BYU Law Review

Volume 2008 | Issue 2 Article 6

5-1-2008

The Constitutional Parameters of School Choice

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I. INTRODUCTION

In a conference about school choice, it is somewhat perverse that it is even necessary to have an article addressing constitutional issues. After all, the United States is a nation doctrinally committed to parental hegemony[1] and educational opportunity,[2] and school choice advances both of those core values. But challenges to school choice programs too seldom recourse to first principles, in large part because it is the plaintiffs who principally frame the terms of the debate. And litigation is a powerful weapon for those who are dedicated to defending the status quo, regardless of the human cost. Every battle over school choice involves at least two parts: the legislative battle, in which legions of lobbyists seek to defeat school choice at any one of the myriad squelch-points in the democratic process; and then the legal challenge, which now rivals death and

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1. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) ("The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); Meyer v. Nebraska, 262 U.S. 390 (1923).

2. *See, e.g.*, Brown v. Bd of Educ., 347 U.S. 483, 493 (1954) ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."); *see also* Title I of the Elementary and Secondary Education Act of 1965, 79 Stat. 27, *as modified*, 20 U.S.C. § 6301 *et seq.* (proposing to ensure educational opportunities to all children regardless of their economic background).

taxes in both its certainty and annoyance whenever a school choice program is passed.

Chapter one in the litigation battle over school choice has already been written,[3] and fortunately, the kids won. In its landmark 2002 decision, *Zelman v. Simmons-Harris*,[4] the U.S. Supreme Court removed the First Amendment cloud that had hovered over school choice since it was a glint in Milton Friedman's eye.[5] But subsequent chapters are being written as you read this; and so far, the results are decidedly more mixed.

Although I am obviously a partisan in this debate—I favor all types of school choice and labor strenuously to promote and defend them—in the following pages I will present the state of the law as objectively as I can, even as I freely editorialize about what I think it should be. It is vitally important that policymakers and advocates have a clear-eyed understanding of the legal lay of the land, so as to ascertain and navigate the realm of the possible.

II. SCHOOL CHOICE PROGRAMS AND THE FIRST AMENDMENT

Few serious scholars have ever questioned whether school choice could be consistent with the First Amendment. Even before the definitive *Zelman* ruling, liberal-leaning legal luminaries such as Jesse Choper,[6] Laurence Tribe,[7] Walter Dellinger,[8] John Coons,[9] Akhil

3. Literally, this is so. *See* CLINT BOLICK, VOUCHER WARS: WAGING THE LEGAL BATTLE OVER SCHOOL CHOICE (2003).

4. 536 U.S. 639 (2002).

5. Brief of Amici Curiae, Center for Individual Freedom, Cato Institute, Milton And Rose D. Friedman Foundation, and Goldwater Institute in Support of Petitioners, at *2, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1480666:

> For nearly 50 years, Milton and Rose Friedman have argued that in order to improve substantially the quality of education in America all parents need to have a truly free choice of the schools that their children attend. Through its publications, research, and public information campaigns, the Friedman Foundation seeks to advance this vision of individual liberty via free educational markets.

Id.

6. *See, e.g.*, Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980).

7. *See, e.g.*, Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 22 (1973).

8. *See, e.g.*, Walter Dellinger, *The Sound of Silence: An Epistle on Prayer and the Constitution*, 95 YALE L.J. 1631, 1633 (1986).

9. *See, e.g.*, John E. Coons, *A Hope for Public Education*, 2 PUB. L.F. 1 (1982).

Amar,[10] and Jeffrey Rosen[11] agreed that, whatever the policy merits of school choice, a well-designed program would satisfy First Amendment dictates. That certainty emanates from the constitutional text, which does not require the separation of church and state, but prohibits laws "respecting an establishment of religion."[12] In a nation in which tax deductions for religious contributions and the G.I. Bill are sacrosanct, the notion that allowing parents to use their children's public education funds at the school of their choice "establishes religion" borders on the absurd.

