Education Tax Credits: School Choice Initiatives Capable of Surmounting Blaine Amendments

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Although political debates surrounding the merits of vouchers and other education funding programs have intensified over the last decade, the underlying issue of school choice has been one of the cruxes of education reform since the nineteenth century when public education began expanding throughout the United States. While voucher programs have recently gained constitutional favor at the federal level, another more significant legal battleground resides at the state level, where constitutional provisions restricting government aid to religious schools (called "Blaine Amendments") continue to present formidable legal obstacles. This Note contends that education tax credit programs, in contrast to school vouchers, are a viable option for school-choice advocates hoping to push their initiatives past Blaine Amendment scrutiny. Additionally, this Note proposes that a voluntary association among states would effectively consolidate and legitimize these initiatives.

I. INTRODUCTION

When discussing issues of education law or policy, nothing polarizes a room more than a strong position on school vouchers. Opponents are cast as unsympathetic to minorities stuck in substandard schools, and proponents are perceived as uncompromising advocates for religious education (the primary benefactor of school vouchers). Discussing education tax credits, on the other

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hand, can result in a more open-minded debate, as they are relatively new to the scene of education reform.

In the legal sphere, too, school voucher programs have spawned vigorous litigation and political turmoil for some time and still face significant legal hurdles. Vouchers struggle against constitutional barriers on the federal and state level. Federal law, as derived from the Establishment Clause[1] of the U.S. Constitution, is fairly well settled in the education funding context. More problematic are Blaine Amendments — amendments to state constitutions that surfaced in the late nineteenth century during a period of mass anti-Catholic sentiment in response to Irish-Catholic immigration.[2] Because these state-level bans on funding religious education have long rested on such a suspect legal impetus, Blaine Amendments have been the subject of divisive political debates and legal challenges. This Note contends that education tax credit programs, in contrast to vouchers, can surmount those legal hurdles because the flow of public funds is substantially different.

This Note explores the political and legal obstacles that Blaine Amendments pose and the potential for education tax credit programs to circumvent those obstacles. Accordingly, the Note is organized as follows. Part II provides a general background on religious liberties jurisprudence in preparation for Part III's discussion of how the Establishment Clause lays the foundation of federal law on this topic. Part IV discusses the origin and interpretation of State Blaine Amendments in the context of education funding programs. Part V identifies three types of education tax credit programs and assesses their constitutionality under various Blaine Amendment regimes. Finally, this Note proposes that an effective way to explore the sustainability and positive effects, if any, of a prospective school-choice regime is to establish a voluntary, national association in which states may coordinate, solidify, and legitimize their efforts. After all, if education tax credit programs are to gain momentum on a national scale, having a

1. U.S. CONST. amend. I (stating that "Congress shall make no law respecting an establishment of religion").

2. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J. L. & PUB. POL'Y 551, 558–76 (2003).

forum where state legislators can debate the merits, discuss constitutional obstacles, and evaluate results is essential.

II. BACKGROUND

A. POLICY

Since the inception of government-sponsored education — and compulsory education laws in particular — allowing parents to choose where to send their children to school has naturally been seen as desirable.[3] Today, the vast majority of children in the United States are assigned to schools geographically, by location of residence.[4] Although this policy constrains school choice, geographical assignment does give parents some choice, at least to the extent they can decide where to live.[5] On the other hand, the decision of where to live draws on many factors unrelated to school choice — e.g., layoffs, divorce, rent increases, and availability of subsidized housing, among other things.[6] And the fact that public schools receive funding in proportion with local property taxes even further compounds such constraints on school choice.

Given our nation's ideological barrier between church and state, school vouchers — often perceived as haphazardly distributed educational gift cards[7] — account for a significant portion of the education reform debate. Publicly funded school vouchers, in particular, have been the primary impetus for discussion surrounding the facilitation of enrolling students in private schools. Although some school districts employ various measures designed

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3. See *Pierce v. Society' of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) for the seminal Supreme Court opinion in which the Court attempted to reconcile a state's legitimate right to pass compulsory education laws with parents' right to direct the education of their children. While states may compel all children to be schooled, they cannot prevent a parent from choosing to do so in a private school or religious school.

4. Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, *in* SCHOOL CHOICE AND SOCIAL CONTROVERSY 13, 14 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

5. *Id.*

6. *Id.* at 15.

7. Although the social policy justification for many voucher programs is to widen learning environment options for low achievers, skeptics worry that these funds often reach the politically savvy rather than the educationally needy.

to expand *public* school-choice options,[8] measures that expand *private* school-choice options are far more contentious.[9]

First conceptualized by Nobel laureate economist Milton Friedman in the 1950s,[10] school vouchers were immediately controversial on a number of levels.[11] Although they purport to promote healthy competition among schools, fears remain not only about their leading to the eradication of the entire public school system, but the legality and sociocultural implications of subsidizing private, religious education.[12]

Proponents argue that school vouchers promote healthy competition among schools, consumer choice, and parents' rights to direct their own child's education.[13] Critics contend that voucher programs drain much needed funds from public schools and funnel them into the bank accounts of predominantly religious institutions.[14] It is also possible that opening the school-choice door too wide may create an unpredictable, Darwinian-like environment in which some students benefit from evolving schools while others become trapped in a devolving jungle of substandard schooling. In other words, if such an educational marketplace creates a kind of competition in which only the fittest institutions survive, many unlucky students could be on the losing side of that competition, having spent their formative years in the natural decline that accompanies being forced into extinction.

B. HISTORICAL DEVELOPMENT OF LAW

Complicating the implementation of a voucher system is a dual barrier of constitutional scrutiny. At both the federal and

8. In addition to charter school options, some school districts incorporate varying degrees of choice into their school assignment and admissions models. *See, e.g.*, New York City Department of Education, High Schools – Choices & Enrollment, http://schools.nyc.gov/ChoicesEnrollment/High/default.htm (last visited Sept. 26, 2009).

9. This is understandable considering the emphasis that various federal statutes and state constitutions place on providing a free *public* education for school-age children. *See, e.g.*, Rehabilitation Act of 1973 § 504, 29 U.S.C. 794 (2006).

10. Milton Friedman, *The Role of Government in Education*, *in* ECONOMICS AND THE PUBLIC INTEREST 123 (Robert A. Solo ed., 3d ed. 1955).

11. Henig & Sugarman, *supra* note 4.

12. Henig & Sugarman, *supra* note 4, at 27.

13. Stephen D. Sugarman & Frank R. Kemerer, *Introduction*, *in* SCHOOL CHOICE AND SOCIAL CONTROVERSY 1, 1 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

14. Brandi Richardson, Note, *Eradicating Blaine's Legacy of Hate: Removing the Barrier to State Funding of Religious Education*, 52 CATH. U. L. REV. 1041, 1043 (2003).

state level, public funding of religious institutions can be unconstitutional, depending largely upon the structural or mechanical details of the program through which those funds are acquired and disbursed. Not only must an education funding program comport with the Federal Constitution, but it must also comport with the respective state constitution.

Federal law in the context of education funding programs is fairly well settled. Since the influential 2002 Supreme Court ruling in *Zelman v. Simmons-Harris*,[15] it has been clear that, notwithstanding the policy's political sensitivity, a voucher program that subsidizes enrollment in religious schools does not automatically offend the Establishment Clause[16] of the U.S. Constitution. Although the *Zelman* decision was hailed as a severe blow to opponents of school choice, a sudden influx of voucher programs did not emerge because the war was far from over at the state level.[17] Many state constitutions are simply less tolerant than the U.S. Constitution in terms of evaluating government programs that, in effect, provide funds to religious institutions.[18]

Many state constitutions, like the U.S. Constitution, include amendments restricting relationships between church and state. Legal scholars call these provisions "Blaine Amendments";[19] amendments that have proven to be significant obstacles to many education funding programs. If a certain type or magnitude of interaction between a government institution and a religious institution conflicts with the prohibitory syntax of a given state's Blaine Amendment, the state judiciary will likely ban that interaction as unconstitutional.

