SCHOOL CHOICE: 
Answers to Frequently Asked Questions 
About State Constitutions’ Religion Clauses 

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1. Why are the opponents of parental choice focusing on state constitutions’ religion clauses as a means of derailing school choice programs? 

There is nothing new about parental choice opponents’ efforts to thwart school choice by using state constitutions’ religion clauses. They have always preferred to challenge parental choice programs on state constitutional grounds, because it is harder for the defenders of choice programs to obtain U.S. Supreme Court review of such decisions. What is new is that they no longer have the second string to their bow, which was their claim that parental choice programs violate the U.S. Constitution’s Establishment Clause. Their defeat in Zelman v. Simmons-Harris eliminated that line of attack, leaving them with the state constitutions as their only alternative. 

Thus, in those cases where the Institute for Justice and its allies have successfully defended parental choice programs, school choice advocates have already confronted and overcome claims that state constitutions’ religion clauses are violated by parental choice programs. For example, the Cleveland program upheld in Zelman had been previously litigated in state court, concluding in a decision by the Ohio Supreme Court that the program did not violate the state constitution’s religion clause. Similarly, choice opponents challenged the Milwaukee parental choice program, on which the Cleveland program was modeled, on state religion clause grounds and were rebuffed by the Wisconsin Supreme Court. The Arizona Supreme Court likewise rejected a challenge to the Arizona school choice tax credit based on Arizona’s religion clause, as did the Illinois Court of Appeals with respect to Illinois’ tax credit. On the other hand, choice opponents have successfully used state religion clauses to thwart the inclusion of religious school options in two cases, one in Puerto Rico and another in Vermont. 

1 Religion clauses are not the only state constitutional provisions opponents use against school choice programs. For example, after nearly seven years of litigation, the Florida Supreme Court in 2006 struck down Opportunity Scholarships as a violation of the state Constitution’s education article, which requires the state to provide a “uniform, efficient, safe, secure, and high quality system of free public schools.” Bush v. Holmes, 919 So. 2d 392 (Fla. 2006). The unprecedented decision is at odds with a Wisconsin Supreme Court ruling upholding Milwaukee’s school choice program under the “uniformity” provision of the Wisconsin Constitution. Davis v. Grover, 480 N.W. 2d 460 (Wis. 1992). The Florida court did not address the unions’ claim that the program violated the Florida Constitution’s Blaine Amendment. For more on the “uniformity” ruling, visit: http://www.ij.org/schoolchoice/florida/index.html. 


3 Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999). 

2. What are Blaine Amendments?

The Blaine Amendments are the most common type of religion clause found in state constitutions. By the Institute for Justice’s count, they are found in 37 state constitutions, although their language varies and some interpretation is involved in classifying a provision as a Blaine Amendment. IJ considers any provision that specifically prohibits state legislatures (and usually other governmental entities) from appropriating funds to religious sects or institutions (often specifically including religious schools) to be a Blaine Amendment.

The Blaine Amendments are named after a failed federal constitutional amendment introduced in the U.S. Congress by Senator James G. Blaine of Maine in 1875. It was directed primarily at efforts by Catholics to obtain a share of funding for their schools, which they had created because of their unwillingness to send their children to the Protestant-oriented public schools. Although the public schools of that period were called “nondenominational,” that description did not mean that they were non-religious or secular in today’s terms. It meant that they did not teach the doctrine of any particular Protestant sect or denomination in the course of conducting religious activities, such as school prayer, Bible reading and lessons, and hymn singing. Understandably, Catholics and certain other religious groups were unwilling to participate in the public schools and maintained their own schools.

When Catholics began agitating for equal funding for their schools, politicians such as Blaine got into the act because the vast majority of Catholics were Democrats, while the Republicans who controlled Congress tended to be white, Anglo-Saxon Protestants. Blaine and the Republicans turned the school aid demands of the Catholics into a political issue and proposed their amendment to prevent the legislature from meeting the Catholics’ demands for equal treatment of their schools. Although the amendment easily

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3 It is during this precise period that a Republican characterized the Democrats as the party of “Rum, Romanism, and Rebellion.”
obtained a majority of votes in both the House of Representatives and the Senate, in the Senate it failed to obtain the super-majority required for a constitutional amendment.