But when modern school choice programs began to proliferate, starting in Milwaukee in 1990, it was far from certain that the U.S. Supreme Court would uphold school choice against First Amendment challenges.[13] That doubt emanated from an era of jurisprudence, which reached its apotheosis during the Warren era in the 1960s and 70s, in which the Court took a dim (and confusing) view of the constitutionality of public funds, services, or materials that made their way into religious schools. The most ominous decision was *Committee for Public Education and Religious Liberty v. Nyquist*,[14] in which the Court struck down a variety of "parochial aid" programs.[15] Because the aid was restricted to private schools and those who patronized them, the Court concluded that the "primary effect" of those programs was to advance religion in violation of the First Amendment. But the Court left open the question of "whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g. scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[16]

The Court began answering that question ten years later in *Mueller v. Allen*,[17] by upholding a Minnesota tuition tax deduction

10. *See, e.g.*, Akhil Reed Amar, *Becoming Lawyers in the Shadow of* Brown, 40 WASHBURN L.J. 1, 10 (2000).

11. *See, e.g.*, Jeffrey Rosen, Kiryas Joel *and* Shaw v. Reno: *A Text-Bound Interpretivist Approach*, 26 CUMB. L. REV. 387, 390–91 (1996).

12. U.S. CONST. amend. I.

13. *See generally* Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

14. 413 U.S. 756 (1973).

15. *Id.* at 805–06.

16. *Id.* at 782 n.38.

17. 463 U.S. 388 (1983).

program even though the vast majority of its beneficiaries were religious school families. The Court applied two criteria in its analysis of the Minnesota program: (1) whether the program allowed options other than religious schools, and (2) whether program funds reached religious school coffers directly or indirectly through the independent decision of third parties (i.e. parents).[18] "The historic purposes of the [Establishment] Clause," Justice William Rehnquist wrote for a 5-4 majority, "simply do not encompass the sorr of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to religious schools from the neutrally available tax benefit at issue in this case."[19] Over the next two decades, the Court continued to apply the *Mueller* criteria in a variety of contexts, distinguishing "direct" subsidies to religious schools (which are generally permissible if religion is purged from the recipient institution) from "indirect aid" (where third parties decide how to spend the funds).[20] Still, lower courts adjudicating school voucher programs split over whether they were unconstitutional under *Nyquist* or permissible under *Mueller* and subsequent cases.[21] Moreover, the Supreme Court was closely divided in many of those cases.[22]

The Court decided not to review decisions upholding school choice programs in Arizona[23] and Wisconsin,[24] but agreed to review

18. *Id.* at 397, 399.

19. *Id.* at 400.

20. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 245 (1997).

21. *See, e.g.*, Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000), *rev'd by* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (holding voucher program unconstitutional); Jackson v. Benson, 578 N.W.2d 602, 618 (Wis. 1998) (holding that school voucher program that placed choice of where to direct public funds in the hands of parents did not violate the Establishment Clause under U.S. Supreme Court precedent).

22. *See* Mitchell v. Helms, 530 U.S. 793 (2000) (6-3 decision holding that state and local government use of federal educational funds to loan educational materials to parochial schools does not violate the Establishment Clause); Agostini v. Felton, 521 U.S. 203 (1997) (5-4 decision upholding constitutionality of state provision, pursuant to Title I, of public school teachers for disadvantaged children in parochial schools); Zobrest v. Catalina Foothills Sch. Dist , 509 U.S. 1 (1993) (5-4 decision holding that state provision of an interpreter for a disabled student at a religious school did not violate the Establishment Clause); Witters v. Wash. Dep't Servs. for the Blind, 474 U.S. 481 (1986) (9-0 decision, with three concurring opinions, holding that the extension of aid under a Washington vocational program to finance training at a religious college did not advance religion in a way prohibited by the Establishment Clause).

23. Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999), *cert. denied*, 528 U.S. 921 (1999).

a decision in which the U.S. Court of Appeals for the Sixth Circuit had struck down the Cleveland voucher program under the First Amendment.[25] The Cleveland case presented strong facts for both sides: the program was a response to abysmal conditions in the Cleveland public schools, which cast it as a remedial program rather than an effort to aid religious schools;[26] but the vast majority of the children (roughly ninety-six percent) were enrolled in religious schools.[27]

In *Zelman*, the Court again was divided 5-4, but it upheld the Cleveland voucher program and set forth clear and broad standards under which carefully crafted school voucher programs are clearly permissible. The majority opinion, written by Chief Justice William Rehnquist and joined by Justices Sandra Day O'Connor, Anthony Kennedy, Antonin Scalia, and Clarence Thomas, noted that "our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools," and "programs of true private choice, in which governmenr aid reaches religious schools only as a result of the genuine and independenr choices of private individuals."[28] In the latter category, the Court noted that its "jurisprudence with respect to true private choice programs has remained consistent and unbroken."[29] Specifically, rhe Court stated that "where a government aid program is neutral with respect to religion, and provides assistance to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, [the program] is nor readily subject to challenge under the Establishment Clause."[30]

The Court found it noteworthy that the benefits were conferred "directly to a broad class of individuals defined without reference to religion"; that no financial incentive was created to choose religious schools; and that other choices (such as charter and magnet schools)

24. Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998), *cert denied*, 525 U.S. 997 (1998).

25. Zelman v. Simmons-Harris, 536 U.S. 639, 648 (2002).

26. *Id.* at 644.

27. *Id.* at 647.

28. *Id.* at 649.

29. *Id.* at 649.

30. *Id.* at 652.

were available to the beneficiaries.[31] Given those characteristics, the fact that most children in the private school choice ptogram were attending religious schools was irrelevant. "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."[32] The *Zelman* decision has settled the question of constitutionality of school choice programs under the First Amendment. Few post-*Zelman* challenges to school choice programs have even raised First Amendment claims, and no court decisions have invalidated school choice programs on First Amendment grounds.

It is easy to design a program to satisfy the *Zelman* criteria. Most states already have charter schools or other public school options, so that private school choice simply would add new choices to an existing array of educational options in public schools. Contemporary private school choice programs place aid directly at the disposal of parents, rather than creating an entitlement for religious schools. So long as school choice programs do not create a financial incentive to choose religious schools, they should not run afoul of First Amendment dictates.

But their defeat in *Zelman* did not force opponents of school choice to quit the legal arena. To the contrary, the National Education Association's chief counsel, Robert Chanin, warned that even if opponents of school vouchers lost the First Amendment battle, they would concentrate on state court challenges, using whatever "Mickey Mouse" provisions they might find in state constitutions to supply their legal "toolbox."[33] It is under state constitutions that school choice opponents have scored their only legal victories.

It took more than a dozen years from the enactment of the nation's first urban voucher program to definitively clear the First Amendment hurdle. It may take many years to resolve the constitutionality of school choice under various state constitutional provisions.

31. *Id.* at 652–54.

32. *Id.* at 658.

33. *See* BOLICK, *supra* note 3, at 156.

III. SCHOOL CHOICE PROGRAMS AND STATE CONSTITUTION RELIGION CLAUSES

Most states have constitutional provisions regarding religion that are more specific than the First Amendment. They typically fall into two categories: Blaine Amendments[34] and provisions forbidding compelled support of religion.[35] Many states have both, and only three states—Maine, North Carolina, and Louisiana—have neither.[36] Although school choice opponents often cite state constitutional provisions regarding religion in legislative battles and litigation over school choice programs, so far most courts have sustained programs against such challenges.[37] Constitutions in only two states appear to foreclose most types of private school choice: Michigan—whose constitutional provision was drafted by teacher unions in an effort to prevent school choice programs[38]—and Massachusetts—whose anti-aid provision traces back to the anti-immigrant "Know Nothing" era of the 1850s.[39]

