Bulletproofing School Choice

How to Write Sound & Constitutional Legislation To Expand Educational Opportunity

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Introduction

As the school choice movement's "legal brain trust," the Institute for Justice has 15 years of experience drafting and defending school choice legislation—including the U.S. Supreme Court victory for school choice in Cleveland in *Zelman v. Simmons-Harris*.

This paper brings together the hard-won lessons of our experience to help advocates and lawmakers craft effective school choice legislation likely to withstand a legal challenge. By "school choice," we mean voucher programs, scholarship tax credit plans and education tax credits or deductions that help parents access a broad array of schooling options, including private schools.

This paper is not a substitute for obtaining expert legal review of a school choice bill or proposal from the Institute for Justice School Choice Team at the earliest possible stage in the process. We will perform a thorough check of state and federal law to help ensure the bill passes constitutional muster, and we offer ongoing support—issue-specific legal memos, review of changes to proposed legislation and expert legislative testimony—throughout the legislative battle. After passage, we will—if necessary—defend the program in court on behalf of parents.

Bulletproofing Legislation Against Legal Challenges

It is an unfortunate fact of the battle for parental choice in education that teachers' unions and others who oppose school choice will use any available tool to thwart it. During legislative debates, opponents will argue that a bill is unconstitutional or otherwise legally unsound, even if it isn't. After a bill is passed, opponents will almost certainly turn those arguments into legal claims and file a challenge against a program in court, trying to stop or slow its implementation.

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U.S. Constitution: First Amendment's Establishment Clause

The U.S. Supreme Court's landmark 2002 decision, *Zelman v. Simmons-Harris*, declared unequivocally that school choice is constitutional under the First Amendment's Establishment Clause. In upholding Cleveland's school voucher program, the Court identified three essential characteristics of school choice programs that make them constitutional. Drafters should make sure their legislation creates programs that are:

1) **Religiously neutral**—neither favoring nor disfavoring religious options. Scholarships must be allocated on the basis of neutral, secular criteria, and religious options may be included among an array of educational options.

2) Driven by the **free and independent choices of parents**. Parental choice is a critical feature because it makes clear that school choice programs aid parents and students—not the schools they happen to choose, religious or otherwise.

3) Designed to **avoid "excessive entanglement"** between government overseers and participating schools.

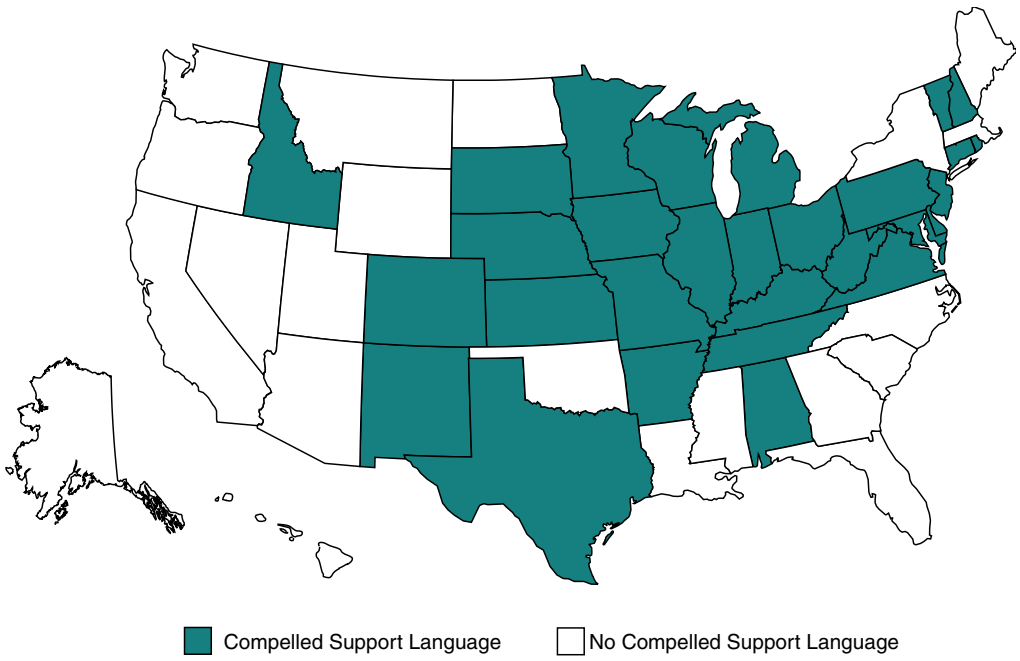
The federal Establishment Clause does not require programs to segregate state funds and use them only for non-religious elements of the education provided in religious schools, nor must the program permit students to "opt-out" of religious classes or activities. Religious schools participating in a school choice program are also free to prefer members of their faith in admissions and employment under the Establishment Clause. By choosing the school, the parents also freely choose to abide by the school's requirements.

