

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

School Choice in America Summit

Bonita Beach, Florida 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 State 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)

School Choice Is Constitutional – Says Who?



U.S. Supreme Court

1983 *Mueller*

2002 *Zelman*

2011 *Wynn*



State Supreme Courts

2013 Indiana

2016 Oklahoma

2017 Georgia



Good (?) Bill Drafters

2013 Louisiana

2013 Arizona

2016 Nevada

. . . aid to parochial schools is available only as a result of decisions of individual parents, no "imprimatur of state approval," . . . on any particular religion, or on religion generally.

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

Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs. . . . 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)

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 rule ends with the disbursement of benefits.

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



The Secret Sauce:

- State legislature appropriates funds for scholarship (or tax credits for private scholarship funding)
- Parents empowered to choose educational options
- True private choice of the parent for the child
- Government does not choose, does not control parent's choice.

Milton Friedman:

... give each child

... a specified sum

... for the parent to spend at a school of their choice.



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.



... exclusion of Trinity Lutheran from a public benefit ...

*solely because it is a church,
is odious to our Constitution ...*

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

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.

Immediate Impact of *Trinity Lutheran* on States

Douglas County, Colorado

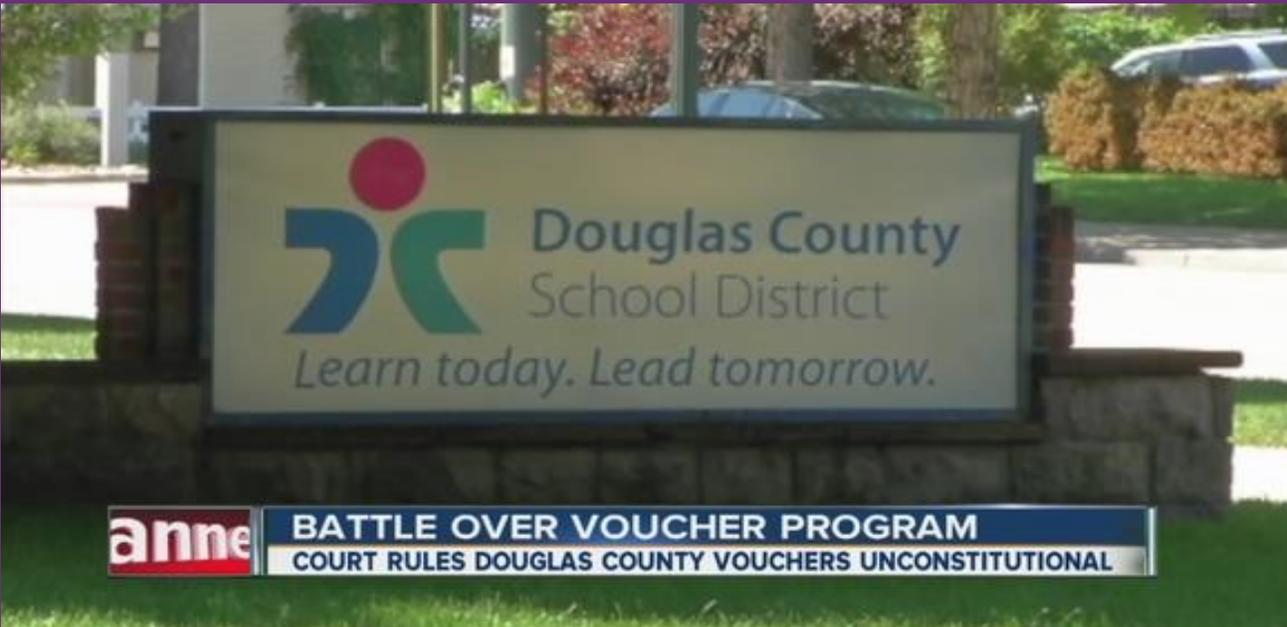
Colorado Supreme Court ruling vacated;
must reconsider in light of *Trinity Lutheran*.

Taxpayers for Public Education v Douglas Co School District and Doyle-intervenors, 2015 CO 50, Supreme Court Case No. 13SC233

New Mexico

New Mexico Supreme Court ruling vacated;
must reconsider in light of *Trinity Lutheran*.

New Mexico Assn of Nonpublic Schools v Moses



School Choice Litigation Status of States Represented At This Summit

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

Delaware, Wyoming Both states have restrictive Blaines. No school choice programs in these states.

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

Illinois Blaine state. Individual tax credits upheld by the courts. Newly enacted tax credit scholarship program not yet implemented, no litigation.

Kansas Blaine state, one of the least restrictive Blaines. No litigation against tax credit scholarship program, but decades-long litigation over adequacy funding. *Gannon v State*

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)*

School Choice Litigation Status of States Represented At This Summit

Missouri Blaine state. Now famous for *Trinity Lutheran* case. No school choice programs.

Nebraska, New York, Texas Blaine states with no school choice programs. Blaines are not unduly restrictive, but Texas has funding stream restrictions.

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)

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 stayed; new town tuitioning law in 2017. *Department of Education v Croydon School Board, et.al.* (220-2015cv146)

South Carolina Blaine state. No litigation against tax credit scholarship programs.

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)*



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.

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)



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)

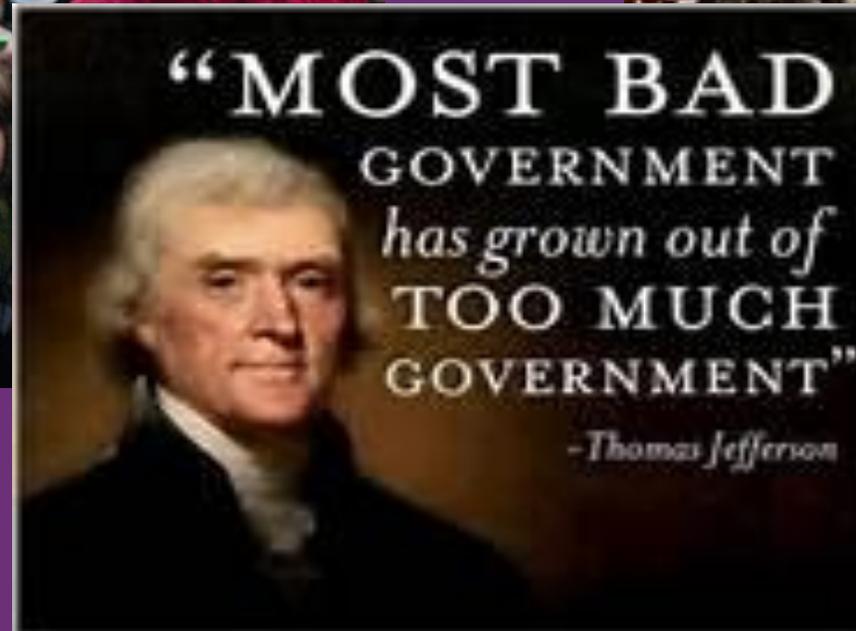
When the scholarship payment is directed to a sectarian private school, it is at the sole and independent choice and direction of the parent and not the State.

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.*

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