A. Blaine Amendments

The most persistent—and notorious—state constitutional provisions used by school choice opponents are Blaine Amendments, which can be found in almost forty state constitutions.[40] The amendments trace their origins to the late 1800s, when public schools were bastions of Protestant theology. Anti-immigrant

34. *See, e.g.*, DEL. CONST. of 1897, art. X, § 3 ("No portion of any fund now existing, or which may hereafter be appropriated . . . for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school."); N.Y. CONST. art. XI, § 3 ("Neither the state nor any subdivision thereof, shall use its property or credit or any public money . . . in aid or maintenance . . . of any school or institution of learning wholly or in part under the control or direction of any religious denomination . . . .").

35. *See, e.g.*, VA. CONST. art. 1, § 16 ("No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . .").

36. *See, e.g.*, FLA. CONST. art. I, § 3 ("There shall be no law respecting the establishment of religion . . . . No revenue of the state . . . shall ever be taken . . . in aid of any church, sect, or religious denomination . . . .").

37. *See, e.g.*, Kotterman v. Killian, 972 P 2d 606, 619–21 (Ariz. 1999) (holding that tax credit for donations to sectarian private school tuition organizations did not violate state constitution's prohibition on aid to religion).

38. BOLICK, *supra* note 3, at 153.

39. *See* RICHARD D. KOMER, INST. FOR JUSTICE, SCHOOL CHOICE: ANSWERS TO FREQUENTLY ASKED QUESTIONS ABOUT STATE CONSTITUTIONS' RELIGION CLAUSES 3 (2006), http://www.ij.org/pdf_folder/school_choice/FAQ/legal_FAQ_state.pdf.

40. *Id.* at 2.

politicians, led by U.S. Senator James G. Blaine, attempted to preserve Protestant hegemony by forbidding the use of public funds for "sectarian" (i.e. Catholic) schools. The effort to graft an amendment onto the U.S. Constitution failed, but it was largely successful in state constitutions.[41]

Blaine Amendments typically forbid the use of public funds for the "aid" or "benefit" of religious schools.[42] Some go further to prohibit support of all private schools,[43] and some forbid aid, "directly or indirectly."[44] Though the basic language of the Blaine Amendments goes further than the First Amendment, they can be construed harmoniously because the First Amendment, too, forbids funding for the aid or benefit of religious schools.[45] Hence, the fact that a state has a Blaine Amendment only begins the constitutional inquiry.

Indeed, the only case so far striking down a school choice program on Blaine Amendment grounds was in Puerto Rico.[46] Courts in three other states have rejected Blaine Amendment challenges. In *Jackson v. Benson*, the Wisconsin Supreme Court upheld a Milwaukee voucher program despite Wisconsin's Blaine Amendment. In doing so, the court essentially treated the constitutional analysis under the state Blaine Amendment the same as under the First Amendment.[47] In *Kotterman v. Killian*,[48] the Arizona Supreme Court upheld the constitutionality of a state income tax credit for contributions to private school scholarships. As a threshold matter, the court concluded that because the aid took the form of tax credits, the state constitutional provision was not implicated because public funds were nor at issue.[49] The court reviewed the history of the Blaine Amendments, finding them "a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to

41. *See generally* Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657 (1998).

42. *See, e.g.*, TEX. CONST. art. I, § 7.

43. *See, e.g.*, ALASKA CONST. art. VII, § 1.

44. *See, e.g.*, FLA. CONST. art. I, § 3.

45. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1946).

46. Asociación de Maestros v. Torres, 137 D.P.R. 528 (1994).

47. 578 N.W.2d 602 (Wis. 1998).

48. 972 P.2d 606 (Ariz. 1999).