State Constitutions and Religion

State constitutions also contain provisions dealing with religion, and they do not necessarily follow the federal Constitution. State religion provisions are subject to the interpretation given them by state courts. Particularly after *Zelman*, school choice opponents have tried to use these provisions to block school choice.

"Compelled Support" Clauses

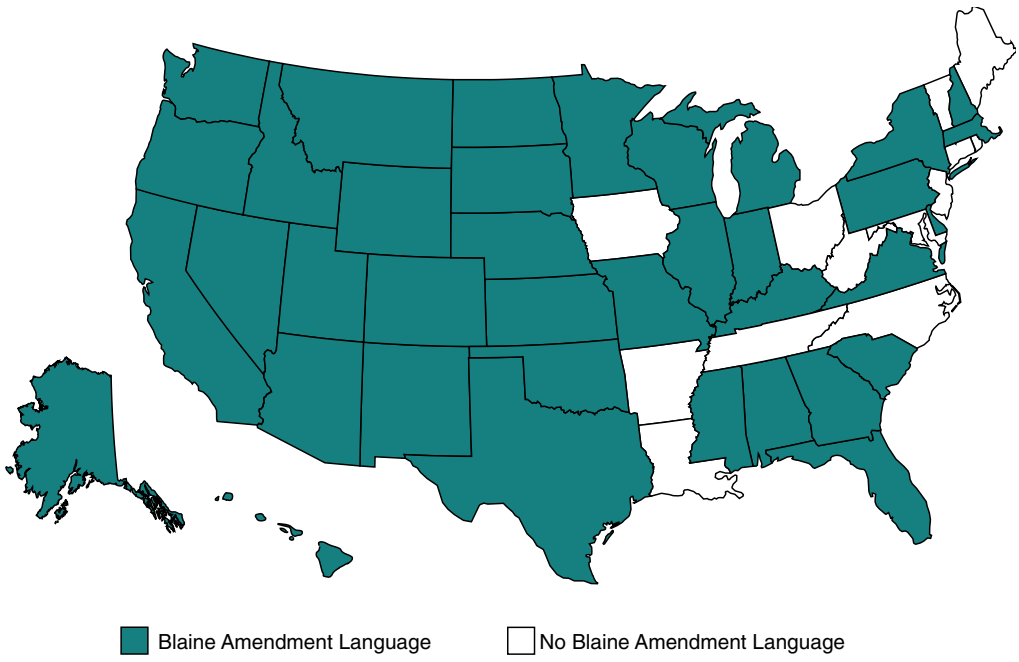
Such clauses generally say something like "no person shall be compelled to attend or support any church or ministry without his consent." Compelled support clauses reflect disapproval of the early American practice of establishing a particular denomination, such as Anglicanism or Congregationalism, as the official state church and requiring all taxpayers to support it, whether they belonged to that denomination or not. Of course, this is very far from offering scholarships to students on a religion-neutral basis, and courts in Ohio, Wisconsin and Illinois have upheld school choice programs challenged under compelled support clauses. No state courts have struck down a school choice program under a compelled support clause. Compelled support clauses are found in 29 state constitutions.



Blaine Amendments

The notorious Blaine Amendments grew out of well-documented upsurges in 19th-century anti-immigrant and anti-Catholic bigotry. At the time, most public schools were Protestant in orientation and inhospitable to Catholics. Catholics sought funding for their own schools, but a resulting anti-immigrant, anti-Catholic backlash led to Blaine Amendments forbidding the funding of "sectarian" (code for "Catholic") schools. The amendments get their name from a failed amendment to the U.S. Constitution proposed by Maine Sen. James G. Blaine.