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15. 536 U.S. 639 (2002); *see* discussion *infra* Part III.C.

16. U.S. CONST. amend. I (stating that "Congress shall make no law respecting an establishment of religion").

17. Vanessa Blum, *Both Sides Head for the Next Battleground; Voucher Proponents Won a Huge Victory June 27; But the War is Far From Over and is Likely to Continue in the States*, LEGAL TIMES, July 1, 2002, at 8.

18. *See, e.g.*, FLA. CONST. art. I, § 3 (prohibiting public funds from reaching religious institutions, either directly or indirectly).

19. DeForrest, *supra* note 2, at 554–55; *see also* discussion *infra* Part IV. Blaine Amendments are essentially state-specific, expanded versions of the U.S. Constitution's Establishment Clause.

C. HOW MY PROPOSAL ADDRESSES LEGAL IMPEDIMENTS

As I discuss in further detail below, when a voucher or education tax credit program results in a transfer of public funds to religious organizations, the directness or indirectness of that transfer becomes a critical constitutional issue. Due largely to legal obstacles encountered at the state level, school-choice advocates have shifted attention in recent years away from school vouchers to education tax credit programs.[20] Because the constitutionality of education funding programs can turn on precise details of the public funds' path to religious organizations, it is not surprising that less direct funding programs, such as education tax-credit programs, present legally viable alternatives to vouchers.

This Note contends that while education tax-credit programs in many cases will survive Blaine Amendment scrutiny where voucher programs have not, such an outcome depends on the type of education tax-credit program,[21] the text of the relevant Blaine Amendment, and the character of the state supreme court.

III. THE FEDERAL FOUNDATION

This Part examines the foundation of the Establishment Clause's church-state jurisprudence and its interpretation by the Supreme Court. Section A introduces the Establishment Clause.[22] Section B dissects two integral Supreme Court decisions whose interpretations of the Establishment Clause framed the issues presented in *Zelman*, and Section C focuses on the *Zelman* decision. Finally, Section D addresses two points that are relevant to a post-*Zelman* analysis of education funding programs: (1) the constitutionality of Blaine Amendments as interpreted in *Locke v. Davey*,[23] and (2) the mechanical difference be-

20. Luis A. Huerta, *Education Tax Credits in a Post-*Zelman *Era: Legal, Political, and Policy Alternatives to Vouchers?*, 21 EDUC. POL'Y 73, 73 (2007).

21. There are three types of education tax-credit programs: (1) education tax credits for expenses, (2) education tax deductions for expenses, and (3) education tax credits for contributions to school tuition organizations (STOs). *Id.* at 76–77. *See* discussion *infra* Part V.

22. U.S. CONST. amend. I.

23. 540 U.S. 712 (2004).

tween vouchers and education tax credit programs in terms of cash flow stops and, consequently, the constitutional analysis.

A. THE ESTABLISHMENT CLAUSE SETS THE FOUNDATION

The Establishment Clause, embedded within the First Amendment of the U.S. Constitution, provides that "Congress shall make no law respecting an establishment of religion . . . ."[24] There is considerable disagreement, however, concerning the clause's limits. As a result of this uncertainty, government actions that affect religious educational institutions are often subject to Establishment Clause challenges.

Lemon v. Kurtzman, perhaps the leading Supreme Court precedent on the Establishment Clause, introduced a three-part test.[25] To pass constitutional muster, the statute in question must: (1) have a secular legislative purpose; (2) have a primary effect that neither enhances nor inhibits religion; and (3) avoid excessive government entanglement with religion.[26]

Application of the "*Lemon* standard" in the context of education funding programs that, to any degree, support religious schools was clarified in *Agostini v. Felton*, where the court highlighted two essential elements that must be true if an education funding program is constitutional.[27] Not only must programs that provide funds to religious schools do so "on the basis of neutral, secular criteria that neither favor nor disfavor religion" — that is, the program must have both religious and secular beneficiaries — but these programs also must not have a financial incentive that skews the program toward benefitting primarily religious schools.[28] In other words, the financial benefits of an education funding program cannot be designed to appeal primarily to reli-

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24. U.S. CONST. amend. I.

25. 403 U.S. 602 (1971). Although the Court has since added a new "coercion standard" and continues to divide generally along ideological lines, the "Lemon standard" is invariably the applicable standard in the education funding context. See Lee v. Weisman, 505 U.S. 577 (1992) (5-4 decision) (Scalia, A., dissenting) for a thorough discussion of this ideological tension.

26. *Id.* at 612–13.

27. 521 U.S. 203, 231 (1997).

28. *Id.*; *see also* Witters v. Wash. Dep't of Servs. for Blind, 474 U.S. 481, 488–89 (1986) (stating that vocational rehabilitation aid given to a blind person studying to become a pastor or missionary at a Christian college was not skewed toward religion and created no financial incentives for students to partake in religious education).

gious schools under the guise that the program theoretically treats both secular and religious schools equally. In summary, then, one can extrapolate two key elements of the federal constitutional analysis with respect to education funding programs: (1) equal access for both secular and religious schools, and (2) the absence of skewing financial incentives.

B. SUPREME COURT JURISPRUDENCE PRIOR TO THE *ZELMAN* DECISION

Although the *Lemon* standard helped clarify the scope of the Establishment Clause, its application to education funding programs is exceedingly fact sensitive. *Nyquist* and *Mueller*, in particular, warrant close attention as they, standing in contrast, helped frame the issues that would be resolved in the recent *Zelman* decision.

In 1973, the *Nyquist* Court was asked to rule on the constitutionality of New York education and tax laws, which provided funding for three separate financial aid programs for nonpublic schools.[29] The first program provided for maintenance and repair of "qualifying" non-public school facilities; to be recognized as "qualifying," the school had to serve a high concentration of pupils from low-income families.[30] The second program provided tuition reimbursement for parents who sent their children to nonpublic schools,[31] and the third program provided tax relief to parents who failed to qualify for tuition reimbursement.[32] The laws that instituted these programs were prefaced by legislative findings outlining their goals, which were, among other things: instituting maintenance and repair programs to address the "crisis in non-public education"; creating "a healthy and safe school environment"; improving "the stability of urban neighborhoods";[33] and promoting a "healthy, competitive and diverse alternative to public education."[34]

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29. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).
30. *Id.* at 762–63.
31. *Id.* at 764–65.
32. *Id.* at 765–67.
33. *Id.* at 763–64 (internal quotation marks omitted).
34. *Id.* at 764 (internal quotation marks omitted).

Perhaps most importantly, the fact that the tuition reimbursement program did not give money *directly* to sectarian schools, but to the parents after the fact, did not affect the constitutional analysis, as "its substantive impact . . . [was] still the same."[35] Applying the three-part *Lemon* test, the Court first acknowledged that the programs had a legitimate secular legislative purpose, which was, primarily, the promotion of diversity and school choice.[36] Next, the Court assessed whether each program had the primary effect of advancing religion. Emphasizing that the maintenance and tuition reimbursement programs were open only to nonpublic schools, "virtually all of which [we]re Roman Catholic," the court reasoned that "while the other purposes for that aid [i.e., promotion of school-choice] . . . are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions."[37]

The court felt that the tax relief program was similar to the tuition reimbursement program in both purpose and primary effect, so it too was deemed unconstitutional. The tax relief involved a deduction from one's adjusted gross income, irrespective of the amount spent on tuition. The effect resembled that of a tax credit because it was "designed to yield a predetermined amount of tax 'forgiveness' in exchange for performing a specific act which the State desire[d] to encourage . . . ."[38] Like the tuition reimbursement program, the tax credits appeared to be designed specifically to support nonpublic, sectarian institutions.