49. *Id.* at 616–19.

counter what was perceived as a growing 'Catholic menace.'"[50] The court concluded that because Arizona entered the Union after the Blaine era, its version might not fit into that category; but that if it were in fact a descendant of the Blaine Amendments, "we would be hard pressed to divorce the amendment's language ftom the insidious discriminatory intent that prompted it."[51] Likewise, Illinois courts have rejected Blaine Amendmenr challenges ro a tuition tax credir program.[52]

Although school choice opponents have come up empty on Blaine Amendment challenges, the Vermont Supreme Court held that its compelled support clause required the exclusion of religious schools from its school choice program.[53]

B. Compelled Support Provisions

Despite the generally positive track record for school choice programs so far, Blaine Amendments—particularly broadly written versions—pose a stark threat to private school choice programs. But school choice advocates have weapons available for counter-attack: the First Amendment and the Equal Protection Clause of the Federal Constitution. In addition to prohibiting establishment of religion, the First Amendment also proscribes government action "prohibiting the free exercise thereof."[54] The U.S. Supreme Court over the past quarter century generally has harmonized the two provisions to require government neutraliry toward religion, allowing neither discrimination in favor of religion or against religion.[55] Blaine Amendments, if construed in broad fashion, violate the neutrality principle by singling out religious schools for exclusion from otherwise generally applicable educational aid programs.

50. *Id.* at 624 (quoting Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 144 (1996)).

51. *Id.*

52. *See, e.g.*, Griffith v. Bower, 747 N.E.2d 423 (Ill. App. Ct. 2001), *appeal denied*, 755 N.E.2d 477 (Ill. 2001); Toney v. Bower, 744 N.E.2d 351 (Ill. App. Ct. 2001), *appeal denied*, 195 Ill. 2d 573 (Ill. 2001).

53. Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539 (Vt. 1999), *cert denied*, Andrews v. Vt. Dep't of Educ., 528 U.S. 1066 (1999).

54. U.S. CONST. amend. I.

55 *See* Locke v. Davey, 540 U.S. 712, 718 (2004) (noting that the no endorsement and free exercise clauses are in tension; combined, they demand neutrality with little "play in the joints").

Likewise, the equal protection guarantee requires the government to justify discrimination against religion.[56] Hence, a state court decision striking down a school choice program on Blaine Amendment grounds because it includes religious schools might be overturned as a violation of the Free Exercise Clause of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment.

The U.S. Supreme Court has left the door open to such a challenge. In *Mitchell v. Helms*, a 2000 school-aid case, the plurality opinion by Justice Thomas—joined by Chief Justice Rehnquist and Justices Scalia and Kennedy—expressed disdain for the Blaine Amendments, remarking that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow."[57] Four years later, in *Locke v. Davey*, the Court considered a Washington statute that provided aid for college students who could use it for any purpose except to study for the ministry. In a 6-3 decision by Chief Justice Rehnquist, the Court upheld the statute on extremely narrow grounds, holding that historically, states were free to withhold funding for training for the ministry. The Court sidestepped the Blaine Amendment issue.[58]

In an effort to resolve the question, the Institute for Justice and the Becket Fund for Religious Liberty have challenged state aid programs that discriminate against religion, so far without success.[59] At the same time, state courts that have invalidated school choice programs on state constitutional grounds[60] have so far avoided doing so under the Blaine Amendment, perhaps perceiving that such a ruling would amount to an invitation to the U.S. Supteme Court to decide whether such discrimination is lawful under the Federal Constitution.

For school choice proponents in most states with Blaine Amendments that are broadly worded or judicially construed, the problem translates into a drafting issue: scholarship or tuition tax credits are more likely than vouchers to withstand constitutional

56. The equal protection guarantee permits government to make classifications based on race, gender, or religion, but requires that those classifications pass increased scrutiny. *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938) (explaining that certain classifications are subject to "more exacting judicial inquiry").

57. Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality).

58. *Locke*, 540 U.S. 712.

59. *See* KOMER, *supra* note 38, at 1.

