

School Choice and the Constitution: Evaluating the Constitutionality of Educational Choice

School Choice in America Summit

Resort at Squaw Creek, California September 2017

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1869

Vermont adopts Town Tuitioning, first recorded voucher-type method of funding education

1955

The Voucher Idea Is Born

“Government, preferably local governmental units, would give each child, through his parents, a specified sum to be used solely in paying for his general education; the parents would be free to spend this sum at a school of their own choice”

The Role of Government in Education, Dr. Milton Friedman, Nobel Laureate Economist

1990

Wisconsin enacts first voucher, in Milwaukee

1998

Wisconsin Supreme Court rules vouchers are constitutional

Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998)

1995

Ohio enacts Cleveland voucher

2002

U.S. Supreme Court rules vouchers are constitutional

Zelman v. Simmons-Harris, 536 U.S. 639 (2002)

The instant program is one of true private choice . . .

*The incidental advancement of
a religious mission,
or the perceived endorsement of
a religious message,
is reasonably attributable to
the individual aid recipients,*

*not the government,
whose role ends with the disbursement of benefits.*

Opinion of the United States Supreme Court in
Zelman v. Simmons-Harris, 536 U.S. 639 (2002)



*Milton Friedman: . . . give each child . . . a specified sum
. . . for the parent to spend at a school of their choice.*

Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs. . . . the tax credit system is implemented by private action and with no state intervention.

Private bank accounts cannot be equated with the Arizona State Treasury.

Arizona Christian Scholarship Tuition Organization v. Winn, 563 US 125 (2011)

Where, as here, aid to parochial schools is available only as a result of decisions of individual parents, no "imprimatur of state approval," can be deemed to have been conferred on any particular religion, or on religion generally.

Mueller v. Allen, 463 U. S. 388, 395 (1983)



The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far.

The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Our cases make clear that such a condition imposes a penalty on the free exercise of religion that must be subjected to the “most rigorous” scrutiny.

Opinion of the United States Supreme Court in *Trinity Lutheran v. Comer*, 582 U.S. __ (2017)



. . . exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . .

**Milton Friedman: . . . give each child . . . a specified sum
. . . for the parent to spend at a school of their choice.**

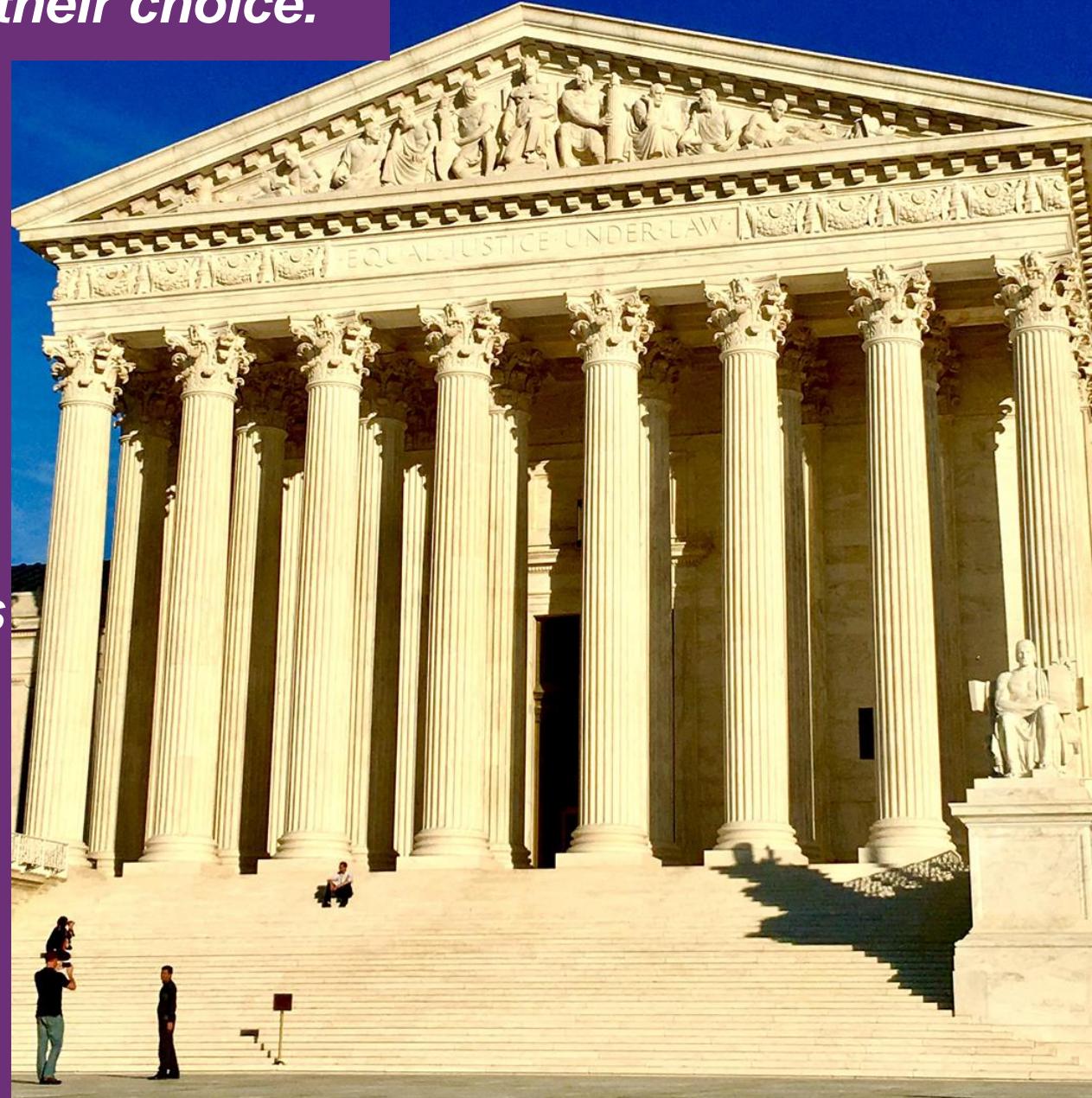
Zellman:

