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ERADICATING BLAINE'S LEGACY OF HATE: REMOVING THE BARRIER TO STATE FUNDING OF RELIGIOUS EDUCATION

Brandi Richardson'

In 1995, Cleveland’s public school system was in the midst of “a crisis that is perhaps unprecedented in the history of American education.”

Failing to meet any of the eighteen state standards for minimal acceptable performance, the entire school district was placed under state control by order of a federal district court. The proposed solution was a voucher project that provided financial assistance to families in target districts such as Cleveland. The program was open to religious and nonreligious private schools, as well as public, community, and charter schools. Under this need-based program, qualifying families received a tuition grant for private education in the amount of $2250 per student.

State taxpayers claimed the program violated the Establishment Clause,


2. Id.

3. Jim Whitton, Unanswered School Voucher Questions, TEX. LAW., Aug. 19, 2002 (explaining that Cleveland’s very low performance ratings caused the Ohio Legislature to enact a “voucher program applicable only to Cleveland public schools”).

4. Zelman, 536 U.S. at 645 (“Any private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards.”).

5. Id. at 646 (“Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to $2,250.”). These families were responsible for co-payment not greater than $250. Id. An additional payment option existed: if excess scholarships existed after meeting the needs of the priority families, others were eligible for up to seventy-five percent reimbursement of tuition, which maxed out at $1875, with no co-payment cap. Id. Different figures applied if a magnate, community, or traditional school was selected. Id. at 647-48.
and the Supreme Court consequently evaluated the program in June 2002. School choice advocates across America celebrated the Court's five-to-four decision in *Zelman v. Simmons-Harris*, which affirmed the constitutionality of the program.

Whatever a party's particular political or philosophical persuasion, the educational debate recognizes many viewpoints. The fight begins when the government decides to fund non-public education, and it escalates when state money funds private, religious schools. Vouchers represent one method available to states for funding private education. Most recently, the Supreme Court focused its attention on vouchers in *Zelman*. Because of the Court's broad argument upholding Cleveland's voucher program, supporters of school choice alternatives predict the decision will impact other areas of educational reform.

Advocates of voucher programs promote the payment of tuition subsidies to private schools as the answer to failing public school systems. Their solution hinges on concepts of social justice, equal

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6. *Id.* at 648. The Court of Appeals affirmed the district court's finding that "the program had the 'primary effect' of advancing religion in violation of the Establishment Clause." *Id.* Following this finding, the Supreme Court granted certiorari. *Id.*


8. Holly Lebowitz Rossi, *Voucher Battle Shifting to the States*, TIMES UNION (Albany, N.Y.), Aug. 11, 2002, at A8 (stating that while "school choice advocates rejoiced" at the *Zelman* decision, they admitted "there's still a political battle to be fought").

9. Editorial, *Carefully Study Voucher Viability*, SHREVEPORT TIMES, Sept. 24, 2002, *available at* 2002 WL 25583057 (predicting that in Louisiana, "[t]he use of state tax dollars to fund school vouchers for students at private and parochial schools" will be "a front burner issue" and has already caused "battle lines [to be] drawn").

10. DAVID W. KIRKPATRICK, CHOICE IN SCHOOLING: A CASE FOR TUITION VOUCHERS 108-09 (1990) (listing alternatives to vouchers, such as full state funding, realigning school districts equitably, and combinations thereof). See also Robert Holland, *The Supreme Court Upholds School Vouchers: Ruling Is a Huge Victory*, RECORD (Bergen County, N.J.), June 30, 2002, *available at* 2002 WL 4663579 (listing federal and state tax credits, privatization of public schools, home schooling, and private tutoring as additional school choice options).

11. *Zelman*, 536 U.S. at 639 (noting the focus of the taxpayers' action was "the voucher portion of [the] Ohio Pilot Scholarship Program").

12. David G. Savage, *School Vouchers Win Backing of High Court Law: The 5-4 Ruling Allows Use of Taxpayer Money to Send Students to Parochial Campuses - It's a Major Victory for 'Choice' Movement*, L.A. TIMES, June 28, 2002, at A1 (quoting President Bush as stating, "[t]his decision clears the way for other innovative school choice programs so that no child in America will be left behind."); see also, Holland, *supra* note 10 (stating that "the *Zelman* verdict has broader implications for parental rights and education reform across the nation").

13. *Vouchers Have Overcome*, WALL ST. J., June 28, 2002, at A10 (asserting that *Zelman* did not solve "the urgent problem of failing urban public schools," and that the next step belongs to politicians who can use *Zelman* to succeed where they might have failed in the past).
opportunity, and a market-driven analysis where competition creates the necessary impetus for change and improvement. These advocates cite parental choice and benefit to the child as their fundamental concerns.

Opponents claim that state financing of private education undermines the public school system. Additionally, many of the private schools in America today are religious, which causes concern that the state becomes prohibitively entangled with religion when it funds private education.

14. David L. Brennan, Editorial, Free Kids From Failing Schools – Let’s Put Aside the Vestiges of Bigotry and Allow Vouchers – and Children – a Chance, STAR-LEDGER (Newark, N.J.), Sept. 3, 2002, available at 2002 WL 26524747 (“Failing public schools and dysfunctional systems are no longer safe from competition. The children of the working poor and the economically disadvantaged need no longer be sentenced to snake-pit schools.”); see also David Davenport, School Vouchers Are A Viable Solution for an Education System at Critical Mass, COLUMBUS DISPATCH, July 18, 2002, available at 2002 WL 23275665 (advancing that “the whole school choice movement may be approaching its tipping point”). The author also asserts that when families begin to realize their access to “real choices about education . . . public schools also will recognize that they face market competition.” Id. The article expands the market analogy to compare the public schools to a monopoly, opining that “monopolies do not generally serve the public good, and public education’s monopoly on teaching our children appears to be coming to an end.” Id. The article expands the market analogy to compare the public schools to a monopoly, opining that “monopolies do not generally serve the public good, and public education’s monopoly on teaching our children appears to be coming to an end.” Id.

15. See, e.g., Richard W. Garnett, Yes to Vouchers, COMMONWEAL, Aug. 16, 2002, available at 2002 WL 12340851 (arguing that the shift in educational choices from the state to parents is a policy decision “that rests upon basic beliefs about the dignity of the person, the rights of children, and the sanctity of the family”). The author concludes by stating “[t]he point of school choice . . . is authentic religious, political, and personal freedom.” Id.

16. Sean Salai, Vouchers Backers Plan More Challenges, WASH. TIMES, July 10, 2002, at A4 (“[T]axpayer dollars should not be spent on private or parochial schools, but on improving neighborhood public schools . . . . There is no evidence that voucher schools perform better than public schools.”); see also Doug Oplinger et al., School Vouchers Upheld: Cleveland’s Test Program Meets Constitution, Justices Vote 5-4, AKRON BEACON J., June 28, 2002, available at 2002 WL 6737655 (quoting public school supporters who project “the ruling will hurt public schools” and that “people are going to take their attention off improving urban systems and instead run from the systems”).

17. See National Center for Education Statistics, Special Analysis 2002 – Private Schools: A Brief Portrait, available at http://nces.ed.gov/programs/coe/2002/analyses/private/sa01.asp (last visited Aug. 27, 2003) (noting that “[79%] of all private schools had a religious affiliation in 1999–2000,” and that of this percentage, Roman Catholic affiliated schools comprised 30% yet still managed to enroll 48% of all private school students); see also JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN’S RIGHTS 13 (1998) (The State [by furnishing subsidies] clearly and affirmatively supports religious schooling without imposing any significant restrictions on the form that such schooling takes . . . . ); Steven Menashi, The Church-State Tangle, POL’Y REV., Aug. 1, 2002. The author states: Excessive entanglement occurs when a statute necessitates pervasive monitoring by public authorities in a religious institution. . . . [T]he court has maintained that injecting a secular regulatory authority into the operations of a religious school would necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission . . . which may impinge on rights guaranteed by the Religion Clauses.
Most opponents wave the flag of the Establishment Clause as they enter battle, predicting indoctrination of the masses and the breakdown of fundamental constitutional principles.\textsuperscript{18} Others, echoing the dissent of Justice Breyer in \textit{Zelman}, predict a surge in religious strife, manifested by competition for the government payout.\textsuperscript{19}

Touted as a "victory for vouchers,"\textsuperscript{20} the decision in \textit{Zelman} falls within a line of cases that emphasize a more accommodating approach to the church-state debate.\textsuperscript{21} What was seen as an insurmountable wall after decisions such as \textit{Lemon v. Kurtzman},\textsuperscript{22} the division between church and state has developed into a more open-minded doctrine, as evidenced in \textit{Agostini v. Felton},\textsuperscript{23} \textit{Mitchell v. Helms},\textsuperscript{24} and most recently, \textit{Zelman}. At least in the area of education, the Court recently focused not on the

\textit{Id.} (internal quotations omitted).

18. Bernard James, \textit{Empowering Educators}, NAT’L L. J., Aug. 5, 2002, at C7 (finding that, regardless of a wide variety of choice, the dissenter in \textit{Zelman} wanted the issue framed as "whether the government’s choice to pay for religious indoctrination is constitutionally permissible"); \textit{see also} Savage, supra note 12 (reporting the opinions of several opponents of school choice initiatives, including Justice Souter’s, who “called the ruling a ‘dramatic departure’ from the ‘core principle in the establishment clause’").


The upshot is the development of constitutional doctrine that reads the Establishment Clause as avoiding religious strife, \textit{not} by providing every religion with an \textit{equal opportunity} (say, to secure state funding or to pray in the public schools), but by drawing fairly clear lines of separation between church and state –at least where the heartland of religious belief, such as primary religious education, is at issue.

\textit{Id.} at 722-23.

20. Jodie Morse et al., \textit{A Victory for Vouchers: The Supreme Court Upholds School Choice}, \textit{TIME}, July 8, 2002, at 32 (indicating that legislatures in a dozen states will be either reintroducing old choice initiatives or drafting new ones in the wake of \textit{Zelman}).

21. Tony Mauro, \textit{Will Supreme Court Remove State Obstacles For School Vouchers?}, TEX. LAW., Aug. 5, 2002 (offering several cases as examples where the Court has “frowned on government actions that single out and disadvantage religious practices and institutions”); \textit{see also} JOSEPH E. BRYSON & SAMUEL H. HOUSTON, JR., \textit{THE SUPREME COURT AND PUBLIC FUNDS FOR RELIGIOUS SCHOOLS: THE BURGER YEARS}, 1969-1986 133 (1990) (attributiong the change in the Court’s direction in religious school funding cases to key decisions beginning in 1977).

22. 403 U.S. 602, 606-07, 625 (1971) (holding that state statutes that authorize salaries for instructors engaged in the teaching of secular subjects in religious schools violate the Establishment Clause).

23. 521 U.S. 203, 234-35 (1997) (holding that the provision of supplemental remedial instruction to students on the premises of parochial schools did not violate the Establishment Clause due to proper neutrality safeguards).

24. 530 U.S. 793, 801 (2000) (holding that the inclusion of parochial schools in a loan program of educational materials and equipment, including computer hardware and software, did not violate the Establishment Clause).
program's ability to pass the ever-evasive Lemon test, but on the program's purported "neutrality" towards religion. The Zelman majority opinion, authored by Chief Justice William Rehnquist, held that:

[W]here a government aid program is neutral with respect to religion, and provides assistance directly 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 not readily subject to challenge under the Establishment Clause.

Calling the Cleveland program one of "true private choice," the Court's decision signaled an end to the federal battle over state funding of religious education. This Comment considers the current state of government funding of religious education. It begins by examining the historical reluctance to entangle the state with religion in the form of financial support for religious institutions. This Comment argues that where Zelman appears

25. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). The Lemon test consists of three separate provisions: "[f]irst the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster an 'excessive government entanglement' with religion." Id. (quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970)); see Perry A. Zirkel et al., A DIGEST OF SUPREME COURT DECISIONS AFFECTING EDUCATION 33 (4th ed. 2001) (discussing further the three-part test and adding a fourth dimension of political divisiveness as a consideration proposed to the Court); see also supra note 19 and accompanying text.

