

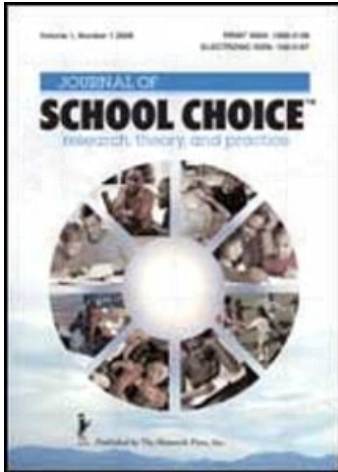
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School Choice and the Law: Introduction

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GUEST CO-EDITOR INTRODUCTION

School Choice and the Law: Introduction

In the first volume of this journal, Professor Robert Fox (2006) provided editorial leadership to a special issue dedicated to school choice and the law. Of the broad-based articles in that issue, only one (McCarthy, 2006) gave extended treatment to what is now arguably the most important issue in the ability to create new school choice programs in the United States and the longevity of existing ones—state constitutional provisions and judicial interpretation therein.

As McCarthy (2006) correctly discussed, the 2002 *Zelman* U.S. Supreme Court decision, save for a few remaining issues, largely limits legal battles over school choice programs, specifically vouchers, to disputes over interpretations of state constitutions. Central to those legal skirmishes have been two provisions present in many, if not most state constitutions: uniformity clauses and what McCarthy calls “no aid” provisions—prohibitions on the use of state funds for religious institutions.

Although uniformity clauses received much attention because of the factor they played in Florida’s much-publicized *Bush v. Holmes* (2004), “no aid,” or religious provisions, continue to represent the most hotly and frequently contested ground in questions of state constitutionality. Typically, arguments center on the constitutionality of the inclusion of religious schools in choice programs, but less known is the discriminatory history of these “no aid” provisions and the implications of that history for deciding the constitutionality of school choice programs that include religious schools. State supreme courts have cited this history as a central reason for upholding school choice programs (*Kotterman v. Killian*, 1999), and after *Zelman*, scholars have continued to give it critical attention (DeForrest, 2003; 2004; Duncan, 2003; Gedicks, 2003; Goldenziel, 2005; Richardson, 2003).

The continued importance of “no aid” provisions was recently illustrated once again with the Arizona Supreme Court’s decision in *Cain v. Horne* (2009). In a twist that heretofore has not been seen the Court appeared to comingle the uniformity and “no aid” provisions to strike down Arizona’s voucher program for students with special needs. For some critics, this comingling was, in the language of social scientists, of questionable construct validity. In addition, the Arizona Supreme Court is now considering

the constitutionality of another choice program, and the central claim against it focuses on the religious provision.

It is in this context, and because of the importance of this topic, that we present a special issue on school choice and the law, with a particular focus on religious (i.e., “no aid”) provisions in state constitutions. In “School Choice and State Constitutions’ Religion Clauses,” Richard Komer provides a historical and legal analysis of the genesis and evolution of religious provisions in state constitutions, with a particular focus on what implications that history holds for contemporary school choice law. In Komer’s thorough treatment we are reminded, indeed if we ever knew, that the history of education and the history of religion in the United States are tightly intertwined, and that the close relationship between the two had, and continues to have, a bearing on educational provisions in state constitutions. In particular, the author’s detailed account of the development of Blaine Amendments sheds light on the rather dark history of what appears to today’s eyes to be the sterile and straightforward “no aid” provisions in state constitutions.

The second article, “The National Implications of *Cain v. Horne*,” a commentary penned by Tim Keller, demonstrates why this history is important when he deconstructs the most recent state supreme court decision on school choice, *Cain v. Horne* (2009). According to Keller, the court’s decision is a perplexingly poor mash created by a failure to apply a straightforward textual analysis of Arizona’s constitution and the wanton dismissal of an analytical framework the court itself created through prior precedent, including a consideration of the very history Komer describes in his article. Instead, the court derived a novel purpose for its educational provisions, supported only by the opinion of a law professor and his students rather than historical or legal precedent, which was then used to strike down Arizona’s voucher programs for students with special needs and children in foster care. With decisions like this, one inevitably wonders about the implications for other programs and other states, and Keller addresses that question by placing the *Cain* decision in a national context and discussing the consequences for future school choice programs in states with similar constitutional provisions. As one might surmise from his commentary, Keller believes *Cain* is not persuasive legal authority for other states.