Despite their narrow defeat in the Senate, the backers of the Blaine Amendment succeeded over the next quarter century in promoting their anti-Catholic agenda by requiring that newly formed states include Blaine Amendment language in their state constitutions as a condition for admission to the union. Additional states added Blaine language on their own, joining still other states whose Blaine-like language pre-dated even the federal effort and provided models for Blaine’s efforts. Today, all of the Western states’ constitutions have Blaine Amendments in them, and approximately half of the states east of the Mississippi do also.

2. What about the other states that don’t have a Blaine Amendment—do their state constitutions contain religion language that poses a potential problem for parental choice efforts?

Yes. Although the Blaine Amendments are the most common type of state religion clause, there is another very common provision that the Institute for Justice calls “compelled support” provisions. In fact, 29 states have this sort of language in their constitutions. Many states have both compelled support and Blaine Amendment language. Only three states, Louisiana, Maine and North Carolina, have neither sort of language. The common component of a compelled support clause is language providing that no one shall be compelled to attend or support a church or religious ministry without his or her consent. Sometimes the language will specifically include religious schools in the entities that cannot be supported.

The historical antecedents of compelled support provisions are much older than the Blaine Amendments and addressed a different concern—the Colonial era practice of requiring church attendance and support for the colony’s established church. Thus, this sort of provision can be found in some of the earliest states’ constitutions, such as Pennsylvania, Vermont and Virginia, dating from the 1770s. Of the states west of the Rocky Mountains, only Idaho has a provision like this. There is a pronounced eastern bias to the map of states with compelled support provisions.

6 For example, Massachusetts adopted the earliest Blaine-like language in the 1850s, during an earlier wave of anti-Catholic sentiment that was a reaction to increased Catholic immigration and fueled the Know-Nothing movement, which briefly captured control of the Massachusetts state government.
3. **Does the federal Constitution limit the interpretation of these state religion clauses in any way?**

Yes, in IJ’s opinion. Not only are members of the U.S. Supreme Court showing increasing recognition that the state Blaine Amendments have a discriminatory pedigree, but the Court has decided a number of cases where it has refused to countenance states’ efforts to justify infringements on free speech and free exercise rights based on expansive interpretations of their Blaine Amendments. For example, in *Widmar v. Vincent,*\(^7\) the Court refused to let Missouri justify its denial of religious groups equal access to campus facilities at the University of Missouri on the basis of the Blaine Amendment and compelled support clauses in its state Constitution. Similarly, in *Rosenberger v. Rectors & Visitors of the University of Virginia,*\(^8\) the Court refused to let Virginia justify its denial of student fee subsidies to a religious student publication on the basis of Virginia’s Blaine Amendment and compelled support language. Missouri and Virginia happen to be two states that, like Washington, have consistently interpreted their religion clauses expansively to restrict parental choice.

When a state denies a student or his or her family educational assistance because that student is attending a religious school—while providing such assistance to those students whose families have chosen non-religious private schools for their children—it is discriminating on the basis of religion. Where the family is religiously motivated in choosing the religious school, the discrimination denies the free exercise of religion, as well as constituting viewpoint discrimination under the free speech clause of the First Amendment. By classifying on the basis of religion (a suspect classification that must be subjected to strict scrutiny) without a compelling need to do so, the state denies those persons choosing religious schools the equal protection of the laws under the 14th Amendment. And by violating religious neutrality and directly hindering religion versus non-religion, the state violates the Establishment Clause of the First Amendment as well. Under the supremacy clause of the U.S. Constitution, courts must avoid state constitutional interpretations that infringe upon federally protected rights, and thus IJ believes that the restrictive interpretations of the state constitutions’ religion clauses violate federal rights.

4. **What is the legal argument that parental choice programs violate these Blaine Amendments?**

Much like their theory under the federal Establishment Clause, the opponents of parental choice programs argue that providing student assistance to families opting for a religious school for their children’s education is the equivalent of providing aid directly to the religious schools themselves. Although the Blaine Amendments were obviously designed to address direct aid to the schools themselves, which was, after all, what Catholics were requesting at the time the Blaine Amendment was created, the opponents of choice wish to extend the language to encompass money that incidentally reaches religious school coffers because parents have selected to spend their scholarships there.