The *Nyquist* Court wavered between analyses of purpose and effect, a tension that the *Zelman* decision later attempted to reconcile. While the *Nyquist* Court recognized a secular legislative purpose, it inferred a second, ulterior purpose of advancing the sustainability of religious schools, as evidenced by the programs' statistical *effect* of benefiting schools that were almost exclusively religious.

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35. *Id.* at 786.
36. *Id.* at 773.
37. *Id.* at 774, 783.
38. *Id.* at 789; *see also* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.").

Mueller v. Allen implicitly broke step with *Nyquist* in two important ways: (1) it deemphasized the effect, or statistical weight, the program ultimately had on religious schools, and (2) it made relevant the indirect nature of the funding route, which was of minimal importance in *Nyquist*.[39] In *Mueller*, a Minnesota statute allowed taxpayers to deduct expenses related to tuition, textbooks, and transportation for children enrolled in elementary or secondary schools, public or nonpublic.[40] Deemphasizing the "effect" prong of the *Lemon* standard, the *Mueller* Court instead focused on the secular purpose of the statute, which was to sustain a well-educated citizenry.[41] Additionally, the Court highlighted the indirect nature of the benefit to religious schools, which was due to individual parents' decisions rather than a direct disbursement from the state.[42]

Mueller and *Nyquist* would remain un-reconciled until *Zelman v. Simmons-Harris* 20 years later.[43]

C. WAS THE *ZELMAN* DECISION A MAJOR VICTORY FOR SCHOOL-CHOICE ADVOCATES?

The *Zelman* decision in 2002 appeared to be a resounding victory for school-choice advocates. With the Supreme Court having wavered unpredictably on the issue of education funding programs for decades, *Zelman* represented an unequivocal, constitutional green-light for school voucher programs that comport with the factors discussed below.

The *Zelman* decision addressed the constitutionality of an Ohio school voucher plan — the Pilot Project Scholarship Program — which provided tuition vouchers up to $2,250 per year for low-income parents to send their children to participating public or private schools.[44] The program was designed to ameliorate the exceedingly deteriorated condition of public schools in the low-

39. 463 U.S. 388 (1983).

40. *Id.* at 391. It is noteworthy that the tax deductions at issue in *Mueller* were available to parents whether their child was in public or private school. The financial aid programs in *Nyquist* only benefitted private schools.

41. *Id.* at 395.

42. *Id.* at 399.

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

44. *Id.* at 645–47.

income neighborhoods of Cleveland.[45] Although the program included both public and private schools, and participating parents could choose where to enroll their children, 82 percent of the participating private schools were religiously affiliated and 96 percent of participating students enrolled in religious schools.[46] Citing *Mueller* more than any other case,[47] the Court highlighted four factors that bolstered the constitutionality of the scholarship program. The first of the four factors is the "distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals . . . ."[48] In *Zelman*, parents receiving vouchers were free to choose the school to which they would like to send their children. The second factor is the intended, not the actual, class of beneficiaries.[49] In *Zelman*, while the student beneficiaries attended mostly sectarian schools, the intended class of beneficiaries included a broad array of students attending both sectarian and non-sectarian schools. The third, the neutrality of the program itself — it must not make reference to or distinguish between sectarian-nonsectarian or public-nonpublic institutions.[50] In *Zelman*, the scholarship program was completely neutral in this respect. The fourth factor is the absence of financial incentives that skew the program toward

45. *Id.* at 644–45.

46. *Id.* at 647.

47. Huerta, *supra* note 20, at 81.

48. *Zelman*, 536 U.S. at 649 (citing Mitchell v. Helms, 530 U.S. 793, 810–14, 841–44 (2000) (O'Conner, J., concurring); Agostini v. Felton, 521 U.S. 203, 225–27 (1997); Mueller v. Allen, 463 U.S. 388 (1983)) (citations omitted). The Court goes on to recognize that its jurisprudence with respect to direct aid programs has "changed significantly" over the past two decades, thereby beginning to carve out a special niche for the analysis of true private choice programs. *Id.* at 649 (quoting *Agostini*, 521 U.S. at 236).

49. *Id.* at 649–53 (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986); *Mueller*, 463 U.S. 388). In *Mueller*, "[w]e thus found it irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religious schools . . . ." *Id.* at 650.

50. *Id.* at 651 (citing *Witters*, 474 U.S. at 488). Curiously, though, it is unclear why a public-nonpublic distinction — technically neutral with respect to religion — would affect the constitutional analysis if, at the same time, the actual class of beneficiaries is irrelevant. In other words, if the intended class of beneficiaries of a given program includes nonpublic, non-sectarian schools, such a program would only be challengeable if its "coincidental" *effect* was primarily benefiting sectarian schools. The Court nevertheless maintains that the actual beneficiaries are "irrelevant to the constitutional inquiry." *Id.* at 650.

favoring religious schools.[51] In *Zelman*, the program in fact created "*dis*incentives for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools."[52]

The Court in *Zelman* also reconciled *Nyquist* and *Mueller* by explicitly divorcing the two as representing different types of cases, governed by different analyses:

> To the extent the scope of *Nyquist* has remained an open question in light of . . . [*Mueller* and] later decisions, we now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion.[53]

Curiously, the Court stopped at "without regard to *religion*,"[54] failing to explicitly exclude from the *Zelman* hegemony those programs that make the public-nonpublic distinction but not the religious distinction. Despite quoting *Nyquist* on this distinction a few sentences earlier in the opinion,[55] the Court omitted the distinction when declaring the scope of *Nyquist*. Thus, there are at least two standards when it comes to the constitutional analysis of education funding programs, with perhaps a slight gap to be filled regarding the public-nonpublic distinction.[56] Nevertheless,

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51. *Id.* at 653 (citing *Witters*, 474 U.S. at 487–88).

52. *Id.* at 654.

53. *Id.* at 662.

54. *Id.* (emphasis added).

55. *Id.* at 661 (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782 n.38 (1973)). *Nyquist* explicitly claimed to govern "case[s] 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." *Nyquist*, 413 U.S. at 782 n.38 (emphasis added).

56. The issue remains why the constitutionality of an education funding program is dependent to any degree on a public-nonpublic distinction, as such a distinction, according to the import of its plain meaning, makes no reference to religion. Even the *Mueller* Court recognized that "[t]he encouragement of private schools, in itself, is not unconstitutional. . . . [P]rivate schools frequently serve to stimulate public schools by relieving tax burdens and producing healthy competition." Kotterman v. Killian, 972 P.2d 606, 611 (Ariz. 1999) (citing Mueller v. Allen, 463 U.S. 388, 395 (1983)). Given that the public-nonpublic distinction can serve a valid secular purpose, one could only allege that such a distinction is contaminated if its effect were to primarily advance religious schools, an effect the *Zelman* Court deemed coincidental and irrelevant.

as far as federal obstacles to school voucher programs go, school-choice advocates have a model to follow in *Zelman*.

D. BLAINE AMENDMENTS' COMPATIBILITY WITH THE FEDERAL CONSTITUTION

Despite what appeared to be a major victory for school-choice advocates in *Zelman*, relatively few state or federally-sponsored voucher programs have emerged in the aftermath.[57] Although this paucity can be attributed to multiple legal obstacles at the state level (e.g., compelled support clauses, uniform education provisions, and local control provisions),[58] Blaine Amendments have been a particularly resistant roadblock. While Part IV discusses the origin and interpretation of Blaine Amendments in detail, this Section considers the Supreme Court's recent commentary on the State of Washington's Blaine Amendment.