At first glance, Komer and Keller’s articles seem somewhat disparate—one is a historical and legal analysis of religion clauses in state constitutions, and the other is an analytical commentary of a recent state supreme court decision. But readers will find the two quite complementary. Komer provides a detailed, fundamental examination of the social and legal history of religion clauses and discusses their relationship to education generally and school choice specifically. Keller then “applies” this history to the *Cain v. Horne* case. According to Keller, the history that Komer discusses should have informed the *Cain* court and produced an affirmative ruling for the school choice programs in question, but this was not the result.

Unlike the authors who typically populate journals like this one, Komer and Keller are not social scientists. Instead, they are both constitutional attorneys who specialize in school choice. Both have litigated school choice cases in federal and state courts, including state supreme courts, and have dedicated their careers to developing a unique expertise in state constitutions and educational provisions relevant to school choice. Thus, their perspective is not just that of legal scholar/theorist but also of constitutional practitioner informed by interactions with other constitutional attorneys and their different views, state and federal judges from divergent sociopolitical and legal ideologies, and the clients they have represented.

Just as social scientists often contribute a unique perspective to legal discussions of school choice by writing in law journals (see, for example, Greene, Butcher, Jensen, & Shock, 2008; Lubienski & Weitzel, 2008; McAndrews, 2005; Viteritti, 2003; Wolf, 2008), I trust Komer and Keller's non-social-scientist contributions will represent a unique, informative, and perhaps provocative perspective on school choice and the law to our scholarly community.

Dick M. Carpenter II, PhD, Guest Co-editor
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REFERENCES

- Bush v. Holmes*, 886 So.2d 340 (Fla. 1st DCA 2004), aff'd on other grounds, 919 so.2d 392 (Fla. 2006).
- Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009).
- DeForrest, M. E. (2003). An overview and evaluation of state Blaine Amendments: Origins, scope, and First Amendment concerns. *Harvard Journal of Law & Public Policy*, 26(2), 551–627.
- DeForrest, M. E. (2004). The connection between the federal Blaine Amendment and Article I, §11 of the Washington State constitution. *Tulsa Law Review*, 40, 295–320.
- Duncan, K. (2003). Secularism's laws: State Blaine amendments and religious persecution. *Fordham Law Review*, 72(3), 493–593.
- Fox, R. (2006). Introduction. *Journal of School Choice*, 1(3), 1–4.
- Gedicks, F. M. (2003). Reconstructing the Blaine Amendments. *First Amendment Law Review*, 2, 85–106.
- Goldenziel, J. (2005). Blaine's name in vain? State constitutions, school choice, and charitable choice. *Denver University Law Review*, 83, 57–99.
- Greene, J. P., Butcher, J., Jensen, L. I., & Shock, C. (2008). You can't choose if you don't know: The failure to properly inform parents about NCLB school choice. *Brigham Young University Law Review*, 2, 7–25.
- Kotterman V. Killian*, 972 P.2d 606 (Ariz. 1999).
- Lubienski, C., & Weitzel, P. (2008). The effects of vouchers and private schools in improving academic achievement: A critique of advocacy research. *Brigham Young University Law Review*, 2, 447–485.

- McAndrews, L. J. (2005). Friends like these: George W. Bush and federal aid to non-public schools. *Journal of Church and State*, 47(4), 769–783.
- McCarthy, M. (2006). The legality of school vouchers: Round two. *Journal of School Choice*, 1(3), 17–28.
- Richardson, B. (2003). Eradicating Blaine's legacy of hate: Removing the barrier to state funding of religious education. *Catholic University Law Review*, 52, 1041–1079.
- Viteritti, J. P. (2003). Reading Zelman: The triumph of pluralism and its effects on liberty, equality, and choice. *Southern California Law Review*, 76(5), 1105–1187.
- Wolf, P. J. (2008). School voucher programs: What the research says about parental school choice. *Brigham Young University Law Review*, 2, 415–446.