26. Zelman, 536 U.S. at 652. Justice O'Connor, concurring in Board of Education of Kiryas Joel Village School District v. Grumet, stated, "as the Court's opinion today shows, the slide away from Lemon's unitary approach is well under way. A return to Lemon, even if possible, would likely be futile, regardless of where one stands on the substantive Establishment Clause questions." Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 721 (1994) (holding that establishment of a special school district to accommodate a religious enclave was a violation of the Establishment Clause).

27. Zelman, 536 U.S. at 652. The Court added:

A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.

Id.

28. Id. The Court stated, "Our focus again was on neutrality and the principle of private choice, not on the number of program beneficiaries attending religious schools." Id.

29. Mauro, supra note 21 (maintaining that although the Supreme Court found that vouchers may not violate the Constitution, a conflict might still arise between this holding and state constitutions' prohibitions on government funding of religious schools).
to have altered the dogmatic adherence to separation of church and state in the education sphere, the legacy lives on in the states through the Blaine amendments. The language of these amendments varies throughout the United States, but their primary function is to block state funding of religious education. While considered by contemporary separationists as merely historical context, the nineteenth century religious discrimination against Catholics and immigrants that created the Blaine Amendments cannot be set aside in order to justify modern-day marginalization of religious educators. This Comment considers various states' attempts to fund religious education despite the presence of this historical bigotry. This Comment also examines the impact of Zelman and its implications for future state funding programs. Next, a major issue left by Zelman is addressed: how to mount a successful challenge to a blanket prohibition on aid to religious education encased in a state constitution. This Comment proposes that a combination of the Free Exercise Clause, the Equal Protection rule reduced from Romer v. Evans, and the Establishment Clause ruling from Zelman could close a major loophole that allows states to continue discriminating against religious education. Finally, this Comment concludes that because these state provisions were conceived out of religious animosity, they should no longer prohibit legitimate school choice options in today's evolving educational landscape.

I. THE STATE BATTLEGROUNDS: THE REMAINING ROADBLOCK TO STATE FUNDING OF PRIVATE EDUCATION

A. The Blaine Amendments: A Historical Review of State-Sponsored Discrimination

Although many decry the Zelman decision as a deathblow to public education, most supporters and opponents of state funding of private education recognize that "the [w]ar is [f]ar from [o]ver" and that the battleground is in the states.30 Despite the line drawn by the Rehnquist Court in Zelman, state courts and legislatures continue to clash with

30. 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 (“The next phase of battle will take place in the states over laws that go further than the Constitution in limiting the way public funds may be spent on religious institutions.”).

31. See id. (quoting Ralph Neas, President of People for the American Way, a group that opposes voucher programs as stating, “[w]e'll go state to state, city to city, school district to school district fighting the effort to have vouchers in our nation’s schools.”). Neas’ legal opponent, Clint Bolick of the Institute for Justice, has focused his organization on those states “where it is absolutely clear that we could not promote school choice under the state constitution.” Id.
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those parties who seek public funds to support private education systems. This conflict represents one of the remaining issues after Zelman. The first category of issues involves the programs themselves and their: viability, desirability, need for uniformity, implementation, and public assessment in the private school setting. This category is not addressed in this Comment. The second issue involves provisions in thirty-seven states prohibiting state funds from going to private religious institutions—in this case—schools. This Comment focuses on this latter issue.

32. Eugene Volokh, Equal Treatment Is Not Establishment, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 341, 342-43 (1999) (Professor Volokh describes four key ways in which “tax money flow[s], through private choices made under neutral funding programs, to religious institutions:” (1) the GI Bill and Pell Grants; (2) recipients of government salaries or welfare contributing to religious charities; (3) general exemption of those contributions for all taxpayers; and (4) vouchers).

33. Whitton, supra note 3 (listing the following as issues of concern: first, whether private religious schools will “lower their admission standards and establish special education” programs in order to qualify for voucher programs; second, whether these schools will accept lower and varying tuition rates set by the state; and finally, whether private schools will submit to standardized testing).

34. Garnett, supra note 15 (discussing the qualifications of the Cleveland program). Though not addressed in this Comment, part of the answer to the monitoring question could be addressed by looking to the decision in Hartmann v. Stone, which held that a U.S. Army regulation prohibiting on-base family childcare providers from having any religious practices during day care was a violation of the First Amendment and not justified by the Army’s goal of prevention of excessive entanglement with religion. Hartmann v. Stone, 68 F.3d 973, 975, 986 (6th Cir. 1995). In Hartmann, the Court found that the Army served as a regulator, not an employer, and that the providers were private, independent contractors who set terms of care with the parents, including price and duration. See id. at 981. If applied in a religious school funding context, the Court’s decision in Hartmann could impact a challenge to governmental monitoring of religious schools as the Court found that the Army’s funding of the day care programs neither conferred benefits on religious groups nor qualified as government endorsement of religion. Id. at 981-83. Perhaps the ruling in Hartmann will focus the debate on the provision of education, rather than a fear of religious indoctrination.

35. For a discussion of these issues, see Richard Lee Colvin and Massie Ritsch, Next Barrier to Vouchers is Selling Idea to the Public Education: Court Offers Momentum, but It Has to Be Shown That the Concept is the Answer to the School Problem, L.A. TIMES, June 28, 2002 at A14. Like the Supreme Court, the focus in this Comment is on the first test, which involves the constitutionality of the program. As for the second test, “[t]he jury’s still out . . . on how well [the voucher] program raises the academic performance of our students.” Id. For further analysis of the viability and desirability of school voucher programs see JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999); and KIRKPATRICK, supra note 10.

36. Mauro, supra note 21. For example, Article I, Section 3 of the Florida constitution states, “No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.” FLA. CONST. art. I § 3.
As identified by analysts, the upcoming legal battles will focus on state programs and the interpretation of state constitutional provisions. In 1875, Congressman James G. Blaine of Maine led the charge to amend the U.S. Constitution to specifically prohibit state revenue from aiding any religious institution. Though the federal debate on this particular subject did not emerge until the latter part of the nineteenth century, the principles behind the legislation predate Blaine.

Growing Catholic and immigrant populations encouraged nativist sentiments that were already running rampant. As far back as the 1780s, Thomas Jefferson and Alexander Hamilton expressed unease with the booming immigrant population who brought with them different cultures, languages, and most notably, politics. These principles

37. See, e.g., Mauro, supra note 21 (framing the conflict between voucher supporters and opponents around each side’s use of the Blaine amendments to bolster their positions).

38. Viteritti, supra note 35, at 151-54. Though the Blaine Amendment came and went on the federal scene with the proposal and failure to amend the Constitution by Congress, the Amendment’s spirit lived on in the states that chose to adopt similar language in their own constitutions.

39. Lloyd P. Jorgenson, The State and the Non-Public School: 1825-1925 (1987) (discussing Blaine’s introduction and aftermath of the amendment in the House of Representatives in December of 1875); see also Lebowitz Rossi, supra note 8. The proposed amendment read:
   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, 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.


41. See Jorgenson, supra note 39, at 28 (defining nativism as connoting an anti-foreign (read: anti-American) spirit). The author points out, “anti-Catholicism is by far the oldest and strongest form of nativism. . . . Anti-Catholicism has been an element of Western culture since Martin Luther. . . . It was deeply ingrained in Elizabethan England. . . .” Id.

42. Charles Leslie Glenn, Jr., The Myth of the Common School 66-67 (1988) (quoting Jefferson’s “Notes on the State of Virginia”). Jefferson asserted that immigrants rejecting the principles of the governments they left behind would either take up “unbridled licentiousness” or, if unable to cast off the taint of their upbringing, would
remained a concern in the nineteenth century; however, the focus of the suspicion became the immigrants’ religion, particularly Catholicism.\textsuperscript{43} Moreover, the anti-Catholic sentiment of the time was considered “respectable . . . across the Protestant spectrum.”\textsuperscript{44} The root of this bias stemmed from the Americans’ inability to reconcile the newly established concepts of liberty and independence with the “authoritarian organization of the Catholic Church.”\textsuperscript{45}

Whereas Protestantism was thought to have “giv[en] birth to republicanism in government,” Catholicism was reminiscent of tyrannous European monarchies and allegedly had “no understanding or appreciation of civil liberties.”\textsuperscript{46} A publication from the time, \textit{Imminent Dangers to the Free Institutions of the United States through Foreign Immigration and the Present State of Naturalization Laws}, echoed the anti-Catholic, anti-immigrant sentiment, and asserted that “emigrants are selected for a service to their tyrants; not for their affinity to liberty, but for their mental servitude, and their docility in obeying the orders of their priests.”\textsuperscript{47} In light of these cultural biases, any reluctance by
Catholics to assimilate into the American Protestant culture “promoted the suspicion [among Protestants] that [Catholics] were indeed subject politically to a foreign power and therefore could not be trusted to become ‘good citizens.’” Education became the major point of contention between these groups because it was seen as the key to the American dream.

At the end of the eighteenth century, it was common to use public funds to support religious education. However, the majority of the funding recipients represented the largely Protestant make-up of the nation. Not surprisingly, schools forming the new “common school,” or

been all their lives sunk, until their minds are dead, mak[ing] them but senseless machines; they obey orders mechanically, for it is the habit of their education, in the despotic countries of their birth.”

Id. (quoting Imminent Dangers to the Free Institutions through Foreign Immigration and the Present State of Naturalization Laws).

48. BRYSON & HOUSTON, supra note 21, at 3-4 (attributing the ensuing education battles between Protestants and Catholics to this imperfect assimilation in society).

49. See GLENN, supra note 42, at 69 (“The newcomers had not been educated for participation in a republican form of government and would be fit tools for the conspiracy to overthrow American freedoms.”); VITERITTI, supra note 35, at 147 (discussing the initiation of a common school for all American children, including immigrants, to attend). Education was seen as “the great social leveler.”

Id. For the immigrants not educated or aware of the American way, the common school was a means to gain that understanding. The gathering of Catholics in ghettos, paired with increasing influx during events such as the Irish Potato Famine, demonstrated a seemingly self-created exclusion from the mainstream, which was considered a threat to the new American society. Id. But see GLENN, supra note 42, at 204 (refuting the assertion that immigrants, including Catholics, resisted assimilation). Glenn argues that “virtually every immigrant group was in fact eager to fit into American life and to assure that its children would not suffer under the stigma of being a foreign element. In some respects . . . parochial schools rivaled the public schools in their commitment to ‘Americanization.’”

Id. Though maintaining group solidarity, Catholic immigrants in particular “were eager to embrace virtually everything about contemporary American life.” Id. Cf. BRYSON, supra note 21, at 2 (“The view of education proposed by some American immigrants was not compatible with the ‘American dream.’ The new Catholic immigrants hoped to maintain cultural and religious continuity “through education.”)

50. Viteritti, supra note 40, at 662-64 (explaining that the Bill of Rights did not seem to preclude state funding of religion as, at the time, “disestablishment was not synonymous with separation”). After the war for independence, localities still levied taxes in support of their own minister; in fact, “[t]he first public-education finance law financed public education with pervasive religious influence – a Protestant public school.”

BRYSON & HOUSTON, supra note 21, at 132. Early American public education consisted of publicly funded religious schools with a pervasively religious purpose. See id. Moreover, public financial assistance was made available to private groups and religious organizations for nonpublic education. See id. In this period, the focus was on financially facilitating education, not on qualifying the aid based on the identities and beliefs of the educators. See id.