Two years after the *Zelman* decision, the Supreme Court was asked not whether public funds directly or indirectly supporting religious institutions were constitutional but whether a funding program that excluded religious beneficiaries was constitutional.[59] This required the Court to determine whether the Washington Blaine Amendment was constitutional.

Without delving into the facts of the case,[60] the opinion can be summarized as consisting of three parts. First, because states are allowed to draw "a more stringent line than that drawn by the United States Constitution,"[61] the analysis involved determining whether the program violated the State's Blaine Amendment. Second, the precise restrictions of the Blaine Amendment were determined using a plain meaning, or "plain text," analysis,[62] which ultimately revealed that the Washington Blaine Amend-

57. Huerta, *supra* note 20, at 73.

58. *Id.* at 85.

59. Locke v. Davey, 540 U.S. 712 (2004).

60. *Id.* at 715–18 (describing the State of Washington's "Promise Scholarship Program," which provided assistance to academically gifted students with postsecondary expenses so long as the student was not pursuing a degree in devotional theology).

61. *Id.* at 722; *see* discussion *infra* Part IV.

62. *Id.* at 723. For a historical illustration of the fundamental tensions inherent to statutory interpretation, *compare United States v. Church of the Holy Trinity*, 36 F. 303 (C.C.S.D.N.Y. 1888), *with Rector, etc., of Holy Trinity Church v. United States*, 143 U.S. 457 (1892) (discussing the issue of plain meaning versus legislative intent).

ment required the exclusion of religious beneficiaries.[63] Third, after concluding that the program was valid under the State's Blaine Amendment, the Court would only strike down the amendment if it evinced hostility, or animus, toward religion, which the Court concluded it did not.[64]

IV. LEEWAY AT THE STATE LEVEL: BLAINE AMENDMENTS

This Part discusses the law and history of Blaine Amendments. Section A introduces the reader to the origin and social effect of Blaine Amendments. Section B explores the interpretation of Blaine Amendments in the context of education funding programs and, specifically, interstate similarities and differences in textual analysis.

A. THE ORIGIN OF BLAINE AMENDMENTS

Because the Establishment Clause and the Free Exercise Clause are frequently in tension with each other, states have traditionally retained a significant degree of discretion in drawing their own lines between church and state.[65] In the words of Justice Burger, "there is room for play in the joints"[66] between the two religion clauses, as "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[67] Consequently, if a voucher or education tax credit program does not offend the U.S. Constitution, it may still run afoul of a State's Blaine Amendment.

Taking its name from Representative James Blaine of Maine, the original Blaine Amendment (1875) was intended to amend the Federal Constitution by expanding on the Establishment

63. Due to the strict nature of the Washington Blaine Amendment (in terms of keeping government actions and religious institutions separate), education funding programs in that state must exclude religious beneficiaries more explicitly.

64. *Locke*, 540 U.S. at 724–25. This portion of the opinion addressed the Free Exercise Clause of the United States Constitution, which is effectively the counterpoint of the Establishment Clause. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the *free exercise* thereof . . . ." (emphasis added)).

65. See Joseph P. Viteritti, *Davey's Plea: Blaine, Blair,* Witters*, and the Protection of Religious Freedom*, 27 HARV. J.L. & PUB. POL'Y 299, 316–17 (2003) for a brief discussion of this federalism issue.

66. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

67. *Locke*, 540 U.S. at 719.

Clause to strictly prohibit state funding of religious institutions.[68] Although political maneuvering leading up to its formal proposal was extensive,[69] it has been argued that the impetus behind the amendment can be reduced to two primary motivations: (1) "hostility towards the teaching and practice of the Roman Catholic Church"[70] coupled with an intent to preclude government resources from supporting their schools, and (2) the desire to protect "generic Protestant religiosity in the common schools and the public square."[71]

The proposed amendment provided that:

> No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor [sic], nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.[72]

After vigorous debate on the Senate floor, including a "rousing defense of the Catholic people,"[73] the amendment proposal was narrowly defeated. Nevertheless, within a year of its defeat at the national level, fourteen states had passed some type of Blaine legislation.[74] By the 1890s, about thirty states had Blaine Amendments in their constitutions,[75] and today that total has risen to thirty-seven.[76]

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68. DeForrest, *supra* note 2, at 556–57.

69. See DeForrest, *supra* note 2, at 557–74 for an extensive discussion of how individual political ambitions influenced Blaine Amendment proposals and revisions as well as Reconstruction Era partisan politics.

70. *Id.* at 602.

71. *Id.*

72. H.R.J. Res. 1, 44th Cong., 4 CONG. REC. 205 (1875).

73. DeForrest, *supra* note 2, at 572.

74. *Id.* at 573.

75. *Id.*

76. Richardson, *supra* note 14, at 1054; *see also* The Becket Fund for Religious Liberty, Blaine Amendments, http://www.blaineamendments.org/states/states.html (last visited Sept. 27, 2009).

B. THE INTERPRETATION OF BLAINE AMENDMENTS

The judicial interpretation of various Blaine Amendments has been a critical component of the success of the school-choice effort. Subsection 1 provides an overview of the different types of Blaine Amendments, in terms of their restrictiveness, that one can expect to find across the country. Subsection 2 demonstrates how the interpretation of Blaine Amendments invariably begins with a plain meaning analysis of the most relevant text — sometimes only a word or two. Finally, subsection 3 emphasizes the important distinction between interpreting Blaine Amendments in light of the "form," or structure, of the education funding program, as opposed to its "effect."

1. *Overview*

Because states gradually adopted Blaine Amendments over time and for a variety of reasons, there is substantial diversity in their language and scope.[77] It has become widely accepted that Blaine Amendments tend to fall into three categories: permissive, moderate, or strict.[78] Although these categories provide an easily comprehensible overview, law professor Mark Edward DeForrest contends that State Blaine Amendments actually fall on a continuum.[79]

On the permissive end of the continuum, indirect public aid of religious institutions is permitted and "court rulings are narrowly cast to limit the restrictive scope of the Blaine Amendment."[80] Furthermore, permissive Blaine Amendments often include exceptions for basic assistance like transportation and higher education grants.[81] In these states, if voucher programs have yet to catch on, education tax credit programs — of almost any type — will most likely represent legally viable alternatives.

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77. DeForrest, *supra* note 2, at 576.

78. *Id.* at 577–602 (categorizing Blaine Amendments as "less restrictive," "moderate," or "most restrictive"); *cf.* Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 TEX. F. ON C.L. & C.R. 137, 162–79 (1998) (categorizing Blaine Amendments as "permissive," "restrictive," and "uncertain").

79. DeForrest, *supra* note 2, at 577.

80. *Id.*

81. *See, e.g.*, MASS. CONST. art. XVIII; N.J. CONST. art. VIII, § 4, para. 3.

The middle ground of the continuum, or "moderate" provisions, are a "hodgepodge of states" that permit some forms of aid and prohibit others, largely based on judicial discretion and outcome-oriented opinions.[82] Taking Utah, Alabama, Texas, Nebraska, and Kentucky as examples,[83] these moderate provisions explicitly prohibit direct funding to religious institutions, but potential outcomes with respect to indirect aid are less clear.[84] Because the constitutional texts in these moderate states lack sufficient clarity, the permissibility of indirect funding — e.g., vouchers or education tax credit programs — is often left to the judiciary. For example, many moderate Blaine provisions use the verb "appropriate,"[85] which requires state judiciaries to construct a contextual meaning of "appropriate" and apply it to the facts. Additionally, because the language and syntax of these moderate provisions "varies considerably from state to state,"[86] they represent prime legal battlegrounds for school-choice advocates. Consequently, it is imperative for school-choice advocates to be cognizant of the specific verbiage that their governing Blaine Amendment employs as well as the room the amendment may leave for varying judicial interpretations, as derived from and beginning with a plain meaning analysis.