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 scholarship tax credit program. State courts in Wisconsin and Illinois also upheld school choice programs against Blaine challenges. An appellate court in Florida struck down a school choice program under a Blaine Amendment, but the Florida Supreme Court ruled against the program on different grounds, leaving the question of Blaine and school choice in Florida unresolved. Blaine Amendments are found in 37 state constitutions.



School Choice and State Constitutions' Religion Provisions

Forty-seven states have one or both of these provisions. Fortunately, they are not necessarily barriers to school choice, as programs thrive in 10 states with Blaine Amendments and/or compelled support clauses. State courts that have upheld school choice under state religion provisions have reasoned, much like the U.S. Supreme Court in *Zelman*, that school choice programs support parents and children—not the schools they happen to choose, religious or otherwise.

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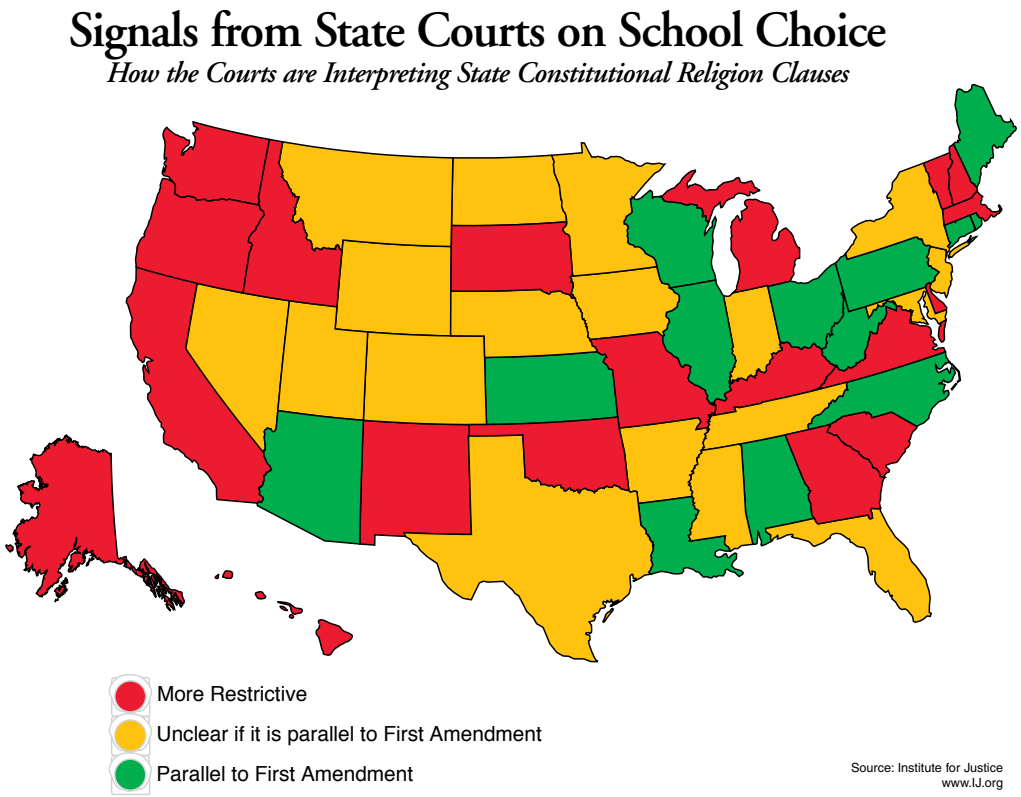
Nonetheless, state religion provisions are critically important to take into account when designing a program. State court interpretations of these provisions vary widely, and only a handful of states have addressed them in the context of school choice. Many state courts have interpreted these provisions in other kinds of cases, such as programs that provide benefits like free transportation or secular textbooks to families using private schools. These cases can provide guidance to lawmakers about how state courts may apply state religion clauses to education issues.

A state's caselaw about its religion provisions will have its most important impact on the choice of program, particularly the choice between tax credit programs and voucher programs. 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 or tax deduction 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 them as limited by Blaine Amendments or compelled support clauses.

The following map reflects Institute for Justice analysis of state caselaw addressing state religion provisions. In green states, state caselaw is favorable to school choice. In red states, state courts have taken a stricter interpretation of religion provisions that may require alternative strategies, such as tax credit programs. Yellow states are those whose courts have yet to give clear signals about their religion provisions. The Institute for Justice School Choice Team can help lawmakers in individual states determine the best strategy.