60. *See infra* Part III.C.

attack because they do not involve legislative appropriations. But in most states, even with Blaine Amendments, either vouchers or tax credits are defensible because of the common sense view, adopted by the Wisconsin,[61] Ohio,[62] and Arizona Supreme Courts,[63] that school choice programs constitute aid to students, not ro religious schools. Until the U.S. Supreme Court rules definitively on the constitutionality of Blaine Amendments that compel discrimination against religion, they will continue to lay about like a loaded weapon,[64] full of menace for school choice programs and the children they are designed to benefit.

C. Other State Constitutional Hurdles

When they prepare to challenge a school choice program, opponents carefully sift the particular state constitution—all fifty of which are different—for any provision that might create doubt over the program's constitutionality. As a result, legal challenges to school choice programs typically present an array of legal theories—referred to as the "shotgun approach"—and the plaintiffs need only convince the court on one of them in order to bring down a school choice program.[65]

The state court decisions upholding school choice programs have rejected multiple grounds of constitutional attack,[66] but school choice opponents have hit paydirt twice, invalidating programs under non-religion provisions of state constitutions.[67]

In Colorado, the state Supreme Court struck down a voucher program, prior to its implementation, under a state constitutional provision that guarantees local control over education—a provision that exists in only approximately six state constitutions.[68] The court

61. Jackson v. Benson, 578 N.W.2d 602, 618 (Wis. 1998).

62. Simmons-Harris v. Goff, 711 N.E.2d 203, 211 (Ohio 1999).

63. Kotterman v. Killian, 972 P.2d 606, 614 (Ariz. 1999).

64. *See* Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

65. *See, e.g.*, *Goff*, 711 N.E.2d 203 (plaintiffs presented six substantive constitutional arguments and succeeded on one claim).

66. *See, e.g.*, *Jackson*, 578 N.W.2d 602 (court rejected five substantive constitutional arguments).

67. As well, plaintiffs successfully challenged the Cleveland voucher program, which was upheld against all other challenges, as an unconstitutional "local bill," *see Goff*, 711 N.E.2d 203; but the state legislature subsequently reenacted the program, which later was upheld by the U.S. Supreme Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

68. Owens v. Colo. Cong. of Parents, Teachers & Students, 92 P.3d 933 (Colo. 2004).

reasoned that because the state purported to direct the use of local public school funds, the school choice program violated the principle of local control.[69]

More troublesome in terms of potential impact are challenges to programs under "uniformity" clauses of state constitutions. Many state constitutions contain provisions decreeing that the state provide public education, often employing terms like "uniform," "thorough and efficient," or "high quality"[70] to describe the type of education to be provided. While school choice supporters generally view such guarantees with affection—after all, school choice is a remedy for education that is not "high quality," "thorough and efficient," or "uniform"—the provisions do provide a porential avenue by which opponenrs can challenge voucher programs.

Early lawsuits against school choice programs included challenges under such provisions, but they were easily defeated. In *Jackson v. Benson*, the Wisconsin Supreme Court ruled that the uniformity clause created a floor, not a ceiling, for legislative action regarding educational opportunities. "[T]he uniformity clause requires the legislature to provide an opportunity for all children in Wisconsin ro receive a free uniform basic education," the court observed. "The legislature has done so. The [Milwaukee school choice program] merely reflects a legislative desire to do more than that which is constitutionally mandated."[71]

The Florida Supreme Court, in contrast, by a 5-2 vote, invoked its state constitutional provisiou guaranteeing a "uniform" and "high quality" public education to invalidate the promising "opportunity scholarships" program[72]—a perverse result given that the program provided vouchers exclusively to children in failing schools. Even more strange was the fact that the court considered the issue at all, given that the Florida Supreme Court had declined review from an earlier appellate decision in favor of the program.[73] In all probability,

69. *Id.* at 936.

70. *See, e.g.*, *Jackson*, 578 N.W.2d at 627–28 (discussing the Wisconsin Constitution's uniformity clause).

71. Davis v. Grover, 480 N.W.2d 460, 474 (Wis. 1992); *accord Jackson*, 578 N.W.2d 602.

72. Bush v. Holmes, 919 So.2d 392 (Fla. 2006). The Florida legislature subsequently provided that children who were displaced from the opportunity scholarship program would be eligible for scholarships under the state's scholarship tax credit program, which has not yet been challenged.

