever ingenuity, perspicacity, passion, and urgency we can muster.