On the strict end of the continuum, Blaine Amendments tend to employ broad, expansive prohibitions, and judicial decisions tend to reinforce them.[87] The possibility of public funds reaching religious schools through some legally tenable avenue, however, is not completely lost. While some states, like Florida, include

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82. DeForrest, *supra* note 2, at 577.

83. ALA. CONST. art. XIV, § 263 ("No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school."); KY. CONST. § 189 ("No portion of any fund . . . shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school."); NEB. CONST. art. VII, § 11 (stating that "appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof"); TEX. CONST. art. 1, § 7 ("No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes."); UTAH CONST. art. X, § 9 ("Neither the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization.").

84. DeForrest, *supra* note 2, at 578–81.

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

86. DeForrest, *supra* note 2, at 587.

87. *Id.*

"absolute prohibition[s]"[88] on even indirect use of public funds to aid religious institutions, the issue of what constitutes "indirect" remains unsettled. The line between an indirect benefit and no benefit is difficult to draw. Conceivably, as money changes hands, the benefit to religious interests will trend from direct to indirect to absent.

2. *Plain Meaning Analysis*

On some level, beginning with a plain meaning analysis states a truism, but it has a significant role in the interpretation of Blaine Amendments. Considering the linguistic variation in Blaine Amendments, it is exceedingly important for school-choice advocates who design education tax credit programs to understand the language of the particular state constitution.[89] Three state-specific examples — Illinois, Arizona, and Florida — are discussed below to illustrate plain meaning analyses.

In *Griffith v. Bower*,[90] an Illinois law provided for an annual tax credit of up to $500 against one's state income tax liability for 25 percent of qualified education expenses. Ultimately holding that such a tax credit did not violate the State's Blaine Amendment, the Illinois court's opinion turned on the interpretation of a single word in Illinois's relatively moderate Blaine provision: "appropriation."[91] The use of public funds runs afoul of the Blaine Amendment only if an "appropriation or pay[ment] from any public fund" aids a religious or "sectarian" purpose.[92] The word "appropriation" in this Blaine Amendment requires a careful analysis of the route by which public funds reach the religious school. Illinois's Fifth Appellate District described the path of funds as follows: "No money ever enters the state's control as a result of this tax credit. Rather, the Act allows Illinois parents to keep

88. *Id.* at 587.

89. Often the constitutionality of an education funding program has turned on whether the educational institution allegedly benefiting from the program can be labeled a "religious" or "sectarian" institution. *See, e.g.*, Saint Louis Univ. v. Masonic Temple Ass'n, 220 S.W.3d 721, 728 (Mo. 2007) (holding that a Jesuit University was not "controlled by a religious creed" because their mission was "education, not indoctrination" (citing MO. CONST. art. IX, § 8)). For the purposes of this Note, however, the focus is not on the type of institution but the financial routes through which education funding programs operate.

90. 319 Ill. App. 3d 993 (2001).

91. ILL. CONST. art. X, § 3; *Id.* at 995–96.

92. ILL. CONST. art. X, § 3.

more of their own money to spend on the education of their children as they see fit and thereby seeks to assist those parents in meeting the rising costs of educating their children."[93]

In a case similar to *Griffith*, the Supreme Court of Arizona in *Kotterman v. Killian*[94] addressed the constitutionality of a program allowing a state tax credit of up to $500 for those who donated to school tuition organizations. Holding the program constitutional, the court spent many paragraphs constructing the meaning of just four words — "public money or property"[95] — on which the opinion largely hinged. Demonstrating the complexity of a plain meaning analysis, the court turned to several sources to help construct and justify its definition of "public money or property."[96] Citing Black's Law Dictionary,[97] a variety of persuasive precedents, and "decades-long acceptance of tax deductions for charitable contributions,"[98] the court discounted modern tax expenditure theory in favor of a plain meaning analysis:

> According to Black's Law Dictionary, "public money" is "[r]evenue received from federal, state, and local governments from taxes, fees, fines, etc." As respondents note, however, no money *ever* enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials. Thus, under any common understanding of the words, we are not here dealing with "public money."
>
> . . . .
>
> We realize that this view may conflict with the "tax expenditure" approach advanced by the petitioners. Nevertheless, it is consistent with the traditional method of constitutional construction that accords to words their plain and simple meaning.
>
> . . . .

93. *Griffith*, 319 Ill. App. 3d at 996.
94. 972 P.2d 972 (Ariz. 1999).
95. ARIZ. CONST. art. II, § 12.
96. *Kotterman*, 972 P.2d at 617–20.
97. *Id.* at 618 (citing BLACK'S LAW DICTIONARY 1005 (6th ed. 1990).
98. *Id.*

> Modern economic theory, under some circumstances, may be helpful to our understanding. As has been shown, however, it does not necessarily govern constitutional interpretation.[99]

In *Bush v. Holmes*,[100] the First District Florida Court of Appeals assessed whether a scholarship program that subsidized private school tuition for students in "failing" public schools violated the state's Blaine Amendment. Unlike moderate amendments at issue in Illinois and Arizona, Florida's more strict Blaine Amendment expressly prohibits taking state revenue "directly *or indirectly*"[101] in aid of a religious institution. Citing the American Heritage Dictionary,[102] the court reasoned that "[t]he common meaning of indirect is [n]ot directly planned for; secondary: *indirect benefits*"[103] and therefore concluded that "[t]he plain text of these constitutional provisions prohibited *any* tax dollars from supporting the clergy."[104]

The preceding case examples illustrate that identification of key words and phrases is a critical first step for school-choice advocates, opponents, and forward-looking legislators. Whether the language at issue is "appropriate," "public money," or "directly or indirectly," invested parties should be familiar with the interpretive arguments illustrated above — particularly as they might be applied to a variety of other state-specific phrases.[105] At the same time, plain meaning analyses may not be so "plain," given the variety of constructive techniques a court might employ. In particular, the proper balance between an education funding program's "form" and "effect" is subject to vigorous debate.

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99. *Id.* at 618–19 (citation omitted).

100. 886 So. 2d 340 (Fla. Dist. Ct. App. 2004), *aff'd*, 919 So. 2d 392 (Fla. 2006) (affirming but declining to reach the "no aid" issue).

101. FLA. CONST. art. I, § 3 (emphasis added).

102. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 670 (1979).

103. *Bush*, 886 So. 2d at 352 (internal quotation marks omitted).

104. *Id.* at 351 (quoting Locke v. Davey, 540 U.S. 712, 351 (2004).

105. *See, e.g.*, ALASKA CONST. art. VII, § 1 ("No money shall be paid from public funds *for the direct benefit* of any religious or other private educational institution." (emphasis added)); IND. CONST. art. I, § 6 ("No money shall be *drawn from the treasury*, for the benefit of any religious or theological institution." (emphasis added)); N.H. CONST. pt. 2, art. 83 ("[N]o money raised by taxation shall ever be *granted or applied* for the use of the schools or institutions of any religious sect or denomination." (emphasis added)).

3. *The Importance of Form vs. Effect*

The form-versus-effect debate has hindered the ability of state courts to reach a consensus on the issues of: (1) the threshold inquiry of indirectness for determining when aid is constitutional and (2) whether Blaine Amendment provisions should be read from the perspective of legal formalism (form) or legal realism (effect).[106] In other words, should the focus of constitutional scrutiny be on the "resulting benefit"[107] of an education funding program or the design of the "mechanism"[108] through which the program operates?