73. Bush v. Holmes, 767 So.2d 668, 670–71 (Fla. Dist. Ct. App. 2000), *review denied*,

the court, which is known for its results-oriented jurisprudence,[74] decided to invalidate the program on a state constitutional provision that would not be reviewable by the U.S. Supreme Court (uniformity clause), rather than one that would be subject to review on First Amendment grounds (Blaine Amendment). As a result, the court reached out to decide an issue that no longer was before it.

The court applied the maxim of *expressio unius est exclusio alterius*, or "the expression of one thing implies the exclusion of another."[75] Because the Constitution provides for public funding of public schools, the court concluded that it "prohibits the state from using public monies to fund a private alternative to the public school system . . . ."[76] The court also found that the program violated the uniformity requirement, because "the private school's curriculum and teachers are not subject to the same standards as those in force in public schools."[77] So stated, the court's rule of law would seem to preclude *all* funding of students attending private schools (such as students whose disabilities cannot be accommodated in the public schools), or funding of *any* schools (such as magnet or public charter schools) that depart from public school orthodoxy. The court made an unconvincing effort to distinguish other such programs,[78] but it is difficult to discern a logical dividing line in light of the decision's underlying reason.

The Florida ruling should cause grave concern to all education reformers. Although decisions interpreting state constitutional provisions are not binding in courts of other states, a court may view them as persuasive authority. Most state constitutions contain provisions relating to education that could be tortured to prohibit the legislature from vindicating the purposes of those provisions by making additional and distinctive educational opportunities available beyond those provided in traditional public schools. Indeed, the Ohio Supreme Court came within a single vote of striking down charter schools as a violation of the state constitutional guarantee of

790 So.2d 1104 (Fla. 2001).

74. *See* Michael Barone, *Red Queen Rules*, U.S. NEWS & WORLD REP., Dec. 18, 2000, at 32.

75. *Bush*, 919 So.2d at 407.

76. *Id.* at 408.

77. *Id.* at 409.

78. *Id.* at 411–12.

a thorough and efficient education.[79] The educational uniformity clauses, turned on their head by those who have a vested interest in the status quo, could be the jurisprudential cancer that destroys meaningful education reform.

IV. FIGHTING BACK

It always has struck me as odd that the school choice movement usually plays defense in the courts, especially when the doctrines of equal educational opportunity and parental autonomy are so deeply embedded in our constitutional tradition,[80] and most state constitutions provide express guarantees of public education.[81] Moreover, in many states (such as California, New York, and New Jersey, to name only a few) whose abysmal inner-city public school systems ought to trigger school choice legislative remedies, the political machinery is effectively controlled by the education establishment, and meaningful reform is regularly thwarted. That spells precisely the type of political system failure that calls for judicial intervention.[82]

Since the 1970s, starting with New Jersey and California, many state courts have invoked education guarantees found in state

79. State *ex rel.* Ohio Cong. of Parents & Teachers v. State Bd. of Educ., 857 N.E.2d 1148 (Ohio 2006).

80. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) ("The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); Meyer v. Nebraska, 262 U.S. 390 (1923).

81. *See* ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2d, § 3; KAN. CONST. art. VI, § 1; KY. CONST. 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. LXXXIII; N.J. CONST. art. VIII, 4, § 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

82. *See* CLINT BOLICK, DAVID'S HAMMER: THE CASE FOR AN ACTIVIST JUDICIARY 127–38 (2007).

constitutions that guarantee a certain level of public education (e.g., thorough and efficient, uniform, and high-quality).[83] The educational equity cases mandated that the legislature must reduce or eliminate funding disparities. The result of such decisions has been a massive increase in public funding for certain public schools with no commensurate improvement in school quality.[84] The funding equity cases began to shift to a second legal theory, educational adequacy, which contends that additional funding is necessary to boost academic achievement.[85]

Although such cases have enjoyed success in court, they have not translated into greater student achievement. Yet the underlying theory of liability in the educational adequacy cases is sound: if a constitutional guarantee of "thorough and efficient" or "high-quality" education is to be more than a chimera, it must be judicially enforceable against government officials who fail to provide it.