*The instant program is one of
true private choice . . .
. . . not the government.*

Trinity Lutheran:

. . . expressly denying a qualified religious entity a public benefit solely because of its religious character . . . goes too far.

. . . exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . .



Educational Choice Judicial Rulings:

A child's or parent's choice of education is a private choice; therefore, there can be no entanglement of religion with government.

The government does not choose.

Trinity Lutheran:

A religious institution cannot be denied a government benefit for which it is qualified solely because it is religious.

The government chooses – but cannot discriminate against religious entities when choosing who will receive benefits.



Trinity Lutheran Next Steps

Douglas County, Colorado

Adverse state supreme court ruling overturned; must reconsider in light of *Trinity Lutheran*. Outcome uncertain. *Taxpayers for Public Education v Douglas Co School District and Doyle-intervenors*, 2015 CO 50, Supreme Court Case No. 13SC233

New Mexico

Textbook case overturned; must reconsider in light of *Trinity Lutheran*. Outcome uncertain. *New Mexico Assn of Nonpublic Schools v Moses*

Next Case in the Pipeline

Montana Tax Credit Scholarship

On appeal to Montana Supreme Court; could advance to US Supreme Court. *Espinoza v MT Dept of Revenue*, DV-15-1152C



School Choice Litigation Status of States Represented At This Summit

Arizona: Two Blaines.

1) Lost voucher case at AZ Supreme Court.

Cain v. Horne, 202 P.3d 1178 (Ariz. 2009)

2) Won tax credit scholarship case at US Supreme Court. *ACSTO v. Winn*, 563 US 125 (2011)

As a result of the voucher loss and specific language in the ruling of the court, ESAs were created. Litigation followed.

3) Won ESA case at AZ appellate court.

Niehaus v. Huppenthal, 310 P.3d 983 (Ariz. Ct. App. 2013)

Arkansas: No Blaine. Compelled support clause proscribes no use of public school funding for other purposes. No litigation re AR voucher.

Connecticut, Nebraska, North Dakota:

No Blaine in Connecticut. Nebraska and North Dakota have Blaines. No school choice programs in these states. Connecticut faces education funding litigation. *Connecticut Coalition for Justice in Education Funding, et.al. v Docket, M. Jodi Rell et.al.*

Georgia: Blaine state. No litigation re voucher. Won litigation in 2017 re tax credit scholarship program. *Gaddy v. Dept of Revenue, (S17A0177)*.

Iowa, South Carolina: No Iowa Blaine. South Carolina has Blaine. No litigation re IA and SC tax credit scholarship programs.