51. JORGENSEN, supra note 39, at 25 (illustrating that the combination of different sects, including Baptists, Congregationalists, Lutherans, and Presbyterians made Protestantism the predominant religion in America in the 1850s). No one denomination,
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public school system, included in their daily routine the teaching of mainstream Protestantism through reading the King James version of the Bible, reciting prayers, and singing hymns. In some cases, Bible reading was intentionally aimed at the children of immigrants. The public school system quickly developed a reputation as a Protestant institution and as “the first line of defense against Catholicism.” When leaders of the Catholic Church began demanding funds for their own public schools, several school boards decided instead to prohibit “Bible readings and religious exercises” in the public schools. Upset with this growing “Catholic menace,” an alliance formed between Protestant educators and nativist politicians to preserve their Protestant-based curricula.

After a failed campaign to remove the Protestant Bible and prayers from the public schools, Catholic parishes began creating their own

however, stood as large as the Roman Catholics. Though only the tenth largest religious body at the end of the American Revolution, by 1850 the Catholic Church maintained the highest membership of all religious sects.

52. Viteretti, supra note 40, at 666-68 (recognizing that Jews and some Protestants, in addition to Catholics, disapproved of the inclusion of the King James Bible in these schools’ curricula); see also Zelman v. Simmons Harris, 536 U.S. 639, 721 (2002) (Breyer, J., dissenting) (discussing the divergence of school systems as Catholics sought their own funding). Justice Breyer explained:

[T]he ‘Protestant position’ on this matter . . . was that public schools must be ‘nonsectarian’ (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support ‘sectarian schools’ (which in practical terms meant Catholic). And this sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully) and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for ‘sectarian’ (i.e., Catholic) schooling for children.

Id.

53. See Glenn, supra note 42, at 203 (citing laws adopted in Massachusetts in the 1850s under the leadership of the nativist “Know-Nothing” majority, which included daily reading of scripture, invocation of the Lord’s Prayer, and weekly recitation of the Ten Commandments, all intended to expose immigrant children “to the full program of Protestant moral teaching”).

54. Jorgenson, supra note 39, at 107 (asserting that the common school movement initially had reluctant support from the older Protestant groups, but this quickly changed when the Catholic position on the state of public schools came to the forefront); see also Bryson & Houston, supra note 21, at 3 (“American Catholics were expected to send their children to public school where the young could be properly indoctrinated with an established process for living in a democratic society.”). Note the positive presentation of indoctrination in this context, where modern day “religious/social indoctrination” is portrayed as an avoidable evil.

55. Viteriti, supra note 40 at 669-70 (contending that the alliance was predicated on the “launch[ing] of a two-pronged campaign to preserve Bible study in public school curricula and to deny government support to sectarian institutions”).

56. See id. at 670.
private school systems as a means of self-preservation. Reaction from the Protestant sector was not favorable, as illustrated by the following excerpt from the Baptist weekly, Watchman:

If the children of Papists are really in danger of being corrupted in the Protestant schools of enlightened, free and happy America, it may be well for their conscientious parents and still more conscientious priests, to return them to the privileges of their ancestral homes, among the half-tamed boors of Germany...

By the time the conflict hit national proportions, the majority of private schools were Catholic. Responding to political pressure, President Ulysses S. Grant vowed to propose a constitutional amendment to prevent the appropriation of public funds for any religious school. James G. Blaine, U.S. Congressman and presidential hopeful,

57. JORGENSEN, supra note 39, at 109. Even those in agreement with Catholic opposition to Protestant-only religious instruction were held out as “following the bad examples of Catholics in establishing separate schools.” See id; see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 739 n.3 (1994) (Scalia, J., dissenting) (remarking on the development of public education in New York City when “[t]he Whigs swept the city elections that year [1842] and made Bible reading—the King James version—mandatory in any schools sharing [state] monies. There was nothing left for the Catholics to do but to build their own parochial system with their own money.”); Zelman v. Simmons-Harris, 536 U.S. 639, 720-21 (2002) (Breyer, J. dissenting) (discussing the deepening chasm between Protestants and Catholics). Breyer stated:

Catholics resisted and Protestants fought back to preserve their domination. ‘Dreading Catholic domination,’ native Protestants ‘terrorized Catholics.’ In some States ‘Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds . . . rioted over whether Catholic children could be released from the classroom during Bible reading.

(citations omitted). Id. See generally BRYSON & HOUSTON, supra note 21, at 1-4 (discussing the evolution of the public school from the end of the eighteenth century into the mid-nineteenth century).

58. JORGENSEN, supra note 39, at 107-08 (citing assorted other publications with similar quotes, such as the Christian Advocate’s series of articles titled “The Common Schools, the Antidote of Jesuitism” and a pronouncement by the Baptist Examiner that “[t]he Pope hates our free schools”).

59. Toby J. Heytens, Note, School Choice and State Constitutions, 86 VA. L. REV. 117, 138 (2000) (indicating that “[v]irtually all private schools were affiliated with the Catholic church when the Blaine Amendments were proposed and enacted” and “as late as 1959, over 90% of private primary and secondary schools were Catholic affiliated”); see also Dwyer, supra note 17, at 15. Department of Education statistics from 1996 indicate that one tenth of the fifty-two million school-aged children in the United States attended religious schools. Id. Half of this one-tenth, about 2.6 million children, attended Catholic schools. Id.

60. VITERITTI, supra note 35, at 152 (making a “highly publicized speech” in 1875, President Grant promised to “encourage free schools, and resolve that not one dollar be apportioned to support any sectarian schools”). Viteritti explains that this position taken by Grant “plant[ed] the national Republican party firmly in the camp of the anti-Catholic
was eager to apply his sponsorship to Grant’s amendment. Blaine, a savvy politician, recognized the political climate was highly receptive to the prevailing nativist and anti-Catholic rhetoric that spurred Grant’s agenda. Many sources, including proponents of the legislation, recognized the legislative efforts of the time as waging “a general war against the Catholic Church.”

The Blaine Amendment that passed in the House was considered an innocuous version. In the Senate, the proposal underwent heated debate in the hands of the Republican majority. By the debate’s end, the vote was on a much more detailed and controversial version. The wing of the public school lobby, delineating the contours of a bitter partisan struggle that was to follow.”

61. VITERITI, supra note 35, at 152.
62. Id. (casting Blaine as a political opportunist, who referred to his proposed amendment as correcting a “constitutional defect”). His maneuvering did not go unnoticed or without criticism, as both sides of the media commented negatively. See id. For example, Catholic World “issued a condemnation of politicians who hope to ride into power by awakening the spirit of fanaticism and religious bigotry among us.” Id. Cf. LEE, supra note 59, at 53 (noting that Blaine hoped the Amendment would help the Republican party recover its national prominence after its 1874 midterm election loss of the majority in the House of Representatives).
63. Viteritti, supra note 40, at 672-73 (pointing out that no federal court ruling existed at the time of the Blaine Amendment prohibited direct or indirect aid to religious institutions). Cf. Heytens, supra note 59, at 138 (“The conclusion is inescapable: When politicians spoke of private or sectarian schools during the debate over Blaine Amendments, they meant Catholic schools.”).
64. JORGENSEN, supra note 39, at 139 (“The members of the Judiciary Committee of the Republican-controlled Senate had little patience with the sham House version . . . .”); see also LEE, supra note 60, at 53 (attributing a significant part of the apathy toward the House proposal to the debate’s focus “on the issue of congressional power in the area of education”). Id. Perhaps another significant factor was the absence of the author himself, as “Blaine never spoke on the floor of Congress to the merits of his proposed amendment.” Id.
65. LEE, supra note 60, at 53-54 (remarking on the Senate’s substantial alteration of Blaine’s original proposal through numerous amendments); see also Heytens, supra note 59, at 132 (pointing out the frequency of references to the “Catholic controversy” during the debates on the amendment with the word “Catholic” spoken fifty-nine times that day). The Pope was referenced almost half as much, as was a papal encyclical on religious education. Id.
66. JORGENSEN, supra note 39, at 139 (stating that a stipulation was added that the Amendment could not be used to exclude the Bible from public schools). The Amendment extended the prohibition on aid to religious schools to all forms, not merely school money, and added an enforcement clause. Id.
Amendment did not achieve the two-thirds majority necessary to pass the Senate, yet it "commanded a sufficient congressional majority to affect policy in other ways." 61 Many state constitutions were changed to adopt the language of the amendment. 62 More significantly, new states west of the Mississippi were "required to incorporate Blaine-like provisions into their new constitutions in order to receive congressional approval." 63

Currently, Blaine Amendments are still law in thirty-seven states, albeit in different versions. 70 Some provisions establish strict guidelines of separation aimed at preventing direct or indirect aid to religious institutions. 71 Other states with Blaine amendments have upheld school choice variants, notwithstanding constitutional prohibitions that prevent the allocation of funds to religious institutions. 72 The next section examines a sampling of these initiatives, providing a glimpse of what has worked—and failed—on the forefront of educational reform.

B. Pre-Zelman Legal Campaigns: How States and Courts Have Addressed Constitutional Provisions Prohibiting Funding for Private Education

In their current composition, the state Blaine amendments bar efforts to provide state aid to religious education, regardless of the

67. VITERITTI, supra note 35, at 153 (citing the Republican's use of the popular amendment to influence Southern education policy and to use federal aid "as a wedge for manipulating policy in the states"). Though manipulative, these tactics were not forced on all recipients, as nationally many states reflected "the spirit of Blaine" in their own deliberations, and looked to the federal government for guidance as well as for funds. Id. at 153-54.

68. Salai, supra note 16 (characterizing the states' adoption of the Blaine amendments as arising from "a thrust by America's Protestant public school establishment to prevent public funds from falling into the hands of private Catholic schools").

69. Viteritti, supra note 40, at 672-73 (finding this type of language in enabling legislation for the Dakotas and for admission of states such as Montana, Washington, and New Mexico).

70. Mauro, supra note 21 (conceding that the amendments "differ slightly in wording and vintage" but acknowledging that the failed [federal] Blaine Amendment served as a "template for the state provisions").

71. Viteritti, supra note 40, at 659 (commenting that stricter provisions, aimed particularly at deflecting aid from Catholic schools are larger barriers to school choice than First Amendment assertions).

presence of a legislative mandate. Though voucher and other aid programs are not new, focusing on the contemporary cases allows for a targeted analysis of the legal and political climate of this issue. The nation's first full-scale state voucher initiative came in Wisconsin in 1990. Governor Tommy Thompson approved legislation that gave, through state funding, low-income Milwaukee parents the opportunity to send their children to a private, nonreligious school of their choice. The initial success of the program led to its 1995 expansion, which incorporated religious schools. Soon after their inclusion, challengers succeeded in temporarily blocking the program's implementation.

In *Jackson v. Benson*, the Wisconsin Supreme Court upheld the addition of religious schools to the voucher program. The court adhered to precedent by applying the *Lemon* test, which requires a statute to have a secular legislative purpose, a primary effect that neither advances nor inhibits religion, and avoids excessive government

73. Mary Leonard, *Private School Aid Efforts Will Face State Challenges: Legal Barriers Likely to Impede Use of Funds*, BOSTON GLOBE, June 28, 2002, at A29. Analysts are conservative regarding the expansion of voucher programs. *See id.* They are looking to state legislatures, which, until the *Zelman* decision, were reticent to propose school choice initiatives. *See id.* Leonard attributes the reluctance to a “lack of political will to take on teachers unions and civil rights groups that oppose vouchers . . . .” *See id.* State constitutional provisions, in the form of Blaine amendments, are seen as possible impediments to the growth of voucher programs. *Id.*

74. VITERITTI, supra note 35, at 223 (stating that “the resolution to the problem defies political logic because it requires governmental bodies to do what they are rarely inclined to do”). Viteritti classifies school choice as a “moral question” requiring “nothing less than a redefinition of public education in America.” *Id.*

75. NINA SHOKRAII REES, *SCHOOL CHOICE 2000: WHAT'S HAPPENING IN THE STATES* 182 (2002); *see also* Jackson v. Benson, 578 N.W.2d 602, 607 (Wis. 1998) (explaining how the first amendment (in 1993) to the original program opened participation up to 1.5 percent of “the student membership of the Milwaukee public schools to attend at no cost to the student any private nonsectarian school located in the City of Milwaukee, subject to certain eligibility requirements”).