The Alaska Supreme Court has struck down legislative attempts to provide indirect aid to religious institutions notwithstanding the language of the Alaska Blaine Amendment prohibiting the use of government funds only "for the *direct* benefit of" religious institutions.[109] In *Sheldon Jackson College v. State*,[110] the court held that, despite the funding mechanism's indirectness, the tuition grant program had the effect of being a direct benefit to the school.[111]

By contrast, the Supreme Court of Wisconsin has discounted the relevance of "incidental benefit[s]"[112] (i.e., effects), instead "focusing on the neutrality and *indirection* of state aid"[113] in a more mechanical sense and "not whether some benefit accrues to a religious institution as a consequence of the legislative program."[114] The same is true in Arizona where the courts have focused on the mechanics and directional flow of public funds with the critical

106. Richardson, *supra* note 14, at 1064–68; *cf.* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 3 (1989) ("An economic analysis of the religion clauses can have either a descriptive or a normative focus. That is, the analyst can attempt either to determine whether particular government policies have been neutral toward religion and, if not, what the direction of the effect is, or to determine what policy should be adopted in order to achieve consistency with the ideal of neutrality.").

107. Huerta, *supra* note 20, at 83.

108. *Id.*

109. ALASKA CONST. art. VII, § 1 (emphasis added).

110. 599 P.2d 127 (Alaska 1979).

111. *Id.* at 132.

112. Jackson v. Benson, 578 N.W.2d 602, 621 (Wis. 1998).

113. *Id.* (emphasis added).

114. *Id.* (internal quotation marks omitted).

line of demarcation being whether "money ever enters the state's control."[115]

Further demonstrating the lack of consensus on the issue of form versus effect, even Florida's strict regime of Blaine Amendment interpretation may be open to arguments of form. The trial court in *Bush v. Holmes* emphasized effect over form when it stated, "[t]o hold that this two-step, payment mechanism avoids the prohibition in Article I, § 3 would be the functional equivalent of redacting the word 'indirectly' from this phrase of the Constitution. Moreover, such an interpretation would amount to a colossal triumph of form over substance."[116] The Florida Court of Appeals affirmed but in its opinion acknowledged the mechanical differences among various types of education funding programs.[117] For example, the court recognized a meaningful distinction between tax exemptions and general subsidies:

> Tax exemptions and general subsidies, however, are qualitatively different [than the payment of state funds]. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. . . . [T]he symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church.[118]

If a strict state like Florida can give significance to this formal distinction, then there is an opportunity to devise new education funding programs that fit this form.

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115. Kotterman v. Killian, 972 P.2d 606, 618 (Ariz. 1999); *see* discussion *supra* Part IV(B)(2).

116. Holmes v. Bush, No. CV 99-3370, 2002 WL 1809079, at *2 (Fla. Cir. Ct. Aug. 5, 2002).

117. Bush v. Holmes, 886 So. 2d 340, 356–57 (Fla. Dist. Ct. App. 2004).

118. *Id.* at 356 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 690 (1970).

C. IMPLICATIONS FOR SCHOOL-CHOICE ADVOCATES AND OPPONENTS

School-choice advocates have attempted to surmount Blaine Amendments by: (1) urging all states to narrowly construe their Blaine Amendments[119] and (2) litigating anti-discrimination claims based on a combination of the Free Exercise Clause, the Equal Protection Clause, and the Establishment Clause.[120] Another often neglected tactic involves adapting the structure of a proposed education funding program to comply with a formalistic, plain-meaning analysis of the constitutional text. The uncertainty in the form-versus-effect debate may redound to the benefit of school-choice advocates, as the rules of the game have yet to be set in stone, and an attempt at coordinated state action may be on the horizon.

If an effects-oriented state court like Florida's acknowledges a formal distinction between tax exemptions and general subsidies, then presumably other states may do so, regardless of how strictly their Blaine Amendments prohibit indirect funding. On this view, exceptionally circuitous benefits to religious schools may survive constitutional scrutiny even if the relevant Blaine Amendment bans "indirect" funding. Education tax credit programs may safely reside within this category of especially circuitous benefits.

V. THREE TYPES OF EDUCATION TAX CREDIT PROGRAMS AND HOW THEY MIGHT SURVIVE BLAINE AMENDMENT SCRUTINY

This Part introduces a three-part typology of education tax credit programs. Section A describes the three generally accepted types of education tax credit programs: education tax credits for expenses, education tax deductions for expenses, and education tax credits for contributions to school tuition organizations (STOs). Section B examines the structural differences distinguishing these types and explains why some types might survive constitutional scrutiny under a wider range of Blaine-

119. Luke A. Lantta, *The Post-*Zelman *Battleground: Where to Turn After Federal Challenges to Blaine Amendments Fail*, 67 LAW & CONTEMP. PROBS. 213, 239–42 (2004).

120. Richardson, *supra* note 14, at 1046.

Amendment regimes. Finally, Section C discusses the potential benefits of coordinated state action and the form such action might take.

A. THREE VARIATIONS OF EDUCATION TAX CREDIT PROGRAMS

Tax credit programs aimed at facilitating school-choice options began to appear at both the federal and state level in the late 1960s.[121] At present, the primary programs operating at the federal level — the Hope Scholarships, Lifetime Learning Credits, and Education IRAs[122] — are aimed at higher education access, although some K–12 expenses became eligible in 2001.[123]

At the state level, education tax credit programs began to surface in the late 1990s but have expanded and become more widely considered in recent years.[124] While a number of states have considered them, education tax credits aimed at expanding school choice options were in operation in just six states as of 2007 — Arizona, Florida, Illinois, Iowa, Minnesota, and Pennsylvania.[125]

In the post-*Zelman* landscape no education funding program will survive even federal scrutiny if, for example, the intended beneficiaries are not neutral with respect to religion.[126] But the more difficult hurdle will be state Blaine Amendments.

The mechanical difference between how school voucher programs and education tax credit programs operate is exceedingly important. Subtle differences between vouchers and education tax credits, in terms of the direction and quantity of financial exchanges, may prove material to a court's application of a State's Blaine Amendment. In this way, various types of education tax credit programs have been referred to as "back-door vouchers"[127]

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121. Huerta, *supra* note 20, at 76.

122. IRS, Education Credits, http://www.irs.gov/individuals/article/0,,id=121452,00.html (last visited Sept. 27, 2009).

123. Huerta, *supra* note 20, at 76.

124. *Id.*

125. *Id.*

126. Zelman v. Simmons-Harris, 536 U.S. 639, 649–53 (2002) (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983)'); *see* discussion *supra* Part III.

127. Kevin G. Welner, *Under the Voucher Radar*, EDUC. WEEK, Sept. 3, 2008, at 27.

or "neovouchers."[128] "Although the resulting benefit may be similar, the mechanism is what makes a tax credit different and potentially a more legally feasible school choice program."[129] The key difference, then, is a mechanical one, which, through the lens of a Blaine Amendment, is often mapped out and scrutinized in detail.

Keeping with the analogy of a map, traditional school voucher programs employ a two-stop route: (1) the public treasury delivers funds to parents who then (2) re-route those funds to educational institutions. Education tax credit programs, on the other hand, generally involve a reverse route: parents pay their way through the education system, using their own funds, and then — after the fact — are reimbursed in various fashions.[130]

The question then proceeds as follows: If a neutral, government-sponsored education funding program benefits religious schools, how directly are they benefited? That is, what is the financial map through which public funds pass? With that question in mind, education tax credit programs can be usefully subdivided into three types: (1) education tax credits for expenses, (2) education tax deductions for expenses, and (3) education tax credits for contributions to school tuition organizations (STOs).[131] These types differ in terms of the source and path of funds, as well as the financial gain ultimately accruing to the beneficiary.