But the equity and adequacy cases go wrong in two ways. First, they focus on school districts, rather than the intended beneficiaries of the constitutional guarantees. School districts do not have a right to thorough and efficient public education—children do. Moreover, the remedy—greater funding—is delivered to those who violated the students' rights in the first place: public school officials.

Taken out of the educational context, the funding remedy would be bizarre. If a consumer purchases a car, for instance, that carries a warranty of "thorough and efficient" transportation and the car turns out to be a lemon, the consumer would go to court for a remedy. The court would not award a multi-billion dollar payment to the car manufacturer in the hopes that one day in the distant future it would produce a better product. Rather, a court would order a refund, which the consumer could use to purchase the car of his or her choice.

Likewise, in educational adequacy cases, courts should do exactly what the U.S. Supreme Court has ordered for disabled students

83. *See, e.g.*, CAL. CONST. art. IX, § 1; N.J. CONST. art. VIII, 4, § 1.

84. *See generally* David Card & A. Abigail Payne, *School Finance Reform, The Distribution of School Spending and The Distribution of Student Test Scores*, 83 J. PUB. ECON. 49 (2002) (finding that the increase in spending does not cortelate to an equivalent increase in test scores).

85. For an excellent distillation of this movement, see Michael Heise, *Symposium: Education and the Constitution: Shaping Each Other and the Next Century: Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73 (2000).

when the government has failed to provide the requisite quality of education in public schools:[86] it should transfer control over educational funding to the family, which may purchase a more appropriate education in a private setting. Such a voucher remedy is far more immediate than funding remedies, which never seem to trickle down to their intended beneficiaries. Moreover, it would provide systemic pressure for the public schools to improve, in a hurry.

Such a lawsuit was filed in 2006 in New Jersey, which is the state that has gone furthest down the road of funding equity with little return on their massive investment. The lawsuit is a class action on behalf of 60,000 children enrolled in public schools that fail to meet the standards that the state has created to define a thorough and efficient education.[87] The New Jersey lawsuit, which has sparked tremendous media coverage and shaken up the state's political establishment, merits replication in other states where the political establishment thwarts the promise of educational opportunities for every child.

Lawsuits like the one filed in New Jersey could also help restore proper focus to the interpretation of state constitutional guarantees—that they are intended to benefit children and not institutions. Whoever files the lawsuit dictates, at least initially, the terms of the debate. It is time for educational reformers to recapture constitutional provisions that were intended to expand, not restrict, educational opportunity.

V. NO STOPPING THE CHOICE TRAIN

Although both sides in the litigation battle over school choice have had their victories—and the end is nowhere in sight—the threat of litigation should not deter earnest reformers from pushing forward. While a careful review of applicable state constitutional provisions might counsel a difference of approach in some situations—tax credits rather than vouchers in some states and public charter schools in states whose constitutions foreclose private school choice—they provide no reason for reformers to surrender. Even in

86. Florence County Sch. Dist. No. Four v. Carter *ex rel.* Carter, 510 U.S. 7 (1993), *superseded by statute, as stated in* A.I. *ex rel.* Iapalucci v. District of Columbia, 402 F. Supp. 2d 152 (D.D.C. 2005).

87. Crawford v. Davy, No. C137-06 (N.J. Super. Ct. Ch. Div. filed July 13, 2006).

states that have adverse precedents, courts can change their minds and new judges may see things differently. Moreover, litigation like *Brown v. Board of Education* and *Zelman* can help shape public and political opinion. Education reform is not for the faint of heart—but the payoff in terms of a brighter future for children who desperately need one makes any fight worth enduring.