Lawmakers should also consider including a purpose provision in school choice bills stating that the purpose of the legislation is to provide parents with additional educational choices for their children, to bolster the argument that the program is intended as aid to parents and not the schools they choose.

State Constitutions and Education

Nearly every state constitution has a provision dealing with education, and these provisions can present limits for school choice programs—and avenues of litigation for school choice opponents.

Limits on State Education Expenditures

In a few states—Alaska, California and Kentucky—the education article makes it clear that state education expenditures are limited to the public school system. In those states, a tax credit or tax deduction program is the only viable approach. Unfortunately, the Massachusetts and Michigan constitutions also preclude education tax credits that benefit families in private schools.

Many state constitutions establish a "common school fund" and limit its use to support of the public schools. In states with such provisions, school choice programs must avoid use of the common school fund and instead use other funding sources such as general revenues or lottery proceeds.

"Uniformity" and Similar Education Provisions

The education articles of many state constitutions contain provisions requiring the establishment of a "uniform" and/or "thorough and efficient" system of free public schools or other words to that effect. Wrenching those words from their proper context, school choice opponents argue that so-called "uniformity" provisions forbid the government from providing education through any other means than the traditional public school system. While that argument was soundly rejected by the first two state supreme courts to consider it (Ohio and Wisconsin), school choice opponents recently persuaded the Florida Supreme Court to adopt their misreading of Florida's uniformity provision in striking down a school voucher program for children trapped in failing public schools.

While there is no sure-fire way to protect against a "uniformity" challenge, it may be helpful to address the issue in a statement of legislative purpose that explains the legislators' awareness of the uniformity provision and their understanding that it requires the legislature to provide for public education, but does not bar it from providing additional educational options, as well.

Other Provisions

Other kinds of provisions in education articles may set limits on designing a school choice program. For example, the Colorado Supreme Court has interpreted part of the state Constitution mandating "local control" of public schools to require local control of all education that used locally raised funds. That led the Court to invalidate an innovative school choice program that, in part, relied on local funds. Fortunately, only five other states' constitutions contain similar language, and Colorado's is by far the most restrictive. But the Colorado case underscores the need to look for and be mindful of all possible avenues of legal challenge.

Other State Constitutional Issues

More general state constitutional provisions—not related to education or religion—can provide grounds for a legal challenge, so legislators should also be aware of them. These include "single subject" rules limiting bills to just one topic and prohibitions on "special legislation" that applies only to a specific, named entity (such as a particular school or district).

Common Policy Choices and Trade-Offs

Any school choice proposal involves policy choices and trade-offs, and state legislators generally know best how to make these decisions for their states. However, in our experience, some trade-offs are often not recognized as such because proponents may not realize the consequences of some policy choices. The following observations are not to urge the adoption of a "one-size-fits-all" approach, but to help lawmakers take such trade-offs into account and avoid oversights of past legislative efforts.

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Accessibility

- Clear, simple eligibility rules help parents know whether they can receive a scholarship, and adequate notice to eligible parents is essential to generate participation.
- Parents need ample time to apply for the program and to choose a school. Consider rolling admissions throughout the year.
- Keep applications simple, with easily verified information to help parents and reduce administrative costs.

Large, Small or Unlimited Programs

- Programs without arbitrary limits on student participation can help more students and offer more choices, as established schools expand and new schools form to serve the much larger population of students who are able to choose them. Larger programs, particularly without caps, can more effectively spur public school reform. And larger programs can better capture cost savings for the state in the long run.
- On the other hand, capping participation can be politically expedient and gradual implementation can sometimes reduce the short-term fiscal impact.

Regular or Randomized Private School Admissions

- Allowing private schools to apply their normal admissions criteria to voucher/scholarship students can help ensure that students are well-matched with schools that will best serve their needs and interests. It can also encourage more private schools to participate.
- However, requiring participating private schools to use random admissions (with

a lottery if more students apply than can be admitted) can help disadvantaged students—who may be behind their private school peers academically—gain access to private schools.

Full or Partial Scholarships

- Permitting or requiring parents to contribute toward tuition can make it possible for more private schools to participate in the program, broadening the educational choices for families. It can also lower costs of the program and/or make more scholarships available.

- Then again, setting a maximum scholarship amount and requiring participating private schools to accept it as full tuition can enable very poor parents to participate.