76. SHOKRAII REES, supra note 75, at 182. A previous legal challenge attacking the program’s disruption of a uniform school district was sustained. Viteritti, *supra* note 40, at 686 (explaining that of several amendments to the Milwaukee program in 1995, the addition of religious schools served as the “primary basis for the . . . legal challenge”).

77. SHOKRAII REES, supra note 75, at 183 (noting that organizations such as the American Civil Liberties Union, the Nation Education Association, and the National Association for the Advancement of Colored People spearheaded a successful effort to block the program).

78. *Jackson*, 578 N.W.2d at 607.
entanglement with religion.\textsuperscript{79} It found that the amended school choice program did not violate the Establishment Clause.\textsuperscript{80}

The Wisconsin Supreme Court's analysis focused on the "general principle" of neutrality.\textsuperscript{81} The court found that state funding programs do not primarily advance religion when public aid is provided "on the basis of neutral, secular criteria that neither favor[s] nor disfavor[s] religion" and manifests from numerous private choices.\textsuperscript{82} No excessive entanglement occurred in the Wisconsin program because enforcement of minimal performance standards within the private schools would be the same for secular and religious schools and, in the words of the court, "this oversight already exists."\textsuperscript{83}

\begin{itemize}
\item \textsuperscript{79} Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (implying that the major problem to avoid is excessive church-state entanglement).
\item \textsuperscript{80} Jackson, 578 N.W.2d at 611 ("[B]ecause it has a secular purpose, it will not have the primary effect of advancing religion, and it will not lead to excessive entanglement between the State and participating sectarian private schools."). The Wisconsin Supreme Court elaborated further:
\begin{quote}
A State's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well educated.
\end{quote}
\textsuperscript{81} Id. at 612 (quoting Mueller v. Allen, 463 U.S. 388, 395 (1983)).
\item \textsuperscript{82} Id. at 613 (discussing a line of cases with an "underlying theory based on neutrality and indirection": "state programs that are wholly neutral in offering educational assistance directly to citizens in a class defined without reference to religion do not have the primary effect of advancing religion").
\item \textsuperscript{83} See id. at 617 (referring to the eligibility requirements such as residency, income, random selection and an "opt out" provision as the evidence of neutral, secular criteria). Therefore, because of the choices made available in the Milwaukee program, which placed public and private schools on an even playing field of choice, the Wisconsin voucher program survived the second hurdle. See id. at 619. The options available vest "power in the hands of parents to choose where to direct the funds allocated for their children's benefit." Id. Thus, the primary effect of these options would not be state advancement of religion. See id. The court went on to reject petitioner's argument that because a large portion of the funds went to religious schools, the state was advancing religion. Id. It warned against focusing on the money rather than the benefit received and pronounced, "the percent of program funds eventually paid to sectarian private schools is irrelevant to our inquiry." Id. at 619 n.17.
\item \textsuperscript{84} Id. at 619-20. The court reasoned, "[I]n the course of his existing duties, the Superintendent currently monitors the quality of education at all sectarian private schools." Id. Furthermore, "routine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no detailed monitoring and close administrative contact between secular and religious bodies, does not of itself violate the nonentanglement command." Id. (quoting Hernandez v. Comm'r, 490 U.S. 696-97 (1989)).
\end{itemize}
Finally, the Wisconsin court evaluated the state constitution. Though the Wisconsin constitution contained more specific language than its federal counterpart, the court opined nonetheless that both the federal and state clauses carry the same import and are intended to operate to serve the same purpose: to prohibit the "establishment" of religion and protect the "free exercise" of religion. The court found that due to the neutrality and indirectness of the aid, there was no violation of the Benefits Clause. The court reasoned that no student was required to attend any religious school or participate in religious activities; thus, both the selection of and participation in religious schools remained a private choice. The next year, Maine’s and Vermont’s tuition voucher programs were challenged because state monies provided a direct benefit.

84. Id. at 620 n.21 (rejecting respondents’ argument that the court should be precluded from examining the Wisconsin provision under federal precedent). The court recognized that not all questions arising under state constitutions can be “fully illuminated by the light of federal jurisprudence alone,” yet asserted that the tradition of deferring to federal Establishment Clause guidelines would continue in this case. See id. (quoting Wisconsin v. Miller, 549 N.W.2d 235 (1996)). The respondents argued that the program violated both the “benefits” and the “compelled support” clauses of the Wisconsin constitution. Id.; see also Wis. Const. art. I, § 18. The pertinent section of the Wisconsin constitution states:

The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

Id. The court cites the above section of the Wisconsin constitution as “Wisconsin’s equivalent of the Establishment Clause of the First Amendment.” Jackson, 578 N.W.2d at 620. Though more specific than the federal equivalent, the court—by applying both federal and state precedent—found that no constitutional violation had taken place. Id.

85. Jackson, 578 N.W.2d at 620. The court stated:

A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he . . . is a member of our society. The fireman protects the Church school . . . because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid ‘Is this man or building identified with the Catholic Church.’

Id. at 618 (citing Everson v. Bd. of Ed., 330 U.S. 1 (1947)). The court made an analogy to the voucher program, arguing that the students qualified for benefits “not because he or she is a Catholic, a Jew, a Moslem, or an atheist; it is because he or she is from a poor family and is a student in the embattled Milwaukee Public Schools.” Id.

86. Id. at 621 (asserting that the indirect nature of the aid is the direct payment to the parent rather than to the schools).

87. Id. at 623. Because the parents had the autonomy to make this choice, no state compulsion existed. Id. Dissatisfied opponents of the program appealed to the U.S. Supreme Court, which denied certiorari. See SHOKRAI REES, supra note 75, at 183.
and directly aided both the religious and educational functions of the schools. 88

In both Vermont and Maine, school districts that chose not to maintain their own public high schools paid tuition for resident pupils to attend other public or approved independent high schools. 89 Originally, Maine’s program was open to private religious schools, but in 1981 the legislature elected to exclude them. 90 Subsequently, parents who sent their sons to a private Roman Catholic high school brought suit challenging the constitutionality of the part of the state tuition program that explicitly excluded religious schools from the receipt of funds. 91

In Bagley v. Raymond School Department, 92 the Maine Supreme Court conducted a legal analysis similar to that of the Wisconsin court. 93 In contrast to other programs, Maine’s program forwarded tuition payments directly to the schools, rather than to individual parents; thus, the specter of “direct aid” to religion presented an insurmountable

88. See, e.g., Bagley v. Raymond Sch. Dep’t, 728 A.2d 127, 142-44 (Me. 1999) (discussing the legal status of school aid programs in other states, including Ohio, Vermont, Wisconsin, and Arizona); Chittenden Town Sch. Dist. v. Dep’t of Educ., 738 A.2d 539 (Vt. 1999).

89. Bagley, 728 A.2d at 131 (stating that the majority of the high school students in the Raymond School District selected public schools, though some chose to attend approved private schools); Chittenden, 738 A.2d at 542 (stating that in the 1995-1996 school year, most students attended public schools, while only three attended private high schools). Maine’s tuition program cost approximately $70 million in public funds and sent almost 14,000 Maine students to public or approved private schools. Bagley, 728 A.2d at 130. For the 1996-1997 school year, Vermont allocated $39,000 for tuition costs at the Catholic high school selected by fifteen students residing in the Chittenden School District. Chittenden, 738 A.2d at 543.

90. Bagley, 728 A.2d at 131 (citing the basis for the exclusion as an opinion of the Maine Attorney General, solicited by the Senate Chair of the Legislature’s Committee on Education, which concluded that the inclusion of religious schools in the program violated the Establishment Clause of the United States Constitution). The tuition statute, as amended, “provide[d] that ‘[a] private secondary school may be approved for the receipt of public funds for tuition purposes only if . . . [i]t is a nonsectarian school in accordance with the First Amendment of the United States Constitution.’” Id. (quoting ME. REV. ST. ANN. tit. 20-A, § 2951(2)).

91. Bagley, 728 A.2d at 131. Chevrus High School, the all-male private Roman Catholic college preparatory school to which petitioners sent their sons, was labeled by the Maine Supreme Court as “pervasively sectarian.” Id. The court’s opinion examined the families’ constitutional claims based on the Free Exercise, Establishment, and Equal Protection Clauses. Id. at 132. The court also noted that the Maine constitution did not create greater protections than the federal Constitution; therefore, when undertaking the analysis of the claims at bar, the two documents were considered coextensive. Id.

92. 728 A.2d 127 (Me. 1999).

93. See id. at 132 (determining whether the exclusion of religious schools was unconstitutional, rather than whether the program’s inclusion of religious schools violated the Establishment Clause).
The court stated: "There were no safeguards within Maine's system to ensure that state funding was only used for secular purposes. The amount of tuition was intended to cover the average per-student cost, which could include expenses for religious classes, religious studies, and religious events." Unlike the Wisconsin program, which prohibited compelled participation in religious activities, Maine's program did not avoid the advancement of religion.

The Vermont tuition reimbursement program failed for similar reasons. Though limiting its program to nonreligious schools, the school district voted in 1996 to approve payments to Mount Saint Joseph Academy, a Catholic high school. In response, the State Commissioner of Education terminated aid going to the school district. In Chittenden Town School District v. Department of Education, the Supreme Court of Vermont relied on a strict interpretation of the state constitution to invalidate the inclusion of religious schools in its tuition reimbursement program. As in Bagley, the Chittenden court found that a major barrier. The court stated: "There were no safeguards within Maine's system to ensure that state funding was only used for secular purposes. The amount of tuition was intended to cover the average per-student cost, which could include expenses for religious classes, religious studies, and religious events." Unlike the Wisconsin program, which prohibited compelled participation in religious activities, Maine's program did not avoid the advancement of religion.

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94. Id. at 143-45 (stating that the "[c]hoice alone cannot overcome the fact that the tuition program would directly pay religious schools for programs that include and advance religion.").

95. Id. at 140. The court also cited controlling United States Supreme Court precedent, stating that "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear . . . [that] direct aid in whatever form is invalid." Id. at 139 (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973)).

96. Id. at 144 ("We conclude that the tuition program, without the religious school exclusion, would indeed have the 'effect' of advancing religion.").


98. Id. at 543 (explaining that the inclusion of Mount Saint Joseph Academy was part of a general 1995 policy that the Chittenden School Board adopted, allowing tuition to be paid to religious schools).

99. Id. (arguing that authorization of payments to religious schools violated state and federal Establishment Clauses and thus their exclusion from the program was constitutional).

100. Id. at 544.

101. See id. at 549 ("The First Amendment prohibits any 'law respecting an establishment of religion.' [Vermont's] Article 3 prohibits coerced support for 'any place of worship.' We are not dealing with 'slightly variant phraseology' that can be easily reconciled."). (quotations and citations omitted). Article 3 of the Vermont constitution states:

That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience, nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments or peculiar mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power
deficiency in the program was "the lack of restrictions to prevent the use of public money to fund religious education." The court predicted that schools receiving tuition from district funds would use them to pay the costs of religious education. Therefore, the repayment scheme offended the Vermont constitution. Moreover, the court remarked, "[i]f choice is involved in the Article III equation, it is the choice of those who are being required to support religious education, not the choice of the beneficiaries of the funding."

Despite setbacks to state funding programs in Maine and Vermont, the supreme court of Arizona, in Kottermann v. Killian, upheld a state statute authorizing tax credits of up to $500 for donations to school tuition organizations. Taxpayers claimed the credit violated both the federal and Arizona constitutions. The Arizona Supreme Court began its Establishment Clause analysis with the premise that federal precedent "reflect[ed] an effort to steer a course of 'constitutional neutrality,' whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship.

