

The changing politics of school choice/school privatization supported by tax revenue.

When school vouchers and charter schools were first legislated in Ohio and across the nation, the idea was to improve educational outcomes for low-income students enrolled in school districts struggling to demonstrate high test scores. The programs were limited to a few students in a few districts. Typically, these programs were presented to the public as pilot projects. Regardless of the outcomes demonstrated, the schemes were expanded in terms of eligible districts and eligible students.

The rhetoric in support of these private ventures transitioned from “opportunities for poor kids” to “right to choose”. Lost in the debates surrounding these private ventures was what state constitutional provisions required state legislatures to do regarding public school districts and public education. All state constitutions require a public school system.

As school vouchers and charter school legislation was enacted, student eligibility criteria expanded—now universal school choice is the norm. In this origination and expansion context, most legislatures avoided any real discussion of the states’ constitutional responsibility for public education.

Now that state funding for school choice has skyrocketed and traditional public school funding is being adversely affected, the general public is starting to challenge these private operations. Court challenges and pushback from citizens are escalating.

The general public pushback bodes well for the EdChoice voucher litigation in Ohio.

The Coalition/Vouchers Hurt Ohio (VHO) constitutional challenge to the EdChoice voucher scheme is in progress at the right time in the history of Ohio.

The attached [State Court Report](#) provides pertinent information regarding the issue.

[State Court Report](#)

Brennan Center for Justice at NYU School of Law

The Kentucky Supreme Court unanimously [struck down](#) the state’s charter school law last month in a major blow to school choice proponents. While the ruling itself relied on the Kentucky Constitution’s unusually strong safeguards against the diversion of public school funding, it’s also part of a wave of recent cases related to school choice and the meaning of public education.

In *Commonwealth v. Council for Better Education*, Kentucky’s high court ruled that public funds can’t be allocated outside the state’s “system of common schools” (its traditional public school system) without voter approval. Charter schools don’t qualify as common schools under the state constitution, the court concluded, because they can limit their admissions and aren’t accountable to local school districts.

“We cannot sell the people of Kentucky a mule and call it a horse,” the court said, “even if we believe the public needs a mule.”

The opinion itself focused on a “uniquely Kentucky” set of constitutional safeguards rooted in the state’s “pilfering landscape” during the 19th century, when public education funds were routinely diverted for other purposes. When Kentucky established its most recent constitution in 1891, it “deliberately ‘locked up’ K–12 money” to stop these shenanigans.

Notably, in 2024, voters rejected a proposed constitutional amendment that would have unlocked funding and allowed the state legislature to provide education funding outside the common school system. The court pointed to this development in its reasoning as well, suggesting that the rejected amendment “steered the constitutional backbone of educational funding as strictly reserved for the common-school system.”

Most interesting to me is how the Kentucky Constitution structures its protection of public school money, requiring voter approval if the legislature wants to allocate funds outside the common schools. It's one of many examples of state constitutions putting popular checks on state legislatures, often reflecting concerns about self-dealing.

While Council for Better Education emphasizes Kentucky's unique history, it's also part of a new wave of education cases challenging various forms of school choice. These cases reflect a sea change in education policy: "the accelerating erosion of the line, once fairly crisp, between public and private schooling," as Fordham School of Law Professor Aaron Saiger [described](#) it.

State cases testing the meaning of public education have had varied outcomes, and not along predictable ideological lines. Also in February, for example, the Idaho Supreme Court [upheld](#) that state's school choice tax credit program, finding that it did not violate the state constitution's requirement that the legislature establish a system of public, free common schools. The common school system is a constitutional minimum, the court concluded, which did not preclude providing other options.

On the other hand, in 2024, the South Carolina Supreme Court struck down the state's school voucher law, ruling that it violated a state constitutional ban on using public funds for the "direct benefit" of private educational institutions. The Wyoming Supreme Court also recently heard [arguments](#) on whether a trial court erred in halting that state's school choice program, and the West Virginia Supreme Court is considering an appeal of a [trial court ruling](#) that the state constitution prohibits the creation of charter schools without a vote from the county or counties in which they would operate.

Underlying many of these cases are concerns that school choice will pull resources from public schools that many people regard as chronically underfunded. In Kentucky, for example, another [pending case](#) claims that the state is failing to provide students with an "adequate and equitable" public education. Changes in federal law, including the creation of a federal tax credit program for private school tuition, may further alter the landscape. Kentucky legislators are now considering a [new school choice bill](#) that will allow the state to opt into this federal funding.

It's not always a comfortable fit for courts to be so closely entwined in education policy issues. But the fact is that state constitutions have a lot to say about education — creating both affirmative rights and structural limits that constrain state legislatures. At their core, recent school choice cases raise the question of what public education really means. Look for ongoing dialogue and conflict between courts, state legislatures, and voters about how states should answer that fundamental question.