- Programs can mix the two approaches by allowing parents above a certain income level to contribute toward tuition, while requiring schools to accept the scholarship as full-tuition for very low-income parents.

Scholarship Value

- The dollar value of the scholarship—whether in a voucher, scholarship tax credit or a educational tax credit program—should be large enough to encourage participation by existing and new private schools and thus provide a wide array of options for parents. Setting the amounts too low can also reduce a program's competitive impact by limiting its reach.

- Surveying local private schools about their tuition is helpful for setting scholarship amounts.

"Hold Harmless" Provisions

- "Hold harmless" provisions—meaning that public schools will not lose per-pupil funding for any students who leave as a result of the choice program, even though they no longer bear the cost of educating those students—can be a politically expedient compromise.

- But such provisions also reduce the competitive impact of the program by reducing a critical financial incentive for public schools to improve to retain students. This is especially important in poor urban areas where few families have meaningful educational choices.

"Failing Students" or "Failing Schools or Districts" Programs

- Targeting a program to failing students (defined by grades or test scores) may help reach students with severe academic problems, but it can create perverse incentives for students to perform poorly (and for schools to influence grades and test scores). In addition, eligible students may be so dispersed that the program's competitive impact is small and the private school marketplace is limited.

- A program that provides choice to students in demonstrably failing schools or districts can provide strong incentives for public schools to improve because eligible children are geographically concentrated.

Eligibility of Current Private School Students

- Limiting eligibility to current public school students can reduce costs.

- But permitting families who would otherwise qualify (for example, based on income) and who already have their children in private schools to participate is fair. Such parents have demonstrated their willingness to make great sacrifices for their child's education and are often committed supporters of school choice.

- One way to meet the goal of extending choice to current public school parents while supporting low-income parents who have already found a way to afford private school is to give current public school families priority in the allotment of scholarships.

Tax Credits, Deductions and Refunds

- Tax credits and deductions against state income taxes for educational expenditures—including private school tuition—help many families afford broader educational options, but exclude very-low income families because they pay little or no state income tax.

- Refundable tax credits (like the federal Earned Income Tax Credit) can help reach very low-income families, but they may run into constitutional challenges in states with restrictive constitutional religion provisions.

- Tax credits for individuals and/or corporations that donate money to private scholarship organizations can help poor families while avoiding many constitutional issues.

Accountability and Research Requirements

- While the ultimate form of accountability is parents' ability to choose, adding a research component to a program can help legislators and the public see how the program is working and provide valuable data to improve it.

- This is particularly useful when legislators opt to create a limited "pilot" program aimed at determining whether school choice is a useful reform and should be expanded.

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- Research should be conducted by experienced, trustworthy researchers, and legislators should consider giving a nonpartisan state agency—not a department traditionally staffed by political appointees—authority to oversee the study. Committing state funds to the study also helps remove any possible taint, but if this proves too expensive, private money can be raised.

- "Random assignment" studies are the "gold standard" for social science research and can often be done with school choice programs, depending on their design. Lawmakers should consult with a social scientist familiar with such studies in the drafting phase.

"Special Needs" School Choice Programs

- In recent years, lawmakers have developed programs that reach out to specially disadvantaged populations, such as special needs students, children with autism, and children who have been placed in foster care. Like traditional means-tested school choice programs, these innovative plans reach out to particularly vulnerable children who can benefit from private schooling.

- Until recently, opponents of school choice have proven unwilling to challenge such specialty programs. Since 1999, special needs scholarship programs have started in Florida, Utah, Ohio and Arizona. In November 2006, school choice opponents challenged the newest such programs—Arizona's scholarships for special needs and foster children. IJ intervened to defend the programs, and in January 2007 the Arizona Supreme Court declined to hear the case, effectively ending it and requiring opponents to file a new challenge in the trial court if they choose.

Conclusion

Given the disappointing state of American public education today, particularly for low-income families, more choice is always better than the status quo. Sometimes a program that includes compromises of the kind described above will be more politically feasible. Fortunately, today's small step can lead to a significant expansion later. Both the Milwaukee Parental Choice Program and Florida's McKay program for disabled students were very limited in potential size when originally passed, but subsequent amendments in the following years unleashed their potential, and now each program serves more than 15,000 students. A thoughtfully designed program will contain the seeds of its own future growth. The Institute for Justice School Choice Team is eager to help you get started.

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