VT. CONST. ch. 1, art. 3.

102. Chittenden, 738 A.2d at 562. An “opt-out” provision, which allowed children to choose not to participate in religious activities, may have strengthened the program. See id.

103. See id. at 562-63 (arguing that the lack of restrictions on the use of funding could create an issue of government endorsement of the tuition-funded religious activities).

104. Id. at 562. Despite specification in the Vermont constitution that education be "encouraged and protected," the court found the limitations of Article 3 did not extend to public financing of religious education." Id.

105. Id. at 563 (recognizing that whereas the Supreme Court contemplated that parental choice may eliminate the First Amendment issues, the Vermont court was unwilling to reach a similar conclusion in light of its own constitutional provision); see also School Vouchers Review: Hearing Before the Subcomm. on the Constitution of the House Comm. On the Judiciary, 107th Congress (2002) (statement of Reverend Timothy McDonald, III, Pastor, First Iconium Baptist Church, Board Member, People For the American Way) ("Vouchers could never provide true school choice to parents. Private schools were established to be selective in their admission of students, thus giving choice to the private school and not the parent.").

106. 972 P.2d 606, 611 (Ariz. 1999) (indicating that "[t]he encouragement of private schools, in itself, is not unconstitutional"). The Supreme Court of Arizona asserted that the addition of private schools would not only help achieve a state's educational goals but "frequently serve to stimulate public schools by relieving tax burdens and producing healthy competition." Id.

107. Id. at 609, 621 (discussing the constitutionality of the state tax statute donations to school tuition organizations (STOs) including: the credit served in lieu of any state tax deduction; the joint filing of married couples; and a credit disallowance if the taxpayer designated the donation for the direct benefit of his/her dependent).

108. Id. at 610.
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aimed ‘between the avoidance of religious establishment on the one hand, and noninterference with religious exercise on the other.’”

The court found that the tax credit allowed all taxpayers to give funds voluntarily in support of a multi-dimensional education system for the state, with benefits flowing in several directions. Though noting that direct subsidies to religious schools may violate the Constitution, the court stated, “the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution.” Aside from ensuring compliance with 501(c)(3) tax-

109. Id. (citations omitted) (quoting Walz v. Tax Comm’n, 397 U.S. 664, 667 (1970)). The court further stated, “[t]his emphasis on neutrality is apparent in a recent line of Supreme Court cases upholding a variety of educational assistance programs . . . . Other courts in recent years have also found state educational aid programs to be in compliance with the First Amendment.” Id. at 610-11 (citations omitted). See supra discussion on the Wisconsin program in Part I.B.

110. Kotterman, 972 P.2d at 616 (noting that where the state provides for free public education, parents who send their children to private schools are in greater need of financial assistance). Additionally, the court compared this credit with Minnesota’s tax deduction program, which allowed a deduction for all parents incurring educational expenses. See id. at 612-14. See also Mueller v. Allen, 463 U.S. 388, 391, 400-02 (1983) (holding that state income tax deductions for tuition, textbook, and transportation expenses incurred in educating elementary and secondary school children did not violate the Establishment Clause, despite inclusion of religious institutions). The Mueller Court emphasized the extension of tax deductions to a broad class of recipients, not just parents of private school children. Id. at 397. The Minnesota funds were available as a result of numerous private choices of individual parents. Id. Citing this distinction, the Arizona court stated, “[u]s with the program in Mueller . . . not one cent flows from the State to a sectarian private school . . . except as a result of the necessary and intervening choices of individual parents.” Kotterman, 972 P.2d at 614. Though noting a “mechanical difference” between credits and deductions, the Supreme Court of Arizona did not find the distinctions constitutionally significant, as both reduced state revenue and were intended to serve policy goals and to induce socially beneficial taxpayer behavior. Id. at 612. The court, in affirming Arizona’s tax credit program, merely substituted “credit” for “deduction,” and through the same analysis, found the credit constitutional. See id. at 613-14.

111. Kotterman, 972 P.2d at 616 (quoting Witters v. Wash. Dep’t of Servs. for the Blind, 474 U.S. 481, 486 (1986)). The court added, “[p]rivate and sectarian schools are at best only incidental beneficiaries of this tax credit, a neutral result that we believe is attenuated enough to satisfy . . . the most recent Establishment Clause decisions.” Id. Additionally, as the state was not involved in the distribution of funds or in the monitoring of applications to the school tuition organizations, there was no entanglement. See id. at 616. For this very reason, some school choice advocates have promoted tax credits as “a superior option that is not only better policy but is more politically viable as well.” Lawrence W. Reed, A New Direction For Education Reform, Mackinac Center For Public Policy, July 2, 2001, at http://mackinac.org/article.asp?ID=3541 (last visited Aug. 20, 2003). According to author and education researcher Andrew Coulson, the advantage of tax credits over voucher programs “is that they restore to the family the direct financial responsibility for educating their children . . . . Since all the money involved in these [tax credit] programs is privately and voluntarily spent, issues of church-state entanglement and necessary public oversight of public spending are rendered moot.” Id. Additionally,
exemption requirements, the state merely offered taxpayers another opportunity to fund education alternatives. Because the tax credit did not solely benefit religious schools, the court noted that the primary effect of the tax credit was not the advancement of religion; therefore it satisfied the third element of the Lemon test.

The tax credit/deduction issue was not new, but the dicta rejecting the dissent’s reliance on the Blaine Amendment was a scorching pronouncement of the court’s opinion of the amendment’s authority.

The court stated, “the Blaine Amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing ‘Catholic menace.’ Its supporters were neither shy nor secretive about their motives.” The court found no historical proof that directly linked the amendment to Arizona’s constitutional convention, but it stated, “In any event, we would be hard pressed to divorce the amendment’s language from the insidious discriminatory intent that prompted it.”

Coulson finds that tax credits “more effectively promote and protect the conditions that have historically produced educational excellence: parental choice, direct parental financial responsibility, freedom for educators, competition among schools, financial incentive for educators, and universal access to the education marketplace.”

112. Kotterman, 972 P.2d at 616 (classifying the state’s role in the program as “entirely passive”).

113. Id. at 615-16 (rejecting petitioners’ argument that the “‘pervasively sectarian’ composition of private schools” in Arizona “presumes an inevitable constitutional breach”). The court stated, “[n]o one yet knows how many taxpayers will take the credit, what dollar amounts will be generated, or how many students will receive tuition scholarships.” Id. at 615. Consequently, the court refused to hinge the evaluation of the program on “such ephemeral numbers.” Id. See also discussion of the Lemon test, supra notes 25-27 and accompanying text.

114. Kotterman, 972 P.2d at 624 (describing the spread of the state Blaine amendments and stating that “such efforts were unsuccessful at the federal level, [but] the jingoist banner persisted in some states”).

115. Id. (citations omitted) (quoting a national publication which stated, “Mr. Blaine did, indeed bring forward . . . a Constitutional amendment . . . and all that [he] means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes”). See also Jorgenson, supra note 39, at 138 (pointing out that other Republicans who possessed a substantially different basis for the federal amendment asserted that “Catholic opposition was a minor element,” but that “states’ rights was [sic] a more important factor”). Blaine’s popularity has been credited with the Amendment’s passage in the House of Representatives; nevertheless, this popularity did not translate into success in the Senate. See id. at 139. The amendment failed in the Senate, and though he was a likely successor to President Grant, Blaine did not receive his party’s nomination. Olasky, supra note 60.

116. Kotterman, 972 P.2d at 624. The court also pointed out that parts of the Arizona constitution were borrowed from the Washington constitution stating, “On several occasions we have acknowledged similarities between provisions of the Washington constitution and our own . . . [and] while Washington’s judicial decisions may prove useful, they certainly do not control Arizona law.” Id. This reference proves significant in the
C. Zelman v. Simmons-Harris: How the Supreme Court Eliminated the Federal Question

The preceding cases illustrate the propensity for some state courts, with the right balance of neutral program criteria and open-minded interpretation of state constitutions, to uphold state funding opportunities for religious institutions.\textsuperscript{117} Zelman v. Simmons-Harris,\textsuperscript{118} on the federal level, cemented the principles previously addressed by the Washington, Arizona, Vermont, Maine, and Wisconsin courts.\textsuperscript{119} In upholding the Cleveland voucher program, the Court asserted that in order to pass constitutional muster, a program must be “entirely neutral with respect to religion.”\textsuperscript{120} Addressing the charge that the program violated the Establishment Clause, the Supreme Court focused on the program’s provisions and ultimately found them to fit within recent precedent.\textsuperscript{121}

The Court rejected the respondents’ argument that vouchers created a state-sponsored financial incentive to skew the program toward religious schools.\textsuperscript{122} Tuition aid and co-payment allocations were based on financial need; if a family selected a private school, checks were sent

\textsuperscript{117} See supra Part I.B for a discussion of the cases preceding Zelman, which attempted to diversify education and funding opportunities.

\textsuperscript{118} 536 U.S. 639 (2002). Ohio’s Pilot Project Scholarship Program provides tuition and tutorial aid to families in “any Ohio school district that is or has been ‘under federal court order requiring supervision and operational management of the district by the state superintendent.’” Id. at 644-45 (quoting OHIO REV. CODE ANN. § 3313.975(A) (Anderson 1999 & Supp. 2000)). Cleveland was the only district to “qualify” for financial assistance. Id.

\textsuperscript{119} See id.

\textsuperscript{120} See id. at 662. The Court distinguished preceding cases that could have limited the challenged program by delineating “neutral educational assistance programs that . . . offer aid directly to a broad class of individual recipients defined without regard to religion.” Id. at 661.

\textsuperscript{121} Id. at 652. The Court elaborated by asserting:

[W]here a government aid program is neutral with respect to religion, and provides assistance directly 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 not readily subject to challenge under the Establishment Clause.

Id.

\textsuperscript{122} Id. at 654 (“The program here in fact creates financial disincentives 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.”). Additionally, a family co-payment was required for private schools, whereas community, magnet, and public schools required no additional payments. Id.
directly to the student’s parents, who endorsed them to the school. Of the 3700 students enrolled in the program, ninety-six percent selected religiously affiliated schools. The program succeeded because it provided “benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district”—secular criteria—and permitted “individuals to exercise genuine choice among options public and private, secular and religious.” In the first federal case decided after Zelman, the Ninth Circuit did not hesitate to cite the majority’s emphasis on neutrality and individual choice when it upheld Washington’s Promise Scholarship Program.

D. Zelman’s Aftermath: A Glimpse of Conflicting Interpretations, the Ninth Circuit Versus the State of Florida

In 1999, the State of Washington created a scholarship program for low- and middle-income students who achieved excellent academic records in high school. In August 1999, Joshua Davey received such a scholarship and upon reaching college, declared a double major in Pastoral Ministries and Business Management and Administration. Due to a state-enforced code forbidding recipients from pursuing degrees in theology, Davey was forced to abandon the scholarship rather than

123. Id. at 646. If a public school was selected, money would have gone directly to the school. See id. Additionally, a public school would receive the ordinary allotment of per-student state funding for each student enrolled, plus the $2,250 voucher payment. Id.

124. Id. In the 1999-2000 school year, fifty-six private schools elected to participate; however, no public schools in adjacent Cleveland districts took part in the program. Id. at 647. The majority dismissed the dissent’s focus on both the number of participating religious schools (making up 82% of the program), and the percentage of scholarship recipients who subsequently enrolled in those schools (96%). See id. at 658-59. The Court illustrated the arbitrary nature of the ninety-six percent statistic by showing that this figure decreases to under twenty percent when the students enrolled in community, magnet, and traditional public schools are also added to the calculation. See id. The Court refused to rely on one “snap shot” year to determine the program’s validity as participation changes from year to year. See id.