A series of figures will be used to illustrate the differences between these programs. The following key will be used:

P = Qualifying Parent
G = Government
STO = Scholarship Tuition Organization
R = Religious School
S = Secular School
I = Taxable Income
T = Tax Liability
t = Marginal Tax Rate

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128. *Id.*; *see also* Kevin G. Welner, *Taxing the Establishment Clause: The Revolutionary Decision of the Arizona Supreme Court in* Kotternman v. Killian, 8 EDUC. POLICY ANALYSIS ARCHIVES 36 (2000), http://epaa.asu.edu/epaa/v8n36.

129. Huerta, *supra* note 20, at 83.

130. The more specific "routes" that the three different types of education tax credits employ are explored further in the following subsections of this part.

131. Huerta, *supra* note 20, at 76–77.

x = Expenditures by Parents on Education
c = Credit Amount
d = Deduction Amount
s = Scholarship Amount
v = Voucher Amount

In each of the figures, time and money pass from left to right.

1. *Education Tax Credits for Expenses*

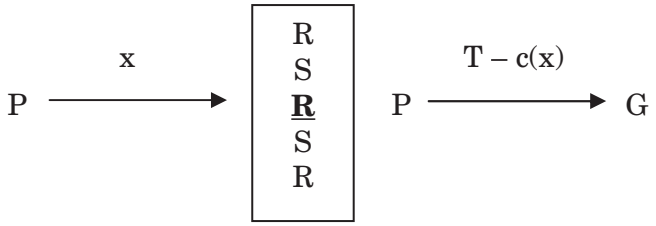
There is a critical distinction to be made between refundable and nonrefundable tax credits.[132] Whereas a refundable credit is essentially a "dollar-for-dollar" reimbursement that is paid whether or not the taxpayer has any tax liability, nonrefundable credits only operate to decrease tax liability.[133] In other words, if you do not pay taxes, you cannot get the nonrefundable credit. To use a quantitative example, if Mr. Smith owes $1,000 in state taxes but is eligible for a *nonrefundable* education tax credit of $500, he then is only required to pay $500 in state taxes. If, on the other hand, Mr. Smith does not owe the state any taxes, the state will not send him a $500 check. A nonrefundable tax credit program does not recognize negative tax liability.

Figure 1 begins with a parent ("P") who is choosing between a number of schools, both religious ("R") and secular ("S"), that qualify for the hypothetical, nonrefundable, tax credit program. P incurs educational expenses of x dollars, paid out of P's income directly to the chosen school. When calculating tax liability, P may subtract the credit amount ("c"), which is a function of x, from what is owed to the government ("G"). Formally speaking, G at no point transfers public funds to either P or R.

132. Constitutionality of education tax credit programs must account for the formal difference between refundable and nonrefundable education tax credits, especially considering the sensitive nature of the directional analysis that courts often use when retracing the path of government funds. *See, e.g.*, William G. Frey & Virginia Lynn Hogben, *Vouchers, Tuition Tax Credits, and Scholarship-donation Tax Credits: A Constitutional and Practical Analysis*, 31 STETSON L. REV. 165, 183–85 (2002) (categorically discounting the utility of education tax credit programs, but accepting their constitutionality, without distinguishing between refundable and nonrefundable sub-types).

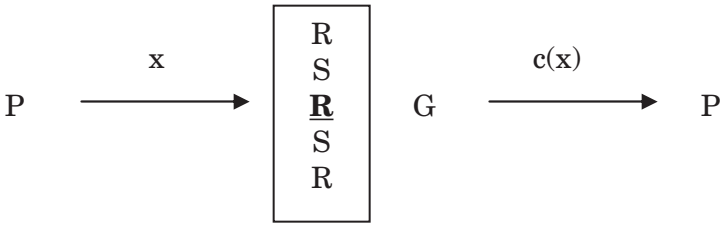
133. Huerta, *supra* note 20, at 103 n.1.

Figure 1: Nonrefundable Tax Credits for Expenses



Refundable tax credit programs could involve parents without tax liability, in which case the relationship between G and P is reversed relative to nonrefundable tax credit programs. The formal distinction in directness could constitute a material fact in determining the constitutionality of the program. Consider, for example, the observation in *Kotterman v. Killian* that "no money ever enters the state's control,"[134] which is precisely the material difference between how refundable and nonrefundable tax credit programs operate. Given that state control of funds is uniquely absent in the processing of a nonrefundable tax credit, such a tax credit program avoids a potentially fatal fact when faced with Blaine Amendment scrutiny.

Figure 2: Refundable Tax Credits for Expenses



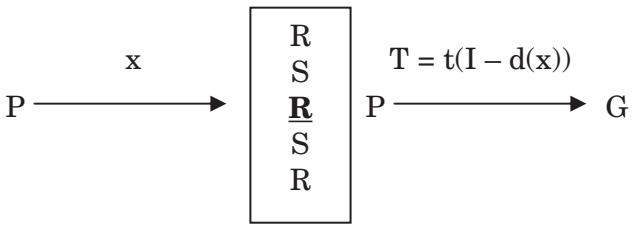
134. 972 P.2d 606, 618 (Ariz. 1999).

2. *Education Tax Deductions for Expenses*

Initially, one must distinguish between tax credits and tax deductions. Although both effectively lower net education expenses, credits are typically more valuable because they are directly subtracted from tax liability.[135] Tax deductions, in contrast, reduce the amount of taxable income, so the benefit is fractional and dependent on the marginal tax rate.[136]

Tax deductions are similar to nonrefundable tax credits in the sense that the direction of all funds flows from P to G, and never from G to P. The difference between a nonrefundable tax credit and a tax deduction is in the calculation of tax paid to G. Instead of the entire credit amount being subtracted from tax liability, a tax deduction is subtracted from taxable income. The value of the tax deduction thus depends on the marginal tax rate of the taxpayer.

Figure 3: Tax Deductions for Expenses



3. Education Tax Credits for STO Contributions

This scheme is the most complicated of the education tax credit programs.[137] Sometimes referred to as "neovouchers,"[138] these

135. Huerta, *supra* note 20, at 103 n.1.

136. *Id.*

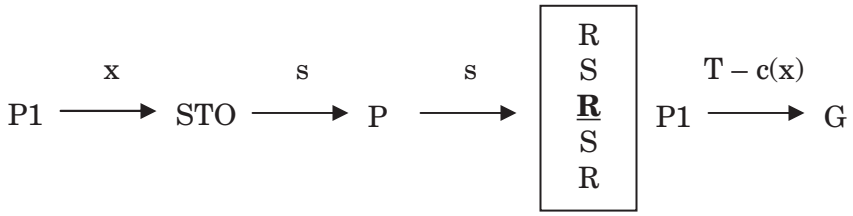
137. For a description of programs such as those operating in Arizona and Pennsylvania, see Frey & Hogben, *supra* note 132, at 185 (footnotes omitted):

> Pennsylvania's statute provides a seventy-five-percent-to-ninety-percent tax credit, up to $100,000 per company, to businesses for making contributions to either "scholarship organizations" or "educational improvement organizations." "Scholarship organizations" are defined in the statute as non-profit organizations that "provide tuition to [low to middle income] students to attend a school located in [Pennsylvania]." An "educational improvement organization" is defined as a non-profit entity that provides "grants to a public school for innovative educational programs."

programs employ a much more indirect route, often with more than one parent (P1 and P) involved in the direction and redirection of funds.