School Choice Litigation Status of States Represented At This Summit

Louisiana: No Blaine; religion clause consistent with US Constitution. Lost voucher litigation. Funding mechanism unconstitutional; funds dedicated to funding public schools may not be used for another purpose. Legislature funded vouchers, separately, shortly after this ruling, in a manner consistent with ruling of the Louisiana Supreme Court. *Louisiana Federation of Teachers v State*, 118 So.3d 1033 (2013)

Minnesota: Two Blaines. Won litigation re tax deduction, U.S. Supreme Court. Landmark case linking education funding to a parent/child. *Mueller v. Allen*, 463 U. S. 388, 395 (1983)

Mississippi: Blaine state. Litigation pending re charter schools may impact vouchers. *Charles Araujo, et.al. v Gov Phil Bryant, et.al.* (Case: 25CH1:16-cv-001008)

New Hampshire: Blaine state.
1) Won litigation re tax credit scholarship program. *Duncan v. State of New Hampshire*, 102 A.3d 913 (N.H. 2014).
2) Litigation against town tuitioning moot stayed; new town tuitioning law in 2017. *Department of Education v Croydon School Board, et.al.* (2202015cv146)

North Carolina: No Blaine. Won litigation re vouchers. *Hart v. State*, 774 S.E.2d 281 (N.C. 2015), and *Richardson v. State*, 774 S.E.2d 304 (N.C. 2015)

Oklahoma Blaine Amendment

“No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.”
Oklahoma Const. Art. II, § 5.



When the scholarship payment is directed to a sectarian private school, it is at the sole and independent choice and direction of the parent and not the State.

Oliver v. Hofmeister, 2016 OK 5

Nevada Blaine Amendment

“No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose [sic].”
Nevada Const. Art. 11, § 10.

. . . public funds are deposited into an account established by a parent, who may then choose to spend the money at a religious school or one of the other participating entities. Those funds, once deposited into the account, are no longer public funds . . .

Schwartz v. Lopez, 132 NV Adv Op 73 (2016)



Indiana Blaine Amendment

“No money shall be drawn from the treasury, for the benefit of any religious or theological institution.”

Indiana Const. Art. 1, § 6.



. . . the voucher program expenditures do not directly benefit religious schools but rather directly benefit lower-income families . . .

. . . the prohibition against government expenditures to benefit religious or theological institutions does not apply to institutions and programs providing primary and secondary education.

*Meredith v. Pence,
984 N.E.2d 1213 (Ind. 2013)*

The instant program is one of true private choice . . .

Cleveland voucher:

Zelman v. Simmons-Harris,
536 U.S. 639 (2002)

The . . . system is implemented by private action and with no state intervention

Arizona tax credit scholarship:
Arizona Christian Scholarship Tuition Organization v. Winn, 563 US 125 (2011)

. . . public funds are deposited into an account established by a parent, who may then choose to spend the money at a religious school

Nevada education savings account:
Schwartz v. Lopez,
132 NV Adv Op 73 (2016)

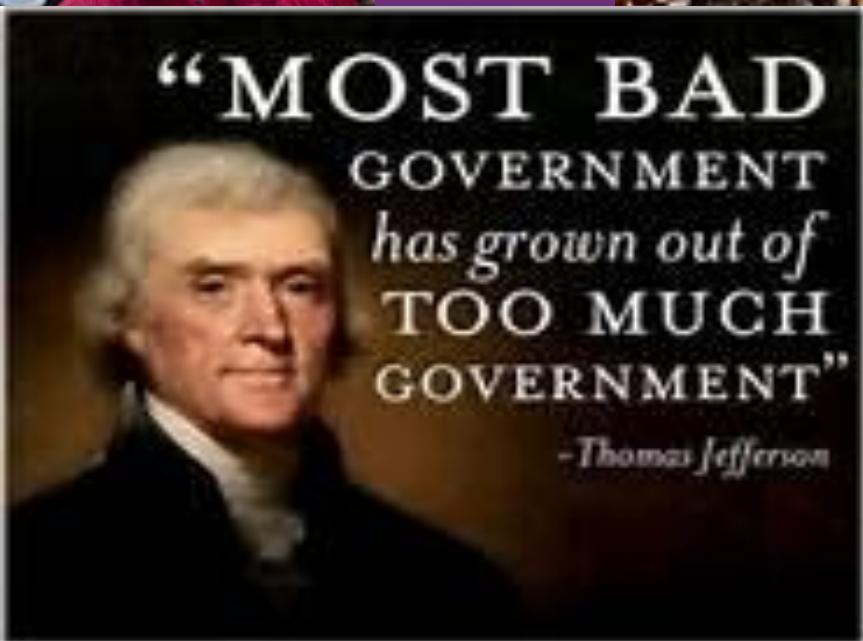
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Oklahoma voucher:
Oliver v. Hofmeister, 2016 OK 5

The Future of Litigation?

Adequacy Funding and
Dedicated Funding Streams

Equal Protection and
Discrimination Against Sexual identity



The Ever Popular Death by Regulation

*Advancing educational freedom
and choice for all as a pathway
to successful lives and a stronger society.*