125. Id. at 662-63 (finding that the decision was “[i]n keeping with an unbroken line of decisions rejecting challenges to similar programs”).

126. See Davey v. Locke, 299 F.3d 748, 760 (9th Cir. 2002), cert. granted, 123 S. Ct. 2075 (2003) (“The Promise Scholarship is a secular program that rewards superior achievement by high school students who meet objective criteria. . . . [S]cholarship funds would not even go indirectly to sectarian schools or for non-secular study unless an individual recipient was to make the personal choice . . . .”).

127. Id. at 750. The scholarship was awarded in the amount of $1,125 in 1999-2000 and $1,542 in 2000-2001, and students could spend the funds on any education-related expense, such as room and board. Id. at 751.

128. Id. Davey enrolled at Northwest College, an institution affiliated with the Assembly of God, whose educational philosophy was distinctly Christian. Id. He selected his course of study in light of his religious beliefs. Id.
drop his Pastoral Ministries major. He challenged the program’s limitation on Free Exercise grounds.

In *Davey v. Locke* the Ninth Circuit began its analysis citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* for its holding that “[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation” will be held to strict scrutiny. In *Davey*, the Ninth Circuit found that “singling Davey out for unfavorable treatment in an otherwise neutral program on account of a religious major violates the Free Exercise rule.”

The *Davey* court found the restrictions to be discriminatory on their face and that “[i]deologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts.” Despite Washington’s interest in not appropriating or applying money to religious instruction, as mandated by

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129. *Id.* (citing the university’s determination that a study of pastoral ministries was a theology program, and as such the university could not certify Davey’s scholarship). Though he abandoned his scholarship, Davey continued to pursue his major. *Id.*

130. *Id.* at 752 (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)). The Court argued that the program’s treatment of Davey created an unfavorable inequality, and alternatively, stressed that a neutral program of broad applicability cannot discriminate due to religious viewpoints. See *id.* Davey appealed from a district court’s entry of summary judgment in favor of Washington’s Higher Education Coordinating Board. See *id.* at 751-52.

131. 299 F.3d 748, 760 (9th Cir. 2002), cert. granted, 123 S. Ct. 2075 (2003).

132. 508 U.S. 520 (1993) (holding that a city ordinance targeting the ritual slaughtering of animals was neither neutral nor generally applicable and that its enforcement unfairly singled out the Santeria Church and its practitioners for discriminatory treatment).

133. *Id.* at 546 (noting that such a law only survives strict scrutiny in rare cases). Additionally, in order to pass constitutional muster, the Court concluded that the law at issue must advance “interests of the highest order” and be “narrowly tailored” to achieve its goal. *Id.* (internal quotations omitted).

134. *Davey*, 299 F.3d at 752. The Ninth Circuit reasoned that “a state may not favor, nor disfavors, religion.” *Id.* This premise relates to the general constitutional prohibition in the First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. 1.; see also *Church of Lukumi*, 508 U.S. at 531 (asserting that where some may find the Santerian tradition of animal sacrifice “aborrent,” nonetheless, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection”).

135. *Davey*, 299 F.3d at 755 (finding that “a restriction based on religion is aimed at suppression of dangerous ideas”) (citation omitted). The court articulated that “at a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. Thus, the Free Exercise Clause protects religious observers against unequal treatment.” *Id.*
its constitution, the court did not find this state interest to be compelling enough to override Davey's Free Exercise interests.\(^{36}\)

The court ultimately found that the government may limit the scope of a program it funds, but “once it opens a neutral ‘forum’ (fiscal or physical), with secular criteria, the benefits may not be denied on account of religion.”\(^{37}\) Citing recent Supreme Court precedent, including \textit{Zelman}, the Ninth Circuit stated that “the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.”\(^{38}\)

Finally, though ruling solely on Free Exercise grounds, the court dealt with the assertion of a state Establishment Clause argument, stating that the particular provision in the Washington constitution could not disqualify Davey's scholarship solely because he chose to study theology.\(^{39}\)

The court acknowledged the Washington constitution's characterization as being “far stricter” than its federal counterpart and noted that the Washington courts' rulings were “less accommodating” than those of the United States Supreme Court.\(^{40}\) Regardless, the Ninth Circuit held that “[t]he real issue is whether the [state’s] interest, no matter how stringently construed, is compelling enough to outweigh a credible free exercise challenge under the federal Constitution.”\(^{41}\)

\(^{36}\) \textit{Id.} at 760 (“We believe that Washington's interest in this case is less than compelling.”). After considering the neutrality of the program, the individual choice involved, and the allowance for application of the funds to any education related expense, the court found that any state funding of religious instruction was “remote at best.” \textit{Id.}

\(^{37}\) \textit{Id.} at 756 (quoting the legislature’s declaration that the scholarship program “regards the higher education of its qualified domiciliaries to be a public purpose of great importance to the welfare and security of this state and nation” and that the program and its beneficiaries would “bring tangible benefits to the states in the future.”) (citing WASH. REV. CODE § 28B.10.800). Further, the Governor sent a letter of congratulations to Davey which asserted that education was society’s “great equalizer” and placed members of society on an even playing field “[r]egardless of gender, race, ethnicity, or income.” \textit{Id.} Note the absence of “religion” from the list.

\(^{38}\) \textit{Id.} at 760 (noting that the scholarship program rewarded high school students of “superior achievement” who met objective criteria, funds were allocated directly to the students rather than to the schools (sectarian or otherwise), and only the element of personal choice would direct the funds to a religious course of study or institution).

\(^{39}\) \textit{Id.} (explaining that because the provision limiting theology students from receiving the scholarship was defeated on solid Free Exercise grounds, there was no further need to look at any other constitutional claims).

\(^{40}\) \textit{Id.} at 758 (noting, however, that recent state precedent upheld “state funding for religious worship so long as it passes through private hands first”).

\(^{41}\) \textit{Id.} at 758. The hope is that Davey will bring the debate over constitutional brinkmanship to the Supreme Court, at which point the conflict between states asserting their own constitutions’ supremacy and those deferring to federal constitutional provisions
Ultimately, a state’s broader prohibition on religion, as based on its constitution’s establishment clause, is limited by the federal Free Exercise Clause.\textsuperscript{142}

In the summer of 2002, Florida asserted a contrary interpretation. In the wake of \textit{Zelman} and \textit{Davey}, teachers’ unions challenged Florida’s Opportunity Scholarship Program (Program) in \textit{Holmes v. Bush}.\textsuperscript{143} The Program provided students in schools “failing for 2 years in a 4-year period” with funds to attend a private school of their choosing.\textsuperscript{144} The program’s limitations included: the requirement of compliance with anti-discrimination provisions; selection criteria proscribing entirely random and religious-neutral acceptance guidelines; and agreement by participating schools not to compel the profession of faith, prayer, or worship.\textsuperscript{145} Despite these stipulations, the Florida Circuit Court found that the program violated the state constitution.\textsuperscript{146}

On remand from the District Court of Appeals, the court recognized that under \textit{Zelman} no federal Establishment Clause issue remained.\textsuperscript{147} Instead, the court relied on “no aid” provision of the state constitution, which was deemed unique as to its “clarity and breadth.”\textsuperscript{148} The court stated, “[I]t cannot be logically, legally, or persuasively argued that the receipt of these funds does not aid or assist the [religious] institution in a


\textsuperscript{142} \textit{Davey}, 299 F.3d at 759 (citing Kreisner v. City of San Diego, 1 F.3d 775, 779 n.2 (9th Cir. 1993)). The court asserted that a state was free to rely on its Establishment Clause as long as no Free Exercise infringement existed. \textit{Id.} (indicating that if a state grant were paid to a religious school directly, the Establishment Clause concern should prevail despite a Free Exercise problem).


\textsuperscript{144} Opportunity Scholarship Program, \textit{Fla. Stat. Ann. § 229.0537} (West Supp. 2003); Leonard, supra note 73 (classifying the legal contest in Florida as “[a]n important test” but noting that challenges to the state provisions cannot proceed until legislatures enact education programs of this type). The Undersecretary of the U.S. Department of Education predicted these enactments “will happen very quickly.” \textit{Id.}


\textsuperscript{146} \textit{Holmes}, 2002 WL 1809079 at *1 (citing the relevant part of the Florida constitution, which provides that “[n]o revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution”).

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{Id.} at *2 (addressing the findings of similar cases, such as the Wisconsin voucher program upheld in \textit{Jackson v. Benson} as controlling precedent, yet rejecting their rulings in light of a strict reading of the Florida statute).
meaningful way." Though the vouchers were payable directly to parents, rather than to schools, the court declared, "To 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." The court recognized the policy goal of creating educational opportunities, yet refused to turn its back on what it termed "the clear mandate of the people as enunciated in the Constitution."

II. WHERE DO WE GO FROM HERE? USING THE FREE EXERCISE AND EQUAL PROTECTION CLAUSES TO DEFEAT STATE SPONSORED RELIGIOUS DISCRIMINATION

A. Church of Lukumi Babalu Aye v. City of Hialeah: The Roadmap to Free Exercise Protection

Considering such a recent pronouncement from the Florida court, is there a way to defeat this constitutional mandate? Some advocate the Zelman decision as "settling the constitutional question" and "lifting the constitutional cloud that has been hanging over school choice programs." Still others think it would be incorrect to conclude

149. Id. The court asserted that the language of the provision "is clear and unambiguous. There is scant room for interpretation or parsing . . . . Courts are duty bound to give plain meaning to the words and phrases being reviewed and . . . are not permitted to fashion or employ a strained construction to reach a result not intended." Id.

150. Id. at *2 (stating that the distinction that payments go directly to the parents, who then make an independent choice of where to send their child, is an "appealing" yet meritless argument).

151. Id. at *3 (saluting the purpose of the scholarship program as "enhanc[ing] the educational opportunity of children caught in the snare of substandard schools"). Note the marked difference between the Davey court's willingness to adhere to the federal constitutional example and the Florida court's steadfast adherence to its constitution's dictates.

152. Don't look to N.Y. to Embrace School Vouchers, NEWSDAY, June 30, 2002 at B2. One commentator opined that the only redress for the citizens of New York State, who were facing a battle similar to those in Florida, was to amend the state constitution. Id. In his opinion, "If it happened tomorrow, 2007 would be the soonest that vouchers might be legal in New York." Id.

153. Morse, supra note 20 (showing that with the burst of post-Zelman enthusiasm, "pro-voucher legislators . . . immediately set out to pump political life into the moribund education-reform movement"); see also Savage, supra note 12 (quoting Secretary of Education Rod Paige, who declared that the Zelman decision "will open the doors of opportunity to thousands of children who need and deserve the best possible education").
controversy over school choice is out of the "legal woods." 154 States such as Florida, which base their strict laws and enforcement on their constitutional no-aid provisions, will become the targets of challenge in the coming months. 155 What is missing is a way to undermine the state constitutional provisions that prohibit state allocation of aid to religious educators. In addition to the favorable analysis in Davey, the Supreme Court decisions in Church of Lukumi and Romer v. Evans provide insight to the solution. 156

At issue in Church of Lukumi were several city ordinances prohibiting religious animal sacrifice. 157 The Church and its congregants practiced Santeria—a religion of West African and Cuban origins—which represents a melding of traditional African and Roman Catholic elements. 158 The district court asserted that the government’s interests were compelling enough to overcome the infringement on the petitioners’ religious practices. 159 In its review, the Supreme Court

154. Garnett, supra note 15 (attributing the obstacle to school choice to state constitutions, and opining that education “reformers should expect . . . trouble from the Know Nothing policies still embedded in many states’ laws”).

155. See Blum, supra note 30. Those mounting challenges focus on seventeen of the thirty-seven state provisions currently construed to prohibit religious aid as posing a “serious threat” to voucher plans. Mauro, supra note 21. While some predict Missouri and Texas as the next phase in the state battle against the Blaine amendments at the state level, the post-Zelman fight has already undergone its first rounds in Washington and Florida. See Davey v. Locke, 299 F.3d 748 (9th Cir. 2002), cert. granted, 123 S. Ct. 2075 (2003) and Holmes v. Bush, No. CV 99-3370, 2002 WL 1809079 at *1 (Fla. Cir. Ct. Aug. 5, 2002); see also supra Part I.D.; Tony Mauro, Voucher Advocates Plan Next Push to High Court, AM. LAW. MEDIA, Aug. 5, 2002, at http://www.law.com/jsp/article.jsp?id=1024079086859 (last visited Aug. 21, 2003) (quoting the Institute for Justice, which is targeting the Florida voucher program as “the next battleground for school choice”).

156. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993) (holding that a legislature cannot create a means to persecute an unpopular religion or its practices); Romer v. Evans, 517 U.S. 620, 635-36 (1996) (holding that a law may not single out a politically or socially unpopular group for disparate treatment).

157. Church of Lukumi, 508 U.S. at 527 (discussing the development of the ordinances, including the solicitation of the opinion of the state attorney general who “advised that religious animal sacrifice was against state law, so that a city ordinance prohibiting it would not be in conflict”).

158. Id. at 524-25 (identifying use of Catholic symbols including saints, attendance at Catholic sacraments, and the sacrifice of animals in recognition of the Old Testament, as parts of the Santerian faith). The sacrificial element arises in connection with spirits called orishas, who enable the fulfillment of individual destinies through their “aid and energy.” Id. at 524. In order for these mortal spirits to survive, sacrifices must be performed at significant times such as birth, marriage, death, sickness, initiation, and annual celebrations. Id. at 525. Santeria ministers kill the animals by severing the carotid (neck) arteries and the members usually cook and eat them (depending on the particular ceremony). Id. Animals used include chickens, doves, ducks, goats, and sheep. Id.

159. Id. at 529 (finding that “at most, the ordinances’ effect on petitioners’ religious conduct was ‘incidental to their secular purpose and effect’”) (quoting Church of the
performed a thorough examination of the ordinance that included Free Exercise and Equal Protection elements.\textsuperscript{163}

The Court began its analysis with the fundamental requirement that a law must be neutral and of general applicability where the effect burdens a particular religion.\textsuperscript{164} Should the law fail this test, the government must provide a narrowly tailored, compelling government interest to justify the infringement.\textsuperscript{165} The Court stated, “if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.”\textsuperscript{166} It had little difficulty concluding that the Santerian rituals were “the object of the ordinances.”\textsuperscript{167} The Court warned that even if the law was neutral on its face, “[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with . . . facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt.”\textsuperscript{168}

The Court used an Equal Protection analysis to bolster the neutrality argument, discerning the city council’s intent from direct and circumstantial evidence.\textsuperscript{169} Within the list of relevant evidence, the Court cited the legislative and administrative history, events preceding the law’s

\textsuperscript{163} Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1484 (S.D. Fla. 1989)). Though admitting to the lack of religious neutrality, the district court found that “the city’s concern about animal sacrifice was ‘prompted’ by the establishment of the Church in the city . . .” and that “the purpose of the ordinances was not to exclude the Church from the city but to end the practice of animal sacrifice, for whatever reason practiced.” \textit{Id.} (citations omitted). The judgment of the district court was upheld by the Court of Appeals for the Eleventh Circuit. \textit{Id.} at 530.

\textsuperscript{164} \textit{Id.} at 531-40 (arguing primarily on the Free Exercise issue and using Equal Protection principles to bolster the position, as well as highlighting Establishment Clause concerns).

\textsuperscript{165} \textit{Id.} at 531 (citing the test established in Employment Div., Dep’t of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990) which states, “neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied”).

\textsuperscript{166} \textit{Id.} at 531-32. The district court found four compelling state interests, asserting health risks, “emotional injury to children” observing the rituals, “protect[ion] [of] animals from cruel and unnecessary killing,” and restriction of slaughtering/sacrificing to certain areas zoned for that purpose. \textit{Id.} at 529-30.

\textsuperscript{167} \textit{Id.} at 534 (finding facial neutrality as the minimum standard, meaning that if a law “refers to a religious practice without a secular meaning discernable from the language or context,” the law fails that requirement).

\textsuperscript{168} \textit{Id.} at 534-35 (“Apart from the text, the effect of a law in its real operation is strong evidence of its object.”).

\textsuperscript{169} \textit{Id.} at 534 (noting “[f]acial neutrality is not determinative” and that the Free Exercise Clause “forbids subtle departures from neutrality”).

\textsuperscript{160} \textit{Id.} at 540 (finding “[t]he ordinances were enacted ‘because of,’ not merely ‘in spite of,’ their suppression of Santeria religious practice [and this] is revealed by the events preceding their enactment” (citations omitted)).
enactment, and statements made by lawmakers. Finding significant facts on record, it concluded that the lower court erred in judging the ordinance neutral. Finally, the Court considered the general applicability of the ordinances, recalling that, “inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.” Criticizing the transparency of the law at issue, the Court concluded, “the ordinances ‘ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself.’” The Court upheld the Free Exercise Clause’s commitment to religious tolerance by striking down the ordinances because they failed to serve a compelling government interest.

B. The Romer v. Evans Solution: Invalidating Laws Based on Their Historic Intent

Romer v. Evans focused on an amendment to the Constitution of the State of Colorado referred to as “Amendment 2.” Amendment 2 repealed ordinances passed in various Colorado municipalities prohibiting discrimination on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.” The State

167. Id. The Court reviewed taped city council meetings that “evidence[d] significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice.” Id. at 541. The audience at the meetings alternately cheered supporters and taunted opponents of the ordinance. Id.

168. Id. at 542 (emphasizing the animosity towards the Church, the focus of the law on its particular practices, the structuring of the law to prevent religious killings (but excluding secular killings), and the suppression of more conduct than necessary to achieve the stated objective).

169. Id. at 542-43 (conceding that where “[a]ll laws are selective to some extent . . . categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice”). Furthermore, protecting against selective government imposition of burdens is an essential part of Free Exercise guarantees. Id.

170. Id. at 545-46 (quoting Fla. Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and concurring in judgment)). The Court added that this type of lawmaking is “the precise evil . . . the requirement of general applicability is designed to prevent.” Id.

171. Id. at 547 (“Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.”).


173. Id. at 624. The entire text of the amendment reads as follows:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall
argued that the referendum amendment did "no more than deny homosexuals special rights." The Supreme Court disagreed with the State's argument. The majority viewed the change in legal status as putting homosexuals in a "solitary class with respect to transactions and relations in both the private and governmental spheres.

In Romer, the Court analyzed the contested state amendment on Equal Protection grounds, with a special emphasis on the legislative history, making the rationale behind the law's enactment as important as the law itself.

The Court began with the proposition that "no person shall be denied the equal protection of the laws" as provided by the Fourteenth Amendment. The majority recognized that the reality of modern lawmaking requires the classification of groups and the likelihood that some will be disadvantaged whatever the outcome. However, unless a law targets a suspect class or burdens a fundamental right, it will be

enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id. at 626. The Court found the amendment withdrew "from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." Id. at 627.

Id. at 632 (finding that the "sheer breadth [of the legislation] is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects").

Id. at 627 (rejecting the Supreme Court of Colorado's argument that the amendment was subject to strict scrutiny based on the infringement of a fundamental right of gays and lesbians to participate in the political process). The U.S. Supreme Court affirmed its judgment, but on a different Equal Protection rationale. Id. at 625-26. The Court asserted that the amendment prevented homosexuals from receiving protection from injuries addressed through the municipal ordinances such as discrimination in housing, real estate sales, health and welfare services, education, and employment. Id. at 629-30 (noting that the repeal of the local measures affected even general laws preventing arbitrary discrimination (e.g. measures not referencing sexual orientation) in government and private settings). The Court argued that instead of depriving homosexuals of special rights, the amendment in fact imposed a special disability. Id. at 631.

See id. at 632-35 (insisting on finding the connection between the intended interest and the classification). The Court found that this link enhances Equal Protection safeguards while providing guidelines for the legislature to follow during the legislative process. See id.

Id. at 631.

Id. (distinguishing the "practical necessity" of classification from the withholding of protections others enjoy in a free society).

ZIRKEL, supra note 25, at 11, 13 (explaining that the term "suspect class" refers to discrimination on the basis of race, national origin, religion, or alienage). The term "suspect class" necessitates the application of strict judicial scrutiny in cases where courts
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upheld as long as the government provides a rational basis. Assessing the merits of Amendment 2, Justice Kennedy found no rational basis to justify the law. Justice Kennedy further asserted that “laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.” In order to validate the provision of Equal Protection of the laws, a simple desire to harm a politically unpopular group, without more, would not amount to a legitimate governmental interest. The Court concluded

find an “indication that the class is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness, as to command extraordinary protection from the majoritarian political process.” See 16B Am. Jur. 2D Const. L. § 817 (2003).

181. ZIRKEL, supra note 25, at 11 (discussing fundamental rights (liberties) such as textual rights found within the Bill of Rights and non-textual rights such as the right to privacy). An alleged abridgment of a fundamental right by a law or statutory provision compels strict scrutiny from the courts, which requires that the state “demonstrate that the statute serves a compelling state interest, and that the state’s objectives could not be achieved by any less restrictive measures.” See 16A Am. Jur. 2D. Const. L. § 387 (2003).

182. See, e.g., Romer, 517 U.S. at 631-33. Though the Court noted that the referendum singled out a particular group for disparate treatment, it failed to apply a traditional Equal Protection “suspect class” analysis. See id. The level of scrutiny applicable to this case appears to be a mix of strict and rational basis tests, resulting in a hybrid “heightened scrutiny.” Id. The Court rejected the argument that “Amendment 2 [was] intended to conserve resources to fight discrimination against suspect classes.” Id. at 630. Though seeming to classify homosexuals as a target group worthy of special protection, the Court resorted to a “rational basis” analysis as the framework for its invalidation of the legislation. Id. at 630-31. The Court elaborated on the rational basis test, stating, “by requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.” Id. at 633. Arguably, if the amendment could not pass at a more accommodating level of scrutiny designed to provide for legitimate state interests, application of strict scrutiny would be unnecessary. Id.

183. Id. at 632. The Court declared:

Amendment 2 fails, indeed defies, even this [rational basis] inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional, and as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.

Id.

184. Id. at 634 (indicating that where incidental disadvantages can be explained through legitimate state interests, Amendment 2 “inflicts on [gays and lesbians] immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it”). Id. at 635.