The U.S. Supreme Court definitively rejected this theory under the Establishment Clause in *Zelman,* holding that where the scholarship program is religiously neutral, *i.e.*, neither favoring nor disfavoring the choice of religious schools, and where the parents made a free and independent choice of a religious alternative for their children’s education, the aid is not to be treated the same as direct aid to the religious schools. Parental choice opponents hope that the state supreme courts will nonetheless adopt a broader construction of their states’ Blaine Amendments that will be more restrictive of parental choice than the federal Establishment Clause. The Institute for Justice’s counterargument is the same as under the Establishment Clause: scholarship/voucher programs aid families—not schools—and not one dime reaches a religious school but for the free and independent choice of a parent.

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\(^7\) 454 U.S. 263 (1981).  
5. Is the legal argument under the “compelled support” clauses similar to that under the Blaine Amendments?

Yes. Parental choice opponents argue that when people’s taxes are used to pay tuition for children whose parents have enrolled them in religious schools it is tantamount to compelling people to pay taxes to be given to a church, ministry or church school. This is, of course, a far cry from the practice of tithing that the compelled support clauses were originally intended to combat, where the government served as a tax collector for an established church. Nonetheless, the opponents of parental choice programs insist that these provisions prohibit giving assistance to families if they choose a religious option for their children’s education.

6. How successful have these anti-choice arguments been so far?

Not very successful. The Institute for Justice and its allies have successfully repelled attacks on parental choice programs based on Blaine Amendments in Arizona, Illinois and Wisconsin. On the other hand, as mentioned previously, opponents succeeded in nullifying the Puerto Rico parental choice program by an attack based on the commonwealth’s constitution. As with so many of the newer states, Puerto Rico’s Constitution contains a Blaine Amendment because the congressional enabling act that permitted Puerto Rico to become a commonwealth required it.

In states with compelled support clauses, IJ helped successfully defend parental choice programs against attack in Illinois, Ohio and Wisconsin. On the other hand, IJ lost in Vermont where the Vermont Supreme Court ruled that its clause required the exclusion of the option of choosing a religious school from Vermont’s tuitioning system. (Under that system, approximately 90 school districts tuition their high school students to the public or private high school the parents choose, in lieu of operating their own public high school.) Despite the fact that parents had the option of choosing religious schools from the inception of the program in 1869 until the Vermont court ruled it violated the Establishment Clause in 1961 (a decision the Vermont Supreme Court itself reversed in 1994), the Court ruled that inclusion of the option would be compelled support of a ministry.

7. What does the future hold with respect to these state constitutions’ religion clauses?

Based on past precedents, it can be determined how some states would approach their religion clauses. The question is which states are likely to construe their clauses parallel to the Establishment Clause of the U.S. Constitution and which states are likely to construe their provisions more restrictively vis-à-vis parental choice programs. Because the question of parallel interpretation has come up before in some states, looking at past case law can aid in predicting how that state’s supreme court might rule.

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12 Asociacion de Maestros v. Torres, 137 D.P.R. 528, 1994 PR Sup. LEXIS 341.
13 Griffith and Toney, supra note 10.
14 Simmons-Harris v. Goff, supra note 3.
15 Jackson v. Benson, supra note 11.
When in the past the U.S. Supreme Court has approved the inclusion of the families choosing religious schools in a program, such as transportation subsidies in *Everson v. Board of Education*¹⁹ and free secular textbooks in *Board of Education v. Allen*,²⁰ many state legislatures responded by passing similar programs, which the same groups that now attack parental choice programs challenged as violations of these state religion clauses. Some of those earlier lawsuits were successful in persuading the state supreme courts to take a more restrictive view of permissible aid to families, while other supreme courts opted for a parallel interpretation. For these states, both parallel or non-parallel in their interpretations, there is a pretty good indicator of how those courts will rule in the future. The remaining states, which have not confronted the issue to date, are unknown territory.

For example, Washington epitomizes a state that has taken a more restrictive view. When the state legislature passed a transportation program allowing families with children in religious schools to participate on an equal basis with all other families, the Washington Supreme Court ruled that the state Blaine Amendment forbade such equal treatment.²¹ Similarly, after the U.S. Supreme Court unanimously ruled that the Establishment Clause was not violated if Washington allowed a resident eligible for vocational rehabilitation to use his funding to attend a religious college and pursue a religious vocation, the Washington Supreme Court held that to do so would violate its Blaine Amendment.²²

Illinois, on the other hand, epitomizes a state that interprets its state constitution’s religion clauses in a parallel fashion to the federal guarantees. Despite having both Blaine and compelled support language in its constitution, Illinois interprets those provisions in unison with the Free Exercise and Establishment Clauses.²³

A lot of states, however, fall into neither category, usually because their courts just have not confronted this issue before. Those states’ courts’ reaction to the question of whether to interpret their religion clauses to parallel the U.S. Constitution is impossible to predict with any degree of confidence. Many states fall into this category, so it is important to see how the next few cases go. Fortunately, there is an increasing recognition that the state Blaine Amendments in particular were conceived in an atmosphere of religious animus that counsels great caution in applying them expansively, as parental choice opponents would have courts do.