Take the following scenario, for example. P1 makes a charitable donation to a nonprofit organization. That donation is then divided or combined with other donations before being issued as voucher-like scholarships to a variety of parents (P).[139] P then passes the scholarship money onto their school of choice, and, as a separate transaction, P1 qualifies for a tax credit. Of course, if the same parent who made a donation was also receiving scholarship money, the analysis would be quite different and perhaps raise a new host of legal or political issues.[140]

Figure 4: Tax Credits for STO Contributions



B. WHY SOME DESIGNS OR VARIATIONS MIGHT PASS MUSTER

Education tax credit programs are more likely to withstand Blaine Amendment scrutiny than typical voucher programs. Voucher programs, unlike education tax credit programs, begin with the government's movement of public funds:

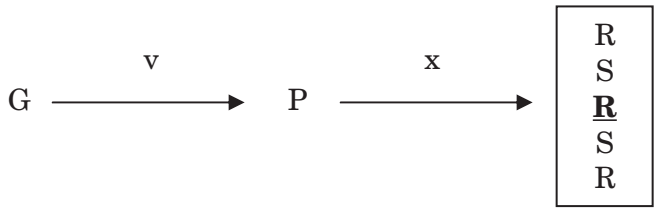
The Arizona statute provides that taxpayers may take a dollar-for-dollar credit of up to $500 per year for donations to "school tuition organizations" and charitable organizations that provide "educational scholarships or tuition grants to children to allow them to attend any qualified school of their parent's choice." Qualified schools include any Arizona "nongovernmental primary or secondary school . . . that does not discriminate on the basis of race, color, sex, handicap, familial status or national origin."

138. Welner, *supra* note 127, at 32.

139. *Id.*

140. *Id.* at 27 ("Opponents of neovouchers have attacked the policy as 'money laundering,' 'a shell game,' and 'back-door vouchers.'").

Figure 5: Voucher Program



A court undertaking a plain meaning analysis of a Blaine Amendment may become skeptical of the role of the government in voucher and *refundable* tax credit programs. These programs are more susceptible to attack because they involve a transfer of funds from the public treasury to a parent. To rebut such attacks, proponents of such programs could argue that benefits to religious school are indirect.

Arguments of indirection are stronger for refundable tax credit programs than voucher programs because the financial exchange between the government and the religious schools is disconnected in time. The funds involved in a voucher program originate in the government and are then paid to schools in accordance with parental choices. In contrast, refundable tax credit programs begin with parents using their own funds, and the credit occurs after the fact. In this way, not only do vouchers and refundable tax credits have different funding timelines, but the roles of government in these programs come into play at opposite ends of those timelines.

The other tax credit programs illustrated above — nonrefundable tax credits, tax deductions, and tax credits for STO contributions — are even more likely to survive Blaine Amendment scrutiny. Any alleged government benefit a religious school receives is so attenuated that it seems unlikely for a court to find any benefit, whether direct or indirect. At no point in the financial operation of these programs does the government disburse public funds, so alleged benefits accruing to a religious school rest merely on an abstract notion of indirectness that has no real boundary. In particular, tax credits for STO contributions are often designed specifically to test this illusive boundary of indirectness, as they require a number of entities to participate in the creation of an elaborate chain of financial exchanges. Employing such an elaborate design presents a strong opportunity for school-choice

advocates to test the bounds of indirectness that Blaine Amendment jurisprudence is grappling with.

C. THE BENEFITS OF COORDINATED STATE ACTION

The constitutionality of education funding programs is an area of law that is currently unsettled. The coordination among states and state officials through a voluntary association could — by facilitating a national discussion — lead to a stable, incremental, and progressive evolution of this area of law.

While such a legal or political hub is not meant to "solve" the problem, or even reach rapid consensus, creating a voluntary association among states has proven to be an effective facilitator[141] in other legal contexts where voluntary state associations have taken on a tremendous amount of regulatory significance.[142] For example, the National Association of Insurance Commissioners (NAIC), a voluntary association of state insurance commissioners, "has played an essential role in the process of centralization, expanding upon its initial advisory and model law drafting functions until it resembled a federal agency in many ways."[143]

The education sector does not have the same centralization issues as the insurance sector. Nevertheless, coordination among states and state officials through a voluntary association has demonstrated its capacity to effect change. Regardless of whether one is a school-choice advocate or opponent, such an organizational hub would put the legal, political, and social conversations on a more stable track. Instead of scattered developments in Blaine Amendment jurisprudence and disjointed efforts to reconcile those developments, a unified conversation would facilitate well-calculated, incremental changes, and, consequently, a more coherent national dialogue.

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141. See Franklin G. Snyder, *Sharing Sovereignty: Non-state Associations and the Limits of State Power*, 54 AM. U.L. REV. 365 (2004) for a discussion of how voluntary associations have generally operated in a political context. The article criticizes the conception of voluntary associations and discredits the model that "postulates a bipolar world with the State at one end of the axis and the Individual at the other, with all the other associations in society distributed between them." *Id.* at 366.

142. *See* Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625 (1999).

143. *Id.* at 627–28.

Again, such an association, if its purpose were to clarify or unify the relationship between Blaine Amendments and education funding programs, would not function as a fast-acting or nationalizing solution to the difficulties posed by the inconsistent language and interpretation of Blaine Amendments and the various education funding programs. Rather, such an association would represent a starting place for coordination in a disjointed area of law, as well as a formalized avenue for dialogue between school-choice advocates, opponents, and their government representatives.

Critics might argue that because education in America has traditionally been a state-specific, locally-controlled enterprise, such a nationalized association is inconsistent with how education in this country is meant to evolve. While local control is an undeniable hallmark of American educational policy, there are a number of educational issues that have and continue to require a nationally coordinated solution.

Perhaps the most salient example is the goal of the No Child Left Behind Act of 2001 (NCLB)[144] to increase educational achievement nationwide across all racial groups. Without national coordination of educational standards and methods of assessment, evaluating and comparing education quality remains extremely difficult. Similarly, if school-choice regimes continue to emerge (and disappear) throughout the country due to variation in constitutional requirements at the state level, it will be difficult to determine the optimal school-choice regime. For the time being, those who are attempting to experiment with different education-funding-program designs are faced with the unpredictable obstacle of navigating their States' Blaine Amendments.

VI. CONCLUSION

A disjointed field of law has long confounded those involved in the school-choice debate, hindering the United State's prospects for enlightenment or unification on such a critical educational issue. Not only has federal jurisprudence wavered over time, but the interpretation of state constitutional Blaine Amendments has

144. U.S. Dep't of Educ.: No Child Left Behind, http://www.ed.gov/nclb/landing.jhtml (last visited Sept. 27, 2009).

been an inconsistent and disagreeable subject of comparative state law.

Given such a widely varying legal landscape, efforts to push the school voucher agenda forward have largely hit a standstill, as school-choice advocates have been searching for new, innovative ways to make private schooling more affordable. Recently, education tax credit programs have been gaining legal traction in this regard, as their funding mechanics are more amenable to the scrutiny that Blaine Amendments pose. As illustrated and explained above, the prospects of surviving Blaine Amendment scrutiny will likely depend on the type of tax credit program employed as well as the specific text of a state's Blaine Amendment. Of course, there is significant room for variation among the states, even among those who are similarly situated with respect to Blaine Amendment language.

Because the success or failure of any school-choice regime cannot be determined without assessing its effects over time and on a national scale, this disjointed area of the law would benefit from the gradual construction of policy consensus. With the assistance of a voluntary association among states, the United States might achieve a level of coordinated state action that stabilizes the national effort of school-choice experimentation over time. Only when such stability is achieved will it be possible to more clearly assess the utility and sustainability of education tax credit programs.