185. Id. at 634-35 (“Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons.”).
that Amendment 2's purpose was to make homosexuals unequal to everyone else.86

In light of the Free Exercise and Equal Protection standards evaluated above, what are the consequences for states featuring Blaine amendments when both are applied in conjunction with the Zelman decision? The result would be the invalidation of the amendments based on their intentional infringement of constitutional rights as evidenced by bias present at their inception. The historical impetus of hatred and animus for immigrants, especially Catholics, could invalidate these provisions in modern courts.187

C. Applying Church of Lukumi and Romer to the Blaine Amendments

With the above in mind, the argument returns to the funding of private religious education. Church of Lukumi provides an excellent framework within which Romer and Zelman neatly fall.188 Under a Free Exercise analysis, the Blaine amendments are first assessed in terms of their neutrality and general applicability.189 Do the “no-aid to religious institutions” provisions found in state constitutions meet the requisite standards? The obvious answer is no, as they apply only to educators of a religious nature, not to secular private schools.190 What is the context behind that distinction? According to the majority in Church of Lukumi, the distinction comes from the “historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.”191 One need look no further than the nineteenth century political and social campaigns waged against immigrants and Catholics to identify such discrimination.192

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86. Id. at 635 (holding, “A State cannot so deem a class of persons a stranger to its laws.”).
87. See supra Part I.A for an analysis of the steps taken to politically and legally legitimize the social climate of religious and cultural intolerance during the 1800s.
88. See supra Part II.B for a discussion of Church of Lukumi.
89. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993). According to the standard set in this case, the Blaine amendments must be either facially neutral and generally applicable or will be otherwise subject to strict scrutiny. Id.
90. Volokh, supra note 32, at 341 (stating that the “heart of the Establishment Clause debate over school choice” lies with the question of whether the government can “exclude religious schools from . . . generally available benefits” and whether the discrimination is “constitutionally mandated”).
91. Church of Lukumi, 508 U.S. at 532-33 (asserting that “a law targeting religious beliefs as such is never permissible”).
92. See supra Part I.A for discussion of the pre-Blaine movement. See also Mauro, supra note 21 (quoting Kevin Hasson, executive director of the Beckett Fund for Religious Liberty, who stated that the Blaine amendments “enshrine bigotry in two-thirds of our states in a profoundly un-American way”).
Eradicating Blaine's Legacy of Hate

Mindful that the government may not conduct “covert suppression of religious beliefs,” the Blaine amendments do not even pretend to achieve any end other than to single out religious schools for disparate treatment.193 The disparity at hand lies in funding, and where government is not required to subsidize religious practice, “once it opens a neutral forum (fiscal or physical), with secular criteria, the benefits may not be denied on account of religion.”194 The *Church of Lukumi* Court advised considering “the effect of the law in its real operation” and instructed that an evaluation of neutrality requires “an equal protection mode of analysis” where “direct and circumstantial evidence” provide insight into the legislators’ intent.195

Under a *Romer* Equal Protection analysis, the intent behind the legislation is crucial to verifying the government’s stated interest.196 As previously discussed, the bigotry prevalent in the late nineteenth century prompted many states to pass Blaine amendments to block the funding of non-public, and at that time, non-Protestant, schools.197 This historic discrimination recalls Justice Kennedy’s admonition against “laws of the kind now before us . . . born of animosity toward the class of persons affected.”198 It would be impossible to argue that the intent of the Blaine amendments was not to “harm a politically unpopular group.”199 The very purpose of the Blaine amendments was to make Catholics and immigrants “unequal to everyone else,” a constitutionally impermissible

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193. *Church of Lukumi*, 508 U.S. at 534 (noting that the Free Exercise Clause “forbids subtle departures from neutrality”).

194. Davey v. Locke, 299 F.3d 748, 756 (9th Cir. 2002) (noting that the recipient of the scholarship risked the disapproval of the state when selecting a religious course of study, thus the prohibition was related to an unconstitutional limitation on free speech).

195. See *Church of Lukumi*, 508 U.S. at 535-40 (discussing the value of utilizing the Court’s Equal Protection jurisprudence to determine whether the law at issue is neutral).


197. See *supra* Part I.A; Cf. *Romer*, 577 U.S. at 633 (stating that “[i]f the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect” (quoting R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J., concurring)). Applying the *Romer* standard to the genesis of the Blaine amendments (that is, legislation motivated anti-Catholic, anti-immigrant sentiment), heightened scrutiny would be necessary. See id.

198. See *Romer*, 517 U.S. at 634. To find the vulnerability in the Blaine amendments, one must merely replace the references to “homosexuals, gays/lesbians” in *Romer* with “Catholic, Jewish, or religious” references.

199. *Id.* Though in modern times the Catholic Church could not be classified as a politically impotent organization, the focus is on the *creation* of the legislation, which dates back to the nineteenth century, nativism, and James Blaine. See *supra* Part I.A for historical analysis of the Blaine amendments.
Like the ordinances aimed at Santeria worshippers, the Blaine amendments have “as their object the suppression of religion.” Due to the lack of neutrality and general applicability, the Blaine amendments are subject to strict scrutiny under the Free Exercise framework. This standard requires a compelling state interest and narrowly tailored laws. Voucher opponents would assert that, “[t]hough the Blaine amendments date from an era of anti-Catholic sentiment . . . they were based on the principle of church-state separation, an idea ‘that had nothing to do with anti-Catholicism and everything to do with protecting and strengthening the institutions of both church and state.’” This argument fails because the Zelman Court solved the church-state separation issue by providing guidelines for school choice programs to avoid Establishment Clause (i.e. church-state separation) issues. If the highest court in America can validate the provision of state aid to religious schools through a neutrality test while maintaining its adherence to the core values established by the First

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200. See, e.g., Romer, 517 U.S. at 635 (stating that a legislature cannot decree a “class of persons a stranger to its laws”). Applying this assertion to the educational choice issue, the “class of persons” targeted are those who attend religious schools, and the declaration of “strange”-ness is found in legislation that prevents the state from funding religious education. As one historian commented, the motivation for this exclusion had no legitimate state interest:

[A]id to religious schools did not become a controversial subject in America until the Catholics started to demand the same support for themselves. The refusal of public authorities to grant such aid did not arise from any well-established constitutional doctrine or from a high-minded desire to protect religious freedom, but rather from a raw hatred of Catholics, especially the Irish.

VITERITTI, supra note 35, at 152 (footnote omitted).

201. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993) (noting that “[t]he pattern” disclosed by the Court shows “animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise”). Comparing this assessment with the Blaine amendments, a similar “pattern” emerges in the treatment of Catholics and immigrants whose religious activities became the targets of repressive legislation.

202. See, e.g., id. at 531 (stating that the Court’s Free Exercise cases establish that if a law is neutral and generally applicable, the law “need not be justified by a compelling governmental interest”).

203. See, e.g., id. at 531-32 (stating that “[a] law failing to satisfy these requirements of neutrality and general applicability must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest”).

204. Leibowitz, supra note 8 (quoting Rabbi David Sapperstein, Director of the Religious Action Center of Reform Judaism).

Amendment's religion clauses, the states cannot offer an Establishment Clause argument to defeat similar provisions. Consequentially, the asserted state interest—avoidance of an Establishment Clause violation—was not compelling enough to override the Free Exercise interests of parents desiring to educate their children in religious schools. Even the exception taken by the Florida court in Holmes, noting the unique "clarity and breadth" of the Florida constitution's establishment clause, could not sustain this analysis. The effect of the Florida provision is significantly overinclusive because its prohibition on aid to religious schools is not predicated on any standard of indirect payments, true private choice, or "opt out" mechanisms. In cases such as Florida's, the failure to narrowly tailor the stated interest is the last step in voiding the prohibition. In the final words of the Church of Lukumi Court, "[t]he Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion . . . [of] animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures."

III. THE UNCERTAIN FUTURE: HOW RECENT DEVELOPMENTS PREDICT SUPREME COURT REVIEW OF THE BLAINE LEGACY

Some reject the "relevance of this ugly episode in our country's history" in favor of a test reflecting "an institution's . . . contribution to
society, not its historical origins . . . ." However, the haunting words of the Arizona Supreme Court in Kotterman v. Killian offer the opposite conclusion: "In any event, we would be hard pressed to divorce the amendment’s language from the insidious discriminatory intent that prompted it."

The Supreme Court has granted certiorari for Davey v. Locke, in which it will be forced to “examine and finally bury what voucher advocates see as an ugly but little-known piece of American history, when anti-Catholic fervor swept the nation and fueled passage of these state constitutional amendments." The goal will be to convince the Court that Blaine’s legacy should not serve to disqualify deserving recipients of aid, whatever their religious persuasion.


213. Kotterman v. Killian, 972 P.2d 606, 624 (Ariz. 1999); see also supra note 114 and accompanying text.


215. Mauro, supra note 21. One remaining issue is the proposition that if a state reauthorizes its constitution and explicitly acknowledges and rejects the previous historical impetus for its Blaine amendment, the religious bias is expunged. See Heytens, supra note 59, at 149-50 for more information on this proposal. Therefore, the proposed analysis stemming from Romer v. Evans could not assail the targeted provision. See id. In states such as Florida, which have undergone this exercise, there may be no way around the Blaine amendment save constitutional amendment or Supreme Court instruction.

216. Menashi, supra note 17 (quoting Justice Brennan who wrote, “The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities”). A small wrinkle is the Florida court’s rejection of this argument by refusing to consider the legislation’s background to determine its current validity. Holmes v. Bush, 2002 WL 1809079, at *2. The court wrote, “the intent of the legislature, always an elusive and debatable commodity, is not determinative of any particular enactment’s facial constitutionally [sic] in Florida.” Id. Despite this pronouncement, a recent development in Florida has cracked open the door of opportunity to vouchers in the state. Judge Permits More School Vouchers, ST. PETERSBURG TIMES, Aug. 10, 2002, available at http://www.floridians.org/news/02/081002.html (last visited Aug. 20, 2003). On August 9, 2002, four days after his initial decision, the same judge who held that the Florida Opportunity Scholarship violated the state constitution approved the issuance of several hundred more school vouchers for the coming school year. Id. An automatic suspension of the ruling occurred when an appeal was filed, but rather than allowing wholesale access to the program during the review of the decision, the judge offered a “hybrid solution to allow the expansion but protect the financial interests of the public schools involved if the courts uphold his [earlier] decision.” Id.
CONCLUSION

This Comment has argued that in light of the sweeping decision in *Zelman v. Simmons-Harris*, the question of whether voucher (and other educational choice) programs violate the Establishment Clause of the United States Constitution has been answered in the negative. Prior decisions such as *Kotterman v. Killian* and *Jackson v. Benson* began the process that would lead to the *Zelman* decision. It is up to the cases following *Zelman*, such as *Davey* and *Bush*, to apply the federal test to the states. In the absence of a federal claim, as will most likely be the case, school choice proponents should access the sound resources found in the Free Exercise and Equal Protection Clauses to address their need for equal treatment in the educational field. The historical background of the Blaine amendments has demonstrated a foundation of religious hatred and bigotry. Therefore, the provisions it spawned could not be upheld, regardless of their present day interpretations. If today's children are to have an optimal chance at educational success, they must be afforded real and substantial choices. The antiquated notions of nineteenth century legislators should not prevent students from accessing their choices, regardless of religion. And if a state desires to fund that religious education, the Constitution will not stand in its way.

217. See Ellen Sorokin, 6 Families Challenge Maine Over Tuitioning Exclusion, WASH. TIMES, Sept. 23, 2002 (commenting on recent litigation in Maine, which revisits the *Bagley* decision. Six families have filed a lawsuit challenging the 1981 law that removed religious schools from the tuition voucher program. See id. The attorney for the families stated that "the state's exclusion of religious schools had no legal standing since the U.S. Supreme Court this summer upheld the constitutionality of a voucher program in Cleveland affirming that parents in neutral school choice programs were free to choose religious options under the Establishment Clause." *Id.* In Washington State, another challenge has developed, targeting state policy "forbidding students at public universities from student teaching in private religious schools." Paul Queary, *Lawsuit Strikes At Ban On Tax Money To Private Schools*, THE COLUMBIAN (Clark County, Washington), Sept. 27, 2002, at C2. The petitioners in the case are a Seventh-Day Adventist pursuing a teaching degree and a Roman Catholic Master's Degree candidate. *Id.* Both plan to teach in religiously affiliated schools upon completion of their studies. *Id.* Attorneys for the petitioners credit the strength of their case on the recent rulings of both *Davey* and *Zelman*. Tan Vinh, *Limits on Student Teachers Targeted: Suit Filed Against Ban On Parochial-School Work*, SEATTLE TIMES, Sept. 26, 2002, at B1. The litigation in both the Maine and Washington cases contributes to the realization of a larger goal: defeat of the Blaine amendments which aim to prevent use of public money for religious schools. Queary, *supra* at C2. These cases will be important to watch in the forthcoming months, especially if any are raised to the federal level, and perhaps instigate a circuit conflict worthy of Supreme Court attention.