8. **What do you mean by “increasing recognition”?**

Most importantly, several members of the U.S. Supreme Court have recognized that the Blaine Amendments reflect an anti-Catholic legacy that is unworthy of the Court’s approval. In *Mitchell v. Helms*,²⁴ Justice Thomas stated in his plurality opinion, which was joined by then-Chief Justice Rehnquist and Justices Kennedy and Scalia, that:

> [H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. … Opposition to aid to “sectarian” schools acquired prominence in the 1870s with Congress’s consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the Amendment

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¹⁹ 330 U.S. 1 (1947).
²⁰ 392 U.S. 236 (1968).
²³ See *Griffith* and *Toney*, supra note10.
arose at a time of considerable hostility to the Catholic Church and to Catholics in general …

Justice Breyer likewise seems to recognize the Blaine Amendment’s anti-Catholic “pedigree” in his dissent in *Zelman*, which was joined by Justices Stevens and Souter, when he implies that anti-Catholic sentiment “played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for ‘sectarian’ (i.e., Catholic) schooling for children.”

Nor is the U.S. Supreme Court the only court to recognize the Blaine Amendment’s “shameful pedigree.” In rejecting the challenge brought by parental choice opponents to Arizona’s school choice tax credit, the Arizona Supreme Court stated that “[t]he Blaine Amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to what was perceived as a growing ‘Catholic menace.’” The Court declined to give a broad reading to language it said it would be “hard pressed to divorce from the insidious discriminatory intent that prompted it.”

Both the U.S. and Arizona Supreme Courts relied on recent scholarship delineating the Blaine Amendments’ origins in religious discrimination.

**10. What do you plan to do about these restrictive interpretations of state religion clauses?**

The Institute for Justice will continue to defend parental choice programs that states pass them, as in Florida where other school choice programs such as the state’s McKay Scholarships for Students with Disabilities and the Corporate Tax Credit Scholarships for low-income students remain under the threat of litigation under the state Blaine Amendment and the education article.

In the summer of 2006, IJ also asked the U.S. Supreme Court to review a ruling by the Maine Supreme Judicial Court upholding the exclusion of religious schools from the state’s “tuitioning” program for rural towns. Although the Maine Constitution doesn’t have a Blaine Amendment or compelled support clause, the state Legislature passed a law in 1982 forbidding participating parents from using their tuitioning dollars at religious schools—even though they had been free to do so for nearly a century prior. IJ argues that the discriminatory exclusion of parents who wish to choose religious schools from the program is a violation of their federal rights to Free Exercise of religion and Equal Protection of the law.

The U.S. Supreme Court’s 2004 decision in *Locke v. Davey*, turning down a request by theology student Joshua Davey to declare unconstitutional the State of Washington’s denial of scholarship funds because he was pursuing the ministry, is a disappointment for school choice supporters, but not a fatal blow. Choice advocates (including the Institute for Justice) and detractors alike hoped for a broad ruling applying the facts of Davey’s case to K-12 school choice, but the Court issued an extremely narrow ruling focused solely on funding the religious training of clergy. Additionally, the Court completely sidestepped the Blaine Amendment issue, dismissing it in a footnote by accepting the State’s assertion that a different provision of

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26 *Zelman*, 536 U.S. at 660 (Breyer, J., dissenting).
28 *Id.*
the Washington Constitution was in play. Any cases involving Blaine Amendments and school choice in other states will certainly require specific consideration by the U.S. Supreme Court.

Ultimately, the U.S. Supreme Court will have to address this issue, as it did in Zelman with the issue of whether the Establishment Clause permitted scholarship recipients to select religious schools. The Institute for Justice is confident that in the end the Supreme Court will rule in favor of liberty and ensure that these state constitutional provisions are not used as vehicles for discriminating against those families who, for whatever reasons, prefer to educate their children